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federal register

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Monday	Tuesday	Wednesday	Thursday	Friday
NRC	USDA/ASCS		NRC	USDA/ASCS
DOT/COAST GUARD	USDA/APHIS		DOT/COAST GUARD	USDA/APHIS
DOT/NHTSA	USDA/FNS		DOT/NHTSA	USDA/FNS
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Documents normally scheduled on a day that will be a Federal holiday will be published the next work day following the holiday.

Comments on this program are still invited. Comments should be submitted to the Day-of-the-Week Program Coordinator, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408.

ATTENTION: For questions, corrections, or requests for information please see the list of telephone numbers appearing on opposite page.

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each month.

Title 7—Agriculture

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

PART 28—COTTON CLASSING, TESTING AND STANDARDS

Licensing of Warehouses and Gins To Sample Cotton

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This amendment provides that cotton gins be licensed to sample cotton for growers under the Smith-Doxey program in lieu of the performance bond now required. The rule sets up a licensing system for gins in conjunction with the present warehouse licensing program. The new rule requires that the license for both gins and warehouses be renewed every five years. The amendment also incorporates in the regulations the uniform rules of practice covering procedures for suspension or revocation of licenses and conduct of hearings, etc.

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

James R. Conrad, Assistant Chief, Marketing Programs Branch, Cotton Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, 202-447-2259.

SUPPLEMENTARY INFORMATION: On February 24, 1977, a notice wa spublished in the FEDERAL REGISTER (42 FR 10848) that consideration was being given to an amendment, as hereinafter set forth, to the regulations issued under authority contained in section 10 of the United States Cotton Standards Act (42 Stat. 1519; 7 U.S.C. 51b and 61) and in section 473c of the Smith-Doxey Act (50 Stat. 62; 7 U.S.C. 473c).

The notice afforded interested persons an opportunity to submit written data, views, or arguments with respect to the proposal. One written comment received did not address the proposed revisions but did suggest a minor change in § 28.908 to provide that samples that were drawn by a mechanical sampler at the gin may be transported with the bales to the warehouse and then shipped or delivered direct to the classing office by the warehouse. This suggestion has merit and is being incorporated into the final rulemaking.

The only other view expressed with respect to the proposal was from the Cotton Warehouse Association of America. This association expressed no opposition to the proposed changes in the licensing procedure for Smith-Doxey sampling. However, they cautioned against making any change that would impair the integrity of sampling.

After consideration of all relevant matters presented, including that in the notice, the comment received and the views expressed by the warehouse association, the amendments to 7 CFR Part 28 are adopted as set forth below.

Since the new cotton season is near at hand it is necessary to initiate the licensing procedure at cotton gins as soon as possible and good cause is found for making this amendment effective less than 30 days after publication in the FEDERAL REGISTER (Sec. 553(d), Administrative Procedure Act; 5 U.S.C. 551-559).

1. By revising § 28.2(1) as follows:

§ 28.2 Terms defined.

* * * * *

(1) *Licensed warehouse or gin.* A cotton warehouse or gin licensed under the United States Cotton Standards Act to sample cotton.

* * * * *

2. By revising center heading and §§ 28.20-28.24 as follows:

LICENSING OF WAREHOUSES AND GINS FOR SAMPLING

§ 28.20 When license is required.

Samples for Form A determination shall be accepted under this subpart from licensed warehouses only. Samples for classification pursuant to §§ 28.901-28.917 shall be accepted from licensed gins or warehouses. No license is required to sample cotton for Form C or Form D determination.

§ 28.21 Eligibility and application.

Any cotton warehouse or gin which may desire to submit samples for determination or classification for which a license is required under § 28.20 shall be eligible for a license. Application for licenses to draw and submit samples shall be submitted by warehouses and gins on forms furnished by the Division.

§ 28.22 Authority granted by license.

Licenses issued by the Division shall authorize the warehouse to draw and submit samples from cotton stored in the warehouse for Form A determination or for classification pursuant to §§ 28.901-28.917. Licenses issued by the Division shall authorize gins to draw and submit samples from cotton ginned at the gin for classification pursuant to §§ 28.901-28.917. Licenses shall be valid for a period of five years.

§ 28.23 Suspension or revocation of license.

(a) Any license issued to a warehouse or gin to sample cotton may be suspended or revoked, following notice and opportunity for hearing, if the licensee has knowingly or carelessly sampled cotton improperly, or has submitted improper samples for classification, or has violated any provision of the Act or the regulations, or has used the license, or allowed it to be used, for any improper purpose.

(b) *Procedure.* (1) All cases arising under this paragraph shall be conducted under the Uniform Rules of Practice, 7 CFR 1.130 et. seq., and instituted upon a complaint filed by the Administrator.

(2) In all cases except those involving willfulness, or in which the public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding, the Administrator shall give written notice to the licensee of facts or conduct which appear to warrant institution of such a proceeding and shall afford the licensee the opportunity, within a reasonable time, to demonstrate or achieve compliance with the Act and regulations.

(c) *Suspension pending adjudication.* In any situation where the integrity of sampling procedures would be seriously jeopardized if a license remained valid pending formal adjudication, the Administrator may temporarily suspend the license effective on or after the third day after mailing notice thereof to the licensee's last known address. Notice of temporary suspension may be made at or after the filing of a complaint and shall contain the reasons for the action.

(d) *Conditional suspension.* (1) The Administrator may temporarily suspend a license, without hearing, for a correctable cause. Such suspension, after appropriate corrective action is taken, will terminate.

(2) Written notice shall be given to the licensee in advance of a temporary suspension if practicable, or within two days of oral notice, stating the reasons and grounds for temporary suspension.

(3) A licensee may request a formal hearing procedure following receipt of oral or written notice of temporary suspension.

(e) During any period in which the cotton sampling license of a warehouse or gin is suspended or revoked, the Division will not accept any samples from the licensee for Form A determination, or for classification pursuant to §§ 28.901-28.917.

§ 28.24 Surrender of license certificate.

In the event of suspension or revocation of a license, the licensee shall

promptly surrender the license to the Division.

§ 28.25 [Amended]

3. Section 28.25 is amended by changing the word "warehouseman" to "warehouse" in the first sentence and in paragraphs (h) and (i).

4. By revising § 28.31 as follows:

§ 28.31 Denial of service.

The Administrator may for good cause, including the acts or practices set forth in § 28.32, debar any person, including the agents, officers, subsidiaries, or affiliates of such person, from any or all benefits of the Act for a specified period, after notice and opportunity for hearing has been afforded. Procedures outlined, or referred, in Part 50 of this chapter (7 CFR 50.1 et seq.) shall govern proceedings under this section.

5. By revising § 28.906 as follows:

§ 28.906 Sampling arrangements.

(a) The cotton of members of organized groups shall be sampled at cotton gins or at cotton warehouses. The gin or warehouse must hold a valid license to sample cotton issued pursuant to §§ 28.20–28.22.

(b) The Director or his authorized representatives may direct that sampling be performed by employees of the Department of Agriculture for the purpose of appraising the sampling procedures at cotton gins or warehouses, or for the purpose of providing service to organized groups in special cases where a licensed gin or warehouse is not available.

6. By revising § 28.907 as follows:

§ 28.907 Responsibilities of licensed gins or warehouses.

Each licensee shall be primarily responsible for drawing, identifying, handling, and shipping samples of cotton in accordance with this subpart and with instructions furnished by the Director or his representatives from time to time.

7. By revising § 28.908 paragraphs (e) and (f) as follows:

§ 28.908 Samples.

* * * * *

(e) *Handling samples.* Samples shall not be dressed or trimmed and shall be carefully handled in such manner as not to cause loss of leaf, sand, or other material, or otherwise change their representative character. Samples shall not be handled by any person other than the licensee prior to shipment or delivery to the cotton classing office of the Division.

(f) *Identifying and shipping samples.* Each sample shall be identified with a tag, supplied or approved by the Division, bearing the gin or warehouse number of the bale from which the sample was drawn and the name and address of the producer of the bale. The tag shall be placed between the two halves of the sample, the sample tightly rolled and enclosed in a package or bag for shipment. Each package or bag shall be labeled or marked with the name and address of the licensed gin or warehouse. The packages shall be shipped or delivered direct to the cotton classing office serving the territory in which the cotton is ginned. Samples that were drawn by a mechanical sampler at the gin may be transported with the bales to the warehouse and then shipped or delivered direct to the classing office by the warehouse.

* * * * *

8. By revising § 28.911 as follows:

§ 28.911 Review Classification.

A producer may request one review classification for each bale of eligible cotton. The fee for review classification is 60 cents per sample. Samples for review classification must be drawn by gins or warehouses licensed pursuant to §§ 28.20–28.22, or by employees of the U.S. Department of Agriculture. Each sample for review classification shall be taken, handled, and submitted according to § 28.908 and to supplemental instructions issued by the Director or his representatives. Costs incident to sampling, tagging, identification, containers, and shipment for samples for review classification shall be without expense to the Government.

* * * * * *

(Sec. 2, Pub. Res. 72–73, 47 Stat. 1621 (7 U.S.C. 51b); Sec. 10, Pub. L. 67–539, 42 Stat. 1519 (7 U.S.C. 61); 3c, Pub. L. 75–28, 50 Stat. 62 (7 U.S.C. 473c).)

Dated: May 10, 1977, to become effective May 16, 1977.

IRVING W. THOMAS,
Acting Administrator.

[FR Doc.77–13873 Filed 5–13–77;8:45 am]

CHAPTER IV—FEDERAL CROP INSURANCE CORPORATION, DEPARTMENT OF AGRICULTURE

PART 410—FLORIDA CITRUS CROP INSURANCE

Subpart—Regulations for the 1977 and Succeeding Crop Years

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule provides regulations for insuring citrus grown in Florida effective with the 1977 and succeeding crop years and revises the Florida Citrus Crop Insurance Regulations for the 1976 and Succeeding Crop Years appearing in the FEDERAL REGISTER on February 4, 1976 (41 FR 5106 through 5109).

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, D.C. 20250, (202–447–3197).

SUPPLEMENTARY INFORMATION: Under the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 et seq.), the Federal Crop Insurance Corporation is revising the Florida Citrus Crop Insurance Regulations effective with the 1977 crop. These regulations, which were published in the FEDERAL REGISTER on February 4, 1976 (41 FR 5106 through 5109), contain some elements which are being corrected in order to make them more administratively effective. The specific revisions contained in the Florida Citrus Regulations for the 1977 and Succeeding Crop Years, as set forth below, are as follows: (1) The "pack size" of tangerines (the minimum size of tangerines accepted by the Corporation as part of the citrus potential under U.S. Standards) has been changed from 246 pack size (2 and 2/16 inches minimum diameter) to 210 pack size (2 and 4/16 inches minimum diameter) to allow for the acceptance of larger tangerines to conform with current marketing practices. (2) The provisions for harvesting freeze damaged juice type fruit is modified. The previous provision which provides for a fresh fruit cut during the period from 8 to 30 days following the freeze is eliminated. Damage will now be determined by the Corporation by sampling representative fruit by a juice fruit cut method for determining juice loss. This provision has been revised to encourage the policyholder to harvest timely freeze damaged fruit. (3) The application portion of § 410.6 has been removed. Future applications for citrus insurance in Florida will be taken on the Standard Application Form, as used with other crops, and processed in the same manner and by the same method as other applications. This will expedite the method of processing such applications. (4) The "Meaning of terms" section, now found at the end of the current regulations, has been placed at the beginning of the revised regulations in order to make it easier for the reader to follow the language of the document. (5) Minor editorial changes have been made to make the document clearer.

The above revisions are not considered by the Corporation to be substantive, and do not adversely affect the policyholder. Notice of any changes must be given to the insured not later than April 15, 1977, in order to be effective for the 1977 crop year. It is, therefore, impossible to follow both the procedure for notice and public participation and the contractual obligations relative to giving notice of changes to current insureds by April 15, 1977. In view of this, the Corporation has found and determined that compliance with the procedure for notice and public participation would be impracticable and contrary to the public interest.

Accordingly, 7 CFR Part 410, Florida Citrus Crop Insurance Regulations, is amended to read as set forth below effective with the 1977 crop year and succeeding crop years until amended or superseded. The provisions of the Florida Citrus Crop Insurance Regulations for the 1976 and Succeeding Crop Years shall remain in effect for the 1976 crop year.

Pursuant to the authority contained in the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.), as amended, the regulations set forth in this part are hereby issued to be in force with respect to Florida citrus crop insurance contracts for the 1977 and succeeding crop years until amended or superseded.

Subpart—Regulations for the 1977 and Succeeding Crop Years

Sec.
410.1 Availability of Florida citrus crop insurance.
410.2 Premium rates and amounts of insurance.
410.3 Application for insurance.
410.4 Public notice of indemnities paid.
410.5 Creditors.
410.6 The policy.

AUTHORITY: The provisions of this subpart are issued under secs. 506, 516, 52 Stat. 73, as amended, 77, as amended; 7 U.S.C. 1506, 1516.

§ 410.1 Availability of Florida citrus crop insurance.

Citrus crop insurance shall be offered for the 1977 and Succeeding Crop Years under the provisions of §§ 410.1 through 410.6 in counties in Florida within the limits prescribed by and in accordance with the provisions of the Federal Crop Insurance Act, as amended. The counties shall be designated by the Manager of the Corporation from a list of counties approved by the Board of Directors of the Corporation for citrus crop insurance. The counties designated by the Manager shall be published by appendix to this section.

§ 410.2 Premium rates and amounts of insurance.

(a) The Manager shall establish premium rates and amounts of insurance per acre which shall be shown on the actuarial table on file in the office for the county. Such premium rates and amounts of insurance may be changed from year to year.

(b) The following shall apply to the transfer of any premium reduction earned under the provisions of section 7 of the Policy set forth in § 410.6 if the insured is a partnership, corporation, or any other joint enterprise and there is no break in the continuity of participation. Upon dissolution of such enterprise, such premium reduction may be credited to the contract of any member or stockholder thereof if the Corporation determines such person is operating only land formerly operated by the dissolved enterprise. Upon formation of a joint enterprise, the smallest premium reduction (zero if none), which the Corporation determines would have been applicable to any insurable acreage brought into the enterprise if the enterprise had not been formed, may be credited to the joint enterprise contract.

§ 410.3 Application for insurance.

An application for insurance, on a form prescribed by the Corporation, may be submitted at the office for the county for the Corporation. Prior to the closing date for the filing of applications, the Corporation reserves the right to discontinue the taking of applications in any county upon its determination that the insurance risk involved is excessive or to limit the amount of insurance. Such closing date shall be August 15 of the crop year. The Corporation further reserves the right to reject any application or to exclude any definitely identified acreage for any crop year of the contract if upon inspection it deems the risk on such acreage is excessive. If any acreage is to be excluded, the insured shall be notified of such exclusion before insurance attaches for the crop year for which the acreage is to be excluded. The Manager of the Corporation is authorized in any crop year to extend the closing date for acceptance of applications in any county, by publishing a notice in the FEDERAL REGISTER, upon his determination that no adverse selectivity will result during the period of such extension: *Provided, however,* That if adverse conditions should develop during such period, the Corporation will discontinue acceptance of applications.

§ 410.4 Public notice of indemnities paid.

The Corporation shall provide for posting annually at each county courthouse a listing of the indemnities paid in the county.

§ 410.5 Creditors.

An interest of a person other than the insured in an insured crop existing by virtue of a lien, mortgage, garnishment, levy, execution, bankruptcy, or any involuntary transfer of title shall not entitle the holder of the interest to any benefit under the contract other than as provided in the Policy set forth in § 410.6.

§ 410.6 The policy.

The provisions of the policy for Florida Citrus Crop Insurance for the 1977 and Succeeding Crop Years are as follows:

FLORIDA CITRUS CROP INSURANCE POLICY

Subject to the regulations of the Federal Crop Insurance Corporation (herein called "Corporation") and in accordance with the terms and conditions set forth in this policy, the Corporation upon acceptance of a person's application does insure such person against unavoidable loss of production of the citrus crop due to causes of loss insured against that are specified in this policy. No term or condition of the contract shall be waived or changed on behalf of the Corporation except in writing by a duly authorized representative of the Corporation.

TERMS AND CONDITIONS

1. *Meaning of terms.* For purposes of insurance on citrus the terms: (a) "Acreage report" means the form prescribed by the Corporation for initially reporting and revising (if necessary) all of the insured's acreage and share therein of citrus in the county.

(b) "Actuarial table" means the forms and related materials approved by the Corporation which are on file for public inspection in the office for the county, and which show the applicable amounts of insurance, premium rates, and related information regarding citrus crop insurance in the county.

(c) "Contiguous land" means land which is touching at any point, except that land which is separated by only a public or private right-of-way shall be considered contiguous.

(d) "Contract" means the application, this policy, and the actuarial table.

(e) "County" means the county shown on the application and any additional insurable land located in a local producing area bordering on the county, as shown on the actuarial table.

(f) "Crop year" means the period beginning May 1 and extending through June 30 of the following year and shall be designated by the calendar year in which the insurance period begins.

(g) "Harvest" means any severance of citrus fruit from the tree either by pulling, picking, or severing by mechanical means, or picking up the marketable fruit from the ground.

(h) "Insurable acreage" means the acres of citrus as reported by the insured or as determined by the Corporation, whichever the Corporation shall elect, grown on the following: (1) Land classified as insurable by the Corporation and shown as such on the county actuarial map or appropriate land identification list or (2) land owned or operated by a person to whom a grove classification is assigned by the Corporation or as otherwise provided on the actuarial table.

(i) "Office for the county" means the Corporation's office serving the county shown on the application for insurance or such office as may be designated by the Corporation.

(j) "Person" or "Insured" means an individual, partnership, association, corporation, estate, trust, or other business enterprise, or legal entity, and wherever applicable, a State, a political subdivision of a State, or any agency thereof.

(k) "Potential" means the production which would have been produced before damage from an insured cause of loss occurred and shall include citrus which (1) was picked before the insured damage occurred; (2) remained on the trees after the damage occurred; (3) was lost from an insured cause; and (4) was lost from an uninsured cause. The potential for the unit shall not be less than the product of 100 standard field boxes multiplied by the number of acres in the unit and shall not include citrus lost before insurance attaches for any crop year, citrus lost by normal dropping, or any tangerines the Corporation determines normally would not, by the end of the insurance period for tangerines, meet the 210 pack size (2 and 4/16 inches minimum diameter) under U.S. Standards.

(l) "Share" means the share of the insured as landlord, owner-operator, or tenant in the insured citrus as reported by the insured or as determined by the Corporation, whichever the Corporation shall elect, and no other share in the citrus crop shall be deemed to be insurable.

(m) "Standard field box" means a standard field box as prescribed in the Florida Citrus Code.

(n) "Tenant" means a person who rents land from another person for a share of the crop or proceeds therefrom.

(o) "Time of loss" means the earlier of (1) the date harvest is completed on the unit; (2) the calendar date for the end of the insurance period; or (3) the date the entire crop on the unit is destroyed, as determined by the Corporation.

(p) "Types of citrus" means any of the following six types of fruit: Type I, Early and midseason oranges; Type II, Late oranges; Type III, Grapefruit; Type IV, Navel oranges, tangeloes, and tangerines; Type V, Murcott honey oranges (also known as Honey tangerines) and Temple oranges; and, Type VI, Lemons. Oranges commonly known as "Sour oranges" and "Clementines" shall not be included in any of the insurable types of citrus.

(q) "Unit means all insurable acreage in the county of any of the six citrus types referred to in subsection (p) of this section located on continguous land, on the date insurance attaches for the crop year, (1) in which the insured has a 100 percent share; (2) which is owned by one person and operated by the insured as a tenant; or (3) which is owned by the insured and rented to one tenant. Land rented for cash, a fixed

commodity payment, or any consideration other than a share in the crop on such land only shall be considered as owned by the lessee. The Corporation shall determine units as herein defined when adjusting a loss, notwithstanding what is shown on the acreage report, and has the right to consider any acreage and share reported by or for the insured's spouse or child or any member of the insured's household to be the bona fide share of the insured or any other person having the bona fide share.

2. *Cause of loss.* (a) The insurance provided is against unavoidable loss of the citrus fruit occurring within the insurance period resulting from freeze, hail, hurricane, or tornado.

(b) The contract shall not cover any loss or damage (1) to the blossoms or trees; (2) due to neglect or malfeasance of the insured, any member of the insured's household, tenants, or employees; (3) due to failure to follow recognized good grove management practices; or (4) due to any cause not specified as an insured cause in this policy.

3. *Citrus insured.* (a) The citrus insured shall be any of the type(s) of citrus as defined in section 1(p), and not excluded by the following provisions of this section, which is located on insurable acreage as shown on the county actuarial map, and in which the insured has a share on the date insurance attaches: *Provided,* That (1) the citrus fruit can be expected to mature each crop year in the normal maturity period for the variety, and (2) the trees have reached at least the tenth growing season after being set out; however, citrus production on trees that have not reached the tenth growing season will be insured only if so provided on the actuarial table.

(b) For any crop year, the insured may elect to exclude from insurance any acreage of Robinson tangerines by the April 30 immediately preceding the crop year for which such exclusion is to become effective.

(c) Upon approval of the Corporation, the insured may elect to insure or exclude from insurance for any crop year any reported, described, and designated insurable acreage which has a potential of less than 100 standard field boxes per acre. If the insured elects to insure such acreage, the Corporation will, in determining the amount of loss, increase the potential on such acreage to 100 boxes per acre. If the insured elects to exclude such acreage, the Corporation will disregard such acreage for all purposes of this contract. If the insured does not report, exclude, describe, and designate any such acreage, the Corporation will disregard such acreage if the production is less than 100 boxes per acre; however, if the production from such acreage is 100 or more boxes per acre, the Corporation shall determine the percent of damage on all of the insurable acreage for the unit, but will not permit the percent of damage for the unit to be increased by including such acreage.

(d) The Corporation reserves the right for any crop year to exclude acreage from insurance, or limit the amount of insurance on any acreage, which was not insured the previous crop year.

4. *Life of contract and contract changes.* (a) The contract shall be in effect for the crop year specified on the application, and may not be canceled for such crop year. Thereafter, either party may cancel insurance on any type of citrus for any crop year by giving written notice to the other by April 30 immediately preceding such crop year. In the absence of such notice to cancel, and subject to the provisions of subsections (b), (c), and (d) of this section, the contract shall continue in force for each succeeding crop year.

(b) If the insured is an individual who dies or is judicially declared incompetent, or the insured entity is other than an individual and such entity is dissolved, the contract shall terminate as of the date of death, judicial declaration, or dissolution; however, if such event occurs after insurance attaches for any crop year, the contract shall continue in force through such crop year and terminate at the end thereof. Death of a partner in a partnership shall dissolve the partnership unless the partnership agreement provides otherwise. If two or more persons having a joint interest are insured jointly, death of one of the persons shall dissolve the joint entity.

(c) If the premium for any crop year is not paid by the April 30 following the calendar year in which the insurance period begins, the contract shall terminate for the succeeding crop year; *Provided,* That the date of payment for a premium (1) deducted from a loss claim shall be the date the insured signs such claim, or (2) deducted from payment under another program administered by the U.S. Department of Agriculture shall be the date such payment was approved.

(d) The contract shall terminate if no premium is earned for three consecutive years.

(e) The Corporation reserves the right to change the terms and conditions of the contract from year to year. Notice thereof shall be mailed to the insured or placed on file and made available for public inspection at the office for the county by the April 15 immediately preceding the crop year for which such changes are to become effective, and such mailing or filing shall constitute notice to the insured. Acceptance of any changes will be conclusively presumed in the absence of any notice from the insured to cancel the contract as provided in subsection (a) of this section.

(f) For any crop year, the insured may with the consent of the Corporation change the amount of insurance per acre which was previously elected by notifying the Corporation in writing not later than the April 30 immediately preceding such crop year.

5. *Responsibility of the insured to report acreage and share.* (a) The insured at the time of filing the application shall also file on a form prescribed by the Corporation a report of all the acreage of citrus of the type insured in the county in which the insured has a share and show the share therein. Such report shall also include a designation of all the acreage of citrus which is uninsurable or excluded under the provisions of section 3 above. This report shall be revised by the insured for any crop year before insurance attaches if the acreage to be insured or share therein has changed, and the latest report filed shall be considered as the basis for continuation of insurance from year to year.

(b) If the insured does not submit an acreage report for any crop year in accordance with the provisions of subsection (a) of this section, the Corporation may elect to determine by units the insured acreage and share or declare the insured acreage for any unit(s) to be "zero."

6. *Insurance period.* Insurance attaches each crop year on May 1, except that for the first crop year if the application is accepted by the Corporation after that date, insurance shall attach on the tenth day after the application is received in the office for the county, and as to any portion of the citrus crop, shall cease upon the earlier of harvest or the second June 30 (January 31 for tangerines and navel oranges) of the crop year.

7. *Annual premium.* (a) The annual premium for each insurance unit is earned and payable on the date insurance attaches and shall be determined by multiplying the applicable amount of insurance for the insured acreage, times the applicable premium rate, times the insured's share at the time insurance attaches and, where applicable, applying the premium reduction or adjustment herein provided.

(b) In counties where the actuarial table does not provide for adjustments in premium, the total annual premium on all units shall be reduced as follows after consecutive years of insurance without a loss for which an indemnity was paid on any unit hereunder (eliminating any year in which a premium was not earned):

Percent premium reduction	*Consecutive insurance years without a loss*
5 percent after	1 yr.
5 percent after	2 yrs.
10 percent after	3 yrs.
10 percent after	4 yrs.
15 percent after	5 yrs.
20 percent after	6 yrs.
25 percent after	7 years or more.

However, if the insured has a loss for which an indemnity is paid hereunder, the number of such consecutive years of insurance without a loss shall be reduced by three years, except that where the insured has seven or more such years, a reduction to four shall be made and where the insured has three or less such years, a reduction to zero shall be made: *Provided,* That, if at any time, the cumulative indemnities paid hereunder exceed the cumulative premiums earned hereunder from the start of the insuring experience through the previous crop year, the 5, 10, or 15 percent premium reductions in this subsection shall not thereafter apply until such cumulative premiums equal or exceed such cumulative indemnities.

(c) In counties where the actuarial table provides for adjustments in premium, the provisions of subsection (b) of this section shall not apply.

(d) If there is no break in the continuity of participation, any premium reduction or adjustment applicable under subsections (b) or (c) of this section shall be transferred to (1) the contract of the insured's estate or surviving spouse in case of death of the insured; (2) the contract of the person who succeeds the insured as the insured's transferee in operating only the same grove or groves, if the Corporation finds that such transferee had previously actively participated in the grove operation involved; or (3) the contract of the same insured who stops operating a grove in one county and starts operating a grove in another county.

(e) If there is a break in the continuity of participation, subsection (b) of this section or any reduction in premium earned under subsection (c) of this section shall not thereafter apply.

8. *Notice of damage or loss.* (a) The insured shall give notice to the office for the county immediately after insured damage to the citrus becomes apparent giving the date(s) and cause(s) of such damage so that an inspection and determination of the extent of damage can be made prior to harvest.

(b) If a loss is to be claimed on any unit, notwithstanding any prior notice of damage, the insured shall notify the office for the county of the intended date of harvest at least seven days prior to the start of harvest.

(c) If a loss is to be claimed on any unit and if damage occurs within the seven-day period prior to the start of or during harvest, notice of damage must be given immediately to the office for the county.

(d) The Corporation reserves the right to reject any claim if any of the requirements of this section are not met and the Corporation determines that the amount of loss cannot be satisfactorily determined.

(e) There shall be no abandonment of the citrus crop to the Corporation.

9. *Claim for loss.* (a) Any claim for loss for any unit shall be submitted to the Corporation on a form prescribed by the Corporation within 60 days after the time of loss. The Corporation reserves the right to provide additional time if it determines that circumstances beyond the control of either party prevent compliance with this provision.

(b) Losses shall be adjusted separately for each unit. The amount of loss with respect to any unit shall be determined by (1) multiplying the insured acreage of citrus on the unit by the applicable amount of insurance per acre; (2) multiplying the product thus obtained by the average percent of insured damage in excess of 10 percent (i.e. average damage 45%—10%=35% payable); and, (3) multiplying this product by the insured share; *Provided,* That for the purpose of determining the amount of loss, the insured share shall not exceed the insured's share in the citrus crop at the time of loss or the beginning of harvest, whichever is earlier.

(c) The average percent of damage to the citrus crop for any unit shall be the ratio of the number of standard field boxes of citrus lost from an insured cause to the potential.

(d) Any citrus which (1) is or could be marketed as fresh fruit, or (2) is harvested prior to an inspection by the Corporation shall be considered as undamaged.

(e) Any citrus harvested within 7 days after a freeze will not be considered as damaged by freeze.

(f) Pink and red grapefruit of citrus Type III and citrus of Types IV and V which is seriously damaged by freeze as determined by a fresh fruit cut of a representative sample in accordance with the applicable provisions of the Florida Citrus Code and could not be marketed as fresh fruit within the prescribed tolerance for freeze damage (including adulteration) shall be considered unmarketable as fresh fruit and the amount of damage shall be as follows: (1) if 15 percent or less of the individual fruit in a sample show freeze damage, the fruit on the unit shall be considered undamaged. (2) If 16 percent or more of the individual fruit in a sample show freeze damage, the fruit on the unit shall be considered 50 percent damaged, with these exceptions: (i) For tangerines of citrus Type IV, damage in excess of 50 percent shall be the actual percent of damaged fruit. (ii) If the Corporation determines by the cut method described in subsection (g) of this section that the juice loss is greater than 50 percent, the damage allowed shall be as shown in such subsection.

(g) Any citrus of Types I, II, and III (excluding pink and red grapefruit), and VI which is damaged by freeze, but may be processed by the canning or processing plants shall be considered as marketable for juice, and the amount of damage shall be determined as provided below: *Provided,* That, before harvest, the citrus has dried to the extent that the amount of damage can be so determined. The percent of damage due to freeze in an individual fruit sampled by a cut method to determine juice loss shall be as follows: Any fruit which has lost less than 16 percent of its juice shall be considered undamaged; any fruit which has lost more than 16 percent, but less than 50 percent of its juice shall be considered 40 percent damaged; any fruit which has lost more than 50 percent but less than 75 percent of its juice shall be considered 70 percent damaged; and, any fruit which has lost more than 75 percent of its juice shall be considered totally lost.

(h) Any citrus on the ground which is not picked up and marketed shall be considered 90 percent lost if the damage was due to freeze and totally lost if the damage was due to any other insured cause.

(i) Any citrus which is unmarketable either as fresh fruit or for juice because it is immature, unwholesome, decomposed, adulterated, or otherwise unfit for human consumption due to an insured cause shall be considered totally lost.

(j) Pink and red grapefruit of citrus Type III and citrus Types IV and V which is unmarketable as fresh fruit due to serious damage from hail as defined in U.S. Standards for grades of Florida fruit shall be considered totally lost.

(k) Citrus lost due to hurricane or tornado shall be the amount of citrus blown from the trees or which falls from the trees as a result of such damage and which is not picked up from the ground and marketed.

(l) If any claim for indemnity under the provisions of the contract is denied by the Corporation, an action on such claim may be brought against the Corporation under the provisions of 7 U.S.C. 1508(c): *Provided,* That the same be brought within one year after the date notice of denial of the claim is mailed to and received by the insured.

10. *Payment of indemnity.* (a) Any indemnity will be payable within 30 days after a claim for loss is approved by the Corporation. However, in no event shall the Corporation be liable for interest or damages in connection with any claim for indemnity whether such claim be approved or disapproved by the Corporation.

(b) If the insured is an individual who dies or is judicially declared incompetent, or the insured entity is other than an individual and such entity is dissolved after insurance attaches for any crop year, any indemnity will be paid to the person(s) the Corporation determines to be beneficially entitled thereto.

11. *Misrepresentation and fraud.* The Corporation may void the contract without affecting the insured's liability for premiums or waiving any right or remedy including the right to collect any unpaid premiums if at any time, either before or after any loss, the insured has concealed or misrepresented any material fact or committed any fraud relating to the contract, and such voidance shall be effective as of the beginning of the crop year with respect to which such act or omission occurred.

12. *Collateral assignment.* Upon submission and approval of forms prescribed by the Corporation, the insured may assign the right to an indemnity for any crop year and the assignee shall have the right to submit the loss notices and forms as required by the contract.

13. *Transfer of insured share.* If the insured transfers all or any part of the insured share in any crop year, the Corporation will, upon submission and approval of forms prescribed by the Corporation, continue to provide protection according to the provisions of the policy to the transferee for such crop year with respect to the transferred share and the transferee shall have the same rights and responsibilities under the contract as the transferor for the current crop year.

14. *Subrogation.* The insured (including any assignee or transferee) assigns to the Corporation all rights of recovery against any person for loss or damage to the extent that payment hereunder is made and shall execute all papers required and take appropriate action to secure such rights.

15. *Records and access to grove.* The insured shall keep or cause to be kept for two years after the time of loss, separate records of the harvesting, storage, shipments, sale, or other disposition of all citrus of the type insured produced on each unit and on any uninsured acreage of such citrus in the county in which the insured has a share. Any persons designated by the Corporation shall have access to such records and the grove for purposes related to the contract.

16. *Forms.* Copies of forms referred to in the contract are available at the office for the county.

Accordingly, said regulations were adopted by the Board of Directors on March 21, 1977.

NOTE.—The reporting requirements contained herein have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942. The Federal Crop Insurance Corporation has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A-107.

J. EARL WILSON,
Acting Secretary, Federal Crop Insurance Corporation.

Approved on May 11, 1977.

BOB BERGLAND,
Secretary.

[FR Doc.77-13872 Filed 5-13-77;8:45 am]

CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS), DEPARTMENT OF AGRICULTURE

[Orange Reg. 75, Amdt. 10; Grapefruit Reg. 77, Amdt. 9]

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

Amendment of Grade Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The amendment for Florida oranges lowers the minimum grade requirements applicable to domestic and export shipments of Valencia oranges during the period May 10 through September 25, 1977. The amendment of the grapefruit regulation lowers the minimum grade requirements for domestic and export shipments of Florida seeded and seedless grapefruit during the period May 10 through August 14, 1977. The amendments recognize the supplies of fruit remaining for fresh shipments and the quality of the crops and are designed to permit movement of available supplies of fruit consistent with the interests of producers and consumers.

EFFECTIVE DATE: May 10, 1977.

FOR FURTHER INFORMATION CONTACT:

Charles R. Brader, Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, 202-447-3545.

SUPPLEMENTARY INFORMATION: *Findings.* (1) Pursuant to the amended marketing agreement, and Order No. 905, as amended, (7 CFR Part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, effective under the applicable provision of the Agricultural Marketing

Agreement Act of 1937, as amended (7 U.S.C. 601–674), and upon the basis of the recommendations of the committees established under the amended marketing agreement and order, and upon other available information, it is hereby found that the regulation of shipments of oranges and grapefruit, as hereinafter provided, will tend to effectuate the declared policy of the act.

(2) These amendments reflect the Department's appraisal of the current and prospective demand for Valencia oranges and grapefruit by domestic and export market outlets. Less restrictive grade requirements on fresh shipments of such fruit are consistent with the character of much of the fruit remaining for fresh shipment.

(3) It is hereby further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking procedure, and postpone the effective date of these amendments until 30 days after publication in the FEDERAL REGISTER (5 U.S.C. 553) because the time intervening between the date when information became available upon which these amendments are based and the time when these amendments must become effective in order to effectuate the declared policy of the act is insufficient; and these amendments relieve restrictions on the handling of Valencia oranges and grapefruit grown in Florida.

Order. 1. The provisions of paragraphs (a) (9) and (b) (9) of § 905.564 (Orange Regulation 75; 41 FR 42177, 49474, 51029, 53007, 54917; 42 FR 5071, 8361, 9663, 10833, 18271) are revised to read as follows:

§ 905.564 Orange Regulation 75.

(a) * * *

(9) Any Valencia, Lue Gim Gong, and similar late maturing oranges of the Valencia type, grown in the production area, which do not meet at least the requirements of the U.S. No. 2 grade and the external requirements of the U.S. No. 1 Golden grade; and

* * * * *

(b) * * *

(9) Any Valencia, Lue Gim Gong, and similar late maturing oranges of the Valencia type, grown in the production area, which do not meet at least the requirements of the U.S. No. 2 grade and the external requirements of the U.S. No. 1 Golden grade; and

* * * * *

2. The provisions of § 905.565 (Grapefruit Regulation 77; 41 FR 42177, 49474, 51029, 54917; 42 FR 9663, 10833, 14865, 18271, 21469) are amended by revising paragraphs (a) (1), (a) (3), (b) (1) and (b) (3) as follows:

§ 905.565 Grapefruit Regulation 77.

(a) * * *

(1) Any seeded grapefruit, grown in the production area, which do not grade at least U.S. No. 1: *Provided,* That during the period May 10, 1977, through August 14, 1977, no handler shall ship any seeded grapefruit, grown in the production area, which do not grade at least U.S. No. 2 Russet;

* * * * *

(3) Any seedless grapefruit, grown in the production area, which do not grade at least Improved No. 2: *Provided,* That during the period May 10, 1977, through August 14, 1977, no handler shall ship any seedless grapefruit, grown in the production area, which do not grade at least U.S. No. 2 Russet; or

* * * * *

(b) * * *

(1) Any seeded grapefruit, grown in the production area, which do not grade at least U.S. No. 1: *Provided,* That during the period May 10, 1977, through August 14, 1977, no handler shall ship any seeded grapefruit, grown in the production area, which do not grade at least U.S. No. 2 Russet;

* * * * *

(3) Any seedless grapefruit, grown in the production area, which do not grade at least Improved No. 2: *Provided,* That during the period May 10, 1977, through August 14, 1977, no handler shall ship any seedless grapefruit, grown in the production area, which do not grade at least U.S. No. 2 Russet; or

* * * * *

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.)

Dated, May 10, 1977, to become effective May 10, 1977.

CHARLES R. BRADER,
Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc.77-13374 Filed 5-13-77;8:45 am]

[Lemon Reg. 92]

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation establishes the quantity of California-Arizona lemons that may be shipped to fresh market during the weekly regulation period May 15–21, 1977. This regulation is needed to provide for orderly marketing of fresh lemons for the regulation period because of the production and marketing situation confronting the lemon industry.

EFFECTIVE DATE: May 15, 1977.

FOR FURTHER INFORMATION CONTACT:

Charles R. Brader, Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447-3545.

SUPPLEMENTARY INFORMATION: (a) *Findings.* (1) Pursuant to the amended marketing agreement and Order No. 910, as amended (7 CFR Part 910), regulating the handling of lemons grown in California and Arizona, effective under the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and upon the basis of the recommendations and information submitted by the Lemon Administrative Committee established under the amended marketing agreement and order, and upon other available information, it is found that the limitation of handling of such lemons, as provided in this regulation will tend to effectuate the declared policy of the act.

(2) The need for this regulation to limit the quantity of lemons that may be marketed during the specified week stems from the production and marketing situation confronting the lemon industry.

(i) The committee has submitted its recommendation for the quantity of lemons it considers advisable to be handled during the specified week. The recommendation resulted from consideration of the factors covered in the order. The committee further reports the demand for lemons is steady this week. Average f.o.b. price was $5.99 per carton the week ended May 7, 1977, compared to $5.79 per carton the previous week. Track and rolling supplies at 150 cars were up 20 cars from last week.

(ii) Having considered the recommendation and information submitted by the committee, and other available information, the Secretary finds that the quantity of lemons which may be handled should be established as provided in this regulation.

(3) It is further found that it is impracticable and is contrary to the public interest to give preliminary notice, engage in public rule-making procedure, and postpone the effective date until 30 days after publication in the FEDERAL REGISTER (5 U.S.C. 553), because the time intervening between the date when information upon which this regulation is based became available and the time when it must become effective to effectuate the declared policy of the act is insufficient. A reasonable time is permitted, for preparation for the effective time; and good cause exists for making the regulation effective as specified. The committee held an open meeting during the current week, after giving due notice, to consider supply and market conditions for lemons and the need for regulation. Interested persons were afforded an opportunity to submit information and views at this meeting. The recommendation and supporting information for regulation during the period specified were promptly submitted to the Secretary after the meeting was held, and information concerning the provisions and effective time has been provided to handlers of lemons. It is necessary, to effectuate the declared policy of the act, to make this regulation

effective as specified. The committee meeting was held on May 10, 1977.

§ 910.392 Lemon Regulation 92.

(b) *Order.* (1) The quantity of lemons grown in California and Arizona which may be handled during the period May 15, 1977, through May 21, 1977, is established at 295,000 cartons.

(2) As used in this section, "handled" and "carton(s)" have the same meaning as when used in the amended marketing agreement and order.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.)

Dated: May 12, 1977.

CHARLES R. BRADER,
Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc.77-14010 Filed 5-13-77;8:45 am]

[Grapefruit Reg. 17; Amdt. 7]

PART 944—FRUITS; IMPORT REGULATIONS

Minimum Grade Requirements For Imports of Seeded and Seedless Grapefruit

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This amendment lowers the minimum grade requirement applicable to imported seeded and seedless grapefruit to U.S. No. 2 Russet grade to coincide with such requirements being made effective on Florida grapefruit. This amendment is required by Federal law.

EFFECTIVE DATE: May 10, 1977.

FOR FURTHER INFORMATION CONTACT:

Charles R. Brader, Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250; telephone (202) 447-3545.

SUPPLEMENTARY INFORMATION: This amendment is consistent with section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This section requires that whenever specified commodities, including grapefruit, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodity. This amendment fixes the same minimum grade requirement on imported seeded and seedless grapefruit as is effective under Marketing Order No. 905, as amended (7 CFR Part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida.

Order. In § 944.113 (Grapefruit Regulation 17; 41 FR 42181, 49109; 42 FR 9664, 10835, 14867, 18271, 21469) the provisions of paragraph (a) (1) and (a) (3) are revised to read as follows:

§ 944.113 Grapefruit Regulation 17.

(a) * * *

(1) Seeded grapefruit shall grade at least U.S. No. 1: *Provided,* That during the period May 10, 1977, through August 14, 1977, seeded grapefruit shall grade at least U.S. No. 2 Russet;

* * * * *

(3) Seedless grapefruit shall grade at least Improved No. 2: *Provided,* That during the period May 10, 1977, through August 14, 1977, seedless grapefruit shall grade at least U.S. No. 2 Russet; and

* * * * *

It is hereby found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice, engage in public rulemaking procedure, and postpone the effective time of this amendment beyond that hereinafter specified (5 U.S.C. 553) in that (a) the requirements of this amended import regulation are imposed pursuant to section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), which makes such regulation mandatory; (b) this amendment fixes the same requirements for imports of seeded and seedless grapefruit as are applicable under amended Grapefruit Regulation 77 (§ 905.565) to the shipment of seeded and seedless grapefruit grown in Florida; and (c) this amendment lowers the minimum grade requirement applicable to imported seeded and seedless grapefruit.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.)

Dated: May 10, 1977, to become effective May 10, 1977.

CHARLES R. BRADER,
Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc.77-13875 Filed 5-13-77;8:45 am]

Title 14—Aeronautics and Space

CHAPTER I—FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

[Airworthiness Docket No. 76-SW-59; Amdt. 39-2897]

PART 39—AIRWORTHINESS DIRECTIVES

Bell Helicopter Textron Models 206A and 206B Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adds an Airworthiness Directive (AD) requiring replacement of the tail rotor drive shaft support bearing arrangement with improved bearings and bearing hangers on Bell Helicopter Textron Model 206A and 206B helicopters. The new bearings and bearing hangers incorporate relubrication features and fail-safe hanger clamp arrangements which should significantly reduce the bearing failure rate and eliminate failures of the tail rotor drive shaft due to bearing seizure.

EFFECTIVE DATE: May 13, 1977.

ADDRESSES: Bell Helicopter Technical Bulletin Number 206-76-2 may be obtained upon request to the Service Manager, Bell Helicopter Textron, Post Office Box 482, Fort Worth, Texas, 76101.

FOR FURTHER INFORMATION CONTACT:

Wilbur F. Wells, Propulsion Section (ASW-214), Engineering and Manufacturing Branch, Flight Standards Division, Southwest Region, Federal Aviation Administration, Post Office Box 1689, Fort Worth, Texas, 76101; telephone 817-624-4911, extension 524.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rule Making was issued on December 9, 1976, and published in 41 FR 55889. This rule provided for removal and replacement of the tail rotor drive shaft bearings and bearing hangers with an improved design which features fail-safe bearing hangers and improved provisions for relubricating these bearings. Reports from operators of these helicopters indicate that occasional bearing failures must be expected and that bearing seizures can result in tail rotor drive shaft failure and consequent hazardous loss of directional control of the helicopter.

No changes have been made to the proposed rule since its original publication.

Interested persons have been afforded an opportunity to participate in the making of the amendment. Those who commented objected to the proposed rule primarily because their individual maintenance capabilities and their corresponding service experience did not indicate compliance with the replacement schedule in the notice was necessary for safety. The FAA cannot agree with this concept since data from a broadly based service difficulty reporting system available to the FAA does reflect a failure history not only of the bearing but also the sequential failure of the tail rotor drive shaft due to bearing seizure. One commenter strongly recommended adoption of this proposed rule.

The principal authors of this document are Wilbur F. Wells, Aerospace Engineer, and James O. Price, General Attorney, Southwest Region.

Accordingly, and pursuant to the authority delegated to me by the Administrator (14 CFR 11.89) § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) is amended, effective May 13, 1977, by adding the following new AD.

BELL HELICOPTER TEXTRON: Applies to Models 206A and 206B helicopters certificated in all categories as indicated below:

Compliance required within the next 100 hours time in service after the effective date of this Airworthiness Directive (AD), unless already accomplished.

To minimize the possibility of loss of directional control due to failure of the tail rotor drive shaft, remove and replace tail rotor drive shaft bearings, bearing hangers, retaining rings, and shaft segments as specified in items 1 through 7 below:

1. Helicopter Serial Numbers 1 through 413: Tail Rotor Drive Shaft Installation Part Number 206-040-301-1:

a. *Remove*	*Install*
1 hanger, P/N 206-040-336-1.	1 hanger, P/N 206-040-346-9.
1 hanger, P/N 206-040-335-1.	1 hanger, P/N 206-040-345-9.
5 hangers, P/N 206-040-331-1.	5 hangers, P/N 206-040-338-5.
7 bearings, P/N 206-040-339-1.	7 bearings, P/N 206-040-339-9.
12 retainers, P/N RR216C.	
1 shaft, P/N 206-040-320-7.	1 shaft, P/N 206-040-320-11.

b. To prevent bearing hangers from chafing the drive shaft cover, the cover must be modified in accordance with Bell Helicopter Company Technical Bulletin Number 206-76-2 dated January 7, 1976, (misdated 206-76-2) or later FAA-approved revision or FAA-approved equivalent.

2. Helicopter Serial Numbers 414 through 913: Tail Rotor Drive Shaft Installation Part Number 206-040-301-7:

Remove	*Install*
7 bearings, P/N 206-040-339-3 or -5.	7 bearings, P/N 206-040-339-9.

3. Helicopter Serial Numbers 414 through 637: Tail Rotor Drive Shaft Installation Part Number 206-040-301-7:

Remove	*Install*
1 shaft, P/N 206-404-320-11.	1 shaft, P/N 206-040-320-11.

NOTE.—Shaft P/N 206-040-320-7 may be reworked to configuration of Shaft P/N 206-040-320-11. See Part V of Bell Helicopter Company Service Bulletin Number 206-76-12.

4. Helicopter Serial Numbers 914 through 1251: Tail Rotor Drive Shaft Installation Part Number 206-040-301-13:

Remove	*Install*
7 bearings, P/N 206-040-339-3 or -5.	7 bearings, P/N 206-040-339-9.

5. Helicopter Serial Numbers 1252 through 1993: Tail Rotor Drive Shaft Installation Part Number 206-040-301-19:

Remove	*Install*
7 bearings, P/N 206-040-339-3- or 5-.	7 bearings, P/N 206-040-339-9.

6. Removal and replacement as prescribed by paragraphs 1 through 5 must be in accordance with the applicable maintenance and overhaul manual instructions.

7. All spring clamp type bearing hangers, Part Number 206-040-338-5, must be installed with the spring on the left side of the tail boom.

Bell Helicopter Company Service Bulletin 206-76-12 pertains to and provides instructions for accomplishing the intent of this AD.

The manufacturer's specifications and procedures identified and described in this directive are incorporated herein and made a part hereof pursuant to 5 U.S.C. 552(a)(1). All persons affected by this directive who have not already received these documents from the manufacturer may obtain copies upon request to Service Manager, Bell Helicopter Textron, P.O. Box 482, Fort Worth, Texas 76101. These documents may also be examined at the Office of the Regional Counsel, Southwest Region, FAA, 4400 Blue Mound Road, Fort Worth, Texas 76101, and at FAA Headquarters, 800 Independence Avenue S.W., Washington, D.C. 20591.

Equivalent means of compliance with the modifications prescribed by this AD may be approved by the Chief, Engineering and Manufacturing Branch, Flight Standards Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101.

Upon request of the operator, an FAA maintenance inspector, subject to prior approval of the Chief, Engineering and Manufacturing Branch, Flight Standards Division, Southwest Region, Federal Aviation Administration, may adjust the compliance time prescribed by this AD, if the request contains substantiating data to justify the increase for that operator.

(Secs. 313(a), 601, and 603, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1421, and 1423); Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c).)

NOTE.—The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OBM Circular A-107.

Issued in Fort Worth, Texas, on May 2, 1977.

HENRY L. NEWMAN,
Director, Southwest Region.

NOTE.—The incorporation by reference provisions in this document was approved by the Director of the Federal Register on June 19, 1967.

[FR Doc.77-13853 Filed 5-13-77;8:45 am]

[Airworthiness Docket No. 76-SW-58; Amdt. 39-2900]

PART 39—AIRWORTHINESS DIRECTIVES

Bell Helicopter Textron Model 205A-1 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adds an Airworthiness Directive (AD) requiring a modification of the alignment of the engine-to-transmission driveshaft on Bell Helicopter Textron Model 205A-1 helicopters. Adverse service experience involving failure of these driveshafts has been reported during operation with external loads and, at least once, with internal loads (passengers).

EFFECTIVE DATE: May 18, 1977.

FOR FURTHER INFORMATION CONTACT:

Wilbur F. Wells, Propulsion Section (ASW-214), Engineering and Manufacturing Branch, Flight Standards Division, Southwest Region, Federal Aviation Administration, Post Office Box 1689, Fort Worth, Texas, 76101; telephone 817-624-4911, extension 524.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rule Making was issued on December 7, 1976, and published in 41 FR 55365 on December 20, 1976. The basis for issuance of this notice consisted of adverse service experience involving complete failure of the engine-to-transmission driveshaft and consequent loss of engine power to drive the main rotor of the helicopter. The subsequent autorotative landing in some instances resulted in accidents. A reevaluation of the angular relationship of the engine to the transmission under operating conditions of high gross weight and with heavy sling loads revealed that the couplings on the driveshaft can be subjected to severe working loads. However, this condition can be significantly improved by adjusting the location of the engine. This is provided for by this AD.

Public comments received were limited to a request that the compliance time for modification of standard category helicopters be revised to coincide with the next airframe overhaul activity. The FAA cannot agree with this since the overhaul criteria would not provide for essentially equal scheduling for all operators, and, in instances where the overhaul has just recently been completed, the allowable operating time before compliance could become excessive, and safety would be compromised. However, the AD does provide for extension of the compliance time upon request by an operator, if substantiating data for such increase are provided.

The principal authors of this document are Wilbur F. Wells, Aerospace Engineer, and James O. Price, General Attorney, Southwest Region.

Accordingly, and pursuant to the authority delegated to me by the Administrator (14 CFR 11.89), § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.19) is amended, effective May 18, 1977, by adding the following new AD:

BELL HELICOPTER TEXTRON: Applies to Model 205A-1 helicopters, Serial Numbers 30001 through 30232, certificated in all categories.

For helicopters certificated and operated pursuant to Part 133 of the FARs (Class B rotorcraft-load combination or Class C rotorcraft-load combinations as defined by Part 1 of the FARs), compliance is required within the next 100 hours cumulative time in service involving external load combinations as defined above, or 300 hours total time in service, whichever comes first, after the effective date of this Airworthiness Directive (AD), unless previously accomplished.

For standard category helicopters not approved for external load operations as defined above, compliance is required within the next 300 hours time in service after the effective date of this AD, unless previously accomplished.

To prevent failure of the engine-to-transmission drive couplings due to excessive angularity under high loading conditions, adjust the engine-to-transmission alignment as described below:

(a) Remove the engine-to-transmission driveshaft assembly, P/N's 205-040-004-3, -11, or -17, in accordance with instructions in the appropriate maintenance and overhaul manuals.

(b) Using instructions and special tools prescribed by the maintenance and overhaul manuals, establish the engine-to-transmission alignment prescribed by the manual except as follows:

(1) Index the target plate inner scale to 8.0 (instead of 3.5) and index the target plate outer scale to 35.6 (instead of 1.75).

NOTE.—Transmission position must be adjusted and leveled to maintenance manual specifications. Engine position adjustment procedures must follow maintenance manual instructions.

(2) Establish angularity as follows: Install dial indicator in accordance with instructions in the maintenance manual at 2.5 inch radius. Read zero at 12 o'clock position;

read +0.030±0.004 at 6 o'clock position. Reset dial indicator to zero at the 3 o'clock position; read +0.006±0.004 at 9 o'clock position. Plus reading on dial indicator means that flange on transmission is closer to flange on engine.

(c) Shim engine support fittings to obtain required alignment. If total laminated shim thickness (P/N 205-060-137-1 or 205-060-138-1), required under any engine support fitting, exceeds 0.188 inches, fabricate a plate of 2024-T4 aluminum alloy 0.100 thick, same outside dimensions as shim stock, and structurally bond the plate to the engine service deck with EC 934. Total thickness of shims and plate under any engine mount fitting must not exceed 0.288 inches. Verify that the engine support fittings are reinstalled with the same fore and aft orientation as before.

(d) Interference between the engine and the aft upper firewall at the 9 o'clock position (looking forward) may result with this realignment. If this condition occurs, accomplish the following:

Remove the aft upper firewall assembly P/N 205-060-909-27 and disassemble by removing the sixteen (16) screws.

Remove the aft section of the firewall web P/N 204-060-909-13 and enlarge the sixteen (16) holes by drilling to 5/16 inch.

Deburr the drilled holes. Reassemble the firewall assembly using P/N AN970-3 washers over the enlarged holes and under the 16 screw heads.

(e) Check engine deck fitting screws and bolts for proper length and thread engagement.

(f) Check fuel control and governor linkage for proper rigging and cushion.

(g) Reinstall the driveshaft assembly. Reinstall transmission 5th mount assembly. Follow maintenance manual instructions for details of reinstallation of access panels, firewall attachments, and related cleanup, as required.

Equivalent means of compliance with the modifications prescribed by this AD may be approved by the Chief, Engineering and Manufacturing Branch, Flight Standards Division, Southwest Region, Federal Aviation Administration, Post Office Box 1689, Fort Worth, Texas 76101.

Upon request of the operator, an FAA maintenance inspector, subject to prior approval of the Chief, Engineering and Manufacturing Branch, Flight Standards Division, Southwest Region, Federal Aviation Administration, may adjust the compliance time prescribed by this AD, if the request contains substantiating data to justify the increase for that operator.

This amendment becomes effective May 18, 1977.

(Secs. 313(a), 601, and 603, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1421, and 1423); Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c).)

NOTE.—The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation for an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Fort Worth, Texas, on May 4, 1977.

HENRY L. NEWMAN,
Director, Southwest Region.

[FR Doc.77-13854 Filed 5-13-77;8:45 am]

[Airworthiness Docket No. 77-SW-4; Amdt. 39-2893]

PART 39—AIRWORTHINESS DIRECTIVES

Bell Model 212 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adds a new Airworthiness Directive (AD) which requires frequent, daily, and 4 hour interval inspections and/or checks of the Model 212 main rotor blades for skin cracks. Several cases of skin cracks and spar cracks have been reported in several locations in the blade. Spar cracks may result in loss of part of the main rotor blade with resulting loss of control of the helicopter.

EFFECTIVE DATE: June 12, 1977. Compliance with a daily inspection is required after the effective date of the AD and frequent inspections and/or checks are required on and after the effective date of this AD for main rotor blades with 400 or more hours' time in service. A blade with a crack must be replaced before further flight.

ADDRESSES: Bell Helicopter Textron Service Instructions and Service Bulletins may be obtained from persons or offices noted in the AD.

FOR FURTHER INFORMATION CONTACT:

James H. Major, Airframe Section, ASW-212, Engineering and Manufacturing Branch, Federal Aviation Administration, 4400 Blue Mound Road, Fort Worth, Texas 76101, telephone number 817-624-4911, Extension 515.

SUPPLEMENTARY INFORMATION: A proposal was published in 42 FR 10853 on February 24, 1977, to amend Part 39 of the Federal Aviation Regulations to include an Airworthiness Directive (AD) requiring installation of the blade inspection system (BIS), P/N 212-704-110-1, on certain main rotor blades with 400 or more hours' total time in service, or requiring installation of blades originally equipped with BIS. Bell Service Bulletin No. 212-76-14 required installation of the BIS by March 1, 1977. The proposed AD would have also required frequent checks or inspections of all Model 212 main rotor blades equipped with the BIS at 4 hour intervals after the blades attained 400 hours' total time in service.

For certain specific main rotor blades that do not have a barrier at the leading edge scarf joint, the proposed AD would have required daily checks of the scarf joint for filler erosion to an exposed joint with attendant replacement of the scarf joint filler.

Since the proposal was published on February 24, 1977, the FAA issued Amdt. 39-2846, AD 77-05-02 (42 FR 13270) effective March 10, 1977, reducing the life from 4,000 hours to 1,500 hours for those Bell Model 212 main rotor blades that were not originally equipped with the internal barrier at the leading edge scarf joint.

As a result of issuing Amdt. 39-2846 and the proposed AD, two letters were received objecting to the expensive modification and installation of BIS on those blades that require replacement at 1500 hours' total time in service and recommending a visual inspection of the blades at intervals of 4 hours for blades that do not have BIS installed or that have an inoperative or faulty BIS. These letters also contended that the BIS is unreliable and that only main rotor blades, P/N 204-012-001-23, were reportedly cracked and only these require frequent inspection.

The agency agrees in part with these comments and recommendations.

Consequently, the adopted rule will require either a visual inspection conducted by an appropriately rated person (FAR 43.7) whenever the BIS is not installed or when it is inoperative or faulty or will permit the pilot to conduct the check of the blade by use of the BIS whenever it is installed and operating properly on all Model 212 main rotor blades.

The agency has found that reports of a faulty BIS system concerned developmental-prototype BIS and that proper installation of BIS as specified in Bell Service Instructions will provide a reliable BIS. The agency has also found that blades, P/N 204-012-001 -29 and -33, will probably be subject to many of the same problems experienced by the blades, P/N 204-012-001-23, and that all of those blades must be either inspected or checked at 4 hour intervals after attaining 400 hours' time in service.

Therefore, the adopted rule is different from the proposal in that installation and proper operation of the BIS will not be required provided a mechanic or other properly rated agency conducts the frequent inspections. Frequent inspections or checks of all the affected blades will be required whereas the proposal required installation of BIS followed by frequent inspections or checks. As stated in the proposal, the adopted rule will specify compliance with Bell Service Instruction No. 212-61, 204-32, or 205-45 whenever the BIS is installed on the main rotor blade to insure a reliable system.

In addition, the adopted rule now provides for installation of a Bell manufactured external cover over the scarf joint for certain main rotor blades that will make a daily inspection of the scarf joint filler unnecessary.

Interested persons were afforded opportunity to participate in the making of this amendment and in response to letters changes were made to provide an alternate means of compliance, and these changes impose no additional burden; therefore, further notice and public procedure is unnecessary.

The principal authors of this document are James H. Major, Aerospace En-

gineer, and James O. Price, General Attorney, Southwest Region.

Accordingly, and pursuant to the authority delegated to me by the Administrator (14 CFR 11.89), Section 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) is amended, effective June 12, 1977, by adding the following new Airworthiness Directive:

BELL. Applies to Bell Model 212 helicopters certificated in all categories.

Compliance required as indicated.

To detect possible chordwise cracks in the main rotor blade skin from near the inboard end to near the outboard end and to detect eroded scarf joint filler, accomplish the following:

(a) Before the first flight of each day, after the effective date of this Airworthiness Directive, accomplish the following:

(1) Check the leading edge scarf joints of both main rotor blades for filler erosion.

(2) Clean and fill scarf joints having filler eroded to the metal, as specified in item 4 of Bell Helicopter Textron Service Bulletin No. 212-77-2 dated January 28, 1977, or later approved revision.

(3) Main rotor blades, P/N 204-012-001-33, and blades, P/N 204-012-001 -23 and -29, having serial numbers listed in Bell Service Bulletin No. 212-77-2 have an internal barrier behind the scarf joint and do not require the check in paragraph (a)(1) of this AD. Main rotor blades, P/N 204-012-001 -23 and -29 that have external cover, P/N 204-015-011 -1 or -701, installed in accordance with Bell Helicopter Textron Technical Bulletin No. 212-77-6 dated April 6, 1977, or later approved revision do not require the check in paragraph (a)(1) of this AD.

(b) For all Bell Model 212 helicopters having main rotor blades with 400 or more hours' total time in service on or after the effective date of this AD, accomplish either (1) or (2) of the following after the effective date of this AD:

(1) For main rotor blades not equipped with Blade Inspection System (BIS) or not equipped with a properly functioning BIS:

(i) Inspect the complete top and bottom surfaces of each main rotor blade before the first flight of each day and at intervals not to exceed 4 hours' time in service from the last inspection as specified in Part I, paragraph A, Bell Helicopter Textron Service Bulletin No. 212-75-6, Revision B, dated May 5, 1976, or later approved revisions.

(ii) Further flight is prohibited if a crack is found in the blade skin.

(2) For main rotor blades equipped with a properly functioning BIS that was factory installed, Blade P/N 212-012-001-33, or that was installed in accordance with the procedures and requirements of Bell Service Instruction No. 212-61, 204-32, or 205-45 dated August 13, 1976, or later approved revision:

(i) Check the blade inspection system by pressing the test button on the BIS detector located on the butt end of each blade before the first flight of each day and at intervals not to exceed 4 hours' time in service from the last check.

(ii) Further flight is prohibited if a steady light on the BIS detector occurs or if a crack in the blade is confirmed.

(iii) The affected main rotor blade may be returned to service after a visual inspection is conducted in which no cracks are found and after a flashing light occurs on the detector. (A flashing light indicates a closed or satisfactory circuit in the blade inspection system.)

(c) The checks in paragraph (a)(1) and (b)(2)(i) of this AD may be performed by the pilot.

NOTE.—For the requirements regarding recording of compliance and method of compliance with this AD in the aircraft permanent maintenance record see FAR 91.173.

(d) Equivalent means of compliance with this AD may be approved by the Chief, Engineering and Manufacturing Branch, FAA, Southwest Region.

(e) Upon request of the operator, an FAA maintenance inspector, subject to prior approval of the Chief, Engineering and Manufacturing Branch, FAA, Southwest Region, may adjust the repetitive inspection intervals specified in paragraph (a) and (b) of this AD to permit compliance at an established inspection period of the operator if the request contains substantiating data to justify the increase for that operator.

(f) The manufacturer's service bulletin and instruction identified and described in this directive are incorporated herein and made a part hereof pursuant to 5 U.S.C. 552 (a)(1). All persons affected by this directive who have not already received these documents from the manufacturer may obtain copies upon request to the Service Manager, Bell Helicopter Textron, P.O. Box 482, Fort Worth, Texas 76101. These documents may also be examined at the Office of the Regional Counsel, Southwest Region, FAA, 4400 Blue Mound Road, Fort Worth, Texas, and at FAA Headquarters, 800 Independence Ave, SW., Washington, D.C. A historical file on this AD which includes the incorporated material in full is maintained by the FAA at its headquarters in Washington, D.C., and at the Southwest Regional Office in Fort Worth, Texas.

This amendment becomes effective June 12, 1977.

(Secs. 313(a), 601, and 603 of the Federal Aviation Act of 1958 (49 U.S.C. 1354(a), 1421, 1423) and of sec. 6(c) of the Department of Transportation Act (49 U.S.C. 1655(c)).)

NOTE.—The FAA has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Fort Worth, Texas, on April 29, 1977.

HENRY L. NEWMAN,
Director, Southwest Region.

NOTE.—The incorporation by reference in the preceding document was approved by the Director of the Federal Register on June 19, 1967.

[FR Doc.77-13856 Filed 5-13-77;8:45 am]

[Docket No. 77-EA-2; Amdt. 39-2899]

PART 39—AIRWORTHINESS DIRECTIVES

Piper Aircraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule (AD) requires the installation of a placard which imposes a speed reduction of 3 mph for each 1,000 feet above 21,000 feet in PA-31-325 type airplanes due to technical omissions in the original application for certification.

EFFECTIVE DATE: May 17, 1977. Compliance within 25 hours in service is required.

ADDRESSES: Piper Service Bulletins may be acquired from the manufacturer at Piper Aircraft Corp., 820 East Bald Eagle Street, Lock Haven, Pennsylvania 17745.

FOR FURTHER INFORMATION CONTACT:

V. Barsamian, Airframe Section, Engineering and Manufacturing Branch, AEA-212, Federal Building, J. F. K. International Airport, Jamaica, New York 11430; Telephone 212-995-2875.

SUPPLEMENTARY INFORMATION: Due to subsequent research by the manufacturer, it was determined that compressibility had not been considered as a factor in the original flutter analysis. A revised analysis indicates a need to reduce V_{no} airspeed by an amount of 3 mph for each 1,000 feet above 21,000 feet. Since this is a deficiency which exists in similarly designed airplanes, an airworthiness directive is being issued requiring the placarding of the pilot's dashboard to restrict the V_{no} speeds. In view of the effect on air safety, notice and public procedure hereon are impractical and good cause exists for making the rule (AD) effective in less than 30 days.

It has been determined that the expected impact of the proposed regulation is so minimal that the proposal does not warrant an evaluation.

DRAFTING INFORMATION

The principal authors of this document are V. Barsamian, Flight Standards Division, and Thomas C. Halloran, Esq., Office of the Regional Counsel.

ADOPTION OF THE AMENDMENT

Accordingly, and pursuant to the authority delegated to me by the Administrator (14 CFR 11.89), § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) is amended, effective May 17, 1977, as follows:

PIPER: Applies to PA-31-325.

To prevent possible adverse airplane vibration effects at higher altitudes, accomplish the following within the next 25 hours in service after the effective date of this Airworthiness Directive unless already accomplished:

Attach the following operating limitation placard on the pilot's instrument panel between the clock and airspeed indicator in full view of the pilot:

"Above 21,000 feet reduce V_{no} speed 3 m.p.h. per 1,000 feet."

(Piper Service Bulletin No. 544 refers to this subject.)

(Secs. 313(a), 601, and 603, Federal Aviation Act of 1958, as amended 49 U.S.C. 313(a), 1421, and 1423; sec. 6(c), Department of Transportation Act, 49 U.S.C. 1655(c).)

NOTE.—The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of a Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Jamaica, New York, on May 3, 1977.

L. J. CARDINALI,
Acting Director, Eastern Region.

[FR Doc.77-13855 Filed 5-13-77;8:45 am]

[Docket No. 77-WE-10-AD; Amdt. 39-2898]

PART 39—AIRWORTHINESS DIRECTIVES

Lockheed-California Company Model L-1011-385 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: An emergency AD was issued by the Federal Aviation Administration on April 14, 1977, as a result of jamming of an elevator drive system on a L-1011-385 airplane. This AD requires an inspection to prevent a similar occurrence.

DATES: Effective date May 17, 1977 for all persons except those to whom it was made effective by telegram dated April 15, 1977.

FOR FURTHER INFORMATION CONTACT:

Wallace M. Frei, Executive Secretary, Airworthiness Directive Review Board, Federal Aviation Administration, Western Region, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Telephone: (213) 536-6351, or Richard G. Wittry, Attorney, Office of the Regional Counsel, Federal Aviation Administration, Western Region, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Telephone: (213) 536-6274.

SUPPLEMENTARY INFORMATION: This AD is required because of occurrence of jamming of one of the two elevator drive systems on the horizontal stabilizer of the primary pitch control system which resulted in degradation of the airplane stability and control performance characteristics.

The jamming of the left hand side elevator drive system on the horizontal stabilizer of the primary pitch control system occurred as a result of a failure of the upper bearing in the elevator aft cable quadrant assembly unit with subsequent lack of free relative motion between the quadrant hub base and the elevator actuation pushrod. This AD provides for inspection of the functional integrity of the upper bearing, verification of the minimum operational clearance between the quadrant hub base and the pushrod, and replacements of components as necessary.

This AD includes editorial changes, technical additions and minor changes for clarification from the text of the telegraphic AD.

Since it was found that immediate corrective action was required notice and public procedure thereon was impracticable and contrary to the public interest and good cause existed for making the airworthiness directive effective immediately as to all known U.S. operators of airplanes by individual telegrams dated April 15, 1977. These conditions still exist and the airworthiness directive is hereby published in the FEDERAL REGISTER as an amendment to § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) to make it effective as to all persons.

LOCKHEED-CALIFORNIA COMPANY: Applies to Lockheed-California Company L-1011-385 Series airplanes, certificated in all categories.

Compliance required as indicated.

To prevent possible inflight jamming of the elevator drive systems on the horizontal stabilizer of the primary pitch control system which can result in degradation of the airplane stability and control performance characteristics, accomplish the following:

1. Within ten hours time in service after the receipt of this telegraphic AD, unless already accomplished, except as provided in paragraph 2, below, perform the following inspection on the left hand and right hand elevator quadrant assemblies P/N 1532385, and replacements, as necessary.

With the hydraulic pressure "OFF" and the horizontal stabilizer at its normal hydraulic "OFF" positions (Reference: Maintenance Manual Section 29-11-00):

(a). Install dial indicator base on beam P/N 1532375. This beam (diagonal) is directly above elevator quadrant assembly.

(b). Position dial indicator pointer on side of upper quadrant hub 0.50 inch down from top, and on the same side of the hub as the applied load.

(c). Apply 180 to 200 pound up load (or equivalent moment) at quadrant's large cable termination point to establish baseline for step (d), down load test.

(d). With dial indicator at zero, apply 180 to 200 pound down load at quadrant's large cable termination point.

(e). Measure deflection of hub by recording dial movement. If this measurement exceeds 0.030 inch, replace quadrant assemblies P/N 1532385 or its upper bearing P/N DA-22-52A7 prior to further flight with new serviceable components. Bearing P/N YD-171-H is considered to be an acceptable replacement component. If measurement is between 0.020 inch and 0.030 inch replace quadrant assembly or its upper bearing within the next 150 hours time in service. If measurement is less than 0.020 inch reinspect at 2,000 hour time in service intervals.

(f). Verify 0.200 inch minimum "Rigging" gap dimension between quadrant hub base and the elevator actuation pushrod (Ref. Lockheed drawing 1532385, NOTE 8). If gap of less than 0.200 inch exists, readjust control rod P/L LS9094A925C90.

2. Accomplish the inspections of paragraph (1), above, at intervals not to exceed 2,000 hours time in service. If the quadrant assembly or the upper bearing has been replaced within the last 2,000 hours time in service prior to the effective date of this AD, the inspections required by (1) may be deferred until the upper bearing has accumulated 2,000 hours time in service.

3. Equivalent inspections may be used when approved by Chief, Aircraft Engineering Division, FAA Western Region.

4. Special flight permits may be issued per FAR's 21.197 and 21.199 for the accomplishment of the inspections required by paragraphs (1) and (2).

NOTE: Part II of FAA approved Lockheed-California Alert Service Bulletin 093-27-A158, dated April 14, 1977, covers the same subject.

This amendment is effective May 17, 1977 for all persons except those to whom it was made effective by telegram dated April 15, 1977 which contained this amendment.

(Secs. 313(a), 601, and 603, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1421, and 1423); Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c))).

NOTE: The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Los Angeles, California on May 2, 1977.

The principal authors of this document are Mr. G. Vasley, Aircraft Engineering Division, and Mr. R. G. Wittry, Office of the Regional Counsel, Western Region.

W. R. FREHSE,
Acting Director,
FAA Western Region.

[FR Doc.77-13950 Filed 5-13-77;8:45 am]

[Docket No. 77-WE-3-AD; Amdt. 39-2896]

PART 39—AIRWORTHINESS DIRECTIVES

Lockheed Aircraft Corporation Model 18 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This airworthiness directive (AD) supersedes an outmoded AD. The old AD specified use of now unavailable parts. It applied only to airplanes used in air carrier passenger operations, and it did not provide for equivalent means of compliance.

DATES: Effective date: June 16, 1977. Compliance required by the first engine change after the effective date of this AD or by October 1, 1977, whichever occurs earlier, unless previously accomplished in accordance with AD 55-15-03 as amended by Amendment 55-24 to Part 507.

FOR FURTHER INFORMATION CONTACT:

Kyle L. Olsen, Executive Secretary, Airworthiness Directive Review Board, Federal Aviation Administration, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Telephone: (213) 536-6351. Richard Wittry, Attorney, Office of the Regional Counsel, Federal Aviation Administration, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Telephone: (213) 536-6274.

SUPPLEMENTARY INFORMATION: After issuing AD 55-15-03, as amended by Amendment 55-24 to Part 507, service experience has shown that clarification and updating of the AD is required.

The FAA has determined that, due to continued operation and modification of the Model 18 series airplanes affected by AD 55-15-03, as amended by Amendment 55-24 to Part 507, the AD as written, requires the use of hose assemblies which currently may not be available. Therefore, the FAA is superseding AD 55-15-03, as amended by Amendment 55-24 to Part 507, to provide an equivalent means of compliance approved by the Chief, Aircraft Engineering Division, FAA Western Region; to add other FAA approved hose assembly part numbers currently available; to clarify the applicability statement to apply to airplanes in all types of operation; and to

establish a new effectivity date and compliance date for those airplanes for which AD 55–15–03, as amended by Amendment 55–24 to Part 507, has not been accomplished.

Interested persons have been afforded an opportunity to participate in the making of the amendment. One comment provided an expanded listing of approved hose assemblies for propeller feathering lines.

In consideration of the foregoing and pursuant to the authority delegated to me by the Administrator (31 FR 13697), § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) is amended by adding the following new Airworthiness Directive:

LOCKHEED: Applies to Lockheed Model 18 airplanes, certificated in all categories, using Hamilton standard propellers.

Compliance required by the first engine change after the effective date of this AD or October 1, 1977, whichever occurs earlier, unless previously accomplished in accordance with AD 55–15–03 as amended by Amendment 55–24 to Part 507.

To increase fire resistance integrity of the propeller feathering system against damage by a powerplant fire, all flexible hose components of propeller feathering lines forward of the firewall must be replaced with lines and fittings which will meet the fire resistance requirements of the hose assemblies specified in (a) through (g) herein. However, if the feathering lines in Zone I include a section of steel tubing, flexible hose assemblies located forward of the cylinders and connecting to the governor are not affected by this directive.

The following flexible hose assemblies are acceptable for use in this application:

(a) Resistoflex SSFR–3800–10 hose assemblies.

(b) Aeroquip 680–10S hose assemblies with Aeroquip 304 protective sleeves over end fittings (Aeroquip Assembly P/N 304000).

(c) Aeroquip 309009 hose assemblies.

(d) Aeroquip 309009–8S hose assemblies (where feathering system requires this size).

(e) Aeroquip 634000–8 or –10, as applicable, hose assemblies.

(f) Aeroquip AE2460001 hose assemblies.

(g) Hose assemblies that fully comply with FAR 37.140 (TSO–C42) and have a pressure rating equal to or greater than that of the propeller feathering system installed on the airplane.

(h) Equivalent hose assemblies or other means of compliance may be used when approved by the Chief Aircraft Engineering Division, FAA Western Region.

Special flight permits may be issued in accordance with FAR's 21.97 and 21.199 to operate the airplane to a base for the accomplishment of this AD.

This supersedes AD 55–15–03, as amended by Amendment 55–24 to Part 507.

This Amendment becomes effective June 16, 1977.

(Secs. 313(a), 601, and 603, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1421, and 1423); Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)).)

NOTE.—The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A–107.

Issued in Los Angeles, California on April 29, 1977.

The principal authors of this document are Mr. M. Rammelsberg, Aircraft Engineering Division, and Mr. R. G. Wittry, Office of the Regional Counsel, Western Region.

W. R. FREHSE,
Acting Director,
FAA Western Region.

[FR Doc.77–13951 Filed 5–13–77;8:45 am]

[Docket No. 77–WE–1AD; Amdt. 39–2894]

PART 39—AIRWORTHINESS DIRECTIVES

McDonnell Douglas DC–3 and C–47 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This airworthiness directive (AD) supersedes an outmoded AD. The old AD specified use of now unavailable parts. It applied only to airplanes used in air carrier passenger operations, and it did not provide for equivalent means of compliance.

DATES: Effective date: June 16, 1977. Compliance required by the first engine change after the effective date of this AD or by October 1, 1977, whichever occurs earlier, unless previously accomplished in accordance with AD 55–15–03 as amended by Amendment 55–24 to Part 507.

FOR FURTHER INFORMATION CONTACT:

Kyle L. Olsen, Executive Secretary, Airworthiness Directive Review Board, Federal Aviation Administration, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Telephone: 213–536–6351. Richard Wittry, Attorney, Office of the Regional Counsel, Federal Aviation Administration, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Telephone: 213–536–6274.

SUPPLEMENTARY INFORMATION: After issuing AD 55–15–03, as amended by Amendment 55–24 to Part 507, service experience has shown that clarification and updating of the AD is required.

The FAA has determined that, due to continued operation and modification of McDonnell Douglas DC–3 and C–47 airplanes affected by AD 55–15–03, as amended by Amendment 55–24 to Part 507, the AD as written, requires the use of hose assemblies which currently may not be available. Therefore, the FAA is superseding AD 55–15–03, as amended by Amendment 55–24 to Part 507, to provide an equivalent means of compliance approved by the Chief, Aircraft Engineering Division, FAA Western Region; to add other FAA approved hose assembly part numbers currently available; to clarify the applicability statement to apply to airplanes in all types of operation; and to establish a new effectivity date and compliance date for those airplanes for which AD 55–15–03, as amended by Amendment 55–24 to Part 507, has not been accomplished.

Interested persons have been afforded an opportunity to participate in the making of the amendment. No comments were received.

In consideration of the foregoing and pursuant to the authority delegated to me by the Administrator (31 FR 13697), § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) is amended by adding the following new Airworthiness Directive:

MCDONNELL DOUGLAS: Applies to DC–3 and C–47 series airplanes, certificated in all categories, using Hamilton Standard propellers.

Compliance required by the first engine change after the effective date of this AD or October 1, 1977, whichever occurs earlier, unless previously accomplished in accordance with AD 55–15–03 as amended by Amendment 55–24 to Part 507.

To increase fire resistance integrity of the propeller feathering system against damage by a powerplant fire, all flexible hose components of propeller feathering lines forward of the firewall must be replaced with lines and fittings which will meet the fire resistance requirements of the hose assemblies specified in (a) through (f) herein. However, if the feathering lines in Zone I include a section of steel tubing, flexible hose assemblies located forward of the cylinders and connecting to the governor are not affected by this directive.

The following flexible hose assemblies are acceptable for use in this application:

(a) Resistoflex SSFR–3800–10 hose assemblies.

(b) Aeroquip 680–10S hose assemblies with Aeroquip 304 protective sleeves over end fittings (Aeroquip Assembly P/N 304000).

(c) Aeroquip 309009 hose assemblies.

(d) Aeroquip 309009–8S hose assemblies (where feathering system requires this size).

(e) Aeroquip 634000–8 or –10, as applicable, hose assemblies.

(f) Hose assemblies that fully comply with FAR 37.140 (TSO–C42) and have a pressure rating equal to or greater than that of the propeller feathering system installed on the airplane.

(g) Equivalent hose assemblies or other means of compliance may be used when approved by the Chief Aircraft Engineering Division, FAA Western Region.

Special flight permits may be issued in accordance with FAR's 21.97 and 21.199 to operate the airplane to a base for the accomplishment of this AD.

This supersedes AD 55–15–03, as amended by Amendment 55–24 to Part 507. This Amendment becomes effective June 16, 1977.

(Secs. 313(a), 601, and 603, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1421, and 1423); Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)).)

NOTE.—The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A–107.

Issued in Los Angeles, California on April 29, 1977.

The principal authors of this document are Mr. M. Rammelsberg, Aircraft Engineering Division, and Mr. R. G. Wittry, Office of the Regional Counsel, Western Region.

W. R. FREHSE,
Acting Director, Federal Aviation Administration, Western Region.

[FR Doc.77-13952 Filed 5-13-77;8:45 am]

[Docket No. 77-WE-2-AD; Amdt. 39-2895]

PART 39—AIRWORTHINESS DIRECTIVES

McDonnell Douglas DC-4 and C-54 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This airworthiness directive (AD) supersedes an outmoded AD. The old AD specified use of now unavailable parts. It applied only to airplanes used in air carrier passenger operations, and it did not provide for equivalent means of compliance.

DATES: Effective date: June 16, 1977. Compliance required by the first engine change after the effective date of this AD or by October 1, 1977, whichever occurs earlier, unless previously accomplished in accordance with AD 55-15-03 as amended by Amendment 55-24 to Part 507.

FOR FURTHER INFORMATION CONTACT:

Kyle L. Olsen, Executive Secretary, Airworthiness Directive Review Board, Federal Aviation Administration, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Telephone: 213-536-6351. Richard Wittry, Attorney, Office of the Regional Counsel, Federal Aviation Administration, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009, Telephone: 213-536-6274.

SUPPLEMENTARY INFORMATION: After issuing AD 55-15-03, as amended by Amendment 55-24 to Part 507, service experience has shown that clarification and updating of the AD is required.

The FAA has determined that, due to continued operation and modification of the McDonnell Douglas DC-4 and C-54 airplanes affected by AD 55-15-03, as amended by Amendment 55-24 to Part 507, the AD as written, requires the use of hose assemblies which currently may not be available. Therefore, the FAA is superseding AD 55-15-03, as amended by Amendment 55-24 to Part 507, to provide an equivalent means of compliance approved by the Chief, Aircraft Engineering Division, FAA Western Region; to add other FAA approved hose assembly part numbers currently available; to clarify the applicability statement to apply to airplanes in all types of operation; and to establish a new effectivity and compliance date for those airplanes for which AD 55-15-03, as amended by Amendment 55-24 to Part 507, has not been accomplished.

Interested persons have been afforded an opportunity to participate in the making of the amendment. No comments were received.

In consideration of the foregoing and pursuant to the authority delegated to me by the Administrator (31 FR 13697), § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) is amended by adding the following new Airworthiness Directive:

McDONNELL DOUGLAS: Applies to DC-4 and C-54 series airplanes, certificated in all categories, using Hamilton Standard propellers.

Compliance required by the first engine change after the effective date of this AD or October 1, 1977, whichever occurs earlier, unless previously accomplished in accordance with AD 55-15-03 as amended by Amendment 55-24 to Part 507.

To increase fire resistance integrity of the propeller feathering system against damage by a powerplant fire, all flexible hose components of propeller feathering lines forward of the firewall must be replaced with lines and fittings which will meet the fire resistance requirements of the hose assemblies specified in (a) through (f). However, if the feathering lines in Zone I include a section of steel tubing, flexible hose assemblies located forward of the cylinders and connecting to the governor are not affected by this directive.

The following flexible hose assemblies are acceptable for use in this application:

(a) Resistoflex SSFR-3800-10 hose assemblies.

(b) Aeroquip 680-10S hose assemblies with Aeroquip 304 protective sleeves over end fittings (Aeroquip Assembly P/N 304000).

(c) Aeroquip 309009 hose assemblies.

(d) Aeroquip 309009-8S hose assemblies (where feathering system requires this size).

(e) Aeroquip 634000-8 or -10, as applicable, hose assemblies.

(f) Hose assemblies that fully comply with FAR 37.140 (TSO-C42) and have a pressure rating equal to or greater than that of the propeller feathering system installed on the airplane.

(g) Equivalent hose assemblies or other means of compliance may be used when approved by the Chief Aircraft Engineering Division, FAA Western Region.

Special flight permits may be issued in accordance with FAR's 21.97 and 21.199 to operate the airplane to a base for the accomplishment of this AD.

This supersedes AD 55-15-03, as amended by Amendment 55-24 to Part 507. This Amendment becomes effective June 16, 1977.

(Secs. 313(a), 601 and 603, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1421, and 1423); Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)).)

NOTE.—The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Los Angeles, California on April 29, 1977.

The principal authors of this document are Mr. M. Rammelsberg, Aircraft Engineering Division, and Mr. R. G. Wittry, Office of the Regional Counsel, Western Region.

W. R. FREHSE,
Acting Director, Federal Aviation Administration, Western Region.

[FR Doc.77-13953 Filed 5-13-77;8:45 am]

[Docket No. 77-NW-12-AD (Amdt. 39-2901)]

PART 39—AIRWORTHINESS DIRECTIVE

Boeing Model 727 Series Airplanes Horizontal Stabilizer Center Section Front Spar Fitting

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule, Airworthiness Directive (AD).

SUMMARY: This AD is being issued to require inspections of the horizontal stabilizer center section front spar junction fitting on Boeing Model 727 series airplanes. The AD is required because cracks have been found that could result in loss of the forward attachment of the stabilizer to the jackscrew.

DATES: Effective, May 16, 1977. Compliance times. Visual inspection within 750 flight-hours or prior to August 15, 1977, whichever occurs first, and eddy current or dye penetrant inspection within 3000 flight-hours or prior to August 15, 1978, whichever occurs first.

ADDRESSES: FAA Northwest Region, 9010 East Marginal Way South, Seattle, Washington 98124.

FOR FURTHER INFORMATION, CONTACT:

Gerald R. Mack, Engineering and Manufacturing Branch, FAA Northwest Region, 9010 East Marginal Way South, Seattle, Washington 98108. (206-767-2516).

SUPPLEMENTARY INFORMATION: Cracks have been found in the jackscrew support lugs of one horizontal stabilizer center section front spar fitting. The majority of the cracks initiated from the attach holes; several lugs had multiple cracks. Cracking is attributed to stress corrosion of the 7079-T6 aluminum alloy material. Since this condition is likely to exist or develop in other 727 airplanes, an Airworthiness Directive is being issued to require a one-time visual inspection and one-time eddy current or dye penetrant inspection of all airplanes with 7079-T6 aluminum alloy fittings. The AD requires reporting of all cracks as results of the inspections.

Approximately 870 airplanes are to be inspected.

This rule was coordinated with the Boeing Commercial Airplane Company and the operators through the Air Transport Association (ATA) prior to issuance by numerous telephone conversations

and a meeting in Seattle, Washington, on April 27, 1977.

DRAFTING INFORMATION: The principal authors of this document are Gerald R. Mack, Engineering and Manufacturing Branch, and Jonathan Howe, Regional Counsel, FAA Northwest Region.

Accordingly, (41 CFR 39), § 39.13 of the Federal Aviation Regulations is amended effective May 16, 1977, by adding the following new Airworthiness Directive:

BOEING: Applies to Boeing Model 727 series airplanes with horizontal stabilizer center section front spar junction fittings, P/N 65-17448-1 or 65-31273-1, certificated in all categories. Compliance required as indicated.

To detect cracks in the horizontal stabilizer center section front spar fitting, accomplish the following:

A. Within the next 750 flight-hours time-in-service from the effective date of this AD or prior to August 15, 1977, which ever occurs first, unless accomplished within the last 850 flight-hours or last 100 days, or unless paragraph B below is or has already been accomplished, inspect for cracks by close visual, eddy current, or dye penetrant means, the exposed surfaces and peripheral edges of all eight (8) lugs which attach the jackscrew support arms to the horizontal stabilizer center section front spar junction fitting. Conduct the eddy current inspection in accordance with Boeing Nondestructive Test Manual, D6-7170, or in a manner approved by the Chief, Engineering and Manufacturing Branch, FAA Northwest Region; and

B. Within the next 3000 flight-hours time-in-service from the effective date of this AD or prior to August 15, 1978, whichever occurs first, unless accomplished since April 20, 1977, eddy current or dye penetrant inspect for cracks all eight (8) lugs which attach the jackscrew support arms to the horizontal stabilizer center section front spar junction fittings with the attach bolts and jackscrew support arms removed. Conduct the eddy current inspections in accordance with Boeing Non-destructive Test Manual D6-7170, or in a manner approved by the Chief, Engineering and Manufacturing Branch, FAA Northwest Region.

C. Parts found cracked are to be replaced or repaired prior to further flight in a manner approved by the Chief, Engineering and Manufacturing Branch, FAA Northwest Region. Report findings of cracks directly to the Chief, Engineering and Manufacturing Branch, FAA Northwest Region, within 64 hours after detection.

D. Aircraft may be ferried to a maintenance base for repair or replacement in accordance with FAR 21.197, subject to prior approval of the Chief, Engineering and Manufacturing Branch, FAA Northwest Region.

The manufacturer's specifications and procedures identified and described in this directive are incorporated herein and made a part hereof pursuant to U.S.C. 552(a)(1).

All persons affected by this directive who have not already received these documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124. The documents may also be examined at FAA Northwest Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective May 12, 1977.

An evaluation of the anticipated impacts has been made, and it is expected that the final regulation is neither costly nor controversial. The preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107 is not required.

(Sec. 313(a), 601 and 603 of the Federal Aviation Act of 1958 (49 U.S.C. 1354(a), 1421, and 1424) and of sec. 6(c) of the Department of Transportation Act (49 U.S.C. 1655(c)).)

Issued in Seattle, Washington on May 12, 1977.

C. B. WALK, Jr.,
Director, Northwest Range.

NOTE.—The incorporation by reference provisions in the document was approved by the Director of the Federal Register on June 19, 1967.

[FR Doc.77-13949 Filed 5-13-77;8:45 am]

SUBCHAPTER F—AIR TRAFFIC AND GENERAL OPERATING RULES

[Docket No. 16766; Amdt. No. 1072]

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the mandatory provisions.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, D.C. 20591;

2. The FAA Regional Office of the region in which the affected airport is located; or

3. The Flight Inspection Field Office which originated the SIAP.

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Information Center (APA-430), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, D.C. 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed weekly, may be ordered from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The current annual subscription price is $150; add $30 for each additional copy mailed to the same address.

FOR FURTHER INFORMATION CONTACT:

William L. Bersch, Flight Procedures and Airspace Branch (AFS-730), Aircraft Programs Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, D.C. 20591; telephone (202) 426-8277.

SUPPLEMENTARY INFORMATION: This amendment to Part 97 of the Federal Aviation Regulations (14 CFR Part 97) prescribes new, amended, suspended, or revoked Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR Part 51, and § 97.20 of the Federal Aviation Regulations (FARS). The applicable FAA forms are identified as FAA Forms 8260-3, 8260-4 and 8260-5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the FEDERAL REGISTER expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

This amendment to Part 97 is effective on the date of publication and contains separate SIAPs which have compliance dates stated as effective dates based on related changes in the National Airspace System or the application of new or revised criteria. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPs). In developing these SIAPs, the TERPs criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs is unnecessary, impracticable, or contrary to the public interest and, where applicable, that good

cause exists for making some SIAPs effective in less than 30 days.

The principal author of this document is Rudolph L. Fioretti, Flight Standards Service, and Richard W. Danforth, Office of the Chief Counsel.

ADOPTION OF THE AMENDMENT

Accordingly, pursuant to the authority delegated to me, Part 97 of the Federal Aviation Regulations (14 CFR Part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective on the dates specified, as follows:

1. By amending § 97.23 VOR-VOR/DME SIAPs identified as follows:

* * * *Effective June 30, 1977.*

Pueblo, CO—Pueblo Memorial, VOR Rwy 25R (TAC), Amdt. 18.
Norman, OK—Goldsby Airport, VOR/DME-A, Orig.
Eugene, OR—Mahlon Sweet Field, VOR-A, Amdt. 4.
Eugene, OR—Mahlon Sweet Field, VOR/DME Rwy 3 (TAC), Orig.
Eugene, OR—Mahlon Sweet Field, VOR/DME Rwy 16 (TAC), Orig.
Eugene, OR—Mahlon Sweet Field, VOR/DME Rwy 34 (TAC), Orig.
Eugene, OR—Mahlon Sweet Field, VORTAC Rwy 3, Original, cancelled.
Eugene, OR—Mahlon Sweet Field, VORTAC Rwy 16, Amdt, 1, cancelled.
Eugene, OR—Mahlon Sweet Field, VORTAC Rwy 34, Amdt. 2, cancelled.
Provo, UT—Provo Municipal, VOR-A, Amdt. 2.

* * * *Effective June 23, 1977.*

Biddeford, ME—Biddeford Muni., VOR-A, Amdt. 2.
Grand Rapids, MI—Grand Rapids Itasca County, VOR Rwy 34, Amdt. 5.
Minneapolis, MN—Anoka County-Blaine Arpt (Janes Field), VOR Rwy 8, Amdt. 6.

* * * *Effective May 26, 1977.*

Albany, GA—Albany-Dougherty County, VOR Rwy 16 (TAC) Amdt. 21.

* * * *Effective May 3, 1977.*

Avalon, CA—Catalina, VOR-A, Amdt. 1.

2. By amending § 97.25 SDF-LOC-LDA SIAPs identified as follows:

* * * *Effective June 30, 1977.*

Pueblo, CO—Pueblo Memorial, LOC (BC) Rwy 25R, Amdt. 10.

* * * *Effective May 26, 1977.*

Albany, GA—Albany-Dougherty County, LOC (BC) Rwy 22, Amdt. 2.

The FAA published an amendment in Docket No. 16559, Amdt. No. 1068 to Part 97 of the Federal Aviation Regulations (42 FR 20118; April 18, 1977) under § 97.25 effective May 26, 1977, which is hereby amended as follows: Trenton, NJ—Mercer County, LOC (BC) Rwy 24 original is rescinded.

3. By amending § 97.27 NDB/ADF SIAPs identified as follows:

* * * *Effective June 30, 1977.*

Pueblo, CO—Pueblo Memorial, NDB Rwy 7L, Amdt. 10.
Pueblo, CO—Pueblo Memorial, NDB Rwy 25R, Amdt. 7.
Eugene, OR—Mahlon Sweet Field, NDB Rwy 16, Amdt. 25.
Salem, OR—McNary Field, NDB Rwy 31, Amdt. 14.

* * * *Effective June 23, 1977.*

Grand Rapids, MN—Grand Rapids Itasca County, NDB Rwy 34, Amdt. 1.
Saranac Lake, NY—Adirondack, NDB Rwy 23, Original.

* * * *Effective May 26, 1977.*

Albany, GA—Albany-Dougherty County, NDB Rwy 4, Amdt. 6.
Albany, GA—Albany-Dougherty County, NDB Rwy 16, Orig., cancelled.

The FAA published an amendment in Docket No. 16711, Amdt No. 1069 to Part 97 of the Federal Aviation Regulations (42 FR 20625; April 21, 1977) under § 97.27 effective June 2, 1977, which is hereby amended as follows: Palmer, MA Metropolitan Arpt., NDB-A, Amdt 3 is rescinded and replaced by Palmer, MA—Metropolitan Arpt.,NDB Rwy 4, original.

4. By amending § 97.29 ILS-MLS SIAPs identified as follows:

* * * *Effective June 30, 1977.*

Pueblo, CO—Pueblo Memorial, ILS Rwy 7L, Amdt. 13.
Pueblo, CO—Pueblo Memorial, ILS Rwy 25R, Amdt. 3.
Eugene, OR—Mahlon Sweet Field, ILS Rwy 16, Amdt. 29.
Salem, OR—McNary Field, ILS Rwy 31, Amdt. 20.

* * * *Effective June 23, 1977.*

Grand Rapids, MN—Grand Rapids Itasca County, MLS Rwy 34 (Interim), Amdt. 1.
Saranac Lake, NY—Adirondack, ILS Rwy 23, Amdt. 2.

* * * *Effective May 26, 1977.*

Albany, GA—Albany-Dougherty County, ILS Rwy 4, Amdt. 5.

The FAA published an amendment in Docket No. 16741, Amdt. No. 1070 to Part 97 of the Federal Aviation regulations (42 FR 21610; April 28, 1977) under § 97.33 effective June 9, 1977, which is hereby amended as follows: Wilmington, NC—New Hanover County, RNAV Rwy 23 Amdt 3 change effective date to June 16, 1977.

(Secs. 307, 313(a), 601, and 1110, Federal Aviation Act of 1958 (49 U.S.C. 1348, 1354(a), 1421, and 1510); sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)); Delegation: 24 FR 5662 and Paragraph 802 of Order FS P 1100.1, as amended March 9, 1973.)

NOTE.—The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Washington, D.C., on May 6, 1977.

JAMES M. VINES,
Chief,
Aircraft Programs Division.

NOTE.—The incorporation by reference in the preceding document was approved by the Director of the Federal Register on May 12, 1969.

[FR Doc.77-13852 Filed 5-13-77;8:45 am]

Title 24—Housing and Urban Development

CHAPTER X—FEDERAL INSURANCE ADMINISTRATION, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

SUBCHAPTER B—NATIONAL FLOOD INSURANCE PROGRAM

[Docket No. FI-410]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for Anne Arundel County, Md.

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On November 29, 1974, in 39 FR 41504, the Federal Insurance Administrator published a list of communities with special hazard areas which included Anne Arundel County, Maryland. Map No. H 240008 Panel 45 indicates that 885 Mallard Circle, being Lot 27, Section 5, Plat Two, Ulmstead Estates, Anne Arundel County, Maryland, as recorded in Deed Liber 2923, Folio 637, of Land Records in the office of Land Records of Anne Arundel County, Maryland, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the existing structure on the above property is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, 202-755-5581 or Toll Free Line 800-424-8872, Room 5270, 451 Seventh Street SW., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided*, That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 240008 Panel 45 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on November 15, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR

17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, February 27, 1969, as amended by 39 FR 2787, January 24, 1974.)

Issued: April 27, 1977.

HOWARD B. CLARK,
Acting Federal Insurance Administrator.

[FR Doc.77-13667 Filed 5-13-77;8:45 am]

[Docket No. FI-2135]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for the Town of Freeport, Maine

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final Rule.

SUMMARY: On July 14, 1976, in 41 FR 28961, the Federal Insurance Administrator published a list of communities with special hazard areas which included Freeport, Maine. Map No. H 230046A Panel 13 indicates that Parcel 23 as shown on Map 2 of Property Map for the Town of Freeport, Cumberland County, Maine, as Parcels J and I and the Southern halves of Parcels K and H as shown on the plan of Harraseeket Park, the entire property being recorded in Book 3774, Page 112, of Deeds in the Registry of Cumberland County, Maine, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the existing structure on the above property is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 230046A Panel 13 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on July 26, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1963), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended by 39 FR 2787, January 24, 1974.)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13668 Filed 5-13-77;8:45 am]

[Docket No. FI-2135]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for the Town of Freeport, Maine

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On July 14, 1976, in 41 FR 28961, the Federal Insurance Administrator published a list of communities with special hazard areas which included Freeport, Maine. Map No. H 230046A Panel 13 indicates that Parcel 21 as shown on Map 2 of Property Maps for Freeport, Maine, as recorded in Book 3714, Page 152 of Deeds, in the office of the Register of Cumberland County, Maine, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the existing structure on the above property is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 230046A Panel 13 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on July 26, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended by 39 FR 2787, January 24, 1974)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13669 Filed 5-13-77;8:45 am]

[Docket No. FI-440]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for the City of Wichita, Kansas

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On January 10, 1975, in 40 FR 2183, the Federal Insurance Administrator published a list of communities with special hazard areas which included Wichita, Kansas. Map No. H 200328 Panel 13 indicates that Lot 2, Block 1 of Dean-Rupert First Addition to Wichita, Wichta, Kansas, as recorded in Book 76, Page 3 of Plats, in the office of the Register of Deeds of Sedgwick County, Kansas, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the above property is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now

agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 200328 Panel 13 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on December 27, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended by 39 FR 2787, January 24, 1974)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13670 Filed 5-13-77;8:45 am]

[Docket No. FI-239]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for the City of Edwardsville, Kansas

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On April 11, 1974, in 39 FR 13148, the Federal Insurance Administrator published a list of communities with special hazard areas which included Edwardsville, Kansas. Map No. H 200362A Panel 01 and 03 indicates that Lots 84 through 123, The Parkway, Edwardsville, Kansas, as recorded in Book 33, Page 13 of Plats, in the office of the Register of Deeds of Wyandotte County, Kansas, are in their entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the above property is not within the Special Flood Hazard Area.

DATE: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 200362A Panels 01 and 03 are hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on April 5, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended by 39 FR 2787, January 24, 1974)

Issued: April 13, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13671 Filed 5-13-77;8:45 am]

[Docket No. FI-310]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for the City of Davenport, Iowa

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On July 12, 1974, in 39 FR 25649, the Federal Insurance Administrator published a list of communities with special hazard areas which included Davenport, Iowa. Map No. H 190242 Panel 10 indicates that Lots 74 through 93, Cedar Vista Annex, Third Addition, Davenport, Iowa, recorded as Document No. 8564–75 of Plats in the office of the Recorder of Scott County, Iowa, are in their entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that Lots 74 through 76 and 91 through 93 of the above property are not within the Special Food Hazard Area. Also Lots 77 through 90 of the above property, with the exception of the recorded building set back easements and the recorded utility and sewer easements, are not within the Special Flood Hazard Area.

DATE: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 190242 Panel 10 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on June 21, 1974.

(National Flood Insurance Act of 1968 (Title III of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended by 39 FR 2787, January 24, 1974)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13672 Filed 5-13-77;8:45 am]

[Docket No. FI-658]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for Cobb County, Georgia

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final Rule.

SUMMARY: On August 12, 1975, in 40 FR 33822, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the County of Cobb, Georgia. Map No. H 130052 Panel 15 indicates that Lot 21, Block A, Casey Park Subdivision, Cobb County, Georgia, as recorded in Plat Book 67, Page 48, in the office of the Clerk of Cobb County, Georgia, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of addi-

tional, recently acquired flood information, that the existing structure on the above mentioned property is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755-5581 or Toll Free Line (800) 424-8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided*, That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 130052 Panel 15 is hereby corrected to reflect that the structure on the above property is not within the Special Flood Hazard Area identified on October 3, 1975.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13673 Filed 5-13-77;8:45 am]

[Docket No. FI-685]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for Richmond County, Georgia

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final Rule.

SUMMARY: On September 8, 1975, in 40 FR 41511, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the County of Richmond, Georgia. Map No. H 130158 Panel 04 indicates that Lot 29, Block J. Kingston, Section 2-E, Richmond County, Georgia, as recorded in Realty Reel 29, Pages 370 through 375, in the office of the Clerk of the Superior Court of Richmond County, Georgia, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the above mentioned property is not within the Special Flood Hazard Area.

DATE: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755-5581 or Toll Free Line (800) 424-8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year, provided that no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 130158 Panel 04 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on October 24, 1975.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974)).

Issued: April 27, 1977.

HOWARD B. CLARK,
Acting Federal Insurance Administrator.

[FR Doc.77-13674 Filed 5-13-77;8:45 am]

[Docket No. FI-658]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for Cobb County, Georgia

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final Rule.

SUMMARY: On August 12, 1975, in 40 F.R. 33822, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the County of Cobb, Georgia. Map No. H 130052 Panel 16 indicates that Buildings 1 through 9, Riverbend, and Buildings 10 through 19, Riverbend III, Cobb County, Georgia, as recorded in Condominium Plat Book I, Page 2, and Condominium Plat Book I, Page 132, respectively, in the office of the Clerk of Cobb County, Georgia, are in their entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the above property is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755-5581 or Toll Free Line (800) 424-8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year, provided that no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 130052 Panel 16 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on October 3, 1975.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as

amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13675 Filed 5-13-77;8:45 am]

[Docket No. FI-327]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for the Town of Guilford, Connecticut

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On August 12, 1974, in 39 FR 28887, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the Town of Guilford, Connecticut. Map No. H 090077 Panel 14 indicates that Lot 11, East River Meadows, Guilford, Connecticut, as recorded on Map No. 1768, in the office of the Town Clerk of Guilford, Connecticut, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the existing structure on the above mentioned property is not within the Special Flood Hazard Area.

DATE: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755–5581 or Toll Free Line (800) 424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided*, That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 090077 Panel 14 is hereby corrected to reflect that the existing structure on the above property is not within the Special Flood Hazard Area identified on August 2, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13676 Filed 5-13-77;8:45 am]

[Docket No. FI-327]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for Town of Guilford, Connecticut

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On August 12, 1974, in 39 FR 28887, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the Town of Guilford, Connecticut. Map No. H 090077 Panel 05 indicates that Lot 30, Nutile Acres, Section IV, located at 62 Cardinal Drive, Guilford, Connecticut, as recorded in Volume 221, Page 334, in the Guilford Land Records, Guilford, Connecticut, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the above mentioned property is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, 202–755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year; *Provided*, That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 090077 Panel 05 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on August 2, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 27, 1977.

HOWARD B. CLARK,
Acting Federal Insurance Administrator.

[FR Doc.77-13677 Filed 5-13-77;8:45 am]

[Docket No. FI-2147]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for City of Newport Beach, California

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On July 16, 1976, in 41 FR 29396, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the City of Newport Beach, California. Map No. H 060227A Panel 08 indicates that Lots 1 through 5, Tract 8787, Newport Beach, California, as recorded in Book 367, Pages 28 through 30, in the office of the Recorder of Orange County, California, are in their entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the above mentioned property is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, 202–755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full re-

fund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 060227A Panel 08 is hereby corrected to reflect that the above property is not within the Special Flood Hazard Area identified on July 9, 1976.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77–13678 Filed 5–13–77;8:45 am]

[Docket No. FI–454]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for Sacramento County, California

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On January 28, 1975, in 40 FR 4126, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the County of Sacramento, California. Map No. H 060262 Panel 14 indicates that Lots 9, 10, and 11, Southgate Commercial Unit No. 2, and Parcels 1 and 2, Portions of Section 32, T. 8 N., R. 5 E., M.D.B. and M., Sacramento County, California, as recorded respectively on Map No. 29, Book 79 of Maps, and Book 8 of Parcel Maps, Page 28, both recorded in the office of the Recorder of Sacramento County, California, are in their entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the above mentioned properties are not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, 202–755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 060262 Panel 14 is hereby corrected to reflect that the above properties are not within the Special Flood Hazard Area identified on January 10, 1975.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77–13679 Filed 5–13–77;8:45 am]

[Docket No. FI–279]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for the City of Pleasant Hill, Calif.

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On June 3, 1974, in 39 FR 19455, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the City of Pleasant Hill, California. Map No. H 060034A Panel 04 indicates that Lot 1127, Gregory Gardens Unit No. 7, at 1631 Mary Drive, Pleasant Hill, California, as recorded in Book 42, Pages 9 and 10, in the office of the County Recorder of Contra Costa County, California, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above may in light of additional, recently acquired flood information, that the portion of the lot outside the channel of Grayson Creek is not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, 202–755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street SW., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 060034A Panel 04 is hereby corrected to reflect that the portion of the lot outside the channel of Grayson Creek is not within the Special Flood Hazard Area identified on May 24, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128), and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 27, 1977.

HOWARD B. CLARK,
Acting Federal Insurance Administrator.

[FR Doc.77–13680 Filed 5–13–77;8:45 am]

[Docket No. FI–685]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for the City of Camarillo, Calif.

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On September 8, 1975, in 40 FR 41511, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the City of Camarillo, California. Map No. H 065020A Panel 07 indicates that Lots 1 through 14, 25 through 51, 62 through 83, Tract 2417, Camarillo, California, as recorded in Book 68 of Miscellaneous Records (Maps), Pages 40 through 43, in the office of the Recorder of Ventura County, California, are in their entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that Lots 1 through 10, 14, 25, 28 through 30, 41 through 47, 69 through 74, and 78 through 80 are not within the Special Flood Hazard Area. Lots 11 through 13, 26, 27, 31 through 40, 48 through 51, 62 through 68, 75

through 77, and 81 through 83, with the exception of the front yard building setback of 20 feet, are also not within the Special Flood Hazard Area.

DATES: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, 202–755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street SW., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 065020A Panel 07 is hereby corrected to reflect that the above described property is not within the Special Flood Hazard Area identified on July 19, 1974.

(National Food Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 27, 1977.

HOWARD B. CLARK,
Acting Federal Insurance Administrator.

[FR Doc.77–13681 Filed 5–13–77;8:45 am]

[Docket No. FI–308]

PART 1920—PROCEDURE FOR MAP CORRECTION

Letter of Map Amendment for City of Palm Springs, Calif.

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: On July 5, 1974, in 39 FR 24639, the Federal Insurance Administrator published a list of communities with Special Flood Hazard Areas which included the City of Palm Springs, California. Map No. H 060257 Panel 12 indicates that Lot 42, Tahquitz Park No. 2, Palm Springs, California, as recorded in Book 19, Page 2, in the office of the Recorder of Riverside County, California, is in its entirety within the Special Flood Hazard Area. It has been determined by the Federal Insurance Administration, after further technical review of the above map in light of additional, recently acquired flood information, that the above mentioned property, less the East 25 feet thereof, adjacent to Cahuilla Road is not within the Special Flood Hazard Area.

DATE: The map amendment is effective as of the date of this notice.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, 202–755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street SW., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: This map amendment, by establishing that the subject property is not within the Special Flood Hazard Area, removes the requirement to purchase flood insurance as a condition of Federal or Federally-related financial assistance for construction or acquisition purposes.

If a property owner was required to purchase flood insurance as a condition of such assistance, and the lender now agrees to waive the property owner from maintaining flood insurance coverage on the basis of this map amendment, the property owner may obtain a full refund of the premium paid for the current policy year: *Provided,* That no claim is pending or has been paid on the policy in question during the same policy year. The premium refund may be obtained from the National Flood Insurers Association (NFIA) through the agent or broker who sold the policy.

Map No. H 060257 Panel 12 is hereby corrected to reflect that the above mentioned portion of the property is not within the Special Flood Hazard Area identified on June 21, 1974.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, February 27, 1969, as amended (39 FR 2787, January 24, 1974).)

Issued: April 27, 1977.

HOWARD B. CLARK,
Acting Federal Insurance Administrator.

[FR Doc.77–13682 Filed 5–13–77;8:45 am]

Title 31—Money and Finance: Treasury

CHAPTER I—MONETARY OFFICES, DEPARTMENT OF THE TREASURY

PART 51—FISCAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS

Interim Regulations

AGENCY: Office of Revenue Sharing, Office of the Secretary.

ACTION: Interim regulations.

SUMMARY: This notice amends Subparts C and D, of the Office of Revenue Sharing regulations. These amendments are required to conform the current regulations with the changes made by the State and Local Fiscal Assistance Amendments of 1976. The purpose of these amendments is to provide necessary guidance to the recipient governments, and to inform other interested persons of the changes necessitated by the amendments to the General Revenue Sharing Program.

EFFECTIVE DATE: These interim regulations are effective on May 11, 1977.

FOR FURTHER INFORMATION CONTACT:

William H. Sager, Chief Counsel, Office of Revenue Sharing, 202–634–5182.

SUPPLEMENTARY INFORMATION:

SUBPART C

In 31 CFR, Part 51, Subpart C, § 51.20 (a) is amended to provide that data used to determine allocations of entitlement funds will be the latest and most complete data supplied by the Bureau of the Census, Bureau of Economic Analysis and the Internal Revenue Service. Section 51.20(c) is amended to include a special rule for entitlement periods of less than one year. Section 51.21 is amended to clarify the definition of pre-disaster data factors. A new § 51.21(c) is added to provide for multiple disasters. Current § 51.21(c) is redesignated § 51.21(d). Section 51.23(c) is amended to change the date for determining adjusted taxes and intergovernmental transfers to the fiscal year that can be uniformly assembled for all units of local government prior to the beginning of the affected entitlement period. Section 51.24 is amended by the deletion of 51.24(a)(1) as it no longer served a useful purpose. Section 51.25 is amended to provide that the waived entitlements of Indian tribes and Alaskan native villages will be added to the entitlement of the county government in the county area in which the tribe or village is situated.

Section 51.26(a) is amended to establish a State Obligated Adjustment Reserve which is set up on a State-by-State basis as opposed to the current National Obligated Adjustment Reserve. This subsection also establishes a limitation, not to exceed 0.5 percent of the total entitlement for the State government and all units of local government within that State, as the amount the Director may reserve. Section 51.26(b) provides that for entitlement periods beginning after December 31, 1976, adjustments to increase or decrease entitlements shall be demanded by the Director from the recipient government within one year from the end of the entitlement period for which the adjustment is claimed.

Section 51.27 is amended to provide for State maintenance of transfer rules for entitlement periods beginning on or after January 1, 1977. Section 51.27(i) adds a new section which provides that a State's entitlement shall not be reduced to the extent that the Federal government has assumed responsibility for a category of expenditures previously the responsibility of the State.

Section 51.29 is amended to require that any evidence supporting adjustment to data factors be presented to the Director not later than one year from the end of the entitlement period in which the data is applicable. Section 51.29 is further amended to delete the last sentence providing that data factors used for more than one entitlement period are subject to challenge only for the first entitlement period in which the data is used. Section 51.31 is added to provide that the office of the separate law enforcement officer in the State of Louisiana will receive a percentage of the entitlements of the State of Louisiana and of each parish in the State, other than the Parish of Orleans.

SUBPART D

In 31 CFR, Part 51, Subpart D, § 51.40 is amended to reflect the fact that the prohibition against the use of entitlement funds for matching other Federal funds is repealed. However, the substance of § 51.40 remains in the regulations in order to provide guidance concerning causes of action arising from the expenditure of entitlement funds in violation of the matching prohibition on or before December 31, 1976. Section 51.41 is amended to reflect the repeal of the priority expenditure restrictions for units of local government. However, § 51.41 remains in the regulations in order to provide guidance concerning causes of action arising from the expenditure of entitlement funds for other than priority purposes on or before December 31, 1976. A new § 51.44 is added to set forth the prohibition against the use of entitlement funds for lobbying purposes. A new § 51.45 is added to clarify the debt retirement restriction contained in § 51.41 (c) (4). In retiring a debt a recipient shall still comply with the provisions of Subparts D and E, particularly the Davis-Bacon Act and nondiscrimination requirements of those subparts where the proceeds of indebtedness were expended on or after October 12, 1972.

OTHER PROVISIONS

Amendments to Subpart B of title 31 CFR, Part 51, (relating to Assurances, Reports, Public Participation and Public Hearings) were published in the FEDERAL REGISTER as interim regulations on January 10, 1977 (42 FR 2196).

Amendments to Subpart F of title 31, CFR, Part 51, relating to Fiscal Procedures and Auditing, were published in the FEDERAL REGISTER as interim regulations on January 11, 1977 (42 FR 2422).

Amendments to Subpart F of Title 31, CFR, Part 51, relating to Fiscal Procedures and Auditing, were published in the FEDERAL REGISTER as interim regulations on January 11, 1977 (42 FR 2422).

Amendments to Subpart A, general provisions; Subpart E, nondiscrimination by recipient governments receiving entitlement funds; and Subpart G, hearing procedures and practice requirements before the Administrative Law Judge, of Title 31, CFR, Part 51 were published in the FEDERAL REGISTER as interim regulations on April 6, 1977 (42 FR 18362).

NEED FOR IMMEDIATE GUIDANCE

Because these interim regulations are necessary to provide immediate guidance it is found impractical to issue these interim regulations with the notice and public procedure thereon under 5 U.S.C. 553(b) or subject to the effective date limitations of 5 U.S.C. 553(d).

WRITTEN COMMENTS SOLICITED

Consideration will be given to any written comments or suggestions pertaining to these amendments to Subparts C and D which are received on or before July 15, 1977. Written comments shall be addressed to the Director, Office of Revenue Sharing (Symbols CC), Department of the Treasury, Washington, D.C. 20226. Written comments submitted in response to this solicitation will be available to the public upon request unless the comments are exempt from disclosure under the Freedom of Information Act, (5 U.S.C. 552) and the Department invokes the applicable exemption. A file of all written comments will be indexed and lodged with the Treasury Library.

These amendments and interim regulations are issued under the authority of the State and Local Fiscal Assistance Act of 1972, as amended, Title I, Pub. L. 92-512 and the State and Local Fiscal Assistance Amendments of 1972, Pub. L. 94-488, (31 U.S.C. 1221-1263) and Treasury Department Order No. 224, dated January 26, 1973 (38 FR 3342).

NOTE:—The Department of the Treasury has determined that these amendments and interim regulations do not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Orders 11821 and 11949, and OMB Circular A-107.

Dated: May 10, 1977.

BERNADINE DENNING,
Director, Office of Revenue Sharing.

Approved:

ROGER C. ALTMAN.

Subpart C—Computation and Adjustment of Entitlement Funds

Sec.

51.20 Data.
51.21 Data affected by a major disaster.
51.22 Adjusted taxes.
51.23 Date for determination of allocation.
51.24 Boundary changes, governmental reorganization, etc.
51.25 Waiver of entitlement; nondelivery of checks; insufficient data.
51.26 Reservation of funds and adjustment of entitlement.
51.27 State to maintain transfers to local governments.
51.28 Optional formula.
51.29 Adjustment of data factors.
51.30 Adjustment of maximum and minimum per capita entitlement; 100 percent criterion.
51.31 Separate law enforcement officers.

AUTHORITY: State and Local Fiscal Assistance Act of 1972, as amended, Title I, Pub. L. 92-512 and State and Local Fiscal Assistance Amendments of 1972, Pub. L. 94-488, (31 U.S.C. 1221-1263); Treasury Dept. Order No. 224, dated January 26, 1973 (38 FR 3342).

Subpart C—Computation and Adjustment of Entitlement

§ 51.20 Data.

(a) *In general.* The data used in determination of allocations and adjustments thereto payable under this part will be the latest and most complete data supplied by the Bureau of the Census, the Bureau of Economic Analysis and the Internal Revenue Service which are available prior to the allocations for one entitlement period unless, in the judgment of the Director, the data provided by those Agencies are not current enough or are not comprehensive enough to provide for equitable allocations.

(b) *Computation and payment of entitlements.* (1) Allocations will not be made to any unit of local government if the available data is so inadequate as to frustrate the purpose of the Act. Such units of local government will receive an entitlement and payment when current and sufficient data become available as necessary to permit an equitable allocation.

(2) Payment to units of local government for which the Director has not received an address confirmation will be delayed until proper information is available to the Director.

(3) Where the Director determines that the data provided by the Bureau of the Census or the Department of Commerce are not current enough, or are not comprehensive enough, or are otherwise inadequate to provide for equitable allocations he may use other data, including estimates. The Director's determination shall be final and such other additional data and estimates as are used, including the sources, shall be publicized by notice in the FEDERAL REGISTER.

(4) *Currency of tax collection.* Only that tax collection data which is received in the most recent reporting year available from the appropriate agencies prior to the allocation for an entitlement period shall be used in the determination of entitlements for that entitlement period.

(c) *Special rule for less than one year entitlement periods.* For entitlement periods which encompass less than one year, the adjusted taxes and intergovernmental transfers of any unit of local government for the entire reporting year will be used. The allocations calculated by these data will be adjusted to be proportionate to the number of months in the entitlement period.

(d) *Units of local government located in more than one county area.* In cases where a unit of local government is located in more than one county, each part of such unit is treated for allocation purposes as a separate unit of government, and the adjusted taxes, and intergovernmental transfers of such parts are estimated on the basis of the ratio which the population of such part bears to the population of the entirety of such unit.

§ 51.21 Data affected by major disaster.

(a) *In general.* Any change in data otherwise eligible for use in determining the entitlement of a recipient government after April 1, 1974, shall be disregarded for a period of 60 months if that change:

1. Resulted from a major disaster determined by the President under section 301 of the Disaster Relief Act of 1974 (Pub. L. 93-288) and

2. Results in a data factor which is less beneficial to the recipient government than the pre-disaster data factor for purposes of the revenue sharing allocation process.

(b) *Less beneficial data factor.* For the purposes of this section a pre-disaster data factor is defined as a data factor of record for revenue sharing purposes which was calculated for a time period immediately preceding the data factor time period in which the disaster occurred and, therefore, could not have been affected by the disaster.

(c) *Eligibility requirements.* To be eligible for the data stabilization benefit of paragraph (a) of this section, a recipient government shall:

1. Be located within a State designated by the President as a major disaster area, and

2. Be located within a geographical subdivision of the State as certified to the Office of Revenue Sharing as a major disaster area by the Administrator of the Disaster Assistance Administration of the Department of Housing and Urban Development.

Further, each recipient government within the specific geographic area so designated will be notified pursuant to the data improvement program, provided for in § 51.29 of each of its data factors developed subsequent to the major disaster designation, which are less beneficial than the pre-disaster data factors, and shall be required to verify through its chief executive officer, that the data was adversely affected by the major disaster. In addition, the Director may require that such verifications be accompanied by substantiating documentation evidencing a causal relationship between the major disaster and the less favorable value of the current revenue sharing data factor of record. The Director, upon being satisfied that all of the requirements of this section have been met with respect to any post-disaster data factor, shall refrain from using the post-disaster data factor in the allocation process, of an entitlement period, and shall continue to use the predisaster data factor for a period of 60 months from the designation by the President of the specific disaster area unless:

(i) A data factor for a current entitlement period is more beneficial than the pre-disaster data factor or;

(ii) A post-disaster data factor of an entitlement period is not verified by the chief executive officer as having been adversely affected by the major disaster.

(d) *Multiple disasters.* Recipient governments may be in areas designated by the President as specific major disaster areas as the result of two or more disasters. Recipient governments in such areas will also be provided their appropriate pre-disaster data for verification. The 60 month period for which more beneficial pre-disaster data may be used for a government shall be determined by the most recent designation by the President of a specific major disaster area containing that government.

(e) *Effect on later entitlement periods of failure to verify.* A recipient government which does not verify that an adverse data change is caused by a disaster in an entitlement period when it was afforded an opportunity to make such verification does not lose the opportunity to verify in a later entitlement period that a disaster has affected the data factor for that later entitlement period.

§ 51.22 Adjusted taxes.

(a) *In general.* Tax revenues are compulsory contributions to a unit of local government exacted for public purposes, as such contributions are determined by the Bureau of the Census for general statistical purposes. The term "adjusted taxes" means the tax revenues adjusted by excluding an amount equal to that portion of such compulsory contributions which is properly allocable to school operations, debt service on school indebtedness, school capital outlays, and other educational purposes.

(b) *Procedure for exclusion of tax revenues for education.* The tax revenues exacted by a unit of local government shall be adjusted to exclude any such tax revenues used for financing education in a manner consistent with the following provisions:

1. Where a unit of local government finances education from a specific fund and lists tax revenues to the fund or levies a separate tax for purposes of education, such amount as determined will constitute the tax revenues for education.

2. If tax revenues for purposes of education are not separately identifiable because education is financed by expenditure or transferring of moneys from a general fund (or similarly named fund) to a school fund or funds, then the ratio of tax revenues (as defined in paragraph (a) of this section) to the total revenues in such fund shall be calculated, and that ratio multiplied by the expenditure or transfer of non-dedicated moneys from such fund to the school fund shall be equated with the tax revenues properly allocable to expenses for education. The phrase "total revenues in such fund" means cash and securities on hand in the general fund (or similarly named fund) at the beginning of the fiscal year, plus all non-dedicated revenues to the fund (other than trust or agency revenues) less cash and securities on hand at the end of the fiscal year. Trust and agency funds are those held specifically for individuals or governments for which no discretion can be exercised as to the amounts to be paid to the recipient.

3. If any instance where neither paragraph (b) (1) nor (2) of this section permits determination of school taxes, then any procedure deemed equitable by the Director shall be utilized to ascertain adjusted taxes.

(c) *Validity of adjusted tax data.* Allocation of funds under the Act will be based on data reported by States and units of local government to the Bureau of the Census and shall be in accordance with definitions established by the Bureau. No unit of government shall report to the Department of the Treasury or the Bureau of the Census in a manner which attempts to circumvent or frustrate the intent of this section.

§ 51.23 Date for determination of allocation.

(a) *In general.* Pursuant to the provisions of § 51.20 (a) and (b) (3), the determination of the data definitions upon which the allocations and entitlements for an entitlement period are to be calculated shall be made not later than the day immediately preceding the beginning of the entitlement period. Any change in the computation of local tax effort to credit certain county sales taxes to units of local government pursuant to section 109(e)(2)(B) of the Act (the "Memphis Rule") will be considered to be a change in a data definition and will not be given effect for any entitlement periods for which there are final data definitions. The final date upon which determinations of allocations and entitlements, including adjustments thereto, may be made for an entitlement period shall be determined by the Director as soon as practicable and shall be publicized by notice in the FEDERAL REGISTER.

(b) *Time limitation and minimum adjustment.* If it is established to the satisfaction of the Director by factual evidence and documentation that the data used in the computation of an allocation is erroneous an adjustment will be made. No adjustment shall be made unless such evidence and documentation of erroneous data is provided the Director for determination within one year of the end of the entitlement period with respect to which the payment is made. No adjustment of any kind which is less than $200 shall be made to an entitlement if in the judgment of the Director such adjustment will be burdensome, expensive, or otherwise impracticable.

(c) *Adjusted taxes and intergovernmental transfers.* The date for determining the amount of adjusted taxes and intergovernmental transfers of a unit of local government will be the fiscal year that can be uniformly assembled for all units of local government prior to the beginning of the affected entitlement period.

§ 51.24 Boundary changes, governmental reorganization, etc.

(a) *In general.* A boundary change, governmental reorganization, or change in State statutes or constitution, relevant to the computation of entitlement of a unit of local government under the Act, which occurs during an entitlement period and is not taken into account during the initial allocation, shall, not result in a change to the entitlement of that unit until the next entitlement period. However, payment tendered to such unit for the entitlement period may be redistributed pursuant to the provisions of paragraphs (b) and (c) of this section.

(b) *New units of local government.* A unit of local government which came into existence during an entitlement period shall first be eligible for an entitlement allocation for the next entitlement period. However, if such unit is a successor government, it shall be eligible to receive the entitlement payment of the

unit or units of local government to which it succeeded in accordance with the conditions of the succession.

(c) *Dissolution of units of local government.* A unit of local government which dissolved, was absorbed or ceased to exist as such during an entitlement period is eligible to receive an entitlement payment for that entitlement period: *Provided,* That such unit of local government is in the process of winding up its governmental affairs or a successor unit of local government has legal capacity to accept and use such entitlement funds. Entitlement payments which are returned to the Director because of the cessation or existence of a unit of local government shall be placed in the State and Local Government Fiscal Assistance Trust Fund until such times as they can be redistributed according to the conditions under which the unit of local government ceased to exist.

(d) *Limitations on adjustment for annexations.*—1. Annexations by units of local government having a population of less than 5,000 on April 1, 1970, shall not affect the entitlement of any unit of local government for an entitlement period unless the Director determines that adjustments pursuant to such annexations would be equitable and would not be unnecessarily burdensome, expensive, or otherwise impracticable.

2. Annexations of areas with a population of less than 250, or less than 5 percent of the population of the gaining government, shall not affect the entitlement of any unit of local government unless the Director determines that adjustments pursuant to such annexations would be equitable and would not be unnecessarily burdensome, expensive, or otherwise impracticable.

(e) *Certification.* Units of local government affected by a boundary change, governmental reorganization, or change in State statutes or constitution shall, before receiving an entitlement adjustment or payment redistribution pursuant to this section, obtain State certification that such change was accomplished in accordance with State law. The certifying official shall be designated by the Governor, and such certification shall be submitted to the Bureau of Census.

§ 51.25 Waiver of entitlement; nondelivery of checks; insufficient data.

(a) *Waiver.* Any unit of local government or Indian tribe or Alaskan native village may waive its entitlement for any entitlement period: *Provided,* The chief executive officer with the consent of the governing body of such unit notifies the Director that the entitlement payments for a past, current, or next beginning entitlement period, or any combination thereof, are being waived. A waiver of entitlement for the next beginning entitlement period will only be given effect if the waiver is received during the 6-month period immediately preceding that entitlement period. In the event that an entitlement payment is returned or a notice of waiver is executed which is not in accordance with this procedure, the chief executive officer will be so notified by the Director and, unless the attempted waiver is rescinded within 30 days of such notice, it shall be given effect. However, in no event will a notice of waiver be given effect for an entitlement period which is subsequent to the next beginning entitlement period. The entitlement waived and adjustments thereto, if any, resulting from recalculation of earlier entitlements, shall be added to and shall become a part of the entitlement of the next highest unit of government eligible to receive entitlement funds in that State in which the unit of local government waiving entitlement is located, except that in the case of an Indian tribe or Alaskan native village, the entitlement funds waived shall be added to and become a part of the entitlement of the county government of the county area in which such tribe or village is located. A waiver of entitlement by a unit of local government or Indian tribe or Alaskan native village shall be deemed irrevocable 30 days prior to the first payment for the entitlement period to which it relates.

(b) *Constructive waiver.* Any recipient government which has not waived and is otherwise eligible to receive entitlement payments and which has failed to provide required reports, or assurances pursuant to Subpart B is subject to a determination of having constructively waived its entitlement funds for the affected entitlement period through inaction. The Director, prior to such a determination, shall notify nonresponsive recipient governments of their noncompliance and that their entitlement funds are being temporarily withheld pursuant to § 51.3 (c). If compliance is not achieved within a reasonable period of time, which shall not be less than 30 days, the Director shall notify the affected recipient governments that if compliance is not achieved within a period of 30 days after mailing such notice, a constructive waiver of entitlement funds will be determined to have occurred. Entitlement funds thus constructively waived will be redistributed pursuant to the provisions of paragraph (a) of this section.

(c) *Nondelivery.* Entitlement funds for any entitlement period which are returned to the Department of the Treasury as being nondeliverable because of incorrect address information, or which are unclaimed for any reason, shall be placed in the State and Local Government Fiscal Assistance Trust Fund until such time as payment can be made.

(d) *Insufficient data.* Entitlement funds for any entitlement period which are withheld from payment because of insufficient data upon which to compute the entitlement, or for which payment cannot be made for any other reason, shall remain in the State and Local Government Fiscal Assistance Trust Fund until such time as payment can be made.

§ 51.26 Reservation of funds and adjustment of entitlement.

(a) *Reservation of entitlement funds.* In order to make subsequent adjustments to an entitlement payment under this part which may be necessitated because of insufficient or erroneous data, or for any other reason, the Director shall reserve in the State and Local Government Fiscal Assistance Trust Fund such percentage, not to exceed 0.5 percent, of the total entitlement funds for any State government and all units of local government within the State for any entitlement period as in his judgment shall be necessary to insure that there will be sufficient funds available so that all recipient governments will receive their full entitlements. Such reserve shall be known as the State Obligated Adjustment Reserve and amounts remaining in that reserve will accumulate until the liabilities of the Trust Fund to the recipient governments in that State are discharged or sufficiently diminished to permit an allocation.

(b) *Adjustments to entitlement payments.* 1. Adjustments to the entitlement of a recipient government during the entitlement period will ordinarily be effected through alteration to entitlement payments for that entitlement period, unless there is a downward adjustment which is so substantial as to make payment alterations impracticable or impossible.

2. After the end of an entitlement period which begins after December 31, 1976, any adjustments to increase or decrease entitlement payments of a recipient government for that entitlement period shall be accomplished only if demand therefor has been made by the recipient government, or the Director, prior to the expiration of one year from the end of the entitlement period for which the adjustment is claimed.

3. After the end of an entitlement period which begins after December 31, 1976, any adjustments to increase or decrease entitlement payments of a recipient government for that entitlement period shall be made through the State Obligated Adjustment Reserve.

4. Adjustments made to decrease payments to a recipient government for an entitlement period ending before January 1, 1977 shall be withheld from the Obligated Adjustment Reserve established under § 51.26(a) (38 FR 18668).

§ 51.27 State to maintain transfers to local governments.

(a) *General rule for entitlement periods ending on or before December 31, 1976.* The entitlement of any State government for any entitlement period beginning on or after July 1, 1973 and before December 31, 1976 shall be reduced by the amount (if any) by which:

1. The average of the aggregate amounts transferred by the State government out of its own sources during such period (or during that State's fiscal year ending on or immediately prior to the end of such period) and the preceding entitlement period (or such fiscal year) to all units of local government (as defined in § 51.21(p)) in such State, is less than

2. The similar aggregate amount for the 1-year period beginning July 1, 1971

(or that State's fiscal year ending on or immediately prior to the end of such period).

(b) *General rule for entitlement periods commencing on or after January 1, 1977.* The entitlement of any State government for any entitlement period beginning on or after January 1, 1977 shall be reduced by the amount (if any) by which:

1. One-half of the aggregate amounts transferred by the State government out of its own sources during the 24 month period ending the last day of the last fiscal year for which the Bureau of the Census has relevant data, on the first day of such entitlement period, to all units of local government in such State is less than

2. One-half the similar aggregate amount for the 24 month period ending the day before the 24 month period described in paragraph (b)(1) of this section.

For purposes of paragraphs (a)(1) and (b)(1) of this section, the amount of any reduction in the entitlement of a State government under this section for any entitlement period shall, for subsequent entitlement periods, be treated as an amount transferred by the State government out of its own sources during such period to units of local government in such State. The phrase "own sources" means all sources of State revenue (including debt proceeds and the State's revenue sharing entitlement funds) but excluding intergovernmental revenues received from the Federal government.

(c) *Measurement of maintenance of effort.* In those States that do not have an accounting system providing an audit trail for all funds concerned (from own source to final application) in intergovernmental tranfers to units of local government (such as those States in which intergovernmental transfers to units of local government are made from a commingled fund with no identification as to specific revenue source), the following formula may be applied by the Director to establish the base year intergovernmental transfers to units of local government from own sources and to generally monitor level of effort in accordance with the maintenance provision of paragraphs (a) and (b) of this section during future entitlement periods:

(1) It shall be assumed that the ratio of a State's own source intergovernmental transfers to units of local government to that State's total intergovernmental transfers to units of local government is equal to the ratio of that State's own source revenues to its total revenues. Thus, for a State in which such formula may be applied, its base year own source intergovernmental transfers to units of local government shall be assumed to equal its total intergovernmental transfers to units of local government in the base year multiplied by its own source revenue in the base year divided by its total revenues in the base year.

(2) In a State in which the formula is applied, the State's own source intergovernmental transfers to units of local government in a future entitlement period shall be assumed to equal the average of:

(i) The State's total intergovernmental transfers to units of local government during that period (or that State's fiscal year ending on or immediately prior to the end of such period) multiplied by its own source revenue in that period (or such fiscal year) divided by its total revenues in that period (or such fiscal year) and

(ii) The State's total intergovernmental transfers to units of local government during the preceding entitlement period (or that State's fiscal year ending on or immediately prior to the end of such period) multiplied by its own source revenue in that period (or such fiscal tal transfers to units of local government period (or such fiscal year).

(3) Therefore, in a State in which the formula is applied, maintenance (for a given entitlement period) of intergovernmental transfer effort to units of local government will be measured by the difference between the State's average aggregate intergovernmental transfers to units of local government (over the appropriate periods) as calculated by employing the method described in paragraph (c)(2) of this section and that State's own source intergovernmental transfers to units of local government in the base period as calculated by employing the method described in paragraph (c)(1) of this section.

(4) Should the application of this formula during any entitlement period indicate nonmaintenance, for example, should a State's calculated own source average aggregate intergovernmental transfers to units of local government (over the appropriate periods) be less than such transfers as calculated for the base period, the difference (as defined in paragraph (c)(3) of this section) shall constitute the future indicated reduction in that State's entitlement unless such State can document to the Director that the fact or amount of nonmaintenance as determined by application of the formula is inaccurate.

(d) *Alternative procedure.* If the Director shall determine that application of the formula set forth in paragraph (b) of this section in a particular case provides an inaccurate or unfair measure of transfer effort, then any formula, procedure, or method deemed equitable by the Director may be utilized to measure such transfer effort for the purpose of implementing the maintenance provision.

(e) *Adjustment where State assumes responsibility for category of expenditures.* If the State government establishes to the satisfaction of the Director that since June 30, 1972, it has assumed responsibility for a category of expenditures which (before July 1, 1972) was the responsibility of local governments located in such State, then, the aggregate amount taken into account under paragraphs (a)(2) or (b)(2) of this section shall be reduced to the extent that increased government spending (out of its own sources) for such category has replaced corresponding amounts, which for the period used for the purposes of this paragraph, it transferred to units of local government.

(f) *Adjustment where new taxing powers are conferred upon local governments.* If a State establishes to the satisfaction of the Director that since June 30, 1972, one or more units of local government within such State have had conferred upon them new taxing authority, then, the aggregate amount taken into account under paragraph (a)(2) of this section (in the case of an entitlement period beginning before December 31, 1976) or paragraph (b)(2) of this section (in the case of an entitlement period beginning on or after January 1, 1977) shall be reduced to the extent of the larger of:

(1) An amount equal to the amount of the taxes collected by reason of the exercise of such new taxing authority by such local governments, or

(2) An amount equal to the amount of the loss of revenue to the State by reason of such new taxing authority being conferred on such local governments. No amount shall be taken into consideration under paragraph (f)(1) of this section if such new taxing authority is an increase in the authorized rate of tax under a previously authorized kind of tax, unless the State is determined by the Secretary to have decreased a related State tax.

(g) *Special rule for period beginning July 1, 1973.* In the case of the entitlement period beginning July 1, 1973, the preceding entitlement period for purposes of paragraph (a)(1) of this section shall be treated as being the 1-year period beginning July 1, 1972, or that State's fiscal year which ends prior to June 30, 1973.

(h) *Special rule for period beginning July 1, 1976.* In the case of the entitlement period beginning July 1, 1976, and ending December 31, 1976, the aggregate amount taken into account under paragraph (a)(1) of this section for the preceding entitlement period and the aggregate amount taken into account under paragraph (a)(2) of this section shall be one-half of the amounts which (but for this paragraph (h)) would be taken into account.

(i) *Special rule for period beginning January 1, 1977.* In the case of the entitlement period beginning January 1, 1977, and ending September 30, 1977, the aggregate amount taken into account under subparagraphs (1) and (2) of paragraph (b) of this section, shall be three-fourths of the amounts which (but for this paragraph (i)) would be taken into account.

(j) *Adjustment where Federal Government assumes responsibility for category of expenditures.* In the case of an entitlement period beginning on or after January 1, 1977, if a State government establishes to the satisfaction of the Director that the Federal Government has assumed responsibility for a category of expenditures for which such State government transferred amounts, during

all or a part of the period utilized for purposes of paragraph (b)(1) of this section, which (but for this paragraph) would be included in the aggregate amount taken into account under paragraph (b)(2), such aggregate amount shall be reduced to the extent that increased Federal Government spending has replaced corresponding amounts which such State government had transferred to units of local government.

(k) *Report by Governor.* Pursuant to the authority of § 51.10 and in order to effect compliance with this section, the Governor of each State shall submit to the Director after the end of the State's fiscal year, on a form to be provided, the aggregate amounts transferred out of its own sources to units of local government for those entitlement periods or that State's fiscal years specified on the report:

(1) The State's own source funds.

(2) The State's total funds.

(3) The State's own source transfers to units of local government.

(4) The State's total transfers to units of local government.

(l) *Reduction in entitlement.* If the Director has reason to believe that paragraphs (a) or (b) of this section require a reduction in the entitlement of any State government for any entitlement period, he shall give reasonable notice and opportunity for hearing to the State. If, thereafter, he determines that paragraphs (a) or (b) of this section require the reduction of such entitlement, he shall also determine the amount of such reduction and shall notify the Governor of such State of such determinations and shall withhold from subsequent payments to such State government under this part an amount equal to such reduction.

(m) *Transfer to general fund.* An amount equal to the reduction in the entitlement of any State government which results from the application of this section (after any judicial review) shall be transferred from the Secretary's Trust Fund to the general fund of the Treasury on the day on which such reduction becomes final.

§ 51.28 Optional formula.

(a) *In general.* A State government may by law provide for the allocation of entitlement funds among the county areas, or among units of local government (other than county governments, Indian tribes, and Alaskan native villages):

(1) On the basis of the population multiplied by the general tax effort factors of such areas or units of local government; or,

(2) On the basis of the population multiplied by the relative income factors of such areas or unit of local government; or,

(3) On the basis of a combination of those two factors.

Any State which provides by law for such a variation in the allocation formula provided by subsections 108(a) or 108(b) (2) and (3) of the Act, shall notify the Director of such law not later than 90 days before the beginning of the first entitlement period to which such law is to apply. Any such law shall:

(i) Provide for allocating 100 percent of the aggregate amount to be allocated under subsections 108(a) or 108(b)(2) and (3) of the Act;

(ii) Apply uniformly throughout the State; and

(iii) Apply during the period beginning on the first day of the first entitlement period to which it applies and ending on September 30, 1980.

(n) *Single legislation required.* If a State government alters its county area allocation formula or its local government allocation formula, or both, such alteration may be made only once and is required to be made in the same legislative enactment.

(o) *Certification required.* Paragraph (a) of this section shall apply within a State only if the Director certifies that the State law complies with the requirements of such paragraph. The Director shall not certify any such law with respect to which he receives notification later than 30 days prior to the initial entitlement period during which it is to apply.

§ 51.29 Adjustment of data factors.

The data factors and data definitions used in computing entitlements under the Act for any entitlement period will be made available to each State government and unit of local government as soon as practicable. Each such government will be given a reasonable opportunity to question those data factors by providing factual documentation demonstrating evidence of error not later than one year from the end of the entitlement period for which the data are applicable. If the Director determines that any data factors used were erroneous, necessary adjustments will be made.

§ 51.30 Adjustment of maximum and minimum per capita entitlement; 100 percent criterion.

(a) *County area maximum and minimum per capita entitlement*—(1) *In general.* Pursuant to section 108(b)(6) of the Act, the per capita amount allocated to any county area shall be not less than 20 percent, nor more than 145 percent, of two-thirds of the amount allocated to the State under section 106 of the Act, divided by the population of that State.

(2) *One hundred forty-five percent rule.* If a county area allocation is greater than the 145-percent limit, its allocation shall be reduced to the 145-percent level and the resulting surplus shall be shared proportionately by all remaining unconstrained county areas.

(3) *Twenty-percent rule.* If, after the application of paragraph (a)(2) of this section, a county area allocation is less than the 20-percent limit, its allocation shall be increased to the 20-percent level and the resulting deficit shall be shared proportionately by all remaining unconstrained county areas.

(b) *Local government (other than a county government)*—(1) *In general.* Except as provided below, the per capita amount allocated to any unit of local government (other than a county government) shall be not less than 20-percent, nor more than 145-percent, of two-thirds of the amount allocated to the State under § 106 of the Act, divided by the population of that State.

(2) *One hundred forty-five percent rule.* If a unit of local government is allocated an amount greater than the 145-percent limit, its allocation shall be reduced to that level.

(3) *Twenty-percent rule.* If a unit of local government is allocated an amount less than the 20-percent limit, its allocation shall be increased to the lower of the 20-percent limit or 50 percent of the sum of that unit's adjusted taxes and transfers.

(c) *One hundred-percent criterion.* If the amounts allocated to recipient governments of a State do not total 100 percent of the amount allocated to that State, the amount to be allocated to county areas shall be adjusted appropriately, and the allocation process shall be repeated until the amounts allocated to recipient governments of a State total 100 percent of the amount allocated to that State.

§ 51.31 Separate law enforcement officers.

(a) *Entitlement of separate law enforcement officers.* (1) The office of the separate law enforcement officer, within any parish area in the State of Louisiana, other than the parish of East Baton Rouge, shall be entitled to receive for each entitlement period beginning on or after January 1, 1977, 15 percent of the entitlement of the government of such Parish.

(2) The office of the separate law enforcement officer, within the area of the government of the parish of East Baton Rouge shall be entitled to receive for each entitlement period, beginning on or after January 1, 1977, 7.5 percent of the entitlements of the governments of Baton Rouge, Baker and Zachary, Louisiana for each such entitlement period.

(b) *Reduction of entitlement of parish government.* (1) The governments of each parish (other than Baton Rouge, Baker and Zachary, Louisiana) shall receive for an entitlement period entitlements reduced by one-half of the amount due the separate law enforcement officer for such parish.

(2) The governments of Baton Rouge, Baker, and Zachary, Louisiana shall receive, for an entitlement period, entitlements reduced by an amount equal to 3.75 percent of such government's normal entitlement.

(c) *Reduction of entitlement of State government.* The State government of Louisiana shall receive, for an entitlement period, an entitlement reduced by the same amount as the entitlement of parishes (including Baton Rouge, Baker and Zachary).

(d) *Entitlement of the Parish of Orleans.* The provisions of paragraph (a), (b) and (c) of this section shall not apply to the entitlements of the Parish of Orleans which shall be entitled to receive for each entitlement period begin-

ning after December 31, 1976 an additional amount equal to 7.5 percent of the amount it is otherwise entitled to receive.

Subpart D—Prohibitions and Restrictions on Use of Funds

Sec.
51.40 Matching funds.
51.41 Permissible expenditures for local governments.
51.43 Wage rates and labor standards.
51.43 Restriction on expenditures by Indian tribes and Alaskan native villages.
51.44 Lobbying.
51.45 Use of entitlement funds for debt retirement.

AUTHORITY: State and Local Fiscal Assistance Act of 1972, as amended, Title I, Pub. L. 92-512 and State and Local Fiscal Assistance Amendments of 1972, Pub. L. 94-488 (31 U.S.C. 1221-1263); Treasury Dept. Order No. 224, dated January 26, 1973 (38 FR 3342).

Subpart D—Prohibitions and Restrictions on Use of Funds

§ 51.40 Matching funds.

(a) *Applicability to entitlement funds appropriated or budgeted on or after January 1, 1977.* The provisions of this section shall not apply to entitlement funds appropriated or budgeted on or after January 1, 1977.

(b) *Applicability to entitlement funds appropriated or budgeted on or before* December 31, 1976, may not be used, appropriated or budgeted on or before December 31, 1976, may not be used, directly or indirectly, as a contribution in order to obtain any Federal funds under any Federal program. The indirect use of entitlement funds to match Federal funds is defined to mean the allocation of entitlement funds to a nonmatching expenditure and thereby releasing or displacing local funds which are used for the purpose of matching Federal funds. This prohibition on use of entitlement funds as matching funds applies to Federal programs where Federal funds are required to be matched by non-Federal funds and to Federal programs which allow matching from either Federal or non-Federal funds.

(1) *Secondary recipients.* The prohibition of paragraph (b) of this section applies to a recipient government's entitlement funds which are transferred by it to another governmental unit or private organization. A violation of this section by a secondary recipent shall constitute a violation by the recipient government and the penalty provided by paragraph (b)(5) of this section shall be imposed on the recipient government.

(2) *Certification required.* The chief executive officer of each recipient government must certify to the Director that entitlement funds received by it have not been used in violation of this section.

(3) *Increased State or local government revenues.* No recipient government shall be determined to have used funds in violation of paragraph (b) of this section with respect to any funds received for any entitlement period (or during its fiscal year) to the extent that net revenues received by it from its own sources during such period exceed the net revenues received by it from its own sources during the 1-year period beginning July 1, 1971 (or its fiscal year ending during the same period). In the case of the entitlement periods of 6 months, one-half of such net revenues shall be measured.

(4) *Presumptions of compliance.* No recipient government shall be determined to have used entitlement funds in violation of the indirect prohibition of paragraph (b) of this section to the extent that:

(i) The expenditure of entitlement funds was accompanied by an aggregate increase in nonmatching funds expenditures.

(ii) The receipt of entitlement funds permitted that government to reduce taxes: *Provided,* Nonentitlement revenue is sufficient to cover all matching funds contributions.

(iii) The matching funds contribution in question is accounted for by in-kind contribution which was not financed directly or indirectly with entitlement funds.

(5) *Determination by Director of the Office of Revenue Sharing.* If the Director has reason to believe that a recipient government has used entitlement funds to match Federal funds in violation of paragraph (b) of this section the Director shall give such government notice and opportunity for hearing. If the Director determines that such government has, in fact, used funds in violation of paragraph (b) of this section, he shall notify such government of his determination and shall request repayment to the United States of an amount equal to the funds so used. To the extent that such government fails to repay such amount, the Director shall withhold from subsequent entitlement payments to that government an amount of entitlement funds equal to the funds used in violation of paragraph (b) of this section or, if this method is impracticable, the Director may refer the matter to the Attorney General for appropriate civil action.

6. *Use of entitlement funds to supplement Federal grant funds.* The prohibition on use of entitlement funds contained in paragraph (b) of this section does not prevent the use of entitlement funds to supplement other Federal grant funds. For example, if expenditures for a project exceed the amount available from non-Federal funds plus matched Federal funds, the recipient government may use entitlement funds to defray the excess costs: *Provided, however,* That the entitlement funds are not used to match other Federal funds: *And provided further,* That in the case of a unit of local government, the use of entitlement funds to supplement Federal grants is restricted to the category of expenditures as set forth in § 51.41.

§ 51.41 Permissible expenditures for local governments.

(a) *Applicability to entitlement funds appropriated or budgeted on or after January 1, 1977.* The provisions of this section shall not apply to entitlement funds appropriated or budgeted by units of local government on or after January 1, 1977.

(b) *Applicability to entitlement funds appropriated or budgeted on or before December 31, 1976.* Entitlement funds appropriated or budgeted by units of local government on or before December 31, 1976 may be used only for priority expenditures. As used in this part, the term "priority expenditures" means:

(1) Ordinary and necessary maintenance and operating expenses for:

(i) Public safety (including law enforcement, fire protection, and building code enforcement);

(ii) Environmental protection (including sewage disposal, sanitation, and pollution abatement);

(iii) Public transportation (including transit systems and streets and roads);

(iv) Health;

(v) Recreation;

(vi) Libraries;

(vii) Social services for the poor or aged; and

(viii) Financial administration, and

(2) Ordinary and necessary capital expenditures authorized by law.

No unit of local government may use entitlement funds for nonpriority expenditures which are defined as any expenditures other than those included in subparagraphs (1) and (2) of this paragraph. The chief executive officer of each unit of local government must certify to the Director that entitlement funds received by it have been used only for priority expenditures as required by the Act.

(3) *Use of entitlement funds for debt retirement.* The use of entitlement funds for the repayment of debt is a permissible expenditure provided that:

(i) Entitlement funds are not used to pay any interest incurred because of the debt,

(ii) The debt was originally incurred for a priority expenditure purpose as defined in this section,

(iii) The actual expenditure from the proceeds of the indebtedness (i.e., for materials, contractors, etc.) was made on or after January 1, 1972 (the beginning of the first entitlement period),

(iv) The actual expenditures from the proceeds of the indebtedness were not in violation of any restrictions enumerated in Subparts D and E of this part.

(4) *Effect of noncompliance.* In the case of a unit of local government which appropriates entitlement funds on or before December 31, 1976 for other than priority expenditures as defined in paragraph (b) of this section, it will pay over to the Secretary (for deposit in the general fund of the Treasury) an amount equal to 110 percent of any amount expended in violation of paragraph (b) of this section, unless such amount of entitlement funds is promptly repaid to the trust fund of the local government after notice by the Director and opportunity for corrective action.

§ 51.42 Wage rates and labor standards.

(a) *Construction laborers and mechanics.* A recipient government which receives entitlement funds under the

Act shall require that all laborers and mechanics employed by contractors or subcontractors in the performance of work on any construction project costing in excess of $2000.000 and of which 25 percent or more of the cost is paid out of its entitlement funds:

(1) Will be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act as amended (40 U.S.C. 276a–276a–5); and

(2) Will be covered by labor standards specified by the Secretary of Labor pursuant to 29 CFR Parts 1, 3, 5, and 7.

(b) *Request for wage determination.* In situations where the Davis-Bacon standards are applicable, the recipient government must ascertain the U.S. Department of Labor wage rate determination for each intended project and insure that the wage rates and the contract clauses required by 29 CFR 5.5 are incorporated in the contract specifications. The recipient government must also satisfy itself that the bidder is made aware of his labor standards responsibilities under the Davis-Bacon Act. Wage rate determinations may be obtained by filing a Standard Form 308 with the Employment Standards Administration of the applicable regional office of the U.S. Department of Labor at least 30 days before the invitation for bids or, in case of construction covered by general wage rate determinations, the appropriate rate may be obtained from the FEDERAL REGISTER.

(c) *Government employees.* A recipient government which employs individuals whose wages are paid in whole or in part from entitlement funds must pay wages which are not lower than the prevailing rates of pay for persons employed in similar public occupations by the same employer. However, this subsection shall apply with respect to employees in any category only if 25 percent or more of the wages of all employees of the recipient government in such category are paid from the trust fund established by it under § 51.100(a).

§ 51.43 Restriction on expenditures by Indian tribes and Alaskan native villages.

Indian tribes and Alaskan native villages as defined in § 51.2 are required to expend entitlement funds only for the benefit of members of the tribe or village residing in the county area from which the allocation of entitlement funds was originally made. Expenditures which are so restricted will not constitute a failure to comply with the requirement of Subpart E of this part.

§ 51.44 Lobbying.

(a) *In general.* Entitlement funds may not be used by any State or unit of local government to pay the costs arising from the personal solicitation or exercise of personal influence upon members of a legislative body by representatives of the recipient government for the purpose of influencing pending or proposed legislation regarding the provisions of the Act.

(b) *Activities prohibited.* Prohibited lobbying activities include but are not limited to the following:

(1) Personal solicitation of individual members of a legislative body to influence legislation regarding the General Revenue Sharing Program by personal interview, letter, financial contributions, and other means.

(2) To employ a lobbyist to engage in proscribed activities.

(c) *Activities permitted.* Without violation of this section a recipient government may:

(1) Use revenue sharing funds to pay dues to national or State organizations.

(2) Use revenue sharing funds to attempt to influence public opinion or to convey opinions and judgments to the public regarding provisions of the Act, by publications, distribution of books, pamphlets and other writings.

§ 51.45 Use of entitlement funds for debt retirement.

Where the actual expenditures of the proceeds of indebtedness were made on or after October 20, 1972, the appropriation of entitlement funds on or after January 1, 1977 for the repayment of the indebtedness (notwithstanding when such indebtedness was incurred), is permissible provided that the expenditures from the proceeds of the indebtedness are made in compliance with the restrictions and prohibitions enumerated in Subparts D and E of this part.

[FR Doc.77–13851 Filed 5–11–77;11:39 am]

Title 33—Navigation and Navigable Waters

CHAPTER I—COAST GUARD, DEPARTMENT OF TRANSPORTATION

[CGD 3–75–8 R2]

PART 127—SECURITY ZONES

Termination of Security Zone—Governor's Island, New York

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This amendment revokes the security zone established by the Captain of the Port, New York as published on January 5, 1976, in the FEDERAL REGISTER (41 FR 755). This Security Zone was terminated by the Captain of the Port, New York on January 2, 1976; however, the FEDERAL REGISTER (42 FR 2109) document that announced the termination of the Security Zone did not have the effect of revoking § 127.334 in the Code of Federal Regulations.

EFFECTIVE DATE: This amendment is effective on May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G–CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street SW., Washington, D.C. 20590, 202–426–1477.

SUPPLEMENTARY INFORMATION: As this amendment is merely revoking a section in the FEDERAL REGISTER that already has been revoked by the Captain of the Port of New York it is unnecessary to publish a notice of proposed rulemaking.

DRAFTING INFORMATION: The principal persons involved in drafting this rule are: LCDR H. E. Snow, Project Manager and Mrs. S. D. Jackson, Project Attorney.

§ 127.334 [Revoked]

Accordingly, 33 CFR Part 127 is amended by revoking § 127.334.

(40 Stat. 220, as amended, (50 U.S.C. 191); 80 Stat. 937. (49 U.S.C. 1655(b)); E.O. 10173, E.O. 10277, E.O. 10352, E.O. 11249; 3 CFR 1949–1953 Comp. 356, 778, 873, 3 CFR 1964–1965 Comp. 349 33 CFR Part 6, 49 CFR 1.46(b),)

Dated: May 10, 1977.

O. W. SILER,
Admiral, United States Coast Guard, Commandant.

[FR Doc.77–13892 Filed 5–13–77;8:45 am]

[CGD 75–168]

PART 183—BOATS AND ASSOCIATED EQUIPMENT

Flotation Standards for Boats; Correction

MAY 6, 1977.

AGENCY: Coast Guard, DOT.

ACTION: Correction.

SUMMARY: In FR Doc. 77–11074 appearing at page 20242 in the FEDERAL REGISTER of April 18, 1977, in the next to the last line of paragraph (c) of § 183.305 appearing on page 20245, the citation "§ 183.220" is corrected to read "§ 183.320".

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G–CMC/81), Room 8118, Department of Transportation, Nassif Building, 400 Seventh Street, SW., Washington, D.C. 20590 (202) 426–1477.

Dated: May 6, 1977.

D. F. LAUTH,
Rear Admiral, U.S. Coast Guard, Chief, Office of Boating Safety.

[FR Doc.77–13893 Filed 5–13–77;8:45 am]

[CGD 73–217]

PART 183—BOATS AND ASSOCIATED EQUIPMENT

Safety Standards for Boat Electrical Systems

Correction

In FR Doc.77–2992, appearing at page 5940 in the issue for Monday, January 31, 1977, make the following changes:

1. On page 5943, first column, first full paragraph, the 14th line beginning "the NEC, Table 5 . . ." should be deleted and the following line inserted in its place: "Code (NEC) and he has had experience".

2. On page 5945, in Table 5, which follows § 183.425, in Note 1, "Temperature rating of conductor" should be raised a line so that it is even with the headings "60° C (140° F), 75° C (167° F), . . .".

3. In § 183.435(c), in the fourth line, insert a semicolon between the words "amperage" and "conductors".

[CGD 73-217]

PART 183—BOATS AND ASSOCIATED EQUIPMENT

Safety Standards for Boat Electrical Systems

AGENCY: Coast Guard, DOT.

ACTION: Correction.

SUMMARY: In FR Doc. 77-2992 appearing at page 5940 in the FEDERAL REGISTER of January 31, 1977, on page 5944, the list of sections in § 183.401(b) that are effective on August 1, 1977, is corrected by inserting "§ 183.402" after "§ 183.401" and before "§ 183.405".

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590 (202 426-1477).

Dated: May 6, 1977.

O. W. SILER,
Admiral, U.S. Coast Guard,
Commandant.

[FR Doc.77-13890 Filed 5-13-77;8:45 am]

[CGD 74-209]

PART 183—BOATS AND ASSOCIATED EQUIPMENT

Safety Standards for Boat Gasoline Fuel Systems

Correction

In FR Doc. 77-2993 appearing at page 5946 in the issue for Monday, January 31, 1977, in § 183.512(a) on page 5951, in the second line "structd" should read "structed".

[CGD 74-209]

PART 183—BOATS AND ASSOCIATED EQUIPMENT

Safety Standards for Boat Gasoline Fuel Systems; Correction

AGENCY: Coast Guard, DOT.

ACTION: Correction.

SUMMARY: In FR Doc. 77-2993 appearing at page 5946 in the FEDERAL REGISTER of January 31, 1977, § 183.558 (b) (2) (iii) on page 5952 is corrected to read as set forth below.

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590 (202 426-1477).

SUPPLEMENTARY INFORMATION: Section 183.558(b) (2) (iii) is corrected to read as follows:

§ 183.558 Hoses and connections.

* * * * *

(b) * * *

(2) * * *

(iii) The fuel system is filled to the capacity marked on the tank label under § 183.514(b) (3).

* * * * *

Dated: May 6, 1977.

O. W. SILER,
Admiral, U.S. Coast Guard,
Commandant.

[FR Doc.77-13891 Filed 5-13-77;8:45 am]

Title 36—Parks, Forests, and Public Property

CHAPTER II—FOREST SERVICE, DEPARTMENT OF AGRICULTURE

NATIONAL FOREST SYSTEM

Prohibitions; Corrections

AGENCY: Forest Service, Department of Agriculture.

ACTION: Correction of typographical errors in final rule.

SUMMARY: FR Doc. 77-1303 appearing at page 2956 in the FEDERAL REGISTER of Friday, January 14, 1977, revised regulations on prohibited acts related to the National Forest System. The purpose of this document is to correct minor errors appearing in the published document.

EFFECTIVE DATE: The effective date of the revised regulations was February 15, 1977.

FOR FURTHER INFORMATION CONTACT:

Kenneth L. Evans, Fiscal and Accounting Management Staff, (202) 447-7850.

In light of the foregoing, the following corrections are made in FR Doc. 77-1303:

PART 231—GRAZING

On page 2957 amendatory language to § 231.11 is corrected to read as follows:

"In § 231.11(d) the citation to 36 CFR 261.13 is amended to read '36 CFR 262.2'."

PART 261—PROHIBITIONS

Subpart A—General Prohibitions

1. On page 2957, table of contents heading for § 261.3 is corrected to read "Interfering with forest officers prohibited".

2. On page 2958, § 261.6(d) is corrected by inserting an "a" between "designate" and "tree".

3. On page 2958, § 261.6(f) is corrected by inserting "any" between "exchanging" and "timber".

4. On page 2958, § 261.9(e) is corrected to read as follows:

"(e) Digging in, excavating, disturbing, injuring, or destroying any archaeological, paleontological, or historical site, or removing, disturbing, injuring, or destroying an archaeological, paleontological, or historical object."

5. On page 2958, § 261.10(c) is corrected to read as follows:

"(c) Selling or offering for sale any merchandise, conducting any kind of business enterprise, or performing any kind of work unless authorized by Federal law, regulation, or permit."

6. On page 2959, § 261.17(b) is corrected by replacing the wording "craft or any" with "craft of any".

7. On page 2959, § 261.20(a), the reference to "§ 261.2" is corrected to read "§ 271.2". In § 261.20(b), the reference to "§ 262.2" is corrected to read "§ 272.2."

Subpart B—Prohibitions In Areas Designated By Order

1. On page 2959, delete the period at the end of § 261.50(b) and add "within the area over which he has jurisdiction."

2. On page 2960, § 261.52(i) is corrected by inserting the word "an" between "operating" and "acetylene".

M. RUPERT CUTLER,
Assistant Secretary.

MAY 6, 1977.

[FR Doc.77-13877 Filed 5-13-77;8:45 am]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 704-4]

PART 86—CONTROL OF AIR POLLUTION FROM NEW MOTOR VEHICLES AND NEW MOTOR VEHICLES ENGINES: CERTIFICATION AND TEST PROCEDURES

Sale of High-Altitude Vehicles; Clarification of Designated High-Altitude Locations

Correction

In FR Doc. 77-11356 appearing at page 20463 in the issue of Wednesday, April 20, 1977, the amendatory language appearing in the first column on page 20464, now reading "In 40 CFR 86.077-03, paragraph (a) (5) is revised to read as follows:" should read "In 40 CFR 86.077-30, paragraph (a) (5) is revised to read as follows:" In the second column on the same page under the "State of New Mexico" the county of Lincoln should be listed only once following the county of "Harding."

Title 41—Public Contracts and Property Management

CHAPTER 6—DEPARTMENT OF STATE

[Departmental Reg. No. 108.738]

PART 6-1—GENERAL

Guidance to Contracting Officers At Foreign Service Posts Regarding Personal Service Contracts

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State finds it necessary to revise its procure-

ment regulations to provide guidance to contracting officers assigned to Foreign Service posts to assist them in recognizing certain characteristics of personal service contracts. This revision will aid contracting officers in avoiding the erroneous awarding of contracts for personal services.

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Harry M. Hite, Special Assistant, Supply & Transportation Division, Department of State, Room 532, State Annex No. 6, Washington, D.C. 20520 (703) 235-9529.

SUPPLEMENTARY INFORMATION: The laws and regulations relating to Federal employment provide specific requirements which must be met by Federal agencies in hiring its employees. Unless authorized by express statutory authority, contracts for personal services, which are employment contracts, are not to be used in obtaining services for the Government. The purpose of this regulation is to advise contracting officers of the salient features of personal service contracts so they will avoid erroneous awarding of such contracts.

Since these regulations deal solely with internal rules and guidance for contracting officers, and do not enlarge or diminish any rights or obligations of contractors and subcontractors, neither notice of proposed rule making nor public participation therein under 5 U.S.C. 533 is deemed appropriate.

Accordingly, § 6-1.258-2 of title 41, Code of Federal Regulations, is revised to read as set forth below.

Subpart 6-1.2—Definition of Terms

Section 6-1.258-2 is revised to read as follows:

§ 6-1.258-2 Personal service contracts.

(a) The laws and regulations relating to Federal employment lay down requirements which must be met by the Department in hiring its employees, and establish the governing of employment. In addition, personnel ceilings have been established for the Department and the Foreign Service posts. Except as otherwise authorized by express statutory authority (e.g., 5 U.S.C. 3109 as implemented by the annual Department of State Appropriation Act for expert and consultant services), these laws and regulations must be followed in obtaining personal services. In particular, they shall not be circumvented through the medium of "personal services" contracting, which is the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Department.

(b) Contracting Officers should be alert to the following conditions or circumstances, which, if present, could result in an improper personal services contract, if with:

(1) *An individual.* (i) The contract does not call for an end product which is adequately described in the contract.

(ii) The contract price or fee is based on the time actually worked rather than the results to be accomplished.

(iii) The services are to be of a continuing rather than a temporary or intermittent nature.

(iv) The services to be performed are usually performed by government employees under the supervision of a government official.

(2) *A concern.* (i) Office space, equipment, and supplies necessary for contract performance are to be furnished by the Department.

(ii) Contractor-furnished personnel are to be integrated within the organizational structure of the Department.

(iii) Contractor-furnished personnel are to be used interchangeably with Department personnel to perform the same functions.

(iv) The Department retains the right to control and direct the means and methods by which contractor-furnished personnel accomplish the work.

(c) If in the opinion of the contracting officer any of the conditions or circumstances in paragraph (b) of this section are present, he will endeavor to resolve all doubts regarding the propriety of the proposed contract. Assistance may be requested from the Chief, Supply and Transportation Division if the contracting officer is unable to resolve the matter.

(Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); sec. 4, 63 Stat. 111; 22 U.S.C. 2658, as amended.)

Dated: May 3, 1977.

VICTOR H. DIKEOS,
Acting Assistant Secretary for Administration.

[FR Doc.77-13846 Filed 5-13-77;8:45 am]

CHAPTER 114—DEPARTMENT OF THE INTERIOR

Nomenclature Change

AGENCY: Office of the Secretary, Interior.

ACTION: Final Regulations.

SUMMARY: The title "Assistant Secretary—Administration and Management" is amended to read "Assistant Secretary—Policy, Budget and Administration" to reflect the consolidation of functions previously performed by the Assistant Secretary — Administration and Management, and the Assistant Secretary—Program Development and Budget (Secretary's Order No. 3000 of March 31, 1977).

EFFECTIVE DATE: This amendment is effective immediately.

FOR FURTHER INFORMATION CONTACT:

Mr. James O. Wyatt, Chief, Division of Property Management, Office of Administrative and Management Policy, Department of the Interior, Washington, D.C. 20240, telephone 202-343-3185.

SUPPLEMENTARY INFORMATION: This amendment relates only to internal Departmental procedures and the proposed rulemaking procedures are inapplicable.

Pursuant to the authority of the Secretary of the Interior contained in 5 U.S.C. 301 and 40 U.S.C. 486(c), Chapter 114, Title 41 of the Code of Federal Regulations is amended as set forth below.

Wherever the title "Assistant Secretary—Administration and Management" appears in this chapter, it is changed to read "Assistant Secretary—Policy, Budget and Administration."

RICHARD R. HITE,
Deputy Assistant Secretary of the Interior.

MAY 4, 1977.

[FR Doc.77-13433 Filed 5-13-77;8:45 am]

Title 45—Public Welfare

CHAPTER V—FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES

SUBCHAPTER A—RULES OF PRACTICE

PART 500—APPEARANCE AND PRACTICE BEFORE THE COMMISSION

SUBCHAPTER C—RECEIPT, ADMINISTRATION AND PAYMENT OF CLAIMS UNDER THE INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949, AS AMENDED

PART 531—FILING OF CLAIMS AND PROCEDURES THEREFOR

Deadline for Filing Claims Against the German Democratic Republic, Official Claim Forms, Attorney Fees

AGENCY: Foreign Claims Settlement Commission of the United States.

ACTION: Final Rule.

SUMMARY: This rule prescribes the dates for filing claims against the German Democratic Republic, the claim form to be used, and the attorney fees which may be received. The purpose of this rule is to amend the Commission's regulations to allow for the consideration of this new class of claims, as provided for by Pub. L. 94-542, approved October 18, 1976.

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Wayland D. McClellan, General Counsel, Foreign Claims Settlement Commission, 1111 20th Street, NW., Washington, D.C. 20579, 202-653-6166.

SUPPLEMENTARY INFORMATION: The provisions of this rule are strictly required by statute. Accordingly, it is issued as a Final rule.

Pursuant to Pub. L. 94-542, approved October 18, 1976, which further amends the International Claims Settlement Act of 1949, as amended, by adding a Title VI to the Act, the Foreign Claims Settlement Commission of the United States is authorized to determine the validity and amounts of outstanding claims against the German Democratic Republic which arose out of the nationalization, expropriation, or other taking of (or special measures directed against) property interest of nationals of the United States.

Therefore, in accordance with the provisions of Pub. L. 94–542, the following amendments to the regulations of the Commission are set forth below.

1. Section 500.3(c) of the Commission's regulations is hereby amended by deleting the "and" after "Title I" and inserting a ","; deleting the words "of the Act" after Title IV, and inserting the words ", or Title VI of the International Claims Settlement Act" so that the subsection reads as follows:

§ 500.3 Fees.

* * * * *

(c) The total remuneration on account of services rendered or to be rendered to or on behalf of any claimant in connection with any claim falling within Title I, Title IV, or Title VI of the International Claims Settlement Act shall not exceed ten per centum of the total amount paid on account of such claim.

2. Section 531.1 of the Commission's regulations is hereby amended by adding a new paragraph (i) which reads as follows:

§ 531.1 Time for filing.

* * * * *

(i) Claims under Title VI of the Act against the German Democratic Republic shall be filed on or before May 16, 1978.

3. Section 531.2 of the Commission's regulations is hereby amended by redesignating paragraph (i) as paragraph (j), redesignating paragraph (j) as paragraph (k), and inserting a new paragraph (i) which reads as follows:

§ 531.2 Form, content, and filing of claims.

* * * * *

(i) FCSC Form 542—Statement of Claim against the German Democratic Republic.

* * * * *

These amendments shall become effective May 16, 1977.

Dated: May 11, 1977.

WAYLAND D. MCCLELLAN,
General Counsel.

[FR Doc.77–13841 Filed 5–13–77; 8:45 am]

Title 46—Shipping

CHAPTER 1—COAST GUARD, DEPARTMENT OF TRANSPORTATION

[CGD 74–45]

PART 12—CERTIFICATION OF SEAMEN

Engine Department Ratings

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This amendment revises the regulations concerned with the Qualified Member of the Engine Department ratings by reducing the number of ratings through consolidation thereby eliminating certain outdated ratings.

EFFECTIVE DATE: June 15, 1977.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G–CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590, 202–426–1477. The principal persons involved in drafting this rule are: Captain Nelson Emory, Project Manager, and Lieutenant Edward J. Gill, Jr., Project Attorney.

SUPPLEMENTARY INFORMATION: On January 6, 1977, the Coast Guard published a proposed rule (42 FR 1278) concerning this amendment. Interested persons were given until February 20, 1977, to submit comments. Two comments were received, both of which supported the proposed changes.

DISCUSSION OF COMMENTS

One comment suggested that the Coast Guard adopt a provision giving individuals who presently hold endorsements as fireman one year to obtain the watertender endorsement after these regulations become effective. The reason given for the request was that individuals would no longer qualify for employment as a fireman if the regulations only provided for a fireman/watertender's endorsement. The elimination of a fireman's endorsement provides no restraints on the employment of a fireman, provided that rating would cover the manning provisions of a vessel's Certificate of Inspection. Accordingly, the provision for a phase-in period was not adopted.

Accordingly, the proposed amendment is adopted without change, as set forth below.

NOTE.—The Coast Guard has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended, and OMB Circular A–107.

Dated: May 5, 1977.

O. W. SILER,
Admiral, U.S. Coast Guard Commandant.

Part 12 of Title 46 of the Code of Federal Regulations is amended as follows:

§ 12.15–9 [Amended]

1. By revoking the column entitled "Fireman" in the list in § 12.15–9(b).

2. By striking the heading of the column entitled "Watertender" and inserting the heading "Fireman/Watertender" in place thereof in the list in § 12.15–9(b).

3. By striking the words "boilermaker and"; and by striking the words "those ratings", and inserting the words "that rating" in place thereof in § 12.15–9(c).

4. By amending § 12.15–11 to read as follows:

§ 12.15–11 General provisions respecting merchant mariner's documents endorsed as qualified member of the engine department.

* * * * *

(a) Refrigerating engineer.
(b) Oiler.
(c) Deck engineer.
(d) Fireman/Watertender.
(e) Junior engineer.
(f) Electrician.
(g) Machinist.
(h) Pumpman.
(i) Deck engine mechanic.
(j) Engineman.

(80 Stat. 973; 46 U.S.C. 367, 375, 391a, 416, 672, 133; 49 U.S.C. 1655(b)(1); 49 CFR 1.46 (b))

[FR Doc.77–13847 Filed 5–13–77;8:45 am]

Title 49—Transportation

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 1048—COMMERCIAL ZONES

[Ex Parte No. MC–37 (Sub-No. 26)]

COMMERCIAL ZONES AND TERMINAL AREAS

AGENCY: Interestate Commerce Commission.

ACTION: Correction of Final Rule.

SUMMARY: This document modifies the findings of the report in Ex Parte No. MC–37 (Sub-No. 26), *Commercial Zones and Terminal Areas*, served December 30, 1976, by defining the limits of the zone which is adjacent to and commercially a part of Syracuse, N.Y., within the meaning of Section 203(b)(8) of the Interstate Commerce Act (49 U.S.C. 303 (b)(8)), to include an area which is within said commercial zone but which was inadvertently omitted from the new definition of the zone as prescribed by the regulations promulgated in the above-captioned report.

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Mr. Michael Erenberg, Assistant Deputy Director, Section of Operating Rights, Interstate Commerce Commission, 12th & Constitution Ave. NW., Washington, D.C. 20423, (202) 275–7292.

SUPPLEMENTARY INFORMATION: In its final report in Ex Parte No. MC–37 (Sub-No. 26), *Commercial Zones and Terminals Areas*, served December 30, 1976, the Interstate Commerce Commission promulgated new regulations expanding the scope of commercial zones of all municipalities by amending Part 1048 of Title 49 of the Code of Federal Regulations. The new regulations became effective April 9, 1977. By letter of April 6, 1977, the Jos. Schlitz Brewing Company of Milwaukee, Wis., advised the Commission that an area which was included within the Syracuse, N.Y., commercial zone under the old regulations had been omitted from said zone as defined by the new regulations. Inasmuch as it was the intent of the Commission in the above-entitled proceeding to expand commercial zones generally and not to omit from

the commercial zone of any Municipality any territory which was within the commercial zone of that municipality as formerly defined, the omission of this area from the Syracuse, N.Y., commercial zone was an inadvertent error. The purpose of this notice is to supplement 49 CFR 1048 to include a definition of the Syracuse commercial zone which comports with the intent of the Commission in promulgating the new regulations and which includes the area of the zone which was inadvertently omitted by application of the new regulations to Syracuse. The definition of the Syracuse commercial zone will appear as new Section 1048.16 of Title 49 of the Code of Federal Regulations.

(Sections 552, 553, and 559 of the Administrative Procedure Act (5 U.S.C. 552, 553, and 559) and Sections 202, 203, 204 207, 209, 402, 403, and 404 of the Interstate Commerce Act (49 U.S.C. 302, 303, 304, 307, 309, 1002, 1003, and 1004).)

Issued at Washington, D.C.

ROBERT L. OSWALD,
Secretary.

Accordingly, Part 1048 of Chapter X of Title 49 of the Code of Federal Regulations is supplemented by adding § 1048.16 as set forth below.

§ 1048.16 Syracuse, N.Y.

The zone adjacent to, and commercially a part of Syracuse, N.Y., within which transportation by motor vehicle, in interstate or foreign commerce, not under common control, management, or arrangement for shipment to or from points beyond such zone, is partially exempt from regulation under Section 203 (b) (8) of the Interstate Commerce Act (49 U.S.C. 303(b) (8) includes and is comprised of all points as follows:

(a) The municipality of Syracuse, N.Y., itself;

(b) All points within a line drawn 8 miles beyond the municipal limits of Syracuse;

(c) Those points in the towns of Van Buren and Lysander, Onondaga County, N.Y., which are not within the area described in paragraph (b) of this section, but which are within an area bounded by a line beginning at the intersection of new New York Highway 48 with the line described in (b) above, thence northwesterly along new New York Highway 48 to junction New York Highway 370, thence westerly along New York Highway 370 to junction Emerick Road, thence northerly along Emerick Road to junction Dunham Road, thence northerly along Dunham Road to junction New York Highway 192, thence easterly along New York Highway 192 to junction new New York Highway 48, thence northerly along new New York Highway 48 to junction New York Highway 213, thence easterly along New York Highway 213 to junction New York Highway 213A, thence easterly along New York Highway 213A to junction New York Highway 37, thence southerly along New York Highway 37 to junction New York Highway 31, thence easterly along New York Highway 31 to its intersection with the Seneca River, thence southerly along the Seneca River to its intersection with the line in (b) above;

(d) All of any municipality any part of which is within the limits of the combined area defined in (b) and (c) above, and

(e) All of any municipality wholly surrounded, or so surrounded except for a water boundary, by the municipality of Syracuse or any other municipality included under the terms of (d) above.

[FR Doc.77-13787 Filed 5-13-77;8:45 am]

Title 50—Wildlife and Fisheries

CHAPTER II—NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

Importation of Yellowfin Tuna and Tuna Products

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

ACTION: Interim final rule.

SUMMARY: This amendment extends the effective date of the regulations governing the importation of yellowfin tuna and tuna products published in the FEDERAL REGISTER on March 1, 1977 (42 FR 12012–12014), and modifies the marking requirements for imported canned tuna in these regulations. The new effective date of the importation requirements is extended 60 days. The canned tuna marking requirements will be modified to allow cans marked by means other than the specific wording. "Other than Yellowfin Tuna," to be imported without documentation, following advance approval by the Director, NMFS, of the can code used to identify the contents. This amendment also allows the NMFS regional Director, Southwest Region to provide limited time extensions to purse seine vessels encountering difficulty in receiving and installing the new fine mesh webbing.

DATES: Effective date: May 16, 1977. Comments will be received until June 10, 1977.

ADDRESSES: Comments or questions may be directed to Director, National Marine Fisheries Service, Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT:

Thomas C. Andrews, Marine Mammal and Endangered Species Division, National Marine Fisheries Service, Washington, D.C. 20235, 202–634–7287.

SUPPLEMENTARY INFORMATION: The National Marine Fisheries Service published regulations in the FEDERAL REGISTER on March 1, 1977 (42 FR 12010–12014) governing the taking of marine mammals incidental to commercial fishing operations and the importation of fish and fish products. These regulations were published following a public hearing presided over by an Administrative Law Judge (ALJ). The ALJ recommended that a three month grace period would be sufficient advance notice to prevent cessation or a lessening of tuna imports from importing nations required to obtain a finding from the Director. We have received, from several nations required to obtain a finding, indications of their attempting to comply with the requirements. However, it has come to our attention that uncertainty had existed as to the exact requirements of the final regulations in regard to obtaining a finding. In addition, arrangements for proper import documentation for tuna entering the United States must be accomplished at least a month in advance. Therefore, it is unlikely that a nation could obtain a finding in time to prevent a cessation or disruption to the flow of tuna imports from catching vessel to final destination under the current June 1, 1977, deadline. Furthermore, a special meeting of the Inter-American Tropical Tuna Commission on June 25–27, 1977, to discuss marine mammal conservation programs among the nations whose vessels are involved in the fishery and who are most affected by U.S. importation restrictions, is seen as an important international negotiation format through which the United States position in this matter can be clearly stated. Therefore, the effective date of §§ 216.24(e) (2) (ii), 216.24(e) (4), and 216.24(E) (5) is extended sixty (60) days to August 1, 1977.

The ALJ also recommended in his decision that canned tuna being imported under the U.S. Tariff Schedule Item Numbers 112.30–40, 112.34–00, and 112.90–00 could be imported without documentation only if labeled as "Tuna Fish, Other than Yellowfin" or like language. Current regulations require cans to be labelled as "Other than Yellowfin Tuna." It has come to our attention that processors' canning codes often identify the species of tuna in the can. Therefore, to allow more flexibility in the importation of canned tuna without affecting the intent or effect of the marking requirement, the regulations are amended to allow cans offered for importation under the above-mentioned U.S. Tariff Schedule Item Numbers, to be imported without documentation if they are marked as containing other than yellowfin tuna, in a manner approved in advance by the Director, NMFS.

It has also been found that the delivery and installation of fine mesh webbing and other gear necessary to complete the required conversion of the porpoise safety panel to 1¼" stretch mesh webbing has met with some unforseen delays. The majority of the tuna purse seiners over 400 short tons carrying capacity have been able to order and receive delivery of sufficient fine mesh webbing and other gear to carry out the required modifications to the porpoise safety panel before April 30, 1977. However, a small number of vessels who ordered the gear during the recent period of regulatory confusion and conflicting court actions have been unable to receive and install the gear before the above mentioned deadline. Therefore, the NMFS Southwest Regional Director is given the authority to

deal with these cases on an individual basis including allowing continued usage of approved 2" stretch mesh safety panels under limited or conditional time extensions, until the fine mesh webbing panel can be properly installed.

In order to avoid disruption or possible cessation of tuna imports as well as to provide timely relief to vessels involved in the recently identified fine mesh webbing delivery and installation problem, it is necessary that these regulations be effective at the earliest possible time. For these reasons, it is hereby for good cause found that the advance notice, public procedures, and delayed effectiveness provision of 5 U.S.C. 553 are impracticable and contrary to the public interest. These regulations are, therefore, effective as Interim Regulations.

In the interest of public participation in the rulemaking process, comments on these regulations will be received until June 10, 1977, after which time amendments will be made as necessary to take proper account of comments received and experience gained during this period.

Accordingly, § 216.24 of the National Marine Fisheries Service marine mammal regulations (16 U.S.C. 216.24) is hereby amended as follows:

1. Section 216.24(e)(2)(iv)(L) is amended by adding the following wording to the last sentence; ". . ., unless the Southwest Regional Director determines that the ordering of fine mesh webbing has been documented in accordance with paragraph (c)(5)(vi) but has not been delivered, or is not otherwise available to the vessel for installation, and that a limited time extension should therefore be granted."

2. Section 216.24(e)(2)(ii) is amended by deleting the date "May 31, 1977:" and inserting the date "July 31, 1977:"

3. Section 216.24(e)(4) is amended by deleting the date "June 1, 1977," in the first line and inserting the date "August 1, 1977,"

4. Section 216.24(e)(5)(i) is amended by deleting the date "May 31, 1977," in the first line and inserting the date "July 31, 1977,"

5. The last three U.S. Tariff Schedule Item Numbers listed in § 216.24(e)(2)(ii) are hereby amended to read:

112.30–40 Tuna; canned, other than white meat, no oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Director.

112–34–00 Tuna; canned, other, no oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Director.

112.90–00 Tuna; canned, other, in oil—except cans marked as other than yellowfin tuna in a manner approved by the Director.

Dated: May 6, 1977.

WINFRED H. MEIBOHM,
National Marine Fisheries Service.

[FR Doc.77-13834 Filed 5-12-77;11:07 am]

Title 5—Administrative Personnel

CHAPTER I—CIVIL SERVICE COMMISSION

PART 213—EXCEPTED SERVICE

Entire Executive Civil Service

AGENCY: Civil Service Commission.

ACTION: Final rule.

SUMMARY: This amendment excepts from the competitive service under Schedule A all positions not in excess of GS–13, whose incumbents will implement the National Youth Conservation Corps program and are to be paid out of funds allocated under title III of the Comprehensive Employment and Training Act of 1973, as amended. Employment under this exception is not to exceed 18 months from the date that funds are authorized for this program under title III of CETA. This exception is granted because it is impracticable to examine for these positions.

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

William Bohling, 202–632–4533.

Accordingly, 5 CFR 213.3102(hh) is amended to read as follows:

§ 213.3102 Entire Executive Civil Service.

* * * * *

(hh) All positions not in excess of GS–13, whose incumbents will implement the National Youth Conservation Corps program and are to be paid out of funds allocated under title III of the Comprehensive Employment and Training Act of 1973, as amended. Employment under this exception is not to exceed 18 months from the date that funds are authorized for this program under title III of CETA.

(5 U.S.C. 3301, 3302; EO 10577, 3 CFR 1954–1958 Comp., p. 218.)

UNITED STATES CIVIL SERVICE COMMISSION,
JAMES C. SPRY,
Executive Assistant to the Commissioners.

[FR Doc.77-14111 Filed 5-13-77;10:49 am]

proposed rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[7 CFR Part 918]

HANDLING OF FRESH PEACHES GROWN IN GEORGIA

Expenses and Rate of Assessment For the 1977–78 Fiscal Period

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed Rule.

SUMMARY: This notice invites written comment on proposed expenses of $20,538.59 and a rate of assessment of $0.015 per bushel of peaches to support the activities of the Industry Committee for the 1977–78 fiscal period under Marketing Order No. 918.

DATES: Comments must be received on or before May 31, 1977. Proposed effective dates: March 1, 1977, through February 28, 1978.

ADDRESSES: Comments may be addressed to the Hearing Clerk, United States Department of Agriculture, Room 1077, South Building, Washington, D.C. 20250. Two copies of all written comments shall be submitted, and they will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT:

Charles R. Brader, Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447–3545.

SUPPLEMENTARY INFORMATION: The proposals under consideration were submitted by the Industry Committee, established under the marketing agreement, as amended, and Order No. 918, as amended (7 CFR Part 918), regulating the handling of fresh peaches grown in the State of Georgia, effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), as the agency to administer its terms and provisions.

The proposals are as follows:

(1) Expenses that are reasonable and necessary to be incurred by the Industry Committee during the fiscal period March 1, 1977, through February 28, 1978, will amount to $20,538.59.

(2) The rate of assessment for the fiscal period, payable by each handler in accordance with § 918.41, be established at $0.015 per bushel basket of peaches (48 pounds net weight) or an equivalent for peaches in other containers or in bulk.

Dated: May 10, 1977.

CHARLES R. BRADER,
Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc.77–13887 Filed 5–13–77;8:45 am]

[7 CFR Part 1065]

[Docket No. AO–86–A37]

MILK IN THE NEBRASKA-WESTERN IOWA MARKETING AREA

Recommended Decision and Opportunity to File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and To Order

AGENCY: Agricultural Marketing Service, USDA

ACTION: Proposed Rule

SUMMARY: This decision recommends certain changes in the Nebraska-Western Iowa Federal milk marketing order, based on industry proposals considered at a public hearing in October 1976. A principal change would reduce the quantity of milk that a supply plant must ship to distributing plants to be a fully regulated plant under the order. This would help supply plants avoid unnecessary and costly milk shipments that might otherwise be made just to keep the plant qualified as a pool plant. Another change, intended to simplify the administration of the order, would alter the manner in which a cooperative association is paid for farm bulk tank milk that it delivers to a regulated pool plant. This would not affect a plant operator's cost of milk or the level of payments to producers.

DATE: Comments are due on or before June 6, 1977.

ADDRESS: Comments (4 copies) should be filed with the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT:

Maurice M. Martin, Marketing Specialist, Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250 (202–447–7183).

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing—Issued September 15, 1976; published September 20, 1976 (41 FR 40495).

Notice of Extension of Time for Filing Briefs—Issued November 12, 1976; published November 17, 1976 (41 FR 50696).

PRELIMINARY STATEMENT

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and order regulating the handling of milk in the Nebraska-Western Iowa marketing area, and of the opportunity to file written exceptions thereto. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C. 20250, on or before June 6, 1977. Four copies are required for this proceeding. All written submissions will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing on the record of which proposed amendments, as hereinafter set forth, to the tentative marketing agreement and to the order, as amended, were formulated was conducted at Omaha, Nebraska, on October 6–7, 1976, pursuant to notice thereof.

The material issues on the record of the hearing relate to:

1. The pooling standards for a supply plant.

2. The Class I price zones within the marketing area and the applicable price for each zone.

3. The payment and accounting for farm bulk tank milk received by a handler from a cooperative association.

FINDINGS AND CONCLUSIONS

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. *Pooling standards for a supply plant.* The pooling requirements for a supply plant (other than a cooperative balancing plant) should be revised to require that at least 40 percent of the plant's monthly receipts of Grade A milk from dairy farmers (including milk diverted from the plant) be shipped as fluid milk products to pool distributing plants. Additionally, a plant that was pooled as a supply plant in each of the months of September through December should be provided continuing pool plant status during each of the following months of January through August in the event the plant does not meet the 40 percent shipping requirement, unless

the plant operator requests that the plant be a nonpool plant.

Under the terms of the present order, a supply plant must ship at least 50 percent of its receipts of Grade A milk from dairy farmers (excluding diversions to nonpool plants) to pool distributing plants during the month to qualify for pooling in such month. A plant which is pooled as a supply plant in each of the months of August through December is accorded automatic pooling status in the subsequent months of January through July unless nonpool plant status is requested.

The order also provides that a supply plant operated by a cooperative association may qualify as a pool plant on the basis of the cooperative's total milk movements to pool distributing plants either by transfer from a supply plant or directly from member producers' farms. This provision is not at issue in the proceeding. However, for the purpose of this discussion, such a pool supply plant shall be referred to herein as a "cooperative balancing plant."

A cooperative association proposed that a supply plant no longer be granted automatic pooling status but instead be required to ship at least a required amount of milk each month to qualify for pooling. As proposed, a supply plant that had met the 50 percent shipping requirement during each of the months of August through December could continue to be a pool plant during the subsequent January through July period by shipping a minimum of 30 percent of its receipts each month. If the fall shipping requirement was not met, then the plant would have to meet the 50 percent requirement in any month for which pooling is desired.

Additionally, the cooperative proposed that for the purpose of determining a plant's qualification for pooling, milk diverted from a supply plant to a nonpool plant be treated as a receipt of producer milk at the supply plant. Also, it proposed that any route disposition in the marketing area from the supply plant be treated as a shipment by such plant.

In its post-hearing brief, the proponent cooperative modified its initial position and concluded that a 40 percent and 25 percent shipping requirement would be acceptable for the August through December period and the January through July period, respectively. This modification was made on the basis that diverted milk be included as a receipt at the supply plant in determining whether the plant qualifies for pool status.

The proponent cooperative indicated that its proposal for year-round shipping requirements was prompted by the recent increase in manufacturing plants that have become pool supply plants under the order. The cooperative alleged that the automatic pooling provision provides an opportunity for a supply plant operator to pool a supply of milk without assuming any responsibility to supply the fluid market on a continuing basis throughout the year. Proponent maintained that additional manufacturing plants are qualifying as pool supply plants under the order so that the plant operators can use the marketwide pool to help them pay a competitive price (the order's blend price) to their dairy farmers and thus insure a supply of milk at their plants. The proponent cooperative reasoned that since most of the new supply plants are primarily engaged in manufacturing they should be required to maintain a substantial association with the fluid market by meeting year-round shipping requirements.

In further support of its position, the cooperative presented testimony on how it serves the fluid milk needs of handlers on a year-round basis. It was noted that every effort is made by the cooperative to meet the requirements of its fluid milk customers at all times. In this connection, the cooperative indicated that it is a source of supply for 15 of the 16 pool distributing plants in the market. Such supply needs of the distributing plants are met by direct shipments from member producers' farms or by transfers from the cooperative's four pool balancing plants. It was pointed out that the cooperative's monthly shipments to distributing plants in 1975 ranged from 68 to 83 percent of the total producer receipts under the order.

As indicated, the proponent cooperative proposed that milk diverted from a supply plant be counted as a receipt at the plant in determining its qualification as a pool plant. In support of this change, the proponent's witness contended that the exclusion of diversions as a receipt at the supply plant permits the pooling of substantial additional milk supplies which may not be available to meet the fluid needs of the market but which are intended solely for manufacturing use. The witness also indicated that such exclusion of diversions can result in a potential inequity between handlers who maintain dual plant operations (facilities for the separate handling of Grade A milk and manufacturing grade milk at the same location) and those who do not since the latter probably would not divert milk to a manufacturing plant and thus would have to meet higher shipping requirements. In addition, the witness indicated that since other provisions of the order treat milk diverted from a pool plant as part of such plant's total supply, it is only appropriate to include diverted milk as a receipt in determining the pool status of a supply plant.

A second cooperative in the market that operates a pool supply plant opposed the modification of the pool supply plant provisions as initially proposed by proponent. A similar position was also taken by still another cooperative association which had commenced qualifying a plant as a pool supply plant in September 1976. The principal concern expressed by the two cooperatives was the recommendation to include milk diverted from a supply plant as a receipt at such plant for pooling purposes. They held that the inclusion of diverted milk as a receipt without any accompanying reduction in the shipping requirements during the qualifying period would effectively deny pool status to plants now pooled as supply plants under the order.

The witness for one of these cooperatives claimed that if diversions are included as a receipt for pool plant qualification purposes, about 40 percent more milk would have to be shipped from the cooperative's supply plant in order to meet the 50 percent shipping requirement. The witness further testified that even under the existing shipping requirements the cooperative has incurred financial losses in order to maintain pool status for its plan during the qualifying months of August through December.

Both of these cooperatives, on the other hand, proposed at the hearing that any deliveries of milk by a cooperative directly from the farms of member producers to a pool distributing plant be considered as having been received first at a plant of such cooperative. This recommendation was supported in its post-hearing brief by the cooperative that proposed the year-round supply plant shipments.

At the hearing, one of these cooperatives also proposed (1) the elimination of August as a qualifying month for automatic pooling of supply plants, (2) the continuation for one month of the pool status of a supply plant if it fails to meet the shipping requirements, provided it was a pool plant during each of the preceding 12 months, and (3) if diverted milk from a supply plant is included as part of the plant's receipts, a reduction of the shipping requirements for a pool supply plant to 35 percent of its receipts during the qualifying period and to 20 percent during the remainder of the year.

Six proprietary handlers who are operating pool supply plants with extensive manufacturing operations opposed any of the proposals or modifications thereto that would "tighten" pooling standards for supply plants. They generally favored a lower shipping requirement during the fall qualifying period for automatic pooling status, the continuance of the automatic pooling feature, and the elimination of August as a qualifying month. Five or the six handlers recommended in their post-hearing brief a 30 percent shipping standard in each of the months of September through December, with the continuance of the automatic pooling provision for the remaining months.

One of the proprietary handlers testified about the problems he encountered during the most recent qualifying period in making the required shipments to distributing plants. He indicated that in order to maintain pool status for one of his supply plants (a pool plant under the order since 1974) he had to arrange to deliver more milk from his supply plant to a distributing plant than it needed, and then backhaul the excess to his supply plant for manufacturing. He also expressed concern that the continuation of the present pooling standards could jeopardize his ability to maintain continued pool plant status because of competition from a greater number of supply

plants competing for distributing plant outlets.

The representative of another proprietary handler who recently qualified his supply plant as a pool plant denied that it was their intent to take advantage of the automatic pooling provision and exploit the pool, as suggested by the proponent cooperative. He stated that milk associated with their supply plant has been and would be available to distributing plants when needed and that substantial quantities of the supply plant's producer receipts were being shipped to distributing plants.

The purpose of pooling standards for supply plants is to distinguish between those plants substantially engaged in serving the fluid needs of the regulated market and those plants that do not serve the market to a degree that warrants their sharing, through pooling, in the market's Class I returns. It is necessary, then, to establish pooling standards that reflect the needs of the local market. Basically, the minimum performance requirements should assure that supply plants associated with the market will make milk available to distributing plants at the times and in the quantities needed. Supply plants regularly serving the market should not be required, however, to ship substantial quantities of milk when it is not needed.

Presently, the order permits supply plants that have met the minimum shipping requirements during the months of August through December to remain pooled during the other months without making shipments to distributing plants at the same minimum level as during the short production months. This reflects the customary situation where the demand for supply plant milk is usually greater during the months of seasonally low milk production than during other months. A distributing plant's needs for supply plant milk may be substantially reduced during the months of seasonally high production when direct deliveries from producers largely fulfill the distributor's needs for milk. The automatic pooling provisions thus eliminate the need for supply plants to make costly, unneeded shipments to distributing plants during the months of heavier production merely to maintain their pool plant status. Moreover, such provisions permit those producers who have established their association with the fluid market by shipping to a pool supply plant to continue to share in the market's Class I sales during the period when supply plant milk may not be needed for fluid use.

The adoption of year-round shipping requirements should be based on an indication that distributing plants are having difficulty in obtaining adequate milk supplies from pool supply plants. This record does not demonstrate that this is the case. Instead, it is apparent that distributing plants are able to acquire from supply plants whatever milk supplies they need and when needed. This is so even at a time when distributors have become increasingly dependent on supply plant milk because of changes in their bottling patterns and their desire for milk of a standardized butterfat test.

Dairy farmers in the supply area for this market have been shifting from Grade B to Grade A milk production. This has resulted in an expanding Grade A milk supply seeking to share in the market pool. The principal means by which new producers enter the pool is by delivering to an existing pool plant or to a supply plant that later becomes fully regulated by its shipments to distributing plants. As was pointed out at the hearing, the pooling of these additional Grade A supplies has been accomplished principally by manufacturing plants upgrading their total farm supply to Grade A status and then making the required shipments to distributing plants.

At the time of the hearing, there were six such manufacturing plants that had established pool qualification under the order. Three of these plants have been pool supply plants for several years while the remainder acquired pool status at or near the beginning of the most recent qualifying period.[1] Most of the receipts at these plants are from dairy farmers who recently converted their production facilities to meet Grade A inspection requirements. Part of the milk supply at these plants, however, is being furnished by producers who have been associated with the market for quite some time.

Proponent's basic contention was that the automatic pooling feature has encouraged manufacturing plants to affiliate with the market to maintain a supply of milk for manufacturing purposes rather than to serve the fluid market on a substantial and continuing basis. By implication, proponent's position suggests that such plants are meeting only the minimum shipping requirements during the qualifying period and then failing to make needed shipments to distributing plants during the period in which shipments are not required by the order. This is not supported by the record evidence. Supply plants are making milk supplies available to distributing plants when the milk is needed.

It is recognized that there can be an incentive for operators of manufacturing plants to associate milk supplies with the market for manufacturing purposes. Because of this, and in view of the number of such plants operating in this market, it is reasonable that the order provide greater assurance that milk supplies will be committed to fluid uses when needed by distributors.

As indicated previously, there have been instances where a supply plant operator, for the purpose of qualifying his plant, has made specific prearrangements for a distributing plant to receive the necessary qualifying shipments of milk and then ship the milk back to the supply plant for manufacturing uses. While this practice involves additional hauling and handling costs and results in uneconomic movements of milk, it has off-setting benefits to the supply plant operator in that he can acquire his milk at the Class III price and yet pay his producers the higher uniform price through the marketwide pool. Such practice in essence constitutes a predetermined commitment of pool milk for manufacturing use. The order should provide a safeguard against such exploitation of the pool.

Accordingly, to help assure that each supply plant pooled represents a continuing, reliable source of milk for the fluid market, the order should provide that only the net amount of milk shipped during the month to a pool distributing plant from the supply plant shall be counted as qualifying shipments. For example, a supply plant may ship fluid milk products to a distributing plant and arrange to have the latter plant transfer fluid milk products back to the supply plant in the same month. In this case, only that quantity of the supply plant's shipments not offset by the return shipments should count toward meeting the minimum shipping requirement for the supply plant. Also, a supply plant operator could operate an other plant (pool or nonpool) and arrange to ship milk from his supply plant to a pool distributing plant and then have it transferred to his other plant for manufacturing, thereby facilitating the pooling of the supply plant. In this circumstance, the supply plant's shipments to the distributing plant should be reduced by the transfers to the supply plant operator's second plant in determining the quantity of qualifying shipments by the supply plant. These net shipment provisions should discourage any circumvention of the intent of the present supply plant performance provisions of the order without having any significant impact on normal marketing practices of pool supply plant operators.

The proposal that the pool qualifications for a supply plant be based on the actual receipts of Grade A milk from dairy farmers at the plant plus the milk of producers diverted from such plant should be adopted. Diverted milk may now be pooled without being counted as a part of the supply of the plant from which diverted in determining the plant's pool status.

Under the present arrangement, the current 50 percent minimum shipping requirement for a pool supply plant can be effectively reduced depending on the extent of such plant's total diversions. For example, if 30 percent[2] of the producer milk normally associated with such plant is diverted without being counted as part of the plant's total producer milk supply, the plant could qualify as a pool plant by shipping to pool distributing plants only 35 percent (rather than 50 percent) of its regular supply of producer milk. On the other hand, a supply

[1] Official notice is taken of the Nebraska-Western Iowa market administrator's monthly uniform price announcements for 1974–1976.

[2] The maximum allowable diversions by a pool supply plant operator is 30 percent during each of the months of January–March and September–November, and 40 percent during any other month, of the producer milk actually received at the plant.

plant that diverts no milk would have to ship 50 percent of its actual producer receipts to qualify for pooling. This procedure, which is currently being employed by some of the pool supply plants, results in inequity among supply plants in acquiring and maintaining pool status. It is reasonable, therefore, to include milk diverted from a supply plant as a receipt in determining such plant's pool status.

Such a change, however, requires a reduction in the present shipping percentage for pool supply plants. Including diverted milk as part of a supply plant's total receipts from producers for pooling purposes could result in some plants having difficulty in meeting the shipping requirements unless they adjusted their present operations. The change in the diversion arrangement adopted herein is not intended to force this type of adjustment.

In view of current supply-demand conditions existing in this market, a reduction of 10 percentage points (from 50 to 40 percent) in the shipping standard appears reasonable. This lower shipping standard should be adequate to assure that milk associated with supply plants will continue to be available to distributing plants when needed.

The months of September–December, rather than August–December, should be used as the qualifying period in which a supply plant may earn automatic pooling status for the following months when there is less demand for supply plant milk. This change would more nearly reflect the current seasonal production pattern for the market. The four months of September–December is the period when milk production is lower relative to demand than in the remaining months of the year. During the most recent such four-month period (September through December 1975) for which data were available at the hearing, Class I utilization of producer milk was 59 percent. In the following eight months (January through August 1976) the comparable Class I utilization was 48 percent.

August, which would be eliminated as a qualifying month for automatic pooling, is now a month of relatively high production relative to demand. For the years 1974, 1975 and 1976, the Class I utilization of producer milk in August was 47 percent, 50 percent and 44 percent, respectively. These percentages for August are essentially at the same level as for the months of seasonally high production in this market. In fact, over the same three-year period, only the months of May, June and July had a lower Class I utilization than did August. In this circumstance, supply plants should not be forced to make substantial shipments when there is little demand for the milk. The qualifying period of September through December should be adequate to establish a supply plant's association with the fluid market.

Qualifying shipments by a supply plant that is not a cooperative balancing plant should not include milk delivered directly from farms to distributing plants by the supply plant operator. This was proposed at the hearing by a cooperative for the purpose of facilitating the continued pooling of its supply plant. The order already provides for this type of pooling arrangement in that a cooperative's plant may be a pool balancing plant if 51 percent or more of the cooperative's producer milk is moved to pool distributing plants either by transfer from the balancing plant or directly from members' farms. Thus, there is no need for the type of change proposed by the cooperative. Moreover, other changes in the pooling provisions adopted herein should aid the cooperative with respect to the pooling of its plant.

At the hearing, a cooperative association proposed that a supply plant which fails to meet the shipping percentage requirement in any month nevertheless be permitted to remain pooled for such month if it was a pool supply plant in each of the preceding 12 months. This should not be adopted. The spokesman for the cooperative did not present any specific testimony on this issue other than merely offering the proposal. Moreover, the record provides no evidence of marketing problems that would warrant the implementation of such a "depooling" safeguard.

No action is taken on the proposal that route disposition in the marketing area from a supply plant be counted as a qualifying shipment for pooling purposes. This suggested change was included in the supply plant definition as initially proposed in the hearing notice. However, there was no testimony presented at the hearing either in support of or in opposition to the proposal.

2. *The Class I price zones within the marketing area and the applicable price for each zone.* No change should be made on the basis of this record in the zone price structure now applicable to pool plants located within the marketing area.

Currently, the marketing area is divided into three pricing zones. Zone 1 includes 39 eastern Nebraska counties, five western Iowa counties plus part of the Iowa county of Pottawattamie, and a portion of Union County, South Dakota. The largest cities in the marketing area are located in Zone 1, which include Omaha and Lincoln, Nebraska, and Council Bluffs and Sioux City, Iowa.

The extreme eastern part of the marketing area is included in Zone 2. This zone comprises 11 Iowa counties and that part of Pottawattamie County, Iowa, not included in Zone 1. The zone is predominately rural, with the largest populated center being Le Mars, Iowa.

The western portion of the marketing area, consisting of 31 Nebraska counties and extending westward from Zone 1 to the Wyoming State line, is included in Zone 3. Grand Island, Hastings, North Platte, Kearney and Scottsbluff, Nebraska, are the principal cities in Zone 3.

The Class I price at plants located in Zone 1 is $1.60 over the basic formula price. The Zone 2 Class I price is 10 cents less. The Zone 3 Class I price is 15 cents more than the Zone 1 price.

Six pricing proposals by three proprietary handlers, all of which would revise the zone price structure, were included in the hearing notice. At the hearing, however, proponents revised many of the proposals, or abandoned them.

Proposals initially offered by a handler at Le Mars, Iowa, who operates the only pool distributing plant in Zone 2, would have changed the prices applicable in each of the present zones, plus establishing an additional price zone. At the hearing, the handler modified his proposals set forth in the hearing notice and supported changes that: (1) Would reduce the Zone 2 Class I price by 10 cents per hundredweight and (2) would establish a new two-county price zone comprising Woodbury County, Iowa, and Dakota County, Nebraska, both of which are now in Zone 1. The handler recommended that a Class I price 15 cents less than the Zone 1 price apply to the new zone.

The primary reason cited by the representatives of the proponent handler for the zone price revisions was that they would restore the historical Class I price relationships that existed between the Le Mars handler and handlers in Sioux Falls, South Dakota, prior to the June 1, 1976, amendment to the Eastern South Dakota order. This amendment reduced the Eastern South Dakota order's Class I differential from $1.50 to $1.40. Prior to the amendment, the Eastern South Dakota's Class I differential was identical to the Nebraska-Western Iowa Zone 2 Class I differential. Proponent claimed that the lowering of the Class I differential in the Eastern South Dakota market has seriously affected his ability to compete with handlers regulated under that order in his principal area of distribution.

In supporting the handler's position, witnesses stated that historically the alignment of Class I prices in Federal order markets has been based on the cost of transporting milk from Eau Claire, Wisconsin, which is in an area that is an important source of alternative milk supplies for various markets. They held that the Sioux Falls price is properly aligned with Eau Claire and that the Le Mars price should be similarly aligned. The witnesses reasoned that since the distance from the alternative milk supply area to Le Mars and to Sioux Falls is about the same, the $1.40 Class I price differential applicable at Sioux Falls is also proper for Le Mars.

Witnesses for the proponent handler also contended that the Zone 2 price has always been too high relative to the Omaha price (Zone 1). They maintained that their proposed Zone 2 price would improve the price alignment between Le Mars and Omaha.

To facilitate the alignment of prices, the handler also proposed establishing a new price zone encompassing Dakota County, Nebraska, and Woodbury County, Iowa (principally the Sioux City, Iowa area) with a Class I price differential of $1.45. It was argued by proponent that this would more accurately reflect the location value of milk in this area in relation to Omaha.

In further support of his position, the proponent handler noted that a factor

considered by the Department in reducing the Eastern South Dakota order's Class I price was the availability of additional milk supplies for Sioux Falls handlers from the nearby heavy milk producing area of Swift, Yellow Medicine and Brown Counties, Minnesota. Since this milk production area is about equi-distant from Le Mars and Sioux Falls, proponent maintained that a Class I differential of $1.40 at Le Mars would be high enough to attract milk supplies from these three counties to his plant when needed.

Two proposals included in the hearing notice by the operator of three pool distributing plants at Grand Island and Omaha, Nebraska, and Sioux City, Iowa, which would revise the zone price structure as to territory and price, were abandoned at the hearing. Instead, the handler proposed the elimination of price zones and recommended that a differential of $1.60 (the present Zone 1 differential) apply throughout the marketing area. Additionally, he proposes that a 10-cent credit be allowed on any Class I sales in a lower-priced Federal order market by a pool handler. The handler believed that his proposed changes would enhance producer prices and improve handler equity from a competitive standpoint.

A third handler who operates a pool distributing plant at Norfolk, Nebraska (Zone 1), originally proposed the consolidation of Zones 1 and 2, with the present Zone 1 Class I price applying to the entire area. At the hearing, the handler did not support the proposal. Instead, he urged that no change be made in the Class I price structure until it can be reviewed at a hearing dealing with the merger of several orders in the region.[3] He did state, however, that if it were determined that a change in the zone price structure is necessary, then his recommendation would be to consolidate Zones 1 and 2 and have a $1.40 Class I differential apply to the entire area. Another alternative recommendation advanced by the handler was that if the proposed $1.40 Class I differential is adopted for Zone 2, then the proposed new two-county pricing zone should be expanded to include 10 additional counties now in Zone 1. Under this recommendation, the handler's plant would be included in the new price zone. The handler stated that his alternative recommendations were intended to maintain the same general competitive relationship with the two handlers at Sioux City and Le Mars that now exists under the present zone price structure.

At the hearing, a cooperative association opposed any change in the price structure for Sioux City and Zone 2 that would have the effect of reducing prices in those areas. The witness for the cooperative held that any price reduction would have an adverse effect on the maintenance of an adequate milk supply at distributing plants in these areas, particularly the single Zone 2 plant. He also maintained that any change in the price structure would disrupt the historical competitive relationship between handlers in Zones 1 and 2.

The cooperative did propose at the hearing, however, shifting to Zone 1 all the territory east of Garden and Deuel Counties, Nebraska, now included in Zone 3. The shift would involve 19 Zone 3 Nebraska counties, including the population centers of North Platte, Grand Island and Hastings. There are presently eight pool plants located in this 19-county area—four distributing plants, three supply plants, and one cooperative balancing plant. Under its proposal, the "panhandle" section of Nebraska, comprising 11 western Nebraska counties, would be the only territory remaining in Zone 3.

The principal reason cited by the cooperative for the change was that the 15-cent higher price in Zone 3 relative to Zone 1 is no longer necessary to attract an adequate supply of milk at the distributing plants located in the 19-county area. In support of its position, the cooperative's witness claimed that marketing conditions have changed since the adoption in June 1968 of the present price structure for the 19-county area. One change cited was the decline in the number of distributing plants in the area—from five in 1968 to four at the present time. Another change was the supply-demand situation. The witness claimed that milk supplies in Zone 3 have become excessive in relation to the Class I sales of the distributing plants located in the area. He further testified that as a result of the increased supplies available in Zone 3 the cooperative has found it necessary to seek alternative outlets in a higher-priced market to enhance the returns to its member producers. This was accomplished, according to the witness, by pooling their former Nebraska-Western Iowa order pool supply plants at Broken Bow, Nebraska, and Ellis, Kansas, under the Eastern Colorado order.

Another cooperative that supplies several pool distributing plants in the market, although it did not testify at the hearing regarding zone pricing, supported in its post-hearing brief the proposal to shift 19 Zone 3 counties to Zone 1.

A handler who operates two pool distributing plants (at Lincoln and North Platte, Nebraska) opposed any change in the present zone price structure. The handler's representative stated that any price change for a single zone, as advocated by the Le Mars, Iowa, handler, would disrupt the historical price relationships among the three zones and as between adjoining markets. He further held that if the proposal to reduce the Zone 2 price by 10 cents is adopted, then the price in the other zones should be reduced the same amount in order to maintain historical price relationships within the marketing area.

Another handler who operates distributing plants at Lincoln and Grand Island, Nebraska, also opposed any change in the present zone price structure. The witness for the handler held that the proposals to reduce the Zone 2 and Sioux City Class I prices, if adopted, would have an adverse effect on the handler's Lincoln plant in competing with the two plants at Le Mars and Sioux City. In his post-hearing brief, the handler revised his position taken at the hearing against any changes and supported the limited proposal to shift 19 Zone 3 counties to Zone 1.

At the hearing two other handlers (operators of a pool distributing plant and a pool supply plant, respectively) opposed any change in the present zone price structure. In their post-hearing briefs, the operators of several pool supply plants also expressed opposition to any change in the provisions establishing zone pricing.

The order's present zone price structure was established on the basis of the Assistant Secretary's decision issued April 15, 1968 (33 FR 6046) when the Sioux City, Iowa, order was merged with the Nebraska-Western Iowa order. It was reviewed at a public hearing held in May 1974. As a result of that hearing, the Assistant Secretary concluded in his decision issued November 26, 1974 (39 FR 41729), that no change should be made in the boundaries of Zones 1, 2 and 3 of the marketing area or in the prices applicable to such zones.

Except for the testimony of the handler who proposed that the same Class I price apply throughout the marketing area, the testimony presented at the current hearing supported the continuance of zone pricing under the order. The handler's proposal for a single Class I price throughout the marketing area would have the effect of reducing the Zone III Class I price by 15 cents and increasing the Zone II price by 10 cents. The handler's witness presented no specific facts or marketing problems supporting the proposal. There was no reason given why the Zone III price should be reduced. Neither was there any indication why the value of milk in Zone II should be more than what the present price reflects.

Under such a pricing scheme, producers obviously would want to deliver their milk only to the plants located nearest their farms to escape the transportation cost involved in more distant movements to other plant locations at which milk is needed. The likely result of this would be to increase the total handling and transportation costs for some handlers as opposed to others in obtaining adequate milk supplies. Accordingly, a single uniform Class I price applicable throughout the expansive marketing area would be inappropriate and could contribute to disorderly marketing conditions.

Under the order's price structure, Class I prices at various locations increase in relation to distance from the eastern to the western segment of the marketing area. This graduation of prices reflects the additional value that milk has at the various plant locations within the marketing area relative to the

[3] The orders referred to here would include at least Eastern South Dakota, Greater Kansas City and Nebraska-Western Iowa. Such a merger, however, is not a matter pending before the Secretary at this time.

cost of obtaining milk supplies on a regular basis from alternative sources (an important source of alternative milk supplies for this market as well as for many other markets is the Upper Midwest region). It is anticipated that even in the absence of a regulatory program the Class I price structure would gradually increase in a westerly direction from the heavy milk producing Upper Midwest region reflecting the variable cost of moving milk supplies from this region.

The Class I prices that now apply at various locations in the Nebraska-Western Iowa market were thus established to reflect the value of an economic service to handlers by distant producers bearing the cost of moving their milk to a handler's plant. This is the case even though a handler may obtain his entire supply from local producers. In the absence of any local supply, the handler would have to procure milk from other areas. Thus, the value of milk at such plant's location necessarily must reflect the cost of obtaining milk from alternative supply sources.

Additionally, the economic value of milk to the producer is determined by the alternative outlets for his milk. If this value is not properly reflected in the Class I price at various locations, the milk, over time, would not be available to plants at such locations.

The record evidence does not demonstrate that the present Class I price structure for the Nebraska-Western Iowa market is inappropriate or is contributing to disorderly marketing conditions. To the contrary, it appears that the present price structure is providing adequate milk supplies at all locations at which milk is delivered by producers and the necessary alignment of prices not only with other markets but also among the various segments within the market. Accordingly, the Class I zone price structure now applicable to the marketing area should be retained.

Present marketing conditions do not warrant a reduction in the Zone 2 Class I prices. As previously noted, the proponent handler's basic argument for reducing the Zone 2 Class I differential by 10 cents was that the present Eastern South Dakota Class I price applicable at Sioux Falls plants provides such plants with a competitive advantage over his Le Mars, Iowa, plant. Two Sioux Falls plants compete with the Le Mars plant for Class I sales, principally in the Sioux City, Iowa, area of Zone 1. Le Mars and Sioux Falls are located 25 miles and 85 miles, respectively, north of Sioux City. Based on the location differential rate of 1.5 cents per 10 miles contained in the order, the 85-mile distance from Sioux Falls to Sioux City would suggest a hauling cost of about 14 cents per hundredweight. In contrast, the cost of moving bulk milk from Le Mars to Sioux City would be about 4 cents. This would suggest a price difference of 10 cents per hundredweight between Sioux Falls and Le Mars, which is presently the case. Thus, this price difference cannot be regarded as disruptive to the Le Mars handler in competing with Sioux Falls handlers for fluid milk sales in the Sioux City area.

In further support of his basic argument, the proponent handler claimed that following the 10-cent reduction in the Eastern South Dakota order Class I price, he lost a bid on a sizeable wholesale account at Vermillion, South Dakota, to a Sioux Falls handler. Considering the greater distance to Vermillion from Sioux Falls (about 55 miles) than from Le Mars (about 36 miles), it is unlikely that Sioux Falls milk could be delivered to Vermillion at a cost significanty less than what the Le Mars handler would incur in serving the area.

The argument of the Le Mars handler that he has substantial sales in other markets where Class I prices are lower provides no basis, in itself, for reducing the Zone 2 Class I differential. A handler may distribute milk in any area he chooses. Should he decide to sell milk in an area where handlers have a lower cost, he must assume any competitive risks involved. It would be uneconomic to have the order provide a handler with cost comparability at any location at which he may choose to distribute milk.

The fact that the Le Mars handler has the same access, distance-wise, as Sioux Falls handlers to the three-county supply area in southwestern Minnesota referred to earlier provides no compelling basis for adopting the Le Mars handler's Zone 2 price proposal. There is no indication on this record that the present price for milk delivered to the Le Mars location does not reflect the economic value that such milk has to the Le Mars handler.

The proposal to remove Woodbury County, Iowa, and Dakota County, Nebraska, from Zone 1, and include them in a new pricing zone with a 15-cent lower Class I price, which would affect only the price structure at the Sioux City plant, was proposed by the Le Mars handler as a corollary proposed to his proposed price reduction at Le Mars. Since the latter proposal is not adopted, further consideration is not given to the proposed 15-cent reduction at Sioux City. Moreover, the operator of the Sioux City plant testified that he was opposed to any price reduction at this time that might adversely affect producer returns and ultimately affect milk supplies in the market.

The proposal to reduce the Class I price 15 cents per hundredweight in 19 Zone 3 counties by shifting these counties to the lower-priced Zone 1 cannot be justified by the record evidence. Contrary to the proponent cooperative's position, the record evidence suggests that milk supplies in and around this area are not excessive and that additional supplies for plants in the area are obtained from the heavy production region in northcentral Nebraska (principally in the Zone 1 area), which is a principal supply area for Omaha distributing plants. The use of a 15-cent per hundredweight higher price in this 19-county area of the marketing area reflects the graduation of Class I prices from east to west that is necessary to reflect the differences in economic value that milk has to handlers in Zone 1 and 3. Without this alignment of prices, plants in the Omaha area, because of distance, would be preferential outlets for milk produced in northcentral Nebraska relative to plants in Zone 3.

Further, some of the milk produced in the 19-county area is delivered to plants regulated by orders south and west of this area where the price is higher. The present higher price in this general area provides the necessary alignment with such higher-priced markets. A 15-cent decrease in that portion of Zone 3, as proposed, could impair the ability of plants located therein to compete for the supplies available in the local area. The economic value of milk produced locally is determined by the alternative outlets for the milk. If this value is not properly reflected in the Class I prices at various locations, the milk, over time, probably would not be available to plants at those locations. The present 15-cent higher price in the 19-county area reflects the additional value that milk has at plants in this area.

As indicated previously, a handler proposed at the hearing that a 10-cent per hundredweight credit be granted to a pool handler on any Class I sales made in a lower-priced Federal order market. This proposal, however, does not comport with the Act since the Act provides for the pricing of producer milk at "the location at which delivery * * * is made." Moreover, the price established under the order at each plant location is the price that is considered necessary to bring forth an adequate supply of milk at that location. To reduce the price at any location because the handler has route distribution into a lower-priced area could jeopardize the ability of the handler to continue over time to receive an adequate supply of milk. Accordingly, the proposal is denied.

3. *Payment and accounting for farm bulk tank milk received by a handler from a cooperative association.* The method of payment to a cooperative association as the handler for farm bulk tank milk should be revised.

Presently, a pool plant operator who receives milk from a cooperative bulk tank handler is required to pay the cooperative association at the classified use value of such milk. Under this payment procedure, the cooperative association is responsible to the producer-settlement fund at class prices for such milk delivered to a pool plant rather than the pool plant operator.

A cooperative association proposed that the order provide that milk received at a pool plant from a cooperative bulk tank handler be paid for at the uniform price and the pool plant operator be obligated to the producer-settlement fund for such milk at its classified use value. There was no opposition to the proposal.

The cooperative's representative testified that the present payment procedure on such milk involves unnecessarily a third party (the cooperative bulk tank handler) in the transaction as related to

obligations to the producer-settlement fund. In this connection, the witness contended the proposal would simplify the accounting for such milk received by the pool plant operator and would result in more effective administration of the order regarding the billing and collection of audit adjustments resulting from changes in classification of milk.

The order should specify, as proposed, that milk delivered to a pool plant by a cooperative bulk tank handler be treated as a receipt of producer milk and be paid for at the uniform price by the pool plant operator. The pool plant operator in turn would be responsible, rather than the cooperative, to the producer-settlement fund for the accounting of the utilization of such milk.

This change will simplify the accounting for such milk by the pool plant operator and will facilitate the administration of the order with respect to matters of financial responsibility, enforcement, and subsequent audit adjustments that may arise. Since the actual utilization of such milk reflects the receiving pool plant's operations, it is reasonable, therefore, that the responsibility for the accounting and payment of such milk be placed directly on such pool plant operator.

Under the revision adopted herein, a cooperative's obligation to the producer-settlement fund would continue to be the same as presently required (1) on producer milk received at its pool plant, (2) on producer milk it diverts to a nonpool plant from its own pool plant or from another pool plant, and (3) on any milk for which it is the bulk tank handler that exceeds the quantity of such milk delivered to pool plants. Also, the pool plant operator would continue to be responsible for the administrative assessment on the milk received from the cooperative bulk tank handler as is the case now under the order.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the aforesaid order and of the previously issued amendments thereto; and all of the said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the Nebraska-Western Iowa marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out:

1. In § 1065.7, the word "July" where it appears in paragraph (d)(3) is changed to "August", and paragraph (b) is revised to read as follows:

§ 1065.7 Pool plant.

* * * * *

(b) A supply plant from which the volume of fluid milk products shipped during the month to pool plants qualified pursuant to paragraph (a) of this section (excluding fluid milk products transferred from any such distributing plant to the supply plant or to any other plant operated by the operator of the supply plant) is not less than 40 percent of the Grade A milk received at such plant from dairy farmers (including receipts of producer milk diverted from the plant pursuant to § 1065.13) and handlers described in § 1065.9(c) during such month. A supply plant that qualifies as a pool plant in each of the immediately preceding months of September through December shall be a pool plant for the months of January through August unless the plant operator requests of the market administrator, in writing, that such plant not be a pool plant, such nonpool plant status to be effective the first month following such notice and thereafter until the plant again qualifies as a pool plant on the basis of shipments.

* * * * *

2. In § 1065.13, paragraphs (a) and (b) are revised to read as follows:

§ 1065.13 Producer milk.

* * * * *

(a) Received at a pool plant directly from a producer or a handler described in § 1065.9(c);

(b) Received by a handler described in § 1065.9(c) from producers in excess of the quantity delivered to pool plants; or

* * * * *

3. In § 1065.41, paragraph (b)(1) is revised to read as follows:

§ 1065.41 Shrinkage.

* * * * *

(b) * * *

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1065.9(c));

* * * * *

4. In § 1065.42, the semicolon at the end of paragraph (a)(1) is changed to a period; the word "and" immediately following is deleted; all of paragraph (a)(2) is revoked; and the introductory text of paragraph (a) is revised to read as follows:

§ 1065.42 Classification of transfers and diversions.

(a) *Transfers to pool plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as follows:

* * * * *

5. In § 1065.44, paragraphs (a)(8)(ii) (b) and (13) are revised to read as follows:

§ 1065.44 Classification of producer milk.

* * * * *

(a) * * *

(8) * * *

(ii) * * *

(b) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

* * * * *

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1065.42(a); and

* * * * *

6. In § 1065.45, paragraph (d) is revised to read as follows:

§ 1065.45 Market administrator's reports and announcements concerning classification.

* * * * *

(d) On or before the 12th day after the end of each month, report to each cooperative association which so requests the class utilization of producer milk received by each handler from a cooperative association or from members of the association. For the purpose of this report, the milk caused to be so delivered by an association shall be prorated to each class in the proportion that the total receipts of milk received from producers by such handler were used in each class.

7. In § 1065.73, paragraph (d)(2) is revised to read as follows:

§ 1065.73 Payments to producers and to cooperative associations.

* * * * *

(d) * * *

(2) On or before the 14th day after the end of each month not less than the value of such milk at the uniform price as adjusted by the butterfat differential specified in § 1065.74 applicable at the location of the receiving handler's plant, less payment made pursuant to paragraph (d)(1) of this section;

* * * * *

8. In § 1065.85, paragraph (a) is revised to read as follows:

§ 1065.85 Assessment for order administration.

* * * * *

(a) Producer milk (including such handler's own production);

* * * * *

Signed at Washington, D.C., on May 10, 1977.

IRVING W. THOMAS,
Acting Administrator.

[FR Doc.77-13888 Filed 5-13-77;8:45 am]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[14 CFR Part 39]

[Docket No. 77-WE-11-AD]

AIRWORTHINESS DIRECTIVES

McDonnell Douglas Model DC-8-62, -62F, -63, and -63F Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rule making.

SUMMARY: This notice proposes to add an airworthiness directive that would require inspections and repair of the wing lower skin tee doubler and lower forward spar cap at the pylon attach points on all McDonnell Douglas Model DC-8-62, -62F, -63, and -63F airplanes to preclude the possibility of fatigue cracking of the wing structure. If allowed to continue indefinitely, such cracking could become hazardous to the continued airworthiness of the wing structure.

DATES: Comments must be received on or before: June 20, 1977.

ADDRESSES: Send comments on the proposal to: Department of Transportation, Federal Aviation Administration, Western Region, Attention: Regional Counsel, Airworthiness Rule Docket, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009.

FOR FURTHER INFORMATION CONTACT: Wallace M. Frei, Executive Secretary, Airworthiness Directives Review Board, Federal Aviation Administration, Western Region, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009; Telephone (213) 536-6351, or Richard G. Wittry, Attorney, Office of the Regional Counsel, Federal Aviation Administration, Western Region, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009; Telephone: (213) 536-6274.

SUPPLEMENTARY INFORMATION: There have been at least five instances of lower wing skin cracks in the area of the engine pylon attack on McDonnell Douglas Model DC-8-62, -62F, -63, -63F airplanes. The cracks were detected on airplanes having between 27,000 and 36,000 flight hours and are attributed to material fatigue. The last skin crack was detected due to a fuel leak in the area of the No. 2 engine pylon attach. Upon removal of the skin panel for repair, it was found that the pylon attach tee doubler and the wing lower forward spar cap were also cracked. The tee doubler has a history of fatigue cracking problems, with cracks being found as early as 1300 flight hours. McDonnell Douglas issued Service Bulletin 54-58 in May, 1970, containing instructions for a modification to the tee doubler designed to relieve any preload resulting from manufacturing tolerance buildup and thereby improve the fatigue life of the tee doubler. However this modification has proven to be inadequate, as cracking problems still exist. Consequently, McDonnell Douglas is designing a replacement for the tee doubler to prevent further fatigue cracks. This tee doubler redesign is expected to be available in a service bulletin about September, 1977.

Investigation of the spar cap failure has indicated that the cracking starts in the tee doubler and, as it progresses, eventually causes the skin panel and spar cap to crack also. If this cracking were allowed to progress without being detected for periods longer than the proposed inspection intervals in this AD, it could become detrimental to the structural integrity of the wing forward spar.

The manufacturer has issued Service Bulletin 57-83 containing x-ray inspection procedures and crack repair instructions to detect and repair such cracks before they become hazardous. Since this condition is likely to exist or develop in other aircraft of the same type design, the proposed airworthiness directive would require compliance with the inspection and repair requirements of Service Bulletin 57-83.

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Information on the economic, environmental, and energy impact that might result because of the adoption of the proposed rule is also requested. Communications should identify the airworthiness docket number and be submitted in duplicate to the Department of Transportation, Federal Aviation Administration, Western Region, Attention: Regional Counsel, Airworthiness Rule Docket, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. All communications received before June 20, 1977 will be considered by the Administrator before taking action upon the proposed rule. The proposals contained in the notice may be changed in light of comments received. All comments will be available, both before and after the closing date for comments, in the Airworthiness Rule Docket for examination by interested persons.

The principal authors of this document are Everett Pittman, Engineer, Aircraft Engineering Division, and R. G. Wittry, Attorney, Office of Regional Counsel, FAA Western Region.

Accordingly, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) by adding the following new Airworthiness Directive:

McDONNELL DOUGLAS: Applies to Model DC-8-62, -62F, -63, and -63F airplanes, certificated in all categories.

Compliance required as indicated.

To detect cracks and prevent failure of the wing lower forward spar cap, tee doubler, and wing skin, comply with the following:

(a) For airplanes with 35,000 or more hours time in service on the effective date of this A.D., within the next 800 hours time in service, unless already accomplished within the last 2400 hours, and thereafter at intervals not to exceed 3200 hours time in service, accomplish Paragraph (e).

(b) For airplanes with 30,000 to 34,999 hours time in service on the effective date of this A.D., within the next 1200 hours time in service, unless already accomplished within the last 2000 hours, and thereafter at intervals not to exceed 3200 hours time in service, accomplish Paragraph (e).

(c) For airplanes with 25,000 to 29,999 hours time in service on the effective date of this A.D., within the next 1600 hours time in service, unless already accomplished within the last 1600 hours, and thereafter at intervals not to exceed 3200 hours time in service, accomplish Paragraph (e).

(d) For airplanes with less than 25,000 hours time in service on the effective date of this A.D., within the next 3200 hours time in service, unless already accomplished, and thereafter at intervals not to exceed 3200 hours time in service, accomplish Paragraph (e).

(e) Perform an x-ray inspection of lower wing structure at all four pylon areas for cracks as outlined in Service Sketch 2575 of McDonnell Douglas DC-8 Service Bulletin 57-83 dated April 15, 1977 or later FAA approved revision.

(f) If cracks are found in the wing spar cap and/or wing skin as a result of the inspections of Paragraph (e), repair before further flight in accordance with the provisions of McDonnell Douglas DC-8 Service Bulletin 57-83 dated April 15, 1977 or later FAA approved revision. Cracks found in the pylon tee doubler shall be repaired in accordance with the limits in McDonnell Douglas DC-8 Service Bulletin 54-58 dated May 15, 1970 or later FAA approved revision.

(g) Equivalent inspections and repairs may be used when approved by the Chief, Aircraft Engineering Division, FAA Western Region.

(h) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of inspections required by this A.D.

(Secs. 313(a), 601, and 603, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1421, and 1423); Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)).)

The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Los Angeles, California on May 4, 1977.

ROBERT H. STANTON,
Director,
FAA Western Region.

[FR Doc.77-13857 Filed 5-13-77;8:45 am]

[14 CFR Part 71]

[Airspace Docket No. 77-SW-16]

PROPOSED DESIGNATION OF TRANSITION AREA

AGENCY: Federal Aviation Administration (FAA), (DOT).

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to designate a transition area at Bogalusa, Louisiana, to provide controlled airspace for aircraft executing an instrument approach procedure established for the George R. Carr Memorial Air Field.

DATES: Comments must be received by June 16, 1977.

ADDRESSES: Send comments on the proposal to: Chief, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101.

The official docket may be examined at the following location: Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101.

An informal docket may be examined at the Office of the Chief, Airspace and Procedures Branch, Air Traffic Division.

FOR FURTHER INFORMATION CONTACT:

John A. Jarrell, Airspace and Procedures Branch (ASW-535), Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101; telephone 817-624-4911, extension 302.

SUPPLEMENTARY INFORMATION: Subpart G, 71.181 (42 FR 440) of FAR Part 71 contains the description of transition areas designated to provide controlled airspace for the benefit of aircraft conducting IFR activity. Designation of the transition area at Bogalusa, Louisiana, will necessitate an amendment to this subpart.

COMMENTS INVITED

Interested persons may submit such written data, views or arguments as they may desire. Communications should be submitted in triplicate to Chief, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101. All communications received by June 16, 1977, will be considered before action is taken on the proposed amendment. No public hearing is contemplated at this time, but arrangements for informal conferences with Federal Aviation Administration officials may be made by contacting the Chief, Airspace and Procedures Branch. Any data, views, or arguments presented during such conferences must also be submitted in writing in accordance with this notice in order to become part of the record for consideration. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons.

DRAFTING INFORMATION

The principal authors of this document are John A. Jarrell, Air Traffic Division, and Robert L. Nelson, Office of the Regional Counsel, Southwest Region.

AVAILABILITY OF NPRM

Any person may obtain a copy of this notice of proposed rulemaking (NPRM) by submitting a request to the Chief, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101, or by calling 817-624-4911, extension 302. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should contact the office listed above.

THE PROPOSAL

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations as hereinafter set forth.

In subpart G, § 71.181 (42 FR 440) the following transition area is added:

BOGALUSA, LA.

That airspace extending upward from 700 feet above the surface within a 5-mile radius of the George R. Carr Memorial Air Field, (Latitude 30°48'41.6" N., Longitude 89°51' 53.9" W.) and within 2.5 miles either side of the Picayune VOR 335 radial extending 1 mile from the 5-mile radius.

Coincident with this action, the airport will be changed from VFR to IFR.

(Sec. 307(a), Federal Aviation Act of 1958 (49 U.S.C. 1348(a)); and Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)).)

The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Fort Worth, Tex., on April 29, 1977.

HENRY L. NEWMAN,
Director Southwest Region.

[FR Doc.77-13859 Filed 5-13-77;8:45 am]

[14 CFR Part 71]

[Airspace Docket No. 77-SW-18]

PROPOSED ALTERATION OF TRANSITION AREA

AGENCY: Federal Aviation Administration (FAA) (DOT).

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to alter the Pleasanton, Texas, transition area to provide controlled airspace for the change in the NDB approach course to the Pleasanton Municipal Airport from the 166° magnetic bearing to the 160° magnetic bearing. The change will improve the instrument approach to the airport.

DATES: Comments must be received by June 16, 1977.

ADDRESSES: Send comments on the proposal to: Chief, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101.

The official docket may be examined at the following location: Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101.

An informal docket may be examined at the Office of the Chief, Airspace and Procedures Branch, Air Traffic Division.

FOR FURTHER INFORMATION CONTACT:

John A. Jarrell, Airspace and Procedures Branch (ASW-535), Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101; telephone 817-624-4911, extension 302.

SUPPLEMENTARY INFORMATION: In Subpart G, § 71.181 (42 FR 440) of FAR Part 71, the description of the Pleasanton, Texas, transition area reflects the controlled airspace needed for the conduct of the NDB instrument approach procedure with the 166° magnetic bearing approach course. The change in the approach course to the 160° magnetic bearing will necessitate alteration of the transition area to provide controlled airspace for aircraft executing the instrument approach procedure on the new approach course.

COMMENTS INVITED

Interested persons may submit such written data, views or arguments as they may desire. Communications should be submitted in triplicate to Chief, Airspace

and Procedures Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101. All communications received by June 16, 1977, will be considered before action is taken on the proposed amendment. No public hearing is contemplated at this time, but arrangements for informal conferences with Federal Aviation Administration officials may be made by contacting the Chief, Airspace and Procedures Branch. Any data, views, or arguments presented during such conferences must also be submitted in writing in accordance with this notice in order to become part of the record for consideration. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons.

DRAFTING INFORMATION

The principal authors of this document are John A. Jarrell, Air Traffic Division, and Robert L. Nelson, Office of the Regional Counsel, Southwest Region.

AVAILABILITY OF NPRM

Any person may obtain a copy of this notice of proposed rulemaking (NPRM) by submitting a request to the Chief, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101, or by calling 817-624-4911, extension 302. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should contact the office listed above.

THE PROPOSAL

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations as hereinafter set forth.

In Subpart G, § 71.181 (42 FR 440), the Pleasanton, Texas, transition area is amended to read:

That airspace extending upward from 700 feet above the surface within a 5-mile radius of Pleasanton Municipal Airport (Latitude 28°57'00" N., Longitude 98°31'30" W.) and within 3 miles each side of the 160° magnetic bearing from the Pleasanton NDB to 8 miles south of the NDB.

(Sec. 307(a), Federal Aviation Act of 1958 (49 U.S.C. 1348(a)); and Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655 (c)).)

The Federal Aviation Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Issued in Fort Worth, Texas, on April 29, 1977.

HENRY L. NEWMAN,
Director, Southwest Region.

[FR Doc.77-13858 Filed 5-13-77;8:45 am]

FEDERAL TRADE COMMISSION

[16 CFR Part 13]

[File No. 731 0049]

OLIN SKI CO., INC.

Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Provisional consent agreement.

SUMMARY: This consent agreement contains an order which requires a Middletown, Conn., manufacturer and distributor of ski boots and other ski industry items, among other things to cease establishing, maintaining, and enforcing price maintenance agreements; requiring such agreements as a precondition to dealing; soliciting reports of recalcitrant distributors and terminating those dealerships; using serial numbers as a means of tracing products sold to unauthorized outlets; and failing to honor warranties for products sold by such establishments. Further, the order requires respondents to maintain prescribed files for a five-year period; and prohibits them from disseminating, for two years, all materials suggesting retail prices.

DATE: Comments must be received on or before July 11, 1977.

ADDRESS: Comments should be directed to: Office of the Secretary. Federal Trade Commission, 6th and Pennsylvania Ave. NW., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT:

William M. Gibson, Director, Boston Regional Office, Federal Trade Commission, 150 Causeway St., Room 1301, Boston, MA 02114. (617-223-6621).

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's rules of practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist and an explanation thereof, having been filed with and provisionally accepted by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) of the Commission's rules of practice (16 CFR 4.9(b)(14)).

[File No. 731 0049]

OLIN SKI COMPANY, INC.

AGREEMENT CONTAINING CONSENT ORDER TO CEASE AND DESIST

The Federal Trade Commission having initiated an investigation of certain acts and practices of Olin Ski Company, Inc., a corporation, and it now appearing that Olin Ski Company, Inc., hereinafter sometimes referred to as proposed respondent, is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed by and between Olin Ski Company, Inc., by its duly authorized officer, and its attorneys, and counsel for the Federal Trade Commission that:

1. Proposed respondent Olin Ski Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 475 Smith Street, Middletown, Connecticut 06457.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become a part of the official record of the proceedings unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released; and such acceptance may be withdrawn by the Commission if comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft of complaint here attached.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's rules, the Commission may without further notice to proposed respondent, (1) issue its compaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto.

When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Mailing of the complaint and decision as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service.

7. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

8. Proposed respondent has read the proposed complaint and order contemplated hereby and understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order, and that it may be liable for a civil penalty in the amount provided by law for each violation of the order after it becomes final.

ORDER

I. *It is ordered,* That respondent Olin Ski Company, Inc., a corporation, or any of its subsidiaries, divisions, successors and assigns, and its officers, and respondent's agents, representatives and employees, individually or in concert, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, manufacture, distribution, offering for sale or sale of skis, ski boots or other ski industry items (hereinafter referred to in this order as "said products") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Establishing, maintaining or enforcing with any authorized dealer any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling or enforcing, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any authorized dealer or prospective dealer to enter into an oral or written agreement or understanding that such authorized dea'er or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Prior to selling to a prospective dealer, requiring a promise or assurance, whether by understanding, agreement, or otherwise, that such dealer will adhere to and observe any resale or retail price for any of said products.

D. Requiring from any authorized dealer a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said authorized dealer.

E. Requesting or requiring, either directly or indirectly, any authorized dealer or prospective dealer to report any authorized dealer who does not adhere to any resale or retail price for any of said products.

F. Terminating or threatening, either directly or indirectly, to terminate any authorized dealer for the reason that such dealer had been reported as not adhering to or observing any resale or retail price for any of said products.

G. Terminating or threatening, either directly or indirectly, to terminate any authorized dealer because of any resale or retail price observed, maintained, or advertised by the authorized dealer for any of said products.

H. For two (2) years from the date on which this order becomes final, publishing or circulating any suggested resale or retail price for any of said products by price list, discount schedule, invoicing procedure, prepricing of commodities or their containers, or by any other such means, to any reseller or authorized dealer.

I. After the expiration of the time period stipulated in provision H above, publishing, disseminating or circulating to any reseller or authorized dealer any price list, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price of said products unless each reference to such price is accompanied by a clear and conspicuous disclosure that the price is suggested or approximate.

J. Refusing to honor a guaranty on any of said products for the reason that said product was not sold by an authorized dealer of respondents.

K. Requiring or inducing by threats of termination any authorized dealer or prospective dealer to refrain, or to agree to refrain from reselling any of said products to any independent dealer or distributor.

L. Using serial numbers, registration numbers or other similar identifying marks on said products as a means of tracing sales of said products to particular authorized dealers where the purpose of such tracing is to terminate or threaten to terminate authorized dealers of respondent selling said products to unauthorized dealers.

M. Requiring any authorized dealer to resell to respondent any unsold stock of said products in the event that business relations between respondent and the authorized dealer are terminated: *Provided, however,* That respondent shall not be prohibited from repurchasing such unsold stock with the consent of an authorized dealer, or where respondent has a "security interest" in said products, or where the authorized dealer is unable to meet its financial obligations to respondent.

II. *It is further ordered,* That respondent shall, within fifty-nine (59) days after service upon it of this order, mail to all current authorized dealers of said products, on official stationery of respondent, together with a copy of this order, a copy of the letter signed by the President of respondent, attached below as Exhibit A, and furnish the Commission proof of the mailing thereof.

III. *It is further ordered,* That respondent, during the five (5) year period of time following the date of service of this order, shall furnish to all future authorized dealers of said products at the time said dealers are opened as accounts a copy of this order, together with a copy of the letter attached below as Exhibit A.

IV. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions and subsidiaries now engaged in the manufacture, sale and distribution of said products and to all of its officers and directors now engaged in the manufacture, sale and distribution of said products.

V. *It is further ordered,* That respondent shall, within thirty (30) days from the date of service of this order, mail or deliver, and obtain a signed receipt therefor, a copy of this order to all of its sales personnel and sales representatives then engaged in the distribution, offering for sale or sale of said products.

VI. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emeregnce of a successor corporation, the creation of or dissolution of subsidiaries, or any other such change in the corporation which may affect compliance obligations arising out of the order.

VII. *It is further ordered,* That respondent, for a period of five (5) years from the date of service of this order, maintain files of all records referring or relating to respondent's termination of any authorized dealer, which files shall contain a record of any written communication to each such dealer explaining such termination, and which files will be made available for Commission inspection on reasonable notice; and, annually, for a period of five (5) years from the date of service, submit a report to the Commission listing the names and addresses of all authorized dealers whom respondent has terminated during the preceding year, a description of the reason for the termination and the date of the termination.

VIII. *It is further ordered,* That the agreement of Olin Corporation, the parent corporation of the respondent, which agreement is in the form of an affidavit of the president of Olin Corporation, attached below as Exhibit B, be incorporated herewith into this order.

IX. *It is further ordered,* That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

EXHIBIT A

(LETTERHEAD OF OLIN SKI COMPANY, INC.)

(Date)

DEAR AUTHORIZED OLIN SKI DEALER: We have agrfeed with the Federal Trade Commission to inform you that the Federal Trade Commission has entered into a consent order with the Olin Ski Company, Inc.

Our agreement to the issuance of a consent order was for settlement purposes only and does not constitute an admission that the law has been violated by us in connection with the marketing of skis, ski boots and other ski industry items.

Subject to the provisions of the enclosed consent order:

1. You are free to set your own retail or resale prices for our products;

2. We will not solicit, invite or encourage you or any other person to report that any authorized dealer is not following any retail or resale price for any of our products, and, further, we will not act on any such reports sent to us; and

3. We will not require any authorized dealer to refrain from advertising our products at any price to any person.

As a result of the consent order, you are free to determine independently your own pricing policy with respect to the advertising, offering for sale and sale of our products without interference by us and without leopardy from such determination to your status as an authorized dealer.

Very truly yours,

President.

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

OLIN SKI COMPANY, INC., A CORPORATION

[File No. 731 0049]

AFFIDAVIT OF JOHN M. HENSKE

State of Connecticut,
County of Fairfield,
ss.:

John M. Henske, being duly sworn, deposes and says:

1. I am the President and a Director of Olin Corporation (Olin), whose wholly owned subsidiary, Olin Ski Company, Inc., (Olin Ski), is the respondent herein.

2. Olin Ski will today execute with counsel for the Federal Trade Commission an Agreement Containing Consent Order to Cease and Desist pertaining to future marketing practices in the manufacture, sale or distribution of skis, ski boots or other ski industry items.

3. Olin will undertake to have Olin Ski fulfill all its obligations under the aforementioned agreement.

4. Olin will notify the Commission at least thirty days prior to any proposed change in Olin Ski such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

5. In the event that Olin Ski is sold, assigned or otherwise disposed of by Olin to any other person, firm, partnership or corporation, Olin will insert in the agreement of purchase a provision specifying that the purchaser or assignee is a successor to or assignee of the obligations of Olin under the order.

6. In the event that Olin dissolves Olin Ski and/or Olin Ski discontinues the manufacture, sale or distribution of skis, ski boots or other ski industry items, and if Olin at any time in the future manufactures, sells

or distributes skis, ski boots or other ski industry items, Olin will become a successor to or assignee of the obligations of Olin Ski under the order.

JOHN M. HENSKE

[File No. 731 0049]

OLIN SKI COMPANY, INC.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted an agreement to a proposed consent order from Olin Ski Company, Inc. (Olin Ski), manufacturer and distributor of ski boots and other ski industry items.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The proposed complaint alleges that Olin Ski, in those states which did not permit the execution of fair trade agreements, had engaged in certain anti-competitive practices which have the effect of enforcing and fixing Olin Ski's resale prices for these products and for its dealers, thereby eliminating price competition among retail dealers.

More specifically, the proposed complaint charges that with reference to the aforementioned products Olin Ski has (1) established agreements, understanding and arrangements that authorized dealerships will be granted only to those dealers maintaining certain resale prices; (2) informed some of its authorized dealers that it expects such dealers to maintain the resale prices or such dealerships will be terminated; (3) required its authorized dealers to agree not to sell these products to anyone not an authorized dealer; (4) solicited from its dealers and representatives the identities of those who fail to observe Olin Ski's sales policy by advertising, offering to sell or selling these products at prices below certain resale prices; (5) refused to honor a guaranty on its products sold by other than an authorized dealer of Olin Ski; and (6) affixed serial numbers on all skis shipped by Olin Ski to its authorized dealers for the purpose of tracing sales of such skis by authorized dealers to unauthorized retail outlets.

The proposed consent order requires the proposed respondent (1) to cease and desist from the practices set forth in numbered items 1 through 6 above, and, furthermore, (2) for two (2) years from the date on which the order becomes final to cease and desist from publishing or circulating to any reseller or authorized dealer any suggested resale or retail price for any of the aforementioned products by various enumerated methods.

The proposed consent order further requires Olin Ski (1) to indicate, after the expiration of the aforementioned two year period, on each page of any price list, price book, price tag, advertising or promotional material indicating any resale or retail prices for these products that any resale price is suggested or approximate; (2) to mail a copy of the order to each of its current authorized dealers with a covering letter stating that while Olin Ski may suggest resale prices for these products, dealers are free to set their own resale prices; (3) to maintain for the next five (5) years a file pertaining to Olin Ski's termination of any authorized dealer, which shall contain a record of any written communication to each such dealer, and, annually, for a period of five (5) years submit a report to the Commission listing the names and addresses of all authorized dealers whom Olin Ski has terminated during the preceding year, a description of the reason for the termination and the date of the termination.

The terms of the aforementioned order will have the effect of preventing Olin Ski from fixing the resale prices of the dealers for these products, thereby encouraging price competition in the sale of these products.

The purpose of this analysis is to facilitate public comment on the proposed order and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

JOHN F. DUGAN,
Acting Secretary.

[FR Doc.77-13698 Filed 5-13-77;8:45 am]

CONSUMER PRODUCT SAFETY COMMISSION

[16 CFR Part 1205]

POWER LAWN MOWERS

Proposed Safety Standard and Extension of Time

Correction

In FR Doc. 77-12721 appearing at page 23051 in the issue for Thursday, May 5, 1977, on page 23072, first column, the date in the 4th line of the second paragraph now reading "June 6, 1977" should have read "July 5, 1977".

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

[Docket No. R-77-451]

[24 CFR Part 58]

COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

Environmental Review Procedures

AGENCY: Department of Housing and Urban Development.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Secretary is conducting a study of the Environmental Review Procedures of the Community Development Block Grant Program to formulate revisions and amendments to these regulations. This Notice solicits comments and recommendations from all interested parties respecting these procedures and any revisions or amendments to the regulations.

DATE: Interested persons are invited to comment by June 13, 1977.

ADDRESS: Send written comments to Rules Docket Clerk, Office of the Secretary, Room 10141, 451 Seventh Street, S.W., Washington, D.C. 20410. (202-755-7603).

FOR FURTHER INFORMATION CONTACT:

Richard H. Broun, Director, Office of Environmental Quality, Room 7258, 451 7th Street, SW., Washington, D.C. 20410, 202-755-6308.

SUPPLEMENTAL INFORMATION: The regulations which implement section 104(h) of the Housing and Community Development Act of 1974 (Pub. L. 93-383) are set forth at 24 CFR Part 58. The purpose of this study is to formulate revisions and amendments to these regulations, which govern the carrying out by Community Development Block Grant (CDBG) applicants of the responsibilities for review, decisionmaking and action, under the National Environmental Policy Act of 1969.

Comments of all interested persons, agencies and groups are invited. Particularly desired are the views of localities which are CDBG applicants; of State and local agencies; groups and persons affected by the CDBG Program; and public interest groups having particular knowledge and experience in the process of environmental review and environmental protection, as they relate to the CDBG program.

Comments are invited which support or criticize the present form and content of 24 CFR Part 58, or which identify relevant issues which are not presently covered in the regulations. The comments and recommendations should address only those matters which concern the implementation of section 104(h) of the Housing and Community Development Act of 1974.

This study is being conducted under the direction of the Assistant Secretary for Community Planning and Development.

Issued at Washington, D.C. on May 6, 1977.

PATRICIA ROBERTS HARRIS,
Secretary of Housing and Urban Development.

[FR Doc.77-13845 Filed 5-13-77;8:45 am]

DEPARTMENT OF TRANSPORTATION

Coast Guard

[33 CFR Part 110]

[CGD 76-40]

ANCHORAGE GROUNDS

Boston Harbor, Mass.

AGENCY: Coast Guard, Department of Transportation.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: As a result of comments received, the Coast Guard is withdrawing the notice of proposed rulemaking to amend anchorage regulations for Boston Harbor, Massachusetts (41 FR 12901) which would have excluded certain vessels with unusually high masts from certain portions of two anchorage grounds.

EFFECTIVE DATE: This withdrawal is effective May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street

SW., Washington, D.C. 20590 (202–426–1477).

SUPPLEMENTARY INFORMATION: A public hearing on this proposal (41 FR 12901) was held by the Commander, First Coast Guard District on April 29, 1976, at Boston, Massachusetts. A total of 25 persons attended representing the Coast Guard, Federal Aviation Administration, Massachusetts Port Authority, maritime industry, Airline-Pilots Association, and harbor pilot's interests. Written comments were received from other interested persons.

DRAFTING INFORMATION

The principal persons involved in the drafting of this withdrawal are LCDR H. E. Snow, Project Manager, and Mr. Steve Jackson, Project Attorney.

DISCUSSION OF MAJOR COMMENTS

Several comments addressed the economics of the proposed amendment. The airline interests contended that adoption of the amendment would increase airport operating time as much as forty hours per year, depending on variable weather conditions, which would bring more revenue into the port and reduce the cost and inconvenience of diverting some flights to other destinations. The Coast Guard has determined that the cost of realizing this possible increase in airport operations would be excessive because a failsafe system to determine the mast height of vessels in the anchorage areas would have to be established. Providing a failsafe system would require rapid communications coordination between various agencies and a mandatory vessel reporting requirement as a base, with positive control of all activity in the area by on scene observers or electronic monitoring plus adequate back-up system provisions. The maritime interests pointed out, and the Coast Guard agrees, that adoption of the amendment reduces potential revenue to the port by restricting the size of vessels that may anchor in these anchorage areas.

Several comments concerning safety were received. The vessels affected by changing the regulations would be exposed to greater safety hazards. The potential for pollution of shores and adjacent waters by oil spills would increase because a greater number of lightering operations would have to be conducted outside of the protected waters of the harbor anchorage grounds. One comment noted that visually checking the area for anchored vessels by getting the airport fireboat underway when tower personnel cannot see the limits of the anchorage puts a burden on the firefighting resources of the airport and adds to traffic in the harbor when weather conditions are unfavorable. If the anchorage regulations were amended, this use of the fireboat would not be needed; however, there would still have to be surveillance of the anchorages so the problem of burdened resources and added traffic would continue. It was argued that changing the regulations would eliminate instances on record of flight crews being unaware that, under certain circumstances, surface vessels could present a safety hazard to the approach path. The Coast Guard has no control over the information pilots receive. If amending the regulations could cause a pilot to rely on there not being any large vessels in these anchorages and one inadvertently encroached the area, due to adverse weather, a more hazardous condition could exist than presently exists due to the uncertainty as to how large the vessels are in the anchorages.

In view of the foregoing, the Coast Guard has determined that rulemaking action on the proposed amendment is not appropriate at the present time, and that notice CGD 76–40 should be withdrawn. The withdrawal of the proposal, however, does not preclude the Coast Guard from considering similar action in the future.

In consideration of the foregoing, the proposal in the FEDERAL REGISTER (41 FR 12901) on March 29, 1976, to amend the anchorage regulations in Boston Harbor by adding § 110.134(b) (4) and (5) is hereby withdrawn.

Dated: May 6, 1977.

O. W. SILER,
Admiral, U.S. Coast Guard
Commandant.

[FR Doc.77–13878 Filed 5–13–77;8:45 am]

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

[33 CFR Part 303]

PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Proposed Rulemaking

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Proposed rules.

SUMMARY: We propose to issue nationwide permits for certain discharges of dredged or fill material into waters of the United States. If certain conditions are met, a person would not have to go through any of the paperwork or delay required for a regular permit from the Corps of Engineers. This proposal will reduce the expected workload brought about by the court-ordered expansion of our permit program.

DATE: Comments must be received on or before June 15, 1977.

ADDRESSES: Send all comments to: Office of the Chief of Engineers, Forrestal Building, Washington, D.C. 20314, Attn: DAEN–CWO–N.

FOR FURTHER INFORMATION CONTACT:

Mr. Curtis Clark or Mr. Bernie Goode, phone 202–693–5070.

SUPPLEMENTARY INFORMATION: Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344) requires permits from the Corps of Engineers for discharges of dredged or fill material into navigable waters. "Navigable waters" are defined in the FWPCA as "waters of the United States." As a result of a court decision that directed the Corps to extend its jurisdiction under section 404 to all waters of the United States (and not just traditionally navigable waters), the Corps issued an interim final regulation on July 25, 1975 (40 FR 144, 33 CFR 209.120) that defined the term "navigable waters" under Section 404 to include:

1. Navigable waters of the United States and their tributaries;
2. Interstate waters;
3. Intrastate waters that, if polluted, will affect interstate commerce; and
4. Wetlands adjacent to these waters.

The interim final regulation also identified the types of activities that would be regulated under Section 404. These include: Site development fills, causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; and backfilling of structures placed in water. Maintenance and emergency reconstruction of these activities are not included in the Section 404 program if the work does not deviate from the original structure. In addition, normal farming, forestry and ranching activities, such as plowing, cultivating, seeding, and harvesting are also excluded from the program.

The interim final regulation also adopted a procedure to process general permits for classes and categories of activities involving discharges of dredged or fill material that are substantially similar in nature, and that cause only minimal individual and cumulative environmental impact. The general permit concept is intended to eliminate unnecessary review of minor activities, and to focus the attention of the Corps on those activitie that require individual review. The Corps of Engineers has implemented the general permit program in its 37 District offices throughout the country. During the two year history of the program, a broad experience base has been gained with respect to certain types of minor activities. From that experience, the Corps has been able to identify certain discharges of dredged or fill material that can be permitted by a nationwide permit, with certain conditions to insure that the objectives and requirements of the FWPCA can be achieved.

The Corps of Engineers is today proposing to issue nationwide permits for certain discharges of dredged or fill material. The public is invited to submit any comments on these proposed nationwide permits to the Office, Chief of Engineers. These comments will be evaluated and appropriate revisions will be made prior to finalization. Those nationwide permits that are issued will be incorporated into revisions to and a reorganization of the Corps permit regulation that is in the final stages of review. When published in final form, the Corps permit regulation will be found in Parts 300–320 of Title 33 of the Code of Federal Regulations.

The nationwide permits that are being proposed today involve two basic categories: Discharges of dredged or fill material into certain smaller or minor waters of the United States and certain specific activities involving the discharge of dredged or fill material.

First, the nationwide permits would, subject to certain conditions specified in § 303.4–2(b), permit discharges into rivers, streams, and their impoundments that are located above their headwaters. (The headwater on a stream is the point above which the average annual flow is less than 5 cubic feet per second.) In addition, the nationwide permit would permit the discharge of dredged or fill material into any natural lake falling under the Section 404 program that is less than 10 acres in surface area (including its adjacent wetlands) if the lake is located on a river or stream beyond its headwaters or is isolated and not part of a surface river or stream. Finally, the nationwide permit would permit discharges into waters of the United States that are not part of a surface tributary system to an interstate water or a navigable water of the United States (i.e., waters subject to the ebb and flow of the tide, or that are used, have been used in the past, or are susceptible to use to transport interstate or foreign waterborne commerce). These latter waters would include intermittent streams, impoundments, and perched wetlands, the degradation or destruction of which, from a water quality standpoint, could affect interstate commerce.

Second, the nationwide permits would permit certain specific activities involving discharges of dredged or fill material in any water of the United States. These include:

(a) Dredged or fill material used for backfill or bedding for subaqueous utility line crossings;

(b) Certain bank stabilization activities; and

(c) Minor road fills.

Special conditions are identified for each of these activities, and a general list of conditions would also pertain to all of these activities. It should also be emphasized that some discharges of dredged or fill material will require individual attention, or special regional attention through the issuance of individual or general permits. In these cases, the District Engineer would still have the authority to process an individual or general permit notwithstanding these nationwide permits.

NOTE.—The Department of the Army has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A–107.

(Pub. L. 92–500, 86 Stat. 816 (33 U.S.C. 1344).)

Dated: May 10, 1977.

DRAKE WILSON,
Deputy Director of Civil Works.

Title 33 CFR, Chapter II is proposed to be amended by adding Part 303 to read as follows:

PART 303—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.

303.4 Discharges permitted by this regulation.
303.4–1 [Reserved]
303.4–2 Discharges into certain waters of the United States.
303.4–3 Specific categories of discharges.
303.4–4 Standard processing.

AUTHORITY. Sec. 404, Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344).

§ 303.4 Discharges permitted by this regulation.

Discharges of dredged or fill material specified in §§ 303.4–2 and 303.4–3, below, are hereby permitted for purposes of section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344) without further processing under this regulation, except as provided in § 303.4–4 below. Permits may, however, be required under section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403). Sections 303.4–2 and 303.4–3 do not obviate the requirement to obtain State or local assent required by law for the activities permitted therein.

§ 303.4–1 [Reserved]

§ 303.4–2 Discharges into certain waters of the United States.

(a) Discharges of dredged or fill material into the following waters of the United States are hereby permitted for purposes of section 404; *Provided,* The conditions in paragraph (b) of this section are met:

(1) Rivers, streams and their impoundments that are located above the headwaters;

(2) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are located on a river or stream beyond its headwaters. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark;

(3) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are isolated and not a part of a surface river or stream. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark; and

(4) Other waters of the United States that are not part of a surface tributary system to interstate waters or navigable waters of the United States.

(b) For purposes of section 404, the following conditions must be satisfied prior to any discharge of dredged or fill material in waters described in paragraph (a) of this section:

(1) That the discharge will not destroy or endanger the critical habitat of a threatened or endangered species, as identified under the Endangered Species Act;

(2) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities; and

(3) That the activity associated with the fill will be properly maintained.

(c) The authorization provided in this section shall not apply to dams which would be 25 feet or more in height or would have an impounding capacity of 50-acre feet or more (an individual permit will be required).

§ 303.4–3 Specific categories of discharges.

(a) The following discharges of dredged or fill material into waters of the United States are hereby permitted for purposes of section 404: *Provided,* The conditions specified in this paragraph and paragraph (b) of this section are met:

(1) Dredged or fill material placed as backfill or bedding for subaqueous utility line crossings: *Provided,* There is no change in preconstruction bottom contours. (The crossing will require a section 10 permit if in navigable waters of the United States.);

(2) Material discharged for bank stabilization provided that the bank stabilization activity is less than 500 feet in length, is for erosion prevention, and involves less than an average of one cubic yard per running foot along the bank: *And provided further,* That no material for bank stabilization is placed in any wetland area (this activity will require a section 10 permit if in navigable waters of the United States); and

(3) Road crossing fills including all attendant features both temporary and permanent that involve the discharge of less than 200 cubic yards of material below the plane of ordinary high water as part of a single and complete crossing of a waterbody: *Provided,* That the crossing is culverted or bridged to prevent the restriction of normal flow of the waterbody as a result of the fill: *Provided further,* That any wetlands adjacent to the waterbody to be crossed are no wider than 50 feet on either side of the waterbody: *And provided further,* That the District Engineer is notified, at least 30 days in advance, of the location and type of material for any discharge between 100 and 200 cubic yards in quantity (see also 33 CFR 303.4–4). The crossing will require a permit from the U.S. Coast Guard if located in navigable waters of the United States (see 33 U.S.C. 401).

(b) For the purposes of section 404, the following conditions must be satisfied prior to any discharge of dredged or fill material associated with the activities described above:

(1) That the discharge will not be located in the proximity of a public water supply intake;

(2) That the discharge will not occur in areas of concentrated shellfish production;

(3) That the discharge will not destroy or endanger the critical habitat of a threatened or endangered species, as identified under the Endangered Species Act;

(4) That the discharge will not disrupt the migration of those species of aquatic life indigenous to the waterbody;

(5) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities; and

(6) That the activity associated with the discharge will be properly maintained.

(c) In the event a discharge will occur in a water listed in § 303.4–2(a) and the discharge is of a type listed in § 303.4–3 (a), the applicable conditions for permitting that discharge will (in addition to those conditions specified in the description of the activity in § 303.4–3(a) be as listed in § 303.4–2(b) only.

§ 303.4–4 Standard processing.

Notwithstanding the provisions of §§ 303.4–2 and 303.4–3, above, individual or general permits will be required for any discharge(s) of dredged or fill material if the District Engineer determines that the concerns of the aquatic environment as expressed in the EPA Guidelines (see 40 CFR Part 230) indicate the need for such action.

[FR Doc.77–13839 Filed 5–12–77;8:45 am]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

[45 CFR Part 186]

INDIAN EDUCATION ACT, PART B

Corrections

AGENCY: Office of Education, HEW.

ACTION: Notice of Corrections

SUMMARY: In the FEDERAL REGISTER, Volume 42, No. 58, in the issue of Friday, March 25, 1977, several items were inadvertently left out of the document. While these changes are of a technical nature, the Office of Education will nevertheless entertain comments on the changes. The scope of these comments willl be limited to the matter contained in this notice and not to the entirety of the publication of March 25, 1977 at 42 FR pages 16258–16269.

COMMENT DATE: Comments must be received on or before May 26, 1977.

ADDRESSES: Office of Indian Education etc. (see below) plus Rm 4047

FOR FURTHER INFORMATION CONTACT:

Lawrence J. LaMoure, Director, Division of Special Projects and Programs, Office of Indian Education, 400 Maryland Avenue, SW., Washington, D.C. 20202 (202) 245–7525.

SUPPLEMENTARY INFORMATION: The Office of Education is correcting the document as follows:

(1) On page 16258, in the citation to the Catalog of Federal Domestic Assistance Programs following "No. 13.535," insert "and No. 13.569."

(2) On page 16262 in § 187.12(d), *Evaluation design.*, the point range is changed from "(0 to 10 points.)" to "(0 to 20 points.)."

(3) On page 16266 under § 187.63, *Criteria.*, a new proposed paragraph (a) is added to read:

(a) *Need.* (0 to 20 points). The need for the type of educational personnel for which the training is to be provided, as indicated by a survey of Indian educational personnel needs in the area to be served.

On page 16266, in § 187.63, *Criteria.*, former proposed paragraph (a) is redesignated as proposed paragraph (b) and the introductory text is revised to read:

(b) *Program Design.* (0 to 30 points). The quality of the program design as indicated by such factors as:

(4) On page 16268, in § 187.81, the second line is changed from "under Subparts B through F . . ." to "under Subparts B through G . . ."

(5 U.S.C. 553(b)(3)(B))

Dated: May 6, 1977.

L. DAVID TAYLOR,
Acting Deputy Assistant Secretary for Management Planning and Technology.

[FR Doc.77–14011 Filed 5–13–77;8:45 am]

DEPARTMENT OF TRANSPORTATION

Office of Pipeline Safety Operations

[49 CFR Part 193]

[Notice No. 77–4; Docket No. OPSO–46]

LNG FACILITIES; FEDERAL SAFETY STANDARDS

Development of New Standards; Correction

AGENCY: Materials Transportation Bureau, Office of Pipeline Safety Operations, DOT.

ACTION: Correction.

SUMMARY: This document corrects an advanced notice of proposed rulemaking that appeared at page 20776 in the FEDERAL REGISTER of Thursday, April 21, 1977, (FR Doc. 77–11359).

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Peggy Hammond, 202–426–0135.

The following corrections are made:

1. On page 20776 in the first column, the last paragraph of the Summary is corrected by adding, at the end of that paragraph, the statement "To the extent applicable, the new standards would govern offshore as well as onshore facilities."

2. On page 20777 in the third column, on the twelfth line of the first new paragraph, change "2000 Btu/ft²hr" to "2800 Btu/ft²hr".

3. On page 20778 in the first column, on the eleventh line of the first new paragraph, change "§ 193.109(f)" to § 193.109(e)".

4. On page 20778 in the second column, on the third line of the third paragraph, change "193.113" to "193.123".

5. On page 20782 in the second line of § 193.109(a), change "paragraph (f)" to "paragraph (e)".

6. On page 20783 in the seventh line of § 193.109(d)(3), change the equation "$(t)=(h/G)^{0.5}$" to "$(t)=(9)(h/G)^{0.5}$".

7. On page 20784, § 193.111(g)(2) is corrected to read "Impounding systems must be of Types 2.1 or 3.1, and surrounding grade elevation must be maintained not below the elevation at the top of the dike for a distance from the inner edge of the dike not less than $4(A)^{0.5}$, where A is the inside area across the top of the impounding space."

8. On page 20784, § 193.111(g)(3) is corrected at the end of that section by adding the words "other than those designed for automatic planned ignition" immediately after the words "known ignition sources" and immediately before the period at the end of the paragraph.

9. On page 20787, in the second and third lines of the note at the end of § 193.407(a)(3), change "§ 193.409(a)(6)" to "§ 193.409(a)(5)".

10. On page 20789, in the sixth and seventh lines of § 193.437(b)(2), change "§ 193.109(f)" to "§ 193.109(e)".

11. On page 20789, § 193.445(a)(1) is corrected in the third and fourth lines from the bottom of that section, by changing the words "the longer of the time periods set forth in § 193.439(b)" to read "the time period prescribed by § 193.441(b)".

12. On page 20789, in the fourth line of § 193.445(a)(2), change "§ 193.439" to "§193.441".

13. On page 20790, § 193.525(b) is corrected in the fifth line of that section by adding the word "not" immediately after "the covering must" and immediately before "be inflammable,".

14. On page 20791, § 193.525(c) is corrected in the fifth line of that section by adding the word "not" immediately after "insulation, in its installed condition, must" and immediately before "be inflammable."

15. On page 20791, item 2 under Instrumentation in the table following § 193.527(a) is corrected in the first and second lines by deleting the hyphen and by adding the words "and low" immediately after "recorders with high" and immediately before "pressure alarms."

16. On page 20792, § 193.615(c) is corrected in the third line of that section by deleting the word "receiving" which appears immediately after "operation until the" and immediately before "tank vehicle".

17. On page 20795, § 193.1033(a) is corrected in the fourth and fifth lines by changing the words "Section Q.9.1" to "Sections Q.8.1.1(a) and Q.9.1".

18 On page 20796, § 193.1117(b) is corrected in the third line by adding the word "cargo" immediately after "attendance during all" and immediately before "transfer operations."

19. On page 20796, § 193.1117(c)(2) is corrected in the first line by changing the words "Verify that the receiving vessels" to "For cargo transfer, verify that the cargo vessels".

Issued in Washington, D.C. on May 9, 1977.

CESAR DELEON,
Acting Director, Office of Pipeline Safety Operations.

[FR Doc.77–13992 Filed 5–13–77;8:45 am]

notices

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATOR EMERGENCY NATURAL GAS ACT OF 1977

[Docket No. E77-99]

PENNSYLVANIA GAS & WATER CO.

Supplemental Emergency Order

By order issued April 28, 1977, pursuant to section 6 of the Emergency Natural Gas Act of 1977 (Act), Pub. L. 95-2 (91 Stat. 4 (1977)), Pennsylvania Gas and Water Company (PG&W) was authorized to make certain emergency purchases of natural gas from Mellon Creek Operating Company (Mellon Creek). The order also authorized and ordered Florida Gas Transmission Company (Florida) and Transcontinental Gas Pipe Line Corporation (Transco) to transport such gas for PG&W. On May 6, 1977, PG&W and Florida filed a joint petition requesting amendment of the April 28 order insofar as it relates to the transportation charge to be imposed by Florida. PG&W and Florida state that Florida's proposed transportation rate stated in the April 28 order ($0.03 per Mcf plus compression fuel and line loss) was not agreed to by the parties and will not compensate Florida for the service to be rendered. The parties state that they have now reached agreement on the transportation charges and request approval of the proposed rate.

Florida will charge $0.1254 per MMBtu plus 1 percent of the volumes transported for compression fuel. Since the parties have agreed upon the transportation charges, I find no basis for prescribing other charges.

To the extent not inconsistent with the provisions of this order, the provisions of the April 28 order remain in full force and effect.

This order is issued pursuant to the authority delegated to me by the President in Executive Order No. 11969 (February 2, 1977), and shall be served upon PG&W, Mellon Creek, Florida and Transco. This order shall also be published in the FEDERAL REGISTER.

This order and authorization granted herein are subject to the continuing authority of the Administrator under Pub. L. 95-2 and the rules and regulations which may be issued thereunder.

RICHARD L. DUNHAM,
Administrator.

MAY 9, 1977.

[FR Doc.77-13909 Filed 5-13-77;8:45 am]

DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service

GRAIN STANDARDS

Michigan Grain Inspection Point

Statement of considerations. On January 5, 1977, a notice was published in the FEDERAL REGISTER (42 FR 1050) announcing that (1) the Detroit Board of Trade, Inc., the official agency designated pursuant to section 7(f) of the U.S. Grain Standards Act (7 U.S.C. 79(f)) for Detroit, Michigan, requested that its designation be transferred to Mr. Roy Marchetti, Chief Grain Inspector, Detroit Board of Trade, Inc., to be known as the Detroit Grain Inspection Service, Detroit, Michigan, effective March 1, 1977, and (2) Mr. Roy Marchetti, filed an application in accordance with § 26.96 of the regulations under the U.S. Grain Standards Act to become the official agency at Detroit, Michigan.

Interested persons were given until February 4, 1977, to submit written views and comments on the requested transfer and/or to make application to become the official agency at Detroit, Michigan.

No written views, comments, or additional applications have been received in response to the above notice.

After due consideration of all relevant matters, the official agency formerly operated by the Detroit Board of Trade, Inc., Detroit, Michigan, is hereby transferred to Mr. Roy Marchetti to operate as the Detroit Grain Inspection Service, 111 E. Larned Street, Detroit, Michigan 48226.

As a point of clarification, it should be noted that the United States Grain Standards Act (7 U.S.C. 71 *et seq.*, hereinafter referred to as the "Act") has been amended by Public Law 94-582, effective November 20, 1976, to extensively modify the official inspection system. The amended Act provides that the Administrator of the newly-created Federal Grain Inspection Service (FGIS), after conducting investigations and other studies, will designate official agencies at the various interior points. In implementing these provisions, FGIS is currently in the process of reviewing the designations of all agencies or persons presently designated to provide official inspection services. The amended Act further provides that existing agencies may continue to operate without a designation under the new law until the Administrator either grants or denies such designation to them or sets a period of time for their termination, not to exceed 2 years from the effective date of the amended Act, provided such agencies pay certain fees to FGIS to cover the cost of Federal supervision.

Accordingly, the transfer of designation, which is the subject of this notice, is made pursuant to the U.S. Grain Standards Act of 1976. The designation will continue until the Administrator of the FGIS either grants or denies a permanent designation to the recipient or sets a period of time for its termination, but in no event will it continue beyond November 20, 1978. This transfer of designation is an interim designation pending a formal designation under the U.S. Grain Standards Act as amended, 1976.

(Sec. 7, (PL-94-582) 90 Stat. 2870 (7 U.S.C. 79).)

Effective date: This notice shall become effective May 16, 1977.

Done in Washington, D.C., on May 10, 1977.

D. R. GALLIART,
Interim Administrator.

[FR Doc.77-13389 Filed 5-13-77;8:45 am]

CENTRAL INTELLIGENCE AGENCY

PRIVACY ACT OF 1974

Changes to Systems of Records

Notice is hereby given that the following Central Intelligence Agency systems of records, subject to the Privacy Act, which were published in 40 FR 39778 through 39801 of August 28, 1975 and 41 FR 12623 through 12625 of March 25, 1976 are amended. CIA record system 22 is merged with and redesignated as CIA-21. A new use is stated for CIA record system 3. CIA record system 1, with minor changes, is restated in its entirely for purposes of clarity. The other 14 changes consist mainly of title redesignations. These amendments are effective May 16, 1977. Also, a new routine general use statement that provides for the routine disclosure of records to NARS (GSA) in connection with records management inspections is proposed and shall become effective, in the absence of any negative comments from the public on or before June 15, 1977. Any data, views, or arguments concerning this proposed routine use statement may be submitted in writing to the Information and Privacy Coordinator, Central Intelligence Agency, Washington, D.C. 20505.

Dated May 9, 1977.

JOHN F. BLAKE,
Deputy Director for Administration, Central Intelligence Agency.

Addition to Statement of General Routine Uses of Systems of Records:

The following paragraph should be added to the Statement of General Routine Uses which precedes the notice of systems of records maintained by CIA:

6. A record from a system of records may be disclosed as a routine use to NARS (GSA) in records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

Systems of Records are amended as follows:

CIA—2

System name:

Office of Joint Computer Support Training and Skills Inventory.

Change:

Delete: Joint Computer Support, D/OJCS, and OJCS wherever they appear; substitute: Data Processing, D/ODP, and ODP, respectively.

CIA—3

System name:

Computer Access File.

Change:

Delete: Joint Computer Support wherever it appears; substitute: Data Processing.

Change:

Routine uses of records maintained in the system, including categories of users and the purposes of such uses: Add: Produce mailing lists of ODP computer users.

CIA—5

System name:

Legal Subject Records.

Change:

Record Source Categories: Delete: statement, (it is incomplete); substitute: Individuals identified in categories of individuals covered by this system as stated above, Federal agencies and other CIA record systems.

CIA—16

System name:

Parking Permit Files.

Change:

Retention and disposal: Add: Files destroyed upon overall reallocation of parking permits done periodically (approximately once a year.)

CIA-22

System name:

Freedom of Information Act Requesters.

Change:

Delete: Records in this system have been merged with and are redesignated as CIA-21, Privacy and Freedom of Information Acts Requesters.

CIA-24

System name:

Supplemental Personnel (Soft) Files.

Change:

Storage: Add: and magnetic disc.

Change:

Retrievability: Add: office, and end date of assignment.

Change:

Safeguards: Add: Access to information on magnetic disc is on limited need-to-know basis using controlled password identifier.

Change:

Retention and disposal: Add: Information on magnetic disc is deleted by erasure when individual reassignment is completed.

Change:

System Manager: Delete: The title; substitute: Chief, DDI Administrative Staff.

CIA—27

System name:

Supplemental Personnel (Soft) Files.

Change:

System manager: Delete: The title; substitute: Chief Career Management Staff, DDO.

CIA—30

System name:

Applicant Files.

Change:

Storage: Delete: and microfilm.

CIA—39

System name:

Publications About CIA.

Change:

System manager: Add: for Public Affairs.

CIA—40

System name:

CIA Authors File.

Change:

System manager: Delete: The title; substitute: Director, Office of Central Reference.

CIA—41

System name:

Intelligence in Public Literature File.

Change:

System manager: Delete: The title; substitute: Director, Office of Central Reference.

CIA—42

System name:

Library Open Literature Ready Reference File.

Change:

System manager: Delete: The title; substitute: Director, Office of Central Reference.

CIA—43

System name:

Briefing Program File.

Change:

System manager: Delete: The title; substitute: DDI Executive Officer.

CIA—45

System name:

Soviet-U.S. Contacts File.

Change:

System manager: Delete: The title; substitute: Director, Office of Central Reference.

CIA—49

System name:

Directorate of Operations Records System.

Change:

System manager: Delete: The title; substitute: Chief, Information Services Staff, DDO.

CIA—58

System name:

Inspector General Research Records.

Change:

Notification procedure: Delete: The fourth and fifth words in Line 2 "their correspondence"; substitute: (where the above words were taken from) "information about them".

CIA—1

System name:

Applications Tracking System.

System location:

Central Intelligence Agency
Washington, D.C. 20505.

Categories of individuals covered by the system:

Agency and contract employees, employees of contractor supporting Office of Data Processing, currently or formerly assigned to computer software development or maintenance projects in Applications.

Categories of records in the system:

Documentation of hours logged on each assigned programming or overhead project.

Authority for maintenance of the system:

Section 506(a), Federal Records Act of 1950 (44 U.S.C., Section 3101).

Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

Used by Applications staff for periodic reporting to management man-hours expended to develop assigned programming projects and overhead hours. Used for tracking the usage and scheduling of all resources for developing software.

Used to substantiate hours spent by contractor personnel on billable contractual activity.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

Storage:

Magnetic disc.

Retrievability:

Name and employee number.

Safeguards:

Limited to specifically designated and cleared personnel.

System manager(s) and address:

Director, Office of Data Processing
Central Intelligence Agency
Washington, D.C. 20505.

Notification procedure:

Individuals seeking to learn if this system of records contains information about them should direct their inquiries to:

Privacy Act Coordinator
Central Intelligence Agency
Washington, D.C. 20505.

Identification requirements are specified in the CIA rules published in the FEDERAL REGISTER (32 CFR 1901.13). Individuals must comply with these rules.

Record access procedures:

Request from individuals should be addressed as indicated in the notification section above.

Contesting record procedures:

The Central Intelligence Agency's regulations for access to individual records, for disputing the contents thereof, and for appealing an initial determination by CIA concerning access to or correction of records, are promulgated in the CIA rules section of the FEDERAL REGISTER.

Record source categories:

Agency employees, contract employees, employees of contractor supporting the Office of Data Processing.

CIA—21

System name:

Privacy and Freedom of Information Acts Requesters.

System location:

Central Intelligence Agency
Washington, D.C. 20505.

Categories of individuals covered by the system:

Individuals who make requests to CIA under provisions of the Privacy Act, the Freedom of Information Act, and Executive Order 11652.

Categories of records in the system:

Files contain all correspondence and other documents related to the receipt, processing, and final disposition of requests received by the Agency for information under the Privacy Act, the Freedom of Information Act, and Executive Order 11652.

Authority for maintenance of the system:

Privacy Act of 1974—Public Law 93-579; Freedom of Information Act of 1974, as Amended; and, Executive Order 11652.

Routine uses of records maintained in the system, including categories of users and the purpose of such uses:

Used by staff employees for reference purposes in formulating responses to Privacy Act, Freedom of Information Act, and Executive Order 11652 requests, and for reference in processing cases under appeal and litigation; to provide documentation for referral to other Federal agencies for their review pursuant to Executive Order 11652, and the Third Agency Rule; and, as a source of information for compiling reports required by the Acts.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

Storage:

Paper, electronic index and log.

Retrievability:

By name, case number.

Safeguards:

Paper files are stored in combination lock safes; automatic data processing index and log files need coded identifier for activation. Access on need to know basis.

Retention and disposal:

From the date of last entry, Freedom of Information Act requests are destroyed after two years, and Privacy Act requests are destroyed after five years. Records are destroyed by burning.

System manager(s) and address:

Chief, Information and Privacy Staff
Central Intelligence Agency
Washington, D.C. 20505.

Notification procedure:

Individuals seeking to learn if this system of records contains information about them should direct their inquiries to:

Information and Privacy Coordinator, Central Intelligence Agency, Washington, D.C. 20505.

Identification requirements are specified in the CIA rules published in the FEDERAL REGISTER (32 CFR 1901.13). Individuals must comply with these rules.

Record access procedures:

Request from individuals should be addressed as indicated in the notification section above.

Contesting record procedures:

The Central Intelligence Agency's regulations for access to individual records, for disputing the contents thereof, and for appealing an initial determination by CIA concerning access to or correction of records, are promulgated in the CIA rules section of the FEDERAL REGISTER.

Record source categories:

Requests received pursuant to the Privacy Act, the Freedom of Information Act, and Executive Order 11652.

[FR Doc.77-13959 Filed 5-13-77;8:45 am]

CIVIL AERONAUTICS BOARD

[Docket No. 30568; Order 77-5-46]

SONTAIR LIMITED

Approval of Transfer of Foreign Air Carrier Permit

Adopted by the Civil Aeronautics Board at its office in Washington, D.C. on the 10th day of May, 1977.

On March 2, 1977, Sontair Limited (Sontair) filed an application[1] for approval of the transfer to it of the foreign air carrier permit held by Seneca Air Services Limited (Seneca).

No answers to the application have been received.

BACKGROUND

Seneca is the holder of a foreign air carrier permit reissued pursuant to Order 75-4-112,[2] effective April 25, 1975. The applicant, Sonair, is owned by the same stockholders who own Seneca. The application states that, for internal reasons, the management wishes to deactivate Seneca and transfer Seneca's existing charter permit to Sontair.

The Air Transport Committee (ATC) of the Canadian Transport Commission has approved the transfer of commercial air services licenses from Seneca to Sontair. Seneca retains no Canadian authority.

OWNERSHIP AND CONTROL

The current permit holder, Seneca, has held a foreign air carrier permit since September 1, 1965.[3] At the time the permit was issued, the Board found the owners of the beneficial interest and all the officers and directors of Seneca to be Canadian nationals. The application states that Sontair is owned by the same shareholders who own Seneca. The officers of the corporation are Mr. Murray Ward, President; and Mr. Stuart Daymond, Vice President. Both officers are Canadian citizens. It is tentatively concluded, therefore, that the ownership and effective control of Sontair remains vested in nationals of Canada.

FINANCIAL AND OPERATIONAL FITNESS

Sontair was incorporated under The Corporations Act of the Province of Ontario on December 29, 1969. The ATC has issued Sontair license No. ATC 221/55(CF), dated April 10, 1975, a class

[1] A copy of the application has been transmitted to the President of the United States in accordance with the requirements of section 801 of the Act.

[2] The permit authorizes charter flights with respect to persons and their accompanied baggage, and planeload charter flights with respect to property, between any point or points in Canada and any point or points in the United States. The holder is limited to the use of "small aircraft" as defined by the Nonscheduled Air Service Agreement executed on May 8, 1974, by the Governments of the United States and Canada.

[3] See Order E-22615, approved September 1, 1965. The permit was reissued under delegated authority on April 23, 1975 pursuant to Order 75-4-112.

9–4 license which authorizes the holder to operate international charter commercial air services from a base at Chatham, Ontario. The licensee is restricted in its operations to the use of Groups A and B aircraft.[4] On September 22, 1976, the Canadian Department of Transport, Civil Aviation Branch, issued Sontair Operating Certificate No. 2803 which certifies that Sontair is adequately equipped and able to conduct a safe operation.

The applicant's balance sheet as of December 31, 1975 showed current assets of $96,235 and fixed assets of $92,590 for total assets of $188,825. The company had current liabilities of $102,-141 and total liabilities of $148,700, leaving $40,125 as shareholders' equity. The company's income statement for the 12-month period ending December 31, 1975 shows an operating income of $3,698. In addition the carrier states that since its inception it has always met its financial obligations and has never defaulted on any commitment to provide transportation.

Sontair has two aircraft available for charter operations to the United States: one Group A aircraft with seating capacity of one passenger and one Group B aircraft with seating capacity of five passengers. Neither Seneca nor Sontair has a record of any accidents, injuries, tariff, or safety violations.

PUBLIC INTEREST

The applicant relies upon the Nonscheduled Air Service Agreement signed by the Governments of Canada and the United States on May 8, 1974, as the basis for the grant of the requested transfer of authority, By diplomatic note No. ECT–850, dated May 9, 1974, the Government of Canada designated the applicant under the Agreement to perform charter services with small aircraft.

In view of the foregoing and all the facts of record, the Board tentatively finds and concludes:

1. That Sontair Limited is fit, willing, and able properly to perform the air transportation proposed in its application and to conform to the provisions of the Act and the rules, regulations, and requirements of the Board thereunder;

2. That Sontair Limited is substantially owned and effectively controlled by nationals of Canada;

3. That Sontair Limited should be subject to all the terms, conditions, and limitations set forth in the specimen foreign air carrier permit attached to this order, and to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board;

4. That the transfer of the foreign air carrier permit from Seneca Air Services Limited to Sontair Limited is in the public interest; and

5. That an evidentiary hearing is not required in the public interest.

Accordingly, *It is ordered*, That: 1. All interested persons be and they hereby are directed to show cause why the Board should not make final the tentative findings and conclusions stated herein and why an order should not be issued, subject to the approval of the President pursuant to section 801 of the Act, transferring and reissuing the permit held by Seneca Air Services Limited to Sontair Limited, and canceling the permit issued by Order 75–4–112 to Seneca Air Services Limited;

2. Any interested person having objection to the issuance, without hearing of an order making final the tentative findings and conclusions stated herein shall file a statement of objections supported by evidence within 21 days after the adoption of this order. If an evidentiary hearing is requested, the objection should state in detail why such hearing is considered necessary and what relevant and material facts would be expected to be established through such hearing which cannot be established in written pleadings;

3. If timely and properly supported objections are filed, further consideration will be accorded the matters and issues raised by the objections before further action is taken by the Board; [5]

4. In the event no objections are filed, all further procedural steps will be deemed to have been waived, and the Board may proceed to enter an order in accordance with the tentative findings and conclusions set forth herein; and

5. Copies of this order shall be served upon Sontair Limited, and the Ambassador of Canada in Washington, D.C.

This order will be published in the FEDERAL REGISTER and will be transmitted to the President.

By the Civil Aeronautics Board.

PHYLLIS T. KAYLOR,
Secretary.

CIVIL AERONAUTICS BOARD: PERMIT TO FOREIGN AIR CARRIER FOR SMALL AIRCRAFT OPERATIONS (AS REISSUED)

Sontair Limited is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958 and the orders, rules, and regulations issued thereunder, to engage in charter foreign air transportation as follows:

> Charter flights with respect to persons and their accompanied baggage, and planeload charter flights with respect property, between any point or points in Canada and any point or points in the United States.

The holder shall be authorized to perform those types of charters originating in Canada as are now, or may hereafter be, prescribed for carriage by small aircraft in Annex B (III) (B) of the Nonscheduled Air Service Agreement between the United States and Canada, signed May 8, 1974 including any amendments, supplements, reservations, or supersessions to that Agreement: *Provided*, That any such charters may be performed only to the extent authorized by the Air Carrier Regulations of the Canadian Transport Commission applicable to operations by small aircraft, and the authority of the holder to perform such charters shall be subject to those Regulations.[1] The authority of the holder to perform United States-originating charters shall, in accordance with Annex B(III) (A) of such Nonscheduled Air Service Agreement, be limited to commercial air transportation of passengers and their accompanied baggage, and property, on a time, mileage, or trip basis, where the entire planeload capacity of one or more aircraft has been engaged by a person for his own use or by a person for the transportation of a group of persons and/or their property, as agent or representative of such groups, or such small aircraft operations as may be authorized pursuant to the amendment, supplement, reservation, or supersession to that Agreement.

This permit shall be subject to the following terms, conditions, and limitations:

(1) In the performance of the charter operations authorized by this permit, the holder shall not use "large aircraft" as defined in Annex A(I) (A) of the Nonscheduled Air Service Agreement between the United States and Canada, signed May 8, 1974, including amendments, supplements, reservations, or supersessions to that Agreement.

(2) The holder shall not engage in foreign air transportation between the United States and any point or points, other than a point or points in Canada, or transport any property or persons whose journey includes a prior, subsequent, or intervening movement by air (except for the movement of passengers independently of any group) to or from a point not in the United States or Canada: *Provided*, That the Board may, upon application by the holder, or by regulation, authorize the performance of charters where such movements are involved.

(3) The holder shall not perform United States-originating charter flights which at the end of any calendar quarter would result in the aggregate number of all United States-originating charter flights performed by the holder on or after May 8, 1974, exceeding by more than one-third the aggregate number of all Canadian-originating charter flights performed by the holder on or after May 8, 1974: *Provided*, That the Board may authorize the performance of charters not meeting the requirements set forth. For the purpose of making such computation the following shall apply:

(a) A charter shall be considered to originate in the United States (or Canada) if the passengers or property are first taken on board in that country, and shall be considered as one flight whether the charter be one-way, round-trip, circle tour, or open jaw, even if a separate contract is entered into for a return portion of the charter trip from Canada (or the United States).

(b) The computation shall be made separately for (i) "small aircraft" flights of persons; and (ii) "small aircraft" flights of property.

(c) In the case of a lease of aircraft with crew for the performance of a charter flight on behalf and under the authority of another carrier, the flight shall be included in the computation if the holder is the lessee, and

[4] Under the Canadian Air Transport Committee regulations, Group A consists of aircraft having a maximum authorized takeoff weight on wheels not greater than 4,300 pounds. Group B consists of aircraft having a maximum authorized takeoff weight on wheels greater than 4,300 pounds, but not greater than 7,000 pounds.

[5] Since provision is made for the filing of objections to this order, petitions for reconsideration will not be entertained.

[1] Annex B(III) (B) presently authorizes Canadian-originating small aircraft charters of the types prescribed in section (II) (B); but only to the extent applicable to small aircraft pursuant to Canadian Transport Commission Regulations. The applicable types of charters presently authorized are: Single Entity Passenger, Single Entity Property, Pro Rata Common Purpose, and Inclusive Tour. (In some instances split passenger charters are authorized.)

shall not be included if the holder is the lessor.

(d) There shall be excluded from the computation:

(i) Flights utilizing aircraft having a maximum authorized takeoff weight on wheels (at determined by Canadian Transport Commission Regulations) not greater than 18,000 pounds; and

(ii) Flights originating at a United States terminal point of a route authorized pursuant to the Air Transport Services Agreement between the United States and Canada, signed January 17, 1966, as amended, or any agreement which may supersede it, or any supplementary agreement thereto which establishes obligations or privileges thereunder (if, pursuant to any such agreement, the holder also holds a foreign air carrier permit authorizing individually ticketed or individually waybilled service over such route, and provides some scheduled service on any route pursuant to any such agreement), when such flights serve either (a) a Canadian terminal point on such route, or (b) any Canadian intermediate point authorized for service on such route by such foreign air carrier permit.

(4) The holder may grant stopover privileges at any point or points in the United States only to passengers and their accompanied baggage moving on a Canadian-originating flight operating under a contract for round-trip charter transportation to be provided solely by the holder and as to which the same aircraft stays with the passengers throughout the journey: *Provided*, That the Board may authorize the performance of charters not meeting the requirements set forth.

(5) The Board, by order or regulation and without hearing, may require advance approval of individual charter trips conducted by the holder pursuant to the authority granted by this permit, if it finds such action to be required in the public interest.

(6) The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of Canada for Canadian international air service.

(7 This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and Canada shall be parties.

(8) This permit shall be subject to the condition that the holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

(9) The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

(10) By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim airsing out of operations by the holder under this permit.

The exercise of the privileges granted by this permit shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall become effective on ---- ------. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the charter foreign air transportation hereby authorized from the transportation which may be operated by carriers designated by the Government of Canada (or in the event of the elimination of part of the charter foreign air transportation hereby authorized, the authority granted herein shall be terminated to the extent of such elimination), or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of Canada in lieu of the holder hereof, or (3) upon the termination or expiration of the Nonscheduled Air Service Agreement between the United States and Canada, signed May 8, 1974: *Provided, however*, That clause (3) of this paragraph shall not apply if, prior to the occurrence of the event specified in clause (3), the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and Canada are or shall become parties.

In witness whereof, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the ----------

(SEAL)

Secretary.

Issuance of this permit to the holder approved by the President of the United States on ----------
in ----------

[FR Doc.77-13915 Filed 5-13-77;8:45 am]

CIVIL RIGHTS COMMISSION

CALIFORNIA ADVISORY COMMITTEE

Agenda and Notice of Open Meeting

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commissions on Civil Rights, that a planning meeting of the California Advisory Committee (SAC) of the Commission will convene at 1:00 p.m. on June 10, 1977 and will end at 3:00 p.m. on June 11, 1977, in the Town and Country Hotel, 500 Hotel Circle, San Diego, California 92138.

Persons wishing to attend this open meeting should contact the Committee Chairperson, or the Western Regional Office of the Commission, 312 North Spring Street, Room 1015, Los Angeles, California 90012.

The purpose of this meeting is a training session for new members and program planning for recharter period with full State Advisory Committee.

This meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, D.C., May 10, 1977.

JOHN I. BINKLEY,
Advisory Committee Management Officer.

[FR Doc.77-13879 Filed 5-13-77;8:45 am]

CONNECTICUT ADVISORY COMMITTEE

Agenda and Notice of Open Meeting

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning meeting of the Connecticut Advisory Commission (SAC) of the Commission will convene at 7:00 p.m. and will end at 11:00 p.m. on June 30, 1977, Holiday Inn 900 E. Main Street, Meriden, Connecticut 06450.

Persons wishing to attend this open meeting should contact the Committee Chairperson, or the Northeastern Regional Office of the Commission, 26 Federal Plaza, Room 1639, New York, New York 10007.

The purpose of this meeting is to discuss steps on domestic violence project and other matters of Commission importance.

This meeting will be conducted pursuant to the rules and regulations of the Commission.

Dated at Washington, D.C., May 11, 1977.

JOHN I. BINKLEY,
Advisory Committee Management Officer.

[FR Doc.77-13880 Filed 5-13-77;8:45 am]

IDAHO ADVISORY COMMITTEE

Agenda and Notice of Open Meeting

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning meeting of the Idaho Advisory Committee (SAC) of the Commission will convene at 9 a.m. and will end at 12:30 p.m. on June 11, 1977, at Tapadera Inn, 1325 Main, Lewiston, Idaho 83501.

Persons wishing to attend this open meeting should contact the Committee Chairperson, or the Northwest Regional Office of the Commission, 915 Second Avenue, Room 2852, Seattle, Washington 98174.

The purpose of this meeting is to plan for project in Idaho.

This meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, D.C., May 11, 1977.

JOHN I. BINKLEY,
Advisory Committee Management Officer.

[FR Doc.77-13881 Filed 5-13-77;8:45 am]

MASSACHUSETTS ADVISORY COMMITTEE

Agenda and Notice of Open Meeting

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning meeting of the Massachusetts Advisory Committee (SAC) of the Commission will convene at 12 p.m. on June 28, 1977, Jewish Labor Committee, 27 School Street, Boston, Massachusetts.

Persons wishing to attend this open meeting should contact the Committee Chairperson, or the Northeastern Regional Office of the Commission, 26 Federal Plaza, Room 1639, New York, New York 10007.

The purpose of this meeting is to discuss progress report on all subcommittees.

This meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, D.C., May 10, 1977.

JOHN I. BINKLEY,
Advisory Committee Management Officer.

[FR Doc.77-13882 Filed 5-13-77;8:45 am]

NEW HAMPSHIRE ADVISORY COMMITTEE

Agenda and Notice of Open Meeting

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning meeting of the New Hampshire Advisory Committee (SAC) of the Commission will convene at 7:00 p.m. and will end at 11:00 p.m. on June 21, 1977, New Hampshire Highway Hotel, Concord, New Hampshire.

Persons wishing to attend this open meeting should contact the Committee Chairperson, or the Northeastern Regional Office of the Commission, 26 Federal Plaza, Room 1639, New York, New York 10007.

The purpose of this meeting is to discuss follow-up activities to committee's conference on correctional system.

This meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, D.C., May 10, 1977.

JOHN I. BINKLEY,
Advisory Committee Management Officer.

[FR Doc.77-13883 Filed 5-13-77;8:45 am]

NEW JERSEY ADVISORY COMMITTEE

Agenda and Notice of Open Meeting

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning meeting of the New Jersey Advisory Committee (SAC) of the Commission will convene at 6:30 p.m. and end at 9:00 p.m. on June 2, 1977, 3236 Green Street, Newark, New Jersey.

Persons wishing to attend this open meeting should contact the Committee Chairperson, or the Northeastern Regional Office of the Commission, 26 Federal Plaza, Room 1639, New York, New York 10007.

The purpose of this meeting is to discuss next steps on project.

This meeting will be conducted pursuant to the rules and regulations of the Commission.

Dated at Washington, D.C., May 10, 1977.

JOHN I. BINKLEY,
Advisory Committee Management Officer.

[FR Doc.77-13884 Filed 5-13-77;8:45 am]

RHODE ISLAND ADVISORY COMMITTEE

Agenda and Notice of Open Meeting

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning meeting of the Rhode Island Advisory Committee (SAC) of the Commission will convene at 4:00 p.m. and will end at 6:00 p.m. on June 28, 1977, Central Congregational Church, 296 Angell Street, Providence, Rhode Island.

Persons wishing to attend this meeting should contact the Committee Chairperson or the Northeastern Regional Office of the Commission, 26 Federal Plaza, Room 1639, New York, New York 10007.

The purpose of this meeting is to discuss progress report from subcommittee.

This meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, D.C., May 10, 1977.

JOHN I. BINKLEY,
Advisory Committee Management Officer.

[FR Doc.77-13885 Filed 5-13-77;8:45 am]

VERMONT ADVISORY COMMITTEE

Agenda and Notice of Open Meeting

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a planning meeting of the Vermont Advisory Committee (SAC) of the Commission will convene at 6:30 p.m. and will end at 10:00 p.m. on June 20, 1977, at Susan Webb's house, Brooksend, Plymouth, Vermont 05056.

Persons wishing to attend this open meeting should contact the Committee Chairperson, or the Northeastern Regional Office of the Commission, 26 Federal Plaza, 1639, New York, New York 10007.

The purpose of this meeting is to discuss progress on all subcommittees.

This meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, D.C., May 10, 1977.

JOHN I. BINKLEY,
Advisory Committee Management Officer.

[FR Doc.77-13886 Filed 5-13-77;8:45 am]

DEPARTMENT OF COMMERCE

Bureau of the Census

CENSUS ADVISORY COMMITTEE ON THE SPANISH ORIGIN POPULATION FOR THE 1980 CENSUS

Public Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix I (1974)), notice is hereby given that the Census Advisory Committee on the Spanish Origin Population for the 1980 Census will convene on June 3, 1977 at 9:00 a.m. The Committee will meet in Room 2424, Federal Building 3, at the Bureau of the Census in Suitland, Maryland.

The Committee is composed of 21 members appointed by the Secretary of Commerce. It was established in February 1975 to advise the Director, Bureau of the Census, on such 1980 census planning elements as improving the accuracy of the population count, developing definitions for classification of the Spanish-origin population, recommending subject content and tabulations of especial use to the Spanish-origin population, and expanding the dissemination of census results among present and potential users of census data in the Spanish-origin population.

The agenda for the meeting is: (1) Discussion of the selection of a site for a dress rehearsal for the 1980 census, (2) discussion of subject content—(a) population, and (b) housing; (3) reports by Committee members on (a) content, except race and ethnicity, and (b) race and ethnicity; (4) Affirmative Action Report; (5) Committe dicussion on (a) chronology of 1980 census planning, (b) survey of income and education, and (c) review of Committee recommendations and Bureau's responses.

The meeting will be open to the public and a brief period will be set aside for public comment and questions. Extensive questions or statements must be submitted in writing to the Committee Control Officer at least 3 days prior to the meeting.

Persons wishing further information concerning this meeting or who wish to submit written statements may contact Clifton S. Jordan, Deputy Chief, Demographic Census Staff, Bureau of the Census, Room 3779, Federal Building 3, Suitland, Maryland. (Mailing address: Washington, D.C. 20233) Telephone: (301) 763-5169.

Dated: May 11, 1977.

MANUEL D. PLOTKIN,
Acting Director, Bureau of the Census.

[FR Doc.77-13991 Filed 5-13-77;8:45 am]

Economic Development Administration

FAVORITE FOOTWEAR, INC.

Petition for a Determination of Eligibility To Apply for Trade Adjustment Assistance

A petition by Favorite Footwear, Inc., 37-11, 35th Avenue, Long Island City, New York 11101, a producer of men's, women's and children's footwear, was

accepted for filing on May 6, 1977, pursuant to section 251 of the Trade Act of 1974 (Pub. L. 93-618) and § 315.23 of the Adjustment Assistance Regulations for Firms and Communities (13 CFR Part 315). Consequently, the United States Department of Commerce has initiated an investigation to determine whether increased imports into the United States of articles like or directly competitive with those produced by the firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of the petitioning firm.

Any party having a substantial interest in the proceedings may request a public hearing on the matter.

A request for a hearing must be received by the Chief, Trade Act Certification Division, Economic Development Administration, U.S. Department of Commerce, Washington, D.C. 20230, no later than the close of business of May 26, 1977.

CHARLES L. SMITH,
Acting Director, Trade Act Certification Division, Office of Planning and Program Support.

[FR Doc.77-13848 Filed 5-13-77;8:45 am]

National Oceanic and Atmospheric Administration

National Marine Fisheries Service

WINDSOR SAFARI PARK

Modification of Permit

Notice is hereby given that, pursuant to the provisions of § 216.23 (d) and (e) of the regulations governing the taking and importing of marine mammals (50 CFR Part 216), the public display permit issued to Windsor Safari Park, Berkshire SL4 4AY England on June 18, 1976, is modified in the following manner:

The period of validity, during which the authorized marine mammals may be taken, is extended from December 31, 1977, to December 31, 1979.

This modification is effective May 16, 1977.

The Permit is modified, and documentation pertaining to the modification is available for review in the following offices:

Director, National Marine Fisheries Service, 3300 Whitehaven Street NW., Washington, D.C.; and

Regional Director, National Marine Fisheries Service, Southwest Region, 300 South Ferry Street, Terminal Island, California 90731.

Dated: April 29, 1977.

WINFRED, H. WEIBOHM,
Associate Director, National Marine Fisheries Service.

[FR Doc.77-13837 Filed 5-13-77;8:45 am]

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

BILATERAL TEXTILE NEGOTIATIONS WITH THE GOVERNMENTS OF EGYPT, JAPAN, PAKISTAN, SINGAPORE, THE REPUBLIC OF CHINA AND THE REPUBLIC OF KOREA

Solicitation of Public Comment

MAY 11, 1977.

On April 21, 1974, the Committee for the Implementation of Textile Agreements published a notice in the FEDERAL REGISTER (39 FR 13307) conveying the Committee's intention to announce and solicit comment on U.S. Government actions implementing the GATT Arrangement Regarding International Trade in Textiles.

Pursuant to the terms of the Arrangement and certain bilateral textile agreements entered into thereunder, the Committee anticipates holding negotiations with the Governments of Egypt, Japan, Pakistan, Singapore, the Republic of China, and the Republic of Korea before the end of 1977. Any party wishing to express a view or provide data or information with regard to the treatment of any product under the bilateral textile agreements and any other aspects thereof, or with respect to imports of other textile products from these countries, is invited to submit such in ten copies to Mr. Robert E. Shepherd, Chairman of the Committee for the Implementation of Textile Agreements and Deputy Assistant Secretary for Resources and Trade Assistance, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Room 3826, Washington, D.C. 20230. Inasmuch as the exact timing of the negotiations is not yet certain it would be appreciated if comments were submitted promptly. Announcement of negotiations with the Governments of Hong Kong, India, Malaysia, Poland and Romania was published in the FEDERAL REGISTER on March 17, 1977 (42 FR 14897).

Views, data or information submitted under this procedure will be available for public inspection in the Office of Textiles, Room 2815, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, D.C. 20230, and may be obtained upon written request. Whenever practicable, public comment may be invited concerning views, comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments on any negotiation, consultation, market disruption or any other matter pursuant to this notice is not a waiver in any respect of the exemption contained in 5 U.S.C. 553 (a)(1) and 554(a)(4) relating to matters which constitute "a foreign affairs function of the United States".

ROBERT E. SHEPHERD,
Chairman, Committee for the Implementation of Textile Agreements, and Deputy Assistant Secretary for Resources and Trade Assistance, Department of Commerce.

[FR Doc.77-13912 Filed 5-13-77;8:45 am]

DEPARTMENT OF DEFENSE

Department of the Air Force

USAF SCIENTIFIC ADVISORY BOARD

Meeting

MAY 3, 1977.

The USAF Scientific Advisory Board ad hoc Committee on Cruise Missile Technology will hold meetings on June 2 and 3, 1977; from 10 a.m. to 4 p.m. on June 2nd and 9 a.m. to 1 p.m. on June 3rd. The meetings will consist of a portion of the ad hoc Committee on Cruise Missile Technology going to DMAC in St. Louis, Missouri to receive classified briefings on TERCOM and related DMAC operations; and other portions of the ad hoc Committee going to Boeing in Seattle, Washington and Convair in San Diego, California to receive classified briefings on the respective Cruise Missile Programs.

The meeting will be closed to the public in accordance with section 552b(c) of Title 5, United States Code, specifically subparagraph (1).

For further information contact the USAF Scientific Advisory Board Secretariat at 202-697-4648.

FRANKIE S. ESTEP,
Air Force Federal Register Liaison Officer, Directorate of Administration.

[FR Doc.77-13903 Filed 5-13-77;8:45 am]

USAF SCIENTIFIC ADVISORY BOARD

Meeting

MAY 4, 1977.

The USAF Scientific Advisory Board ad hoc Committee on Defensive Chemical Systems will hold a meeting on June 1 and 2, 1977 from 9 a.m. to 4 p.m. each day at the Army Chemical Systems Laboratory, Edgewood, Maryland.

The purpose is to hold classified discussions with the Army on prophylaxis and treatment for aircrews operating in a hostile chemical environment.

The meeting will be closed to the public in accordance with section 552b(c) of Title 5, United States Code, specifically subparagraph (1).

For further information, contact the Scientific Advisory Board at 202-697-4648.

FRANKIE S. ESTEP,
Air Force Federal Register Liaison Officer, Directorate of Administration.

[FR Doc.77-13904 Filed 5-13-77;8:45 am]

USAF SCIENTIFIC ADVISORY BOARD

Meeting

MAY 5, 1977.

The USAF Scientific Advisory Board ad hoc Committee on Test and Evaluation will hold a meeting on June 21, 1977 from 8:30 a.m. to 5:30 p.m. at the Air Force Test and Evaluation Center, Kirtland Air Force Base, New Mexico.

The Committee will receive classified briefings and hold classified discussions on the Air Force JTIDS program. The meeting will be closed to the public in accordance with section 552b(c) of Title 5, United States Code, specifically subparagraph (1).

For further information contact the Scientific Advisory Board Secretariat at 202-697-8404.

FRANKIE S. ESTEP,
Air Force Federal Register Liaison Officer, Directorate of Administration.

[FR Doc.77-13905 Filed 5-13-77;8:45 am]

Office of the Secretary

ADVISORY GROUP ON ELECTRON DEVICES

Advisory Committee Meeting

The DOD Advisory Group on Electron Devices (AGED) will meet in closed session at 201 Varick Street, 9th Floor, New York, N.Y. 10014, on June 2, 1977.

The purpose of the Advisory Group is to provide the Director of Defense Research and Engineering, the Director, Defense Advanced Research Projects Agency and the Military Departments with technical advice on the conduct of economical and effective research and development programs in the area of Electron Devices.

The meeting will be limited to review of research and development programs which the Military Departments propose to initiate with industry, universities or in their laboratories. The AGED will review programs on microwave devices, night vision devices, lasers, infrared systems and microelectronics. The review will include classified program details throughout.

In accordance with Section 10(d) of Apendix I, Title 5, United States Code, it has been determined that this Advisory Group meeting concerns matters listed in Section 552b(c) of Title 5 of the United States Code, specifically Subparagraph (1) thereof, and that accordingly this meeting will be closed to the public.

MAURICE W. ROCHE,
Director, Correspondence and Directives, OASD (Comptroller).

MAY 11, 1977.

[FR Doc.77-13911 Filed 5-13-77;8:45 am]

FEDERAL ENERGY ADMINISTRATION

CASES FILED WITH THE OFFICE OF EXCEPTIONS AND APPEALS

Week of April 22 through April 29, 1977

Notice is hereby given that during the week of April 22 through April 29, 1977, the appeals and applications for exception or other relief listed in the Appendix to this Notice were filed with the Federal Energy Administration's Office of Exceptions and Appeals.

Under the FEA's Procedural regulations, 10 CFR, Part 205, any person who will be aggrieved by the FEA action sought in such cases may file with the FEA written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of these regulations, the date of service of notice shall be deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first.

May 10, 1977.

ERIC J. FYGI,
Acting General Counsel.

APPENDIX.—*List of cases received by the Office of Exceptions and Appeals, week of April 22 through April 29, 1977*

Date	Name and location of applicant	Case No.	Type of submission
Apr. 22, 1977	Bright & Schiff, Dallas, Tex. (If granted: Crude oil produced from O. S. Petty well No. 1 located in Hardin County, Tex., would be sold at upper tier ceiling prices.)	FEE-4091	Price exception (sec. 212.73)
Do	Mobil Oil Corp. (Vanderbilt), New York, N.Y. (If granted: The FEA's Apr. 1, 1977, decision and order would be modified and Mobil Oil Corp. would be granted additional price relief covering nonproduct cost increases for natural gas liquid products produced at its Vanderbilt plant.)	FXA-1270	Appeal of decision and order in Mobil Oil Corp., 5 FEA par. ____ (Apr. 1, 1977).
Do	State of Oregon, Salem, Oreg. (If granted: The FEA's Oct. 3, 1975, decision and order would be modified to permit dealers and retailers of motor gasoline, located in the State of Oregon, to increase their prices above maximum permissible levels established pursuant to 10 CFR 212.93 to offset a proposed 2-cents-per-gallon increase in the State of Oregon's license tax on motor vehicle or aircraft fuel.)	FMR-0100	Request for modification of decision and order in State of Oregon, 2 FEA par. 83,320 (Oct. 3, 1975).
Do	Univar Corp., Seattle, Wash. (If granted: The FEA's Dec. 16, 1976, notice would be modified and the Univar Corp. would be removed from the listing of most energy consumptive corporations in the SIC 20 category and would be exempted from the mandatory requirement of sec. 375(a) that the firm report progress made in energy efficiency to the FEA.)	FMR-0101	Request for modification of FEDERAL REGISTER notice at 41 Fed. Reg. 51977 (Dec. 16, 1976).
Apr. 25, 1977	Alexander-Loop Oil Properties, Inc., Tulsa, Okla. (If granted: Alexander-Loop Properties, Inc. would receive an extension of the exception relief granted in the FEA's Dec. 23, 1976, decision and order and crude oil produced from the Dicey McIntosh lease sec. 12 located in Okmulgee County, Okla., would be sold at upper tier ceiling prices.)	FXE-1092	Extension of exception relief granted in Paul R. Loop, 5 FEA par. 83,010 (Dec. 23, 1976).
Do	Midland Cooperatives, Inc., Minneapolis, Minn. (If granted: The FEA's Mar. 17, 1977, decision and order would be rescinded and Midland Cooperatives, Inc. would be relieved of its 1975 entitlements purchase obligation and would not be required to make any purchases of entitlements in the future.)	FXA-1271	Appeal of decision and order in Midland Cooperatives, Inc., 5 FEA par. ____ (Mar. 17, 1977).
Do	Petrochemical Energy Group, Washington, D.C. (If granted: The FEA's Dec. 31, 1976, order would be rescinded and the Consumers Power Co. would not be granted an interim allocation of SNG feedstocks.)	FMR-0102	Modification of FEA assignment order dated Dec. 31, 1976.
Do	Superior Oil Co., Houston, Tex. (If granted: The Superior Oil Co. would be permitted to increase its prices to reflect nonproduct cost increases in excess of $0.005 per gallon for natural gas liquid products produced at its South Fullerton and West Seminole plants.)	FEE-4093 FEE-4094	Price exception (sec. 212.165).
Apr. 26, 1977	Atlantic Richfield Co., Los Angeles, Calif. (If granted: The FEA's Apr. 12, 1977, remedial order would be rescinded and the Atlantic Richfield Co. would not be required to refund alleged overcharges made in its sales of motor gasoline to the Digas Co.)	FRA-1272 FRS-1272	Appeal of FEA region IX's remedial order dated Apr. 12, 1977; Stay requested.
Do	C. C. Operating Co., Victoria, Tex. (If granted: The FEA's Apr. 14, 1977, remedial order would be rescinded and C. C. Operating Co. would not be required to refund alleged overcharges made in its sales of crude oil.)	FRA-1274 FRS-1274	Appeal of FEA region VI's remedial order issued Apr. 14, 1977. Stay requested.
Do	Consumer Federation of America, Washington, D.C. (If granted: The FEA Office of Exceptions and Appeals would appoint and compensate a special public counsel to represent consumers in connection with FEA rulemaking proceedings involving price and allocation controls for middle distillates.)	FSG-0042	Request for assignment of a special public counsel.
Do	General Distributors, Inc., Salisbury, Md. (If granted: The regional counsel of FEA region III would be granted an additional 30 days to comply with the provisions of a Mar. 10, 1977, decision and order issued to General Distributors, Inc.)	FEX-0153	Supplemental order to decision and order in General Distributors, Inc., 5 FEA par. ____ (Mar. 10, 1977).

Date	Name and location of applicant	Case No.	Type of submission
Do.	Justiss-Mears Oil Co., Inc., Jena, La. (If granted: Crude oil produced from the Saucier No. 1 well located in Avoyelles Parish, La., would be sold at upper tier ceiling prices.)	FEE-4097	Price exception (sec. 212.73).
Do.	Kern County Refinery, Inc., Bakersfield, Calif. (If granted: Kern County Refinery, Inc. would receive an extension of the exception relief granted in the FEA's Dec. 15, 1976, decision and order and would not be required to purchase entitlements under the old oil entitlements program.)	FXE-4096	Extension of exception relief granted in Kern County Refinery, Inc., 4 FEA par. 83,213 (Dec. 15, 1976).
Do.	Lampton-Love, Inc., Washington, D.C. (If granted: Lampton-Love, Inc. would be permitted to increase its prices for propane above the maximum allowable price for that product as determined pursuant to the mandatory petroleum price regulations.)	FEE-4099	Price exception (sec. 212.93).
Do.	Luke Bros., Inc., Oklahoma City, Okla. (If granted: The FEA's Oct. 5, 1976, remedial order would be rescinded and Luke Bros., Inc. would not be required to refund overcharges made on sales of propane.)	FMR-0103	Modification of FEA region VI's remedial order dated Oct. 5, 1976.
Do.	Navajo Refining Co., Washington, D.C. (If granted: The Navajo Refining Co. would receive an extension of the exception relief granted in the FEA's Dec. 15, 1976, decision and order which would reduce the firm's purchase obligations under the FEA old oil entitlements program.)	FXE-4093	Extension of exception relief granted in Navajo Refining Co., 4 FEA par. 83,223 (Dec. 15, 1976).
Do.	Stephens & Cass, Dallas, Tex. (If granted: 13 of the firm's properties would be classified as stripper well properties. Stephens & Cass would be granted a stay of the refund requirements of the Apr. 12, 1977, remedial order issued to the firm pending a final determination on its exception application.)	FEE-4095 FRS-4095	Price exception (sec. 212.73). Stay requested.
Do.	Texas City Refining, Inc., Texas City, Tex. (If granted: The FEA's Apr. 11, 1977, remedial order would be rescinded and Texas City Refining, Inc. would not be required to recompute its cost of crude oil to include the effect of foreign-domestic crude oil sales and exchanges engaged in by the firm.)	FRA-1273 FRS-1273	Appeal of FEA region VI's remedial order dated Apr. 11, 1977. Stay requested.
Apr. 27, 1977	Atlantic Richfield Co., Dallas, Tex. (If granted: Crude oil produced from the State lease PRC 1466 located in Ventura County, Calif., would be sold at upper tier ceiling prices.)	FEE-4104	Price exception (sec. 212.73).
Do.	Bassett Oil & Equipment Co., Inc. (If granted: The FEA's Apr. 13, 1977, remedial order would be rescinded and Bassett Oil & Equipment Co., Inc. would not be required to refund overcharges made on sale of No. 2 heating oil and kerosene.)	FRA-1270 FRS-1270	Appeal of FEA region III's remedial order dated Apr. 13, 1977. Stay requested.
Do.	Diamond Shamrock Corp., Amarillo, Tex. (If granted: The Diamond Shamrock Corp. would be granted an exception from the provisions of 10 CFR 212.83 to permit the firm to use the modified "R" term to allocate its increased nonproduct costs beginning Mar. 1, 1977.)	FEE-4100	Price exception (sec. 212.83).
Do.	Harpel Petroleum Corp., Casper, Wyo. (If granted: The FEA's Apr. 11, 1977, remedial order would be rescinded and the Harpel Petroleum Corp. would not be required to refund any overcharges made in sales of crude oil to the Continental Oil Co.)	FRA-1275	Appeal of FEA region VIII's remedial order dated Apr. 11, 1977.
Do.	W. H. Porter, Midwest City, Okla. (If granted: W. H. Porter would receive an extension of the exception relief granted in the FEA's Dec. 16, 1976, decision and order and crude oil produced from the Kirchnicr lease in Lincoln County, Okla., would be sold at upper tier ceiling prices.)	FXE-4101	Extension of exception relief granted to W. H. Porter, 4 FEA par. 83,224 (Dec. 16, 1976).
Do.	San Joaquin Refining Co., Newport Beach, Calif. (If granted: The San Joaquin Refining Co. would receive an extension of the exception relief granted in the FEA's Dec. 15, 1976, decision and order to relieve the firm of any purchase obligations under the old oil entitlements program.)	FEX-4102	Extension of exception relief granted in San Joaquin Refining Co., 4 FEA par. 83,224 (Dec. 15, 1976).
Do.	Standard Oil Co. (Indiana), Chicago, Ill. (If granted: Processing of an exception application filed by the Standard Oil Co. (Indiana) on Feb. 16, 1977, would be held in abeyance pending a final determination in a judicial proceeding involving the firm now pending before the Federal district court in St. Louis, Mo.)	FES-3703	Stay request.
Do.	Sunland Refining Corp., Bakersfield, Calif. (If granted: The FEA would rescind the exception relief granted to the Sunland Refining Corp. beginning with the month of January 1977, and Sunland would be required to purchase entitlements equivalent in value to approximately $738,180.)	FEX-0154	Supplemental order to decision and order in Sunland Refining Corp., 4 FEA par. 83,260 (Dec. 15, 1976).
Do.	Time Oil Co., Los Angeles, Calif. (If granted: The FEA's Apr. 8, 1977, decision and order would be rescinded and the continuing fee-free import authority granted to Time by the Oil Imports Appeals Board (OIAB) in an order dated June 13, 1974 would be extended.)	FPI-0115	Appeal of decision and order in Time Oil Co., 5 FEA par. ____ (Apr. 8, 1977).
Do.	Young Refining Corp., Douglasville, Ga. (If granted: The Young Refining Corp. would receive an extension of the exception relief granted in the FEA's Dec. 15, 1976, decision and order which would relieve the firm of any purchase obligations under the old oil entitlements program.)	FXE-4103	Extension of exception relief granted in Young Refining Corp., 4 FEA par. 83,204 (Dec. 15, 1976).
Apr. 28, 1977	Crystal Petroleum Co., Corpus Christi, Tex. (If granted: The Crystal Petroleum Co. would receive an exception to 10 CFR 212.93 to permit it to increase the maximum permissible selling price for the motor gasoline which it sells to the city of Corpus Christi.)	FEE-4106	Price exception (sec. 212.93).
Do.	Eddy Refining Co., Houston, Tex. (If granted: The FEA's Mar. 4, 1977, decision and order would be rescinded and Eddy Refining Co. would be permitted to charge prices in excess of its maximum allowable prices computed pursuant to the provisions of sec. 212.83. Eddy would also receive retroactive exception relief which would reduce or eliminate any liability on the part of the firm to refund revenues which it obtained as a result of previous overcharges.)	FXA-1277	Appeal of decision and order in Eddy Refining Co., 5 FEA par. 83,062 (Mar. 4, 1977).

Date	Name and location of applicant	Case No.	Type of submission
Do.....	Guam Oil & Refining Co., Inc., Dallas, Tex. (If granted: The Guam Oil & Refining Co., Inc. would receive an exception from the requirements of 10 CFR 211.67(a) to permit the firm to include as crude oil for purposes of the FEA old oil entitlements program all of the feedstocks processed in the firm's Guam refinery.)	FEE-4105	Exception to the old oil entitlements program (sec. 211.67).
Do.....	McFarland, A. B., McAlester, Okla. (If granted: A. B. McFarland would receive an increase in his base period use of motor gasoline.)	FEE-4106	Exception to increase base period use (sec. 211.13 (e)).
Do.....	Peters Fuel Corp., Oakland, Md. (If granted: The Nov. 24, 1976, stay which was granted to the Peters Fuel Corp. would be rescinded and the Director of Compliance, region III, would be required to take all steps necessary to ensure that funds which the Peters Fuel Corp. deposited in an escrow account under the terms of the Nov. 24, 1976, decision and order were disbursed to the customers of the Peters Fuel Corp.)	FRX-0155	Supplemental order to decision and order in Peters Fuel Corp., 4 FEA par. 85,036 (Nov. 24, 1976).
Do.....	San Joaquin Refining Co., Newport Beach, Calif. (If granted: The San Joaquin Refining Co. would be granted a stay of its February 1977, entitlement purchase obligations and the FEA would adjust the firm's March 1977 obligations to correct an error made in the February 1977 entitlement calculations.)	FES-0093	Stay request.
Do.....	Union Oil Co. of California. (If granted: Crude oil produced from the Point Conception field located in Santa Barbara County, Calif. would be sold at upper tier ceiling prices.)	FEE-4107	Price exception (sec. 212.73).
Apr. 29, 1977	Amtel, Inc., Houston, Tex. (If granted: The FEA's Feb. 25, 1977, decision and order would be rescinded and Amtel would be permitted to calculate the maximum permissible prices which its South Central subsidiary may charge for the covered products it sells by reference to the May 15, 1973 prices charged by the firm's Harlond Hauck Oil Co. subsidiary. In addition, all of Sun's base period supply obligations to customers served by South Central would be assigned to Amtel and Sun would be assigned to supply Amtel with the covered products. Finally, the existing supplier/purchaser relationship between Sun and Whitco, Inc. would be terminated and Whitco would be assigned a new base period supplier other than Amtel or Sun.	FXA-1278	Appeal of decision and order in Amtel, Inc., 5 FEA par. 83,091 (Feb. 25, 1977).

[FR Doc.77-13823 Filed 5-13-77;8:45 am]

GRANTS FOR OFFICES OF CONSUMER SERVICES

Advance Notice of Program Guidelines

AGENCY: Federal Energy Administration.

ACTION: Advance notice of program guidelines.

SUMMARY: FEA will establish a program of discretionary grants for the establishment and operation of offices of consumer services to assist consumers in their presentations before electric utility regulatory commissions. Any State, the District of Columbia, Puerto Rico, any territory or possession of the United States, and the Tennessee Valley Authority will be eligible to apply for a grant. This notice explains the guidelines now being developed by FEA and solicits comments from interested persons.

DATES: Comments by May 31, 1977, 4:30 p.m., e.d.t.

ADDRESSES: Comments to: Executive Communications, Room 3317, Federal Energy Administration, Box MI, Washington, D.C. 20461.

FOR FURTHER INFORMATION CONTACT:

Ms. Nancy Tate Gavin, Federal Energy Administration, 1200 Pennsylvania Avenue NW., Washington, D.C. 20461 (202-566-7472).

SUPPLEMENTARY INFORMATION: A. Background; B. Functions of an Office of Consumer Services; C. Minimum Program Requirements; D. Award of Funds; E. Comments.

A. *Background.* Section 205, 42 U.S.C. 6805, of the Energy Conservation and Production Act (Act), Pub. L. 94-385, 90 Stat. 1144, authorizes FEA to make grants to States to provide for the establishment and operation of a State office of consumer services (Office). For purposes of this program, "State" means a State, the District of Columbia, Puerto Rico, a territory or possession of the United States, and the Tennessee Valley Authority. The Act authorizes not more than 2 million dollars for this grant program through fiscal year 1977.

FEA presently is developing program guidelines, and the purpose of this notice is to solicit public comment, views and data to assist FEA in the preparation of program guidelines.

B. *Functions of an Office of Consumer Services.* The Act provides that grants may be made only for an Office which has authority under State law to:

(1) Make general factual assessments of the impact of proposed rate changes and other proposed regulatory actions upon all affected consumers;

(2) Assist consumers in the presentation of their positions before utility regulatory commissions; and

(3) Advocate, on its own behalf, a position which it determines represents the position most advantageous to consumers, taking into account developments in rate design reform.

Because of the Act's emphasis on the cosumer assistance function, FEA presently intends to permit an Office to develop a program in the first year of a grant which assists consumers in the presentation of their positions before a State utility regulatory commission. To be eligible for Federal financial assistance, therefore, an Office would not be required to implement the other functions which it must be empowered to carry out under the Act, although it may choose to do so.

An Office shall take a broad view of consumer interests, thereby including in its considerations any person or party who is buyer of electricity for a purpose other than resale. FEA is considering requiring assistance to be granted only for participation in State proceedings, thereby precluding participation at the Federal level.

Assistance may be provided by an Office in the form of direct assistance and technical assistance. With respect to direct assistance, an Office may provide funds to a consumer group for the preparation of testimony and written submissions, legal services and expert witnesses. An Office may provide technical assistance by using its staff, or a consultant or contractor retained by the Office, to prepare testimony or submissions and to provide data, technical analyses and other information to consumer groups. An Office also may assign members of its staff to work directly with a consumer group to provide legal services or serve as expert witnesses. FEA is considering allowing an Office to expend up to 45 percent of the funds awarded to employ one or more contractors or consultants to assist it in carrying out any of the three authorized functions.

Assistance only will be provided to a consumer group. A consumer group may range from a recognized consumer organization to an ad hoc aggregation of concerned persons. Assistance, however, may not be provided to only one person.

In formulating the final guidelines for furnishing assistance to a consumer group, FEA intends to require that the Office make the following determinations:

(1) The consumer group has or represents an interest which would not otherwise be adequately represented in the outcome of a proceeding before a State utility regulatory commission, the representation of which is necessary to contribute to a fair determination of the proceeding taken as a whole;

(2) The proceeding is of a nature such that its outcome will have a significant impact on consumer interests; and

(3) The consumer group does not have sufficient resources to participate effectively in the proceeding in the absence of such assistance.

These standards were developed to apply to situations where consumer groups seek to intervene in Federal agency proceedings where no express statutory provision authorizes the use of Federal funds to assist a consumer group. They also are consistent with the standards utilized by FEA's Office of Private Grievances and Redress with respect to requests by consumer representatives for financial assistance to enable them to participate in FEA proceedings. Section 205, however, would permit FEA to adopt more flexible standards. For example, an Office could only be required to determine that participation in a proceeding by a consumer group was useful instead of necessary. No decision has been

reached by FEA with regard to whether less restrictive standards should be provided for this program.

C. *Minimum program requirements.* FEA anticipates establishing the following minimum program requirements which a State must meet to be eligible for Federal financial assistance under the program: First, a State shall have in existence at the time it submits its grant application an Office which is independent of a State utility regulatory commission, or provide assurance that it will establish an Office which is independent within six months of the date of grant award and prior to the expenditure of any grant funds. FEA will consider an Office to be independent of the State utility regulatory commission if: (1) the commission has no direct control over the Office's budget and fund disbursement, (2) the commission exercises no authority over the hiring of the Office's personnel, and (3) employees of the Office have no concurrent duties for, or obligation to report to, the commission.

Second, a State shall have in existence at the time it submits its grant application an Office which is authorized by State law to undertake the functions listed in the Act, or assure the establishment of an Office which is so authorized within six months of the date of grant award and prior to the expenditure of any grant funds.

Third, a State shall give assurance that the total proposed budget for the Office exceeds, by the amount of the grant award, the amount expended by the State, if any, to perform functions similar to those proposed in its grant application in the twelve months preceding the date of the application.

D. *Award of funds.* To participate in the program, a State would be required to submit an application to FEA within the prescribed application period, which FEA expects to be seven weeks from the date of issuance of the guidelines. Subject to the availability of funds, FEA expects to complete its review of applications and award grants by September 30, 1977.

FEA does not intend to allocate funds to all States because the authorized level of funding makes it impracticable for all States to participate. FEA will award grants to a limited number of States whose applications best demonstrate a feasible and well-conceived Office and best demonstrate the need for Federal financial assistance for an Office. No grant award made in fiscal year 1977 shall exceed $250,000.

States will be selected by FEA in accordance with evaluation criteria presently being developed. FEA is assesing the feasibility of employing a point scoring system to grade applications based upon a possible score of 100 points. Under this scoring system, an application from a State could receive up to 55 points based upon the demonstration of a feasible and well-conceived Office and 45 points for a demonstration of need for Federal financial assistance for a new or expanded Office.

With respect to assessing the feasibility and quality of an Office, FEA intends to evaluate such factors as the Office's goals and objectives, organizational structure, budget, the nature, specificity and timetable for proposed activities, and the number, qualifications and experience of staff members.

With respect to a demonstration of need for a new or expanded Office, FEA intends to consider a State's consumption and price patterns of electric energy and activities of the State utility regulatory commission. To evaluate these considerations, FEA may assess such factors as the relationship of the average annual cost of residential electricity to the average annual income of residential users, increases in the rates for and consumption of electricity by classes of customers, fuel sources used for generation of electricity, the average annual expenditures of utility companies for representation in utility regulatory commission proceedings in relationship to State population, average level and annual rate of growth of the utility case load of the State utility regulatory commission, and the budget of the State utility regulatory commission for electric utility regulation in relationship to State population.

E. *Comments.* FEA particularly is interested in receiving comments on the following items:

(1) The feasibility and need criteria for evaluating a State's application;

(2) The criteria for determining whether an Office is operated independently of the State utility regulatory commission;

(3) The standards for determining those consumer groups who are eligible for direct or technical assistance in the presentation of their positions before utility regulatory commissions;

(4) The appropriateness of a $250,000 ceiling on a grant award;

(5) Whether the costs of presentations by consumers in Federal ratemaking or rulemaking proceedings should be an eligible program expenditure; and

(6) Whether an Office should establish priorities among consumer groups.

Interested persons are invited to submit their written comments, which may include views, data or arguments, to Executive Communications, Room 3317, Box MI, Federal Energy Administration, Washington, D.C. 20461.

Comments should be identified on the outside of the envelope and on documents submitted to FEA Executive Communications with the designation "Grants for Offices of Consumer Services." Fifteen copies should be submitted. All comments received by May 25, 1977, before 4:30 p.m., e.d.t., will be considered by FEA and may be used by FEA in the development of the guidelines.

Any information or data considered by the person furnishing it to be confidential must be so identified and submitted in writing, one copy only. FEA reserves the right to determine the confidential status of the information and to treat it according to its determination.

Issued in Washington, D.C., May 13, 1977.

ERIC J. FYGI,
Acting General Counsel,
Federal Energy Administration.

[FR Doc.77-14100 Filed 5-13-77;10:19 am]

FEDERAL POWER COMMISSION

[Docket Nos. RP74-6 and RP72-74]

SOUTHERN NATURAL GAS CO.

Proposed Changes in FPC Gas Tariff

MAY 5, 1977.

Take notice that Southern Natural Gas Company (Southern) on April 21, 1977 tendered for filing proposed changes in its FPC Gas Tariff, Sixth Revised Volume No. 1, in compliance with the Commission's Opinion No. 747-B, Opinion and Order Granting Rehearing in Part and Denying Rehearing in Part, issued May 21, 1976 in "Southern Natural Gas Company", Docket Nos. RP74-6 and RP72-74.

Southern states that the Commission said at pages 10 and 11 of Opinion No. 747-B, "Furthermore, while we cannot conclude from the evidence that consumers contracting for gas on an interruptible basis contemplated substantial interruption or intended to install alternate fuel facilities, as will be discussed later, it is apparent that those consumers which formed firm gas contracts contemplated neither interruption nor the need for alternate fuel facilities; therefore, those firm requirements lacking installed alternate fuel facilities will be given a one year grace period from the date of this order to install such facilities. These requirements will remain in priority category 3 during this grace period. Thereafter such requirements will be placed in the appropriate revised categories." The tariff sheets included in the filing show changes in the Index of Requirements which are necessary to reflect the end of the one year grace period for firm industrial requirements lacking installed alternate fuel facilities for the Amory, Louisville, West Point and Meridian Area delivery points of Mississippi Valley Gas Company; the Town of Calera, Alabama; the Town of Livingston, Alabama; the City of Scottsboro, Alabama; the Aiken delivery point of South Carolina Electric & Gas Company; the City of Statesboro, Georgia; Hunt Oil Company; MacMillan Bloedel United, Inc.; and the Westfield delivery point of United States Steel Corporation.

The proposed effective date of the enclosed tariff sheets is the date they are accepted by the Commission.

Copies of the filing were served upon the company's jurisdictional customers, interested state commissioners' and the parties of record in Docket Nos. RP74-6 and RP72-74.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Power Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with §§ 1.8 and 1.10 of the

Commission's rules of practice and procedure (18 CFR 1.8, 1.10). All such petitions or protests should be filed on or before May 16, 1977. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

KENNETH F. PLUMB,
Secretary.

[FR Doc.77-13910 Filed 5-13-77;8:45 am]

FOREIGN CLAIMS SETTLEMENT COMMISSION

GERMAN DEMOCRATIC REPUBLIC

Deadline for Filing Claim and Completion Date of Program

AGENCY: Foreign Claims Settlement Commission of the United States.

ACTION: Notice.

SUMMARY: Notice of program for claims against the German Democratic Republic, deadline for filing claims and completion date of program, as provided by Pub. L. 94-542.

EFFECTIVE DATE: May 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Wayland D. McClellan, General Counsel, Foreign Claims Settlement Commission, 1111 20th Street, Washington, D.C. 20579, 202/653-6166.

NOTICE OF TIME FOR FILING

Notice is hereby given that pursuant to section 600, Title VI of the International Claims Settlement Act of 1949, as amended, the Foreign Claims Settlement Commission of the United States will receive at its principal office located at 1111 20th Street, N.W., Washington, D.C. 20579, during the period beginning on the publication of this notice, and ending May 16, 1978, claims against the German Democratic Republic, as authorized by Title VI of the International Claims Settlement Act of 1949, as amended by Pub. L. 94-542, approved October 18, 1976, (90 Stat. 2509), and in accordance with the Regulations of the Commission made with respect thereto.

Title VI of the International Claims Settlement Act, as amended, provides for the determination of the validity and amounts of outstanding claims against the German Democratic Republic which arose out of the nationalization, expropriation, or other taking of (or special measures directed against) property interests of nationals of the United States, whether such losses occurred in the German Democratic Republic or East Berlin.

Details concerning the filing and claim applications may be obtained by contacting the Office of the General Counsel, Foreign Claims Settlement Commission, Washington, D.C. 20579, 202/653-6166.

Dated: May 11, 1977.

WAYLAND D. MCCLELLAN,
General Counsel.

[FR Doc.77-13842 Filed 5-13-77;8:45 am]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

PROGRAM EFFECTIVENESS AND EVALUATION COMMITTEE, NATIONAL ADVISORY COUNCIL ON ADULT EDUCATION

Meeting

AGENCY: National Advisory Council on Adult Education.

NOTICE: Notice.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Program Effectiveness and Evaluation Committee of the National Advisory Council on Adult Education. The meeting shall be open to the public. This notice also describes the functions of the Council. Notice of this meeting is required under the Federal Advisory Committee Act (Pub. L. 92-463, Section 10(a)(2)).

DATE: May 27, 1977, 8:30 a.m. to 4 p.m.

ADDRESS: Reighart School, 500 E. Strawberry Street, Lancaster, Pennsylvania.

FOR FURTHER INFORMATION CONTACT:

Dr. Gary A. Eyre, Executive Director, National Advisory Council on Adult Education, 425 13th St. NW., Washington, D.C. 20004, (202-376-8892).

SUPPLEMENTARY INFORMATION: The National Advisory Council on Adult Education is established under Section 311 of the Adult Education Act (80 Stat. 1216.20 U.S.C. 1201). The Council is directed to:

Advise the Commissioner in the preparation of general regulations and with respect to policy matters arising in the administration of this title, including policies and procedures governing the approval of State plans under section 306 and policies to eliminate duplication, and to effectuate the coordination of programs under this title and other programs offering adult education activities and services.

The Council shall review the administration and effectiveness of programs under this title, make recommendations with respect thereto, and make annual reports to the President of its findings and recommendations (including recommendations for changes in this title and other Federal laws relating to adult education activities and services). The President shall transmit each such report to the Congress together with his comments and recommendations.

The meeting of the Council shall be open to the public. The proposed agenda includes:

Survey Instrument on the Status of Bilingual Adult Education Programs; NACAE 311(d) Evaluation; Adult Education Local Program Visitation; Committee Responsibilities.

Records shall be kept of all Committee proceedings, and shall be available for public inspection at the Office of the National Advisory Council on Adult Education, Room 323, Pennsylvania Bldg., 425 13th Street NW., Washington, D.C. 20004.

Signed at Washington, D.C., on May 9, 1977.

GARY A. EYRE,
Executive Director, National Advisory Council on Adult Education.

[FR Doc.77-13836 Filed 5-13-77;8:45 am]

Health Resources Administration

GRADUATE MEDICAL EDUCATION NATIONAL ADVISORY COMMITTEE

Meeting

Correction

In FR Doc. 77-12432 appearing at page 22204 in the issue for Monday, May 2, 1977, the headings should have read as set forth above.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Federal Disaster Assistance Administration

[Docket No. NFD-478; FDAA-3039-EM]

OREGON

Amendment to Notice of Emergency Declaration

AGENCY: Federal Disaster Assistance Administration, HUD.

ACTION: Notice.

SUMMARY: This Notice amends the Notice of emergency declaration for the State of Oregon (FDAA-3039-EM), dated April 29, 1977.

DATED: May 3, 1977.

FOR FURTHER INFORMATION CONTACT:

Frank J. Muckenhaupt, Chief, Program Support Staff, Federal Disaster Assistance Administration, Department of Housing and Urban Development, Washington, D.C. 20410, (202-634-7825).

NOTICE: The Notice of emergency for the State of Oregon dated April 29, 1977, is hereby amended to include the following counties among those areas determined to have been adversely affected by the catastrophe declared an emergency by the President in his declaration of April 29, 1977:

The counties of:

Jefferson Wheeler
Wasco

The purpose of this designation is to provide emergency livestock feed assistance and cattle transportation assist-

ance only in the aforementioned affected areas effective the date of this amended Notice.

(Catalog of Federal Domestic Assistance No. 14.701, Disaster Assistance.)

THOMAS P. DUNNE,
Administrator, Federal Disaster Assistance Administration.

[FR Doc.77-13864 Filed 5-13-77;8:45 am]

Office of the Secretary

[Docket No. N-77-506]

PRIVACY ACT OF 1974

Proposed New Notice of Systems of Records and Alteration of Existing Notice of System of Records

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed New Notice of Systems of Records and Alteration of Existing Notice of System of Records.

SUMMARY: As required by law, the Secretary is publishing for comment two new systems of records and an altered system of records that will be maintained by the Department. The proposed new records systems are "Privacy Act Requesters" and "Solar Energy Demonstration Survey Files". The change is necessary to convert the "Equal Opportunity Housing Complaints" records system from a manual to an automated system.

DATES: Comments should be submitted in writing on or before June 15, 1977.

ADDRESS: Rules Docket Clerk, Office of the Secretary, Room 10141, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, D.C. 20410.

FOR FURTHER INFORMATION CONTACT:

Mr. Harold Rosenthal, Departmental Privacy Act Officer, on (202) 755-5192.

SUPPLEMENTARY INFORMATION: The proposed new system of records entitled "Privacy Act Requesters" will result from processing requests made under the provisions of the Privacy Act. The "Solar Energy Demonstration Survey Files" system will consist of demographic, socio-economic, and housing characteristics of purchasers and renters of solar-heated residential dwellings and of occupants of non-solar-heated dwellings in the same development. The conversion from manual to automated processing of the "Equal Opportunity Housing Complaints" will improve complaint tracking and compliance review.

A new systems report was filed with the Speaker of the House, the President of the Senate, the Privacy Protection Study Commission, and the Office of Management and Budget on December 14, 1976 for the Privacy Act Requesters system and on December 14, 1976 for the Solar Energy Demonstration Survey Files system. A report on the conversion from manual to automated processing of the Equal Opportunity Housing Complaints system was filed with the above addresses on December 14, 1976.

A Finding of Inapplicability respecting the National Environmental Policy Act of 1969 has been made in accordance with HUD Handbook 1390.1. A copy of this Finding of Inapplicability will be available for public inspection during regular business hours at the address set forth above.

HUD/DEPT-52

System name:

Privacy Act Requesters.

System location:

Headquarters, Regional, Area, and Insuring Offices maintain files of this type. See Appendix A for a complete listing of these offices.

Categories of individuals covered by the system:

Individuals inquiring about existence of records about them, and requesting access to and correction of such records under provisions of the Privacy Act.

Categories of records in the system:

Personal identification of requester, nature of request, and disposition of the request by the Department.

Policies and practices for storing, retrieving, accessing, retaining and disposing of records in the system:

Storage:

In file holders.

Retrievability:

Filed by case number and name of individual.

Safeguards:

Records maintained in locked and lockable file cabinets with access limited to authorized personnel.

Retention and disposal:

Records are primarily active. Inactive files are normally disposed of after a one-year period.

System manager and address:

Director
Office of Organization and Management Information
Department of Housing and Urban Development
451 Seventh Street, SW.
Washington, D.C. 20410

Notification procedure:

For inquiry about existence of records, contact the Privacy Act Officer at appropriate location, in accordance with procedures in 24 CFR Part 16. If additional information or assistance is required, contact the Privacy Act Officer at the appropriate location. A list of all locations is given in Appendix A.

Contesting record procedures:

The Department's rules for contesting the contents of records and appealing initial denials by the individual concerned, appear in 24 CFR Part 16. If additional information or assistance is needed, it may be obtained by contacting: (i) In relation to contesting contents of records, the Privacy Act Officer at the appropriate location. A list of all locations is given in Appendix A; (ii) in relation to appeals of initial denials, the HUD Departmental Privacy Appeals Officer, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410.

Record source categories:

Subject individuals.

HUD/PD&R-2

System name:

Solar Energy Demonstration Survey Files

System location:

Headquarters

Categories of individuals covered by the system:

Purchasers and renters of solar heated or cooled housing under the demonstration program; comparative purchasers of conventional heated and cooled housing; prospective purchasers of housing marketed under the demonstration program.

Categories of records in the system:

Housing characteristics, reason for moving, utility expenditures, neighborhood characteristics, perception of housing and subdivision, housing costs and financing characteristics, marketing attitudes toward solar energy, operating experience with heating and cooling systems, socio-economic information.

Routine uses of records maintained in the system, including categories of users and purposes of such uses:

See Routine Uses paragraph in the prefatory statement. Other routine uses: Real Estate Research Corporation (Chicago, Ill.) for analysis and evaluation of solar energy use and its acceptance by the public.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

Storage:

In file folders and on magnetic tape/disc/drum.

Retrievability:

Name; address; code number; and index.

Safeguards:

Computer facilities are secured and accessible only to authorized personnel. The name-address index file will be kept in the Department in lockable file cabinets, with access limited to key authorized personnel.

Retention and disposal:

Records will be maintained until follow-up interviews have been completed. Records of survey participants will be destroyed as each cycle ends or the participants leave the program. Hard copy questionnaires will be destroyed after they are encoded into machine readable format. All records will be destroyed at the conclusion of the study, scheduled to end in approximately five years.

System manager and address:

Director
Office of Organization and Management Information
Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410

Notification procedure:

For inquiry about existence of records, contact the Privacy Act Officer at the Headquarters location, in accordance with procedures in 24 CFR Part 16. If additional information or assistance is required, contact the Privacy Act Officer at the Headquarters location.

Record access procedures:

The Department's rules for providing access to records to the individual concerned appear in 24 CFR Part 16. If additional information or assistance is required, contact the Privacy Act Officer at the Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

Contesting record procedures:

The Department's rules for contesting the contents of records and appealing initial denials by the individual concerned, appear in 24 CFR Part 16. If additional information or assistance is needed in relation to contesting contents of records or in relation to appeals of initial denials, it may be obtained by contacting the Departmental Privacy Appeals Officer, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

Record source categories:

Subject individuals.

HUD/DEPT–15

System name:

Equal Opportunity Housing Complaints.

System location:

Housing Discrimination files are located at the office where originated and may also be transferred to associated Area and/or Regional Offices, or the Department's Headquarters. For a complete listing of these with addresses, see Appendix A.

Categories of individuals covered by the system:

Individuals filing housing discrimination complaints; individuals, officials, and organizations complained about; managers; grant or project applicants; builders; developers; contractors; appraisers; property owners; mortgagors; candidates for positions; witnesses; attorneys; individuals in disaster and EO files; Titles VI, VIII and IX complainants. Does not include files on HUD employee complaints regarding their employment. Notices regarding these inquiries under the Privacy Act are published by the U.S. Civil Service Commission.

Categories of records in the system:

Allegations of housing discrimination; names of complainant and persons or organizations complained about; investigation information; details of discrimination cases; compliance reviews; marketing activity; complaints under Titles VI, VIII and IX; conciliation files; correspondence; affidavits; complaint status reports.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

See Routine Uses paragraph in prefatory statement. Other routine uses: to non-federal EO-concerned agencies, the U.S. Department of Justice (including the Federal Bureau of Investigation), the U.S. Department of Labor (including the Office of Federal Contract Compliance), U.S. Courts, the Veterans Administration, the Farmers' Home Administration, complainants, respondents, and attorneys-for investigation, preparing litigation, and monitoring compliance.

Policies and practices for storing, retrieving, accessing, retaining and disposing of records in the system:

Storage:

Records kept in lockable desks and file cabinets and magnetic tape/disc/drum.

Retrievability:

Usually retrievable by name of complainant and, in some instances, by case file number.

Safeguards:

Manual records are stored in lockable file cabinets; computer facilities are secured and accessible only by authorized personnel, and all files are stored in a secured area. Technical restraints are employed with regard to accessing the computer and data files.

Retention and disposal:

HUD handbooks establish procedures for retention and disposition of records. Generally retained for two years, then transferred to Federal Records Centers for an additional five years.

System manager and address:

Director
Office of Organization and Management Information
Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410

Notification procedure:

For inquiry about existence of records, contact the Privacy Act Officer at the appropriate location, in accordance with procedures in 24 CFR Part 16. If additional information or assistance is required, contact the Privacy Act Officer at the appropriate location. A list of all locations is given in Appendix A.

Record access procedures:

The Department's rules for providing access to records to the individual concerned appear in 24 CFR Part 16. If additional information or assistance is required, contact the Privacy Act Officer at the appropriate location. A list of all locations is given in Appendix A.

Contesting record procedures:

The Department's rules for contesting the contents of records and appealing initial denials by the individual concerned appear in 24 CFR Part 16. If additional information or assistance is needed, in relation to contesting contents of records or in relation to appeals of initial denials, it may be obtained by contacting the Departmental Privacy Appeals Officer, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

Record source categories:

Subject and other individuals. Federal and non-federal government agencies, law enforcement agencies, credit bureaus, financial institutions, current and previous employers, corporations or firms, EO counselors and witnesses.

Systems exempted from certain provisions of the Act:

Pursuant to 5 U.S.C. 552a(k)(2), all investigatory material, including conciliation files, in records contained in this System which meet the criteria of these sub-sections is exempted from the notice, access, and contest requirements (under 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4), (G), (H), and (I), and (f)) of the agency regulations in order for the Department's Fair Housing and Equal Opportunity and legal staffs to perform their functions properly.

(5 U.S.C. 552a, 88 Stat. 1896; sec. 7(d) Department of HUD Act (42 U.S.C. 3535(d)).)

NOTE.—It is hereby certified that the economic and inflationary impacts of this Notice have been carefully evaluated in accordance with OMB Circular A–107.

Issued at Washington, D.C., May 10, 1977.

PATRICIA ROBERTS HARRIS,
Secretary of Housing and Urban Development.

[FR Doc.77–13863 Filed 5–13–77;8:45 am]

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[A 9977]

ARIZONA

Application

Notice is hereby given that pursuant to section 28 of the Mineral Leasing Act of 1920 (30 U.S.C. 185), as amended, by the Act of November 6, 1973 (87 Stat. 576), El Paso Natural Gas Company, PO Box 1492, El Paso, Texas 79978, filed an application for a right-of-way to construct

a cathodic protection site consisting of a rectifier pole, low voltage, underground cable and anode pipe bed adjacent to their existing gas pipeline right-of-way on the following described National Resource Lands:

T. 2 S., R. 3 W., GSR Mer., Arizona
Sec. 27, SE¼SW¼,
Sec. 34, NE¼NW¼.

The cathodic protection site is necessary to the preservation and reliability of service of the natural gas pipeline.

The purpose of this notice is to inform the public that the Bureau will be proceeding with consideration of whether the application should be approved, and if so, under what terms and conditions.

Interested persons desiring to express their views on this matter should do so promptly. Persons submitting comments should include their name and address and send them to the District Manager, Bureau of Land Management, 2929 W. Clarendon, Phoenix, Arizona 85017.

Dated: May 9, 1977.

MARIO L. LOPEZ,
Chief, Branch of Lands and Minerals Operations.

[FR Doc.77-13906 Filed 5-13-77;8:45 am]

U.S. MINERAL SURVEYOR APPOINTMENT EXAMINATION

Examination

Notice is hereby given that the Bureau of Land Management will administer the U.S. Mineral Surveyor Appointment Examination June 2 and 3, 1977, in Anchorage, Alaska. Persons wishing to take the examination must submit an SF 171 by May 19, 1977, (with pages 1, 3, and 4 and the first block on page 2 completed), to the Director, Bureau of Land Management (420), 18th and "C" Streets, NW., Washington, D.C. 20240. Details for the administration of the examination will be furnished directly to the applicants or may be obtained at the Division of Cadastral Survey Bureau of Land Management, 805 "G" Street, Anchorage, Alaska 99501.

GEORGE L. TURCOTT,
Associate Director, Bureau of Land Management.

MAY 12, 1977.

[FR Doc.77-14086 Filed 5-13-77;9:06 am]

DEPARTMENT OF JUSTICE

UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION, FIRST CIRCUIT PANEL

Meeting

The Advisory Committee to recommend candidates for the judicial vacancy in the First Circuit will meet in Boston, Massachusetts, at Room 1620, John W. McCormack Building, 10 Post Office Square, on May 21, at 10:30 a.m.

The purpose of the meeting is to discuss procedures, criteria, and possible candidates. That part of the meeting which will be devoted to a discussion of personnel will not be open to the public, in accordance with Pub. L. 92-463, Sec. 10(D), as amended, (CF. 5 U.S.C. 552B (c)(6)).

JOSEPH A. SANCHES,
Advisory Committee Management Officer.

[FR Doc.77-14052 Filed 5-13-77;8:45 am]

NATIONAL ADVISORY COUNCIL ON EXTENSION AND CONTINUING EDUCATION

MEETING

AGENCY: National Advisory Council on Extension and Continuing Education.

ACTION: Notice.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Continuing Education Policy Committee of the National Advisory Council on Extension and Continuing Education with representatives of labor and business organizations. It also describes the functions of the Council. Notice of this meeting is required under the Federal Advisory Committee Act (5 U.S.C. Appendix 1, 10(a)(2). This document is intended to notify the general public of their opportunity to attend.

DATE: Meeting: June 1, 1977, from 9:30 a.m. to 12:30 p.m.

ADDRESS: Council Office, 425 13th Street NW., Suite 529, Washington, D.C.

FOR FURTHER INFORMATION CONTACT:

James A. Turman, Executive Director, National Advisory Council on Extension and Continuing Education, 425 13th Street NW., Suite 529, Washington, D.C. 20004 (202-376-8888).

The National Advisory Council on Extension and Continuing Education is authorized under Pub. L. 89-329. The Council is required to report annually to the President, the Congress, the Secretary of HEW, and the Commissioner of Education in the preparation of general regulations and respect to policy matters arising in the administration of Part A of Title I (HEA), including policies and procedures governing the approval of State plans under section 105; and to advise the Assistant Secretary of HEW on Part B (Lifelong Learning activities) of the title. The Council is require to review the administration and effectiveness of all federally supported extension and continuing education programs.

The meeting of the Continuing Education Policy Committee will be open to the public, but because of the limited space available in the Council's office, anyone wishing to attend the meeting should inform the Council's staff office (376-8888) no later than May 25, 1977. This meeting will be held at the Council's office, 425 13th Street NW., Suite 529, Washington, D.C. 20004.

The proposed agenda includes a discussion with representatives of labor and business organizations of the recommendations generated by the participants in the Council-sponsored invitational conference on Continuing Education, Manpower Policy, and Lifelong Learning, held at the Xerox Center for Training and Management Development, January 10 and 11, 1977.

All records of Council proceedings are available for public inspection at the Council's staff office, located in Suite 529, 425 13th Street NW., Washington, D.C.

Dated: May 3, 1977.

JAMES A. TURMAN,
Executive Director.

[FR Doc.77-13838 Filed 5-13-77;8:45 am]

NUCLEAR REGULATION COMMISSION

[Docket Nos. 50-325 and 50-324]

CAROLINA POWER AND LIGHT CO.

Issuance of Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendments Nos. 4 and 26 to Facility Operating Licenses Nos. DPR-71 and DPR-62, issued to Carolina Power and Light Company (the licensee), which revised Technical Specifications for operation of the Brunswick Steam Electric Plant, Units Nos. 1 and 2, located in Brunswick County, North Carolina. The amendments are effective as of the date of issuance.

The amendments modify the method for verifying safety relief valve operability during surveillance testing.

The application for the amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendments. Prior public notice of these amendments was not required since the amendments do not involve a significant hazards consideration.

The Commission has determined that the issuance of these amendments will not result in any significant environmental impact and that pursuant to 10 CFR 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with issuance of these amendments.

For further details with respect to this action, see (1) the application for amendments dated March 21, 1977, (2) Amendment No. 4 to License No. DPR-71, (3) Amendment No. 26 to License No. DPR-62, and (4) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C. and at the Southport-Brunswick County Library, 109 W. Moore Street, Southport, North Carolina 28461. A copy of items (2), (3), and (4) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Operating Reactors.

Dated at Bethesda, Maryland, this 22nd day of April 1977.

For the Nuclear Regulatory Commission.

A. SCHWENCER,
Chief, Operating Reactors Branch No. 1, Division of Operating Reactors.

[FR Doc.77-13767 Filed 5-13-77;8:45 a.m.]

[Docket Nos. 50-237, 50-249, 50-254 and 50-265]

COMMONWEALTH EDISON CO. AND IOWA-ILLINOIS GAS AND ELECTRIC CO.

Issuance of Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment Nos. 30, 28, 40 and 38 to Facility Operating License Nos. DPR-19, DPR-25, DPR-29 and DPR-30 (respectively), issued to the Commonwealth Edison Company (and, in the matter of License Nos. DPR-29 and DPR-30, the Iowa-Illinois Gas and Electric Company), which revised Technical Specifications for operation of Unit Nos. 2 and 3 of the Dresden Nuclear Power Station (located in Grundy County, Illinois) and Unit Nos. 1 and 2 of the Quad Cities Nuclear Power Station (located in Rock Island County, Illinois). These amendments are effective as of their date of issuance.

The amendments incorporated changes in the Technical Specifications surveillance frequency and testing methods utilized to assure the operability of the relief valves used in the automatic pressure relief subsystem.

The application for the amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendments. Prior public notice of these amendments was not required since the amendments do not involve a significant hazards consideration.

The Commission has determined that the issuance of these amendments will not result in any significant environmental impact and that pursuant to 10 CFR § 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with issuance of the amendments.

For further details with respect to this action, see (1) the application for amendment dated March 8, 1977, (2) Amendment Nos. 30 and 28 to License Nos. DPR-19 and DPR-25, and Amendment Nos. 40 and 38 to License Nos. DPR-29 and DPR-30, and (3) the Commission's concurrently issued related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C., and for those items relating to Dresden Unit Nos. 2 and 3 at the Morris Public Library, 604 Liberty Street, Morris, Illinois 60450, and for those items relating to Quad Cities Unit Nos. 1 and 2 at the Moline Public Library, 504—17th Street, Moline, Illinois 60625. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Operating Reactors.

Dated at Bethesda, Maryland, this second day of May, 1977.

For the Nuclear Regulatory Commission.

DON K. DAVIS,
Acting Chief, Operating Reactors Branch No. 2, Division of Operating Reactors.

[FR Doc.77-13764 Filed 5-13-77;8:45 am]

[Docket Nos. 50-440 and 50-441]

CLEVELAND ELECTRIC ILLUMINATING CO., ET AL

PERRY NUCLEAR POWER PLANT, UNITS 1 AND 2

Notice of Issuance of Construction Permits

Notice is hereby given that, pursuant to the Initial Decisions dated January 6, 1977 (Antitrust), and April 29, 1977, the Nuclear Regulatory Commission (the Commission) has issued Construction Permits Nos. CPPR-148 and CPPR-149 to The Toledo Edison Company, The Cleveland Electric Illuminating Company, Duquesne Light Company, Ohio Edison Company, and Pennsylvania Power Company for construction of two boiling water nuclear reactors at the applicants' site in Lake County, Ohio, on the southern shore of Lake Erie, about 35 miles northeast of Cleveland.

The proposed reactors, known as the Perry Nuclear Power Plant, Units 1 and 2 (the facilities), are each designed for a rated power of 3579 megawatts thermal with a net electrical output of 1205 megawatts.

The Initial Decisions are subject to review by an Atomic Safety and Licensing Appeal Board prior to becoming final. Any decision or action taken by an Atomic Safety and Licensing Appeal Board in connection with the Initial Decisions may be reviewed by the Commission.

The Commission has made appropriate findings as required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the construction permits. The construction permits include the condition that the construction permit is subject to the outcome of the proceedings in Natural Resources Defense Council v. Nuclear Regulatory Commission (D.C. Circuit, July 21, 1976) Nos. 74-1385 and 74-1586. The application for the construction permits complies with the standards and requirements of the Act and the Commission's rules and regulations.

The construction permits are effective as of their dates of issuance. The earliest date for completion of Unit 1 is April 1, 1981, and the latest date for completion is December 31, 1982. The earliest date for completion of Unit 2 is October 1, 1982, and the latest date for completion is June 30, 1984. The permits shall expire on the latest dates for completion of the facilities.

A copy of (1) the Initial Decisions dated January 6, 1977 (Antitrust), and April 29, 1977; (2) Construction Permits Nos. CPPR-148 and CPPR-149; (3) the report of the Advisory Committee on Reactor Safeguards, dated December 12, 1974, and May 12, 1975; (4) the Office of Nuclear Reactor Regulation's Safety Evaluation Report dated July 1974, and supplements thereto; (5) the Preliminary Safety Analysis Report and amendments thereto; (6) the Applicant's Environmental Report dated June 22, 1973, and supplements thereto; (7) the Draft Environmental Statement dated November 1973; and (8) the Final Environmental Statement dated April 1974, are available for public inspection at the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C., and the Perry Public Library, 3753 Main Street, Perry, Ohio 44081. A copy of the items 2, 4 and 8, may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Project Management.

Dated at Bethesda, Maryland, this 3rd day of May, 1977.

For the Nuclear Regulatory Commission.

STEVEN A. VARGA,
Chief, Light Water Reactors Branch 4, Division of Project Management.

[FR Doc.77-13766 Filed 5-13-77;8:45 am]

[Docket No. 50-389A]

FLORIDA POWER AND LIGHT CO (ST. LUCIE, UNIT 2)

Reconstitution of Atomic Safety and Licensing Appeal Board

Notice is hereby given that, in accordance with the authority in 10 CFR 2.787 (a), the Chairman of the Atomic Safety and Licensing Appeal Panel has reconstituted the Atomic Safety and Licensing Appeal Board for this antitrust proceeding to consist of the following members:

Jerome E. Sharfman, Chairman.
Michael C. Farrar.
Richard S. Salzman.

Dated: May 6, 1977.

ROMAYNE M. SKRUTSKI,
Secretary to the Appeal Board.

[FR Doc.77-13761 Filed 5-13-77;8:45 am]

[Docket No. 50-321]

GEORGIA POWER CO. ET AL

Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 42 to Facility Operating

License No. DPR-57 issued to Georgia Power Company, Oglethorpe Electric Membership Corporation, Municipal Electric Association of Georgia and City of Dalton, Georgia, which revised Technical Specifications for operation of the Edwin I. Hatch Nuclear Plant, Unit No. 1, located in Appling County, Georgia. The amendment is effective as of its date of issuance.

The amendment consists of changes to the Technical Specifications to authorize operation with (1) up to 92 General Electric (GE) 8×8 reload fuel bundles, (2) holes drilled in the lower tie plate of all remaining 7×7 fuel bundles to provide an alternate bypass flow path, (3) a revised safety limit MCPR of 1.06, (4) revised MCPR operating limits for 7×7 and 8×8 fuels, (5) revised MAP LHGR limits for 7×7 and 8×8 fuels, (6) restricted natural circulation operation to 1 percent thermal power or below, (7) an installed atmospheric monitoring leak detection system, and (8) an installed post-LOCA radiation monitoring system. The amendment also includes an administrative change to the main steam isolation valve setpoint from 880 psig to 825 psig, on page 1.1-12 in the Technical Specifications. The change was previously made to all other appropriate pages in the Technical Specifications as a result of License Amendment No. 24.

The applications for the amendment comply with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment. Notice of Proposed Issuance of Amendment to Facility Operating License in connection with the licensee's application dated February 8, 1977 (supplemented by letters dated February 22, April 11, and April 19, 1977) was published in the FEDERAL REGISTER on March 14, 1977 (42 FR 13872). No request for a hearing or petition for leave to intervene was filed following notice of the proposed action. Prior public notice of the portions of the amendment dealing with the atmospheric monitoring leak detection system and the post-LOCA radiation monitoring system was not required since they do not involve a significant hazards consideration.

The Commission has determined that the issuance of this amendment will not result in any significant environmental impact and that pursuant to 10 CFR 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with issuance of this amendment.

For further details with respect to this action, see (1) the applications for amendment dated February 2, 1977 (revision dated April 1, 1977), February 3, 1977, February 8, 1977 (supplemented by letters dated February 22, April 11 and April 19, 1977), and April 21, 1977, (2) Amendment No. 42 to License No. DPR-57 and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C. and at the Appling County Public Library, Parker Street, Baxley, Georgia 31513. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Operating Reactors.

Dated at Bethesda, Maryland this 6th day of May 1977.

For the Nuclear Regulatory Commission.

GEORGE LEAR,
Chief, Operating Reactors Branch No. 3, Division of Operating Reactors.

[FR Doc.77-13762 Filed 5-13-77;8:45 am]

[Docket No. 50-298]

NEBRASKA PUBLIC POWER DISTRICT

Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 36 to Facility Operating License No. DPR-46, issued to the Nebraska Public Power District (the licensee), which revised Technical Specifications for operation of the Cooper Nuclear Station (the facility) located in Nemaha County, Nebraska. The amendment is effective as of its date of issuance.

The amendment deleted a temporary restriction regarding reactor internals vibration testing, altered the Automatic Depressurization System timer setpoint, added operability and surveillance requirements for recirculation pump discharge and bypass valves, added new surveillance requirements for safety/relief valves, and corrected errors in the specifications for Main Control Room Ventilation Isolation, High Pressure Coolant Injection Subsystem, and Automatic Depressurization System.

The applications for amendment comply with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment. Prior public notice of this amendment was not required since the amendment does not involve a significant hazards consideration.

The Commission has determined that the issuance of this amendment will not result in any significant environmental impact and that pursuant to 10 CFR 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with issuance of this amendment.

For further details with respect to this action, see (1) the applications for amendment dated January 21, 1976 and March 4, 1977, (2) Amendment No. 36 to License No. DPR-46, and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C., and at the Auburn Public Library, 118 15th Street, Auburn, Nebraska 68305. A single copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Operating Reactors.

Dated at Bethesda, Maryland, this 27th day of April 1977.

For the Nuclear Regulatory Commission.

DON K. DAVIS,
Acting Chief, Operating Reactors Branch No. 2, Division of Operating Reactors.

[FR Doc.77-13763 Filed 5-13-77;8:45 am]

[Docket Nos. STN 50-580 and STN 50-581]

OHIO EDISON COMPANY, ET AL., ERIE NUCLEAR PLANT, UNITS 1 AND 2

Hearing on Application for Construction Permits

Pursuant to the Atomic Energy Act of 1954, as amended (the Act), and the regulations in Title 10, Code of Federal Regulations, Part 50, "Licensing of Production and Utilization Facilities," Part 51, "Licensing and Regulatory Policy and Procedures for Environmental Protection," and Part 2, "Rules of Practice," notice is hereby given that a hearing will be held before an Atomic Safety and Licensing Board (Board), to consider the application filed under the Act by the Ohio Edison Company, The Cleveland Electric Illuminating Company, Duquesne Light Company, Pennsylvania Power Company, and the Toledo Edison Company (the applicants), for construction permits for two pressurized water nuclear reactors designated as the Erie Nuclear Plant, Units 1 and 2 (the facilities), each of which will be designed for operation at 3780 thermal megawatts with a net electrical output of approximately 1260 megawatts. The proposed facilities are to be located at Erie County, Ohio, approximately two and one-half miles south of Lake Erie and 34 miles west of Cleveland.

The hearing, which will be scheduled to begin in the vicinity of the site of the proposed facilities, will be conducted by an Atomic Safety and Licensing Board (Board), which has been designated by the Chairman of the Atomic Safety and Licensing Board Panel. The Board consists of Dr. Frederick P. Cowan, Mr. Frederick J. Shon, and Elizabeth S. Bowers, Esq., Chairman.

Pursuant to 10 CFR § 2.785, an Atomic Safety and Licensing Appeal Board will exercise the authority and the review function which would otherwise be exercised and performed by the Commission. Notice as to the membership of the Appeal Board will be published in the FEDERAL REGISTER at a later date.

Upon completion by the Commission's staff of a favorable safety evaluation of

the application and an environmental review, and upon receipt of a report by the Advisory Committee on Reactor Safeguards, the Director of Nuclear Reactor Regulation will consider making affirmative findings on Items 1–3, a negative finding on Item 4, and an affirmative finding on Item 5 specified below as a basis for the issuance of construction permits to the applicants. In the event that a separate hearing is held with respect to a limited work authorization, Item 6 below describes the matters for consideration.

ISSUES PURSUANT TO THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. Whether in accordance with the provisions of 10 CFR 50.35(a):

(a) The applicants have described the proposed design of the facilities including, but not limited to, the principal architectural and engineering criteria for the design, and have identified the major features or components incorporated therein for the protection of the health and safety of the public;

(b) Such further technical or design information as may be required to complete the safety analysis and which can reasonably be left for later consideration, will be supplied in the final safety analysis report;

(c) Safety features or components, if any, which require research and development have been described by the applicants and the applicants have identified, and there will be conducted a research and development program reasonably designed to resolve any safety questions associated with such features or components; and

(d) On the basis of the foregoing, there is reasonable assurance that (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facilities, and (ii) taking into consideration the site criteria contained in 10 CFR Part 100, the proposed facilities can be constructed and operated at the proposed location without undue risk to the health and safety of the public.

2. Whether the Ohio Edison Company is technically qualified to design and construct the proposed facilities;

3. Whether the applicants are financially qualified to design and construct the proposed facilities; and

4. Whether the issuance of permits for construction of the facilities will be inimical to the common defense and security or to the health and safety of the public.

ISSUE PURSUANT TO NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA)

5. Whether, in accordance with the requirements of 10 CFR Part 51, the construction permits should be issued as proposed.

ISSUES PURSUANT TO 10 CFR § 2.761a (LIMITED WORK AUTHORIZATION)

6. Pursuant to 10 CFR § 2.761a, a separate hearing and partial decision by the Board on issues pursuant to NEPA and general site suitability and certain other possible issues may be held and issued prior to and separate from the hearing and decision on other issues. In the event the Board, after the hearing, makes favorable findings on such issues, the Director of Nuclear Reactor Regulation may, pursuant to 10 CFR § 50.10(e), authorize the applicants to conduct certain onsite work entirely at their own risk prior to completion of the remainder of the proceeding.

In the event that this proceeding is not a contested proceeding, as defined by 10 CFR 2.4(n), the Board will determine without conducting a de novo evaluation of the application: (1) whether the application and the record of the proceeding contain sufficient information, the review of the application by the Commission's staff has been adequate to support the proposed findings to be made by the Director of Nuclear Reactor Regulation on Items 1–4 above, and to support, insofar as the Commission's licensing requirements under the Act are concerned, the issuance of the construction permits proposed by the Director of Nuclear Reactor Regulation; and (2) whether the NEPA review conducted by the Commission's staff has been adequate.

In the event that this proceeding becomes a contested proceeding, the Board will consider and initially decide, as issues in this proceeding, Items 1–5 above as a basis for determining whether the construction permits should be issued to the applicants.

With respect to the Commission's responsibilities under NEPA, and regardless of whether the proceeding is contested or uncontested, the Board will, in accordance with section 51.52(c) of 10 CFR Part 51: (1) Determine whether the requirements of section 102(2) (A), (C), and (D) of NEPA and Part 51 have been complied with in this proceeding; (2) independently consider the final balance among conflicting factors contained in the record of the proceeding for the permits with a view to determining the appropriate action to be taken; and (3) determine after weighing the environmental, economic, technical and other benefits against environmental and other costs, and considering available alternatives whether the construction permits should be issued, denied, or appropriately conditioned to protect environmental values.

The Board will convene a special prehearing conference of the parties to the proceeding and persons who have filed petitions for leave to intervene, or their counsel, to be held within sixty (60) days after the notice of hearing is published or at such other time as the Board deems appropriate, for the purpose of dealing with the matters specified in 10 CFR 2.751a.

The Board will convene a prehearing conference of the parties, or their counsel, to be held subsequent to any required special prehearing conference, and within sixty (60) days after discovery has been completed or at such other time as the Board may specify, for the purpose of dealing with the matters specified in 10 CFR 2.752.

The Board will set the time and place for any special rehearing conference, prehearing conference and evidentiary hearing, and the respective notices will be published in the FEDERAL REGISTER.

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 CFR 2.715. A person making a limited appearance may make an oral or written statement on the record. He does not become a party, but may state his position and raise questions which he would like to have answered to the extent that the questions are within the scope of Items 1–5 above. Limited apearances will be permitted at the time of the hearing at the discretion of the Board, within such limits and on such conditions as may be fixed by the Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by July 15, 1977. The presiding Atomic Safety and Licensing Board may make further provision with respect to limited appearances subsequently during the course of this proceeding.

Any person whose interest may be affected by the proceeding, who wishes to participate as a party in the proceeding must file a written petition under oath or affirmation for leave to intervene in accordance with the provisions of 10 CFR § 2.714. A petition for leave to intervene shall set forth the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, and any other contentions of the petitioner including the facts and reasons why he should be permitted to intervene, with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. Any such petition shall be accompanied by a supporting affidavit identifying the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene and setting forth with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene. A petition that sets forth contentions relating only to matters outside the jurisdiction of the Commission will be denied.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A petition for leave to intervene must be filed with the Secretary of the Commission and others as specified below by June 15, 1977. A petition for leave to intervene which is not timely will not be

entertained absent a determination by the Board that the petitioner, in addition to the matters specified in 10 CFR 2.714 (d), has made a substantial showing of good cause for failure to file on time. The reasons for the tardiness in filing a petition for leave to intervene, as well as the factors specified in 10 CFR 2.714(a)(1)–(4) shall be considered in making a determination whether there has been a substantial showing of good cause by the petitioner.

An answer to this notice, pursuant to the provisions of 10 CFR 2.705, must be filed by the applicants by June 6, 1977.

Papers required to be filed in this proceeding shall be filed by mail or telegram addressed to the Secretary of the Commission, United States Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch, or may be filed by delivery to the Commission's Public Document Room, 1717 H Street NW., Washington, D.C. Pending further order of the Board, parties are required to file, pursuant to the provisions of 10 CFR 2.708, an original and twenty (20) conformed copies of each such paper with the Commission. A copy of any petition for intervention should also be sent to the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and to Shaw, Pittman, Potts and Trowbridge, 1800 M Street NW., Washington, D.C. 20036, Attention: Gerald Charnoff, Esquire, attorney for the applicants.

For further details, see the application for construction permits dated February 28, 1977 (docketed March 1, 1977), including site suitability information; the applicants' environmental report dated April 29, 1977 (docketed May 2, 1977); and the Babcock and Wilcox Company's standardized application, B–SAR–205 (Docket No. STN 50–561), which is incorporated by reference. These documents, along with any amendments or supplements thereto, are or will be available as noted above for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C., between the hours of 8:30 a.m. and 5 p.m. on weekdays. Copies of those documents will also be available at the Berlin Township Public Library, 4 East Main Street, Berlin Heights, Ohio, for inspection by members of the public between the hours of 10 a.m. and 7:30 p.m. weekdays and 10 a.m. and 2 p.m. on Saturdays. As they became available, a copy of the safety evaluation report by the Commission's Office of Nuclear Reactor Regulation, the draft and final environmental statements, the report of the Advisory Committee on Reactor Safeguards (ACRS), the proposed construction permits, the transcripts of the prehearing conferences and of the hearing, and other relevant documents, will also be available at the above locations. Copies of the proposed construction permits and the ACRS report may be obtained, when available, by request to the Director, Division of Project Management, United States Nuclear Regulatory Commission, Washington, D.C. 20555. Copies of the Office of Nuclear Reactor Regulation's safety evaluation report and final environmental statement, when available, may be purchased at current rates from the National Technical Information Service, Springfield, Virginia, 22161.

Dated at Washington, D.C., this 5th day of May 1977.

NUCLEAR REGULATORY COMMISSION,
SAMUEL J. CHILK,
Secretary of the Commission.

[FR Doc.77–13759 Filed 5–13–77;8:45 am]

[Docket No. P–564A]

PACIFIC GAS AND ELECTRIC CO. (STANISLAUS NUCLEAR PROJECT, UNIT NO. 1)

Reconstitution of Atomic Safety and Licensing Appeal Board

Notice is hereby given that, in accordance with the authority in 10 CFR 2.787 (a), the Chairman of the Atomic Safety and Licensing Appeal Panel has reconstituted the Atomic Safety and Licensing Appeal Board for this antitrust proceeding to consist of the following members:

Alan S. Rosenthal, Chairman
Michael C. Farrar
Jerome E. Sharfman

Dated: May 6, 1977.

ROMAYNE M. SKRUTSKI,
Secretary to the Appeal Board.

[FR Doc.77–13760 Filed 5–13–77;8:45 am]

[Docket No. STN 50–508 and STN 50–509]

WASHINGTON PUBLIC POWER SUPPLY SYSTEM WPPSS NUCLEAR PROJECTS NOS. 3 AND 5

Availability of Partial Initial Decision of the Atomic Safety and Licensing Board

Pursuant to the National Environmental Policy Act of 1969 and the United States Nuclear Regulatory Commission's regulations in 10 CFR Part 51, notice is hereby given that a Partial Initial Decision Authorizing Limited Work Authorization dated April 8, 1977, by the Atomic Safety and Licensing Board in the above-captioned proceeding is available for inspection by the public in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C. and at the W. H. Abel Memorial Library, 125 Main Street, South, Montesano, Washington.

Based on the record developed in the public hearing in the above-captioned matter, the Partial Initial Decision modified in certain respects the contents of the Final Environmental Statement prepared by the Commission's Office of Nuclear Reactor Regulation relating to the proposed construction of the Washington Public Power Supply System Nuclear Projects Nos. 3 and 5.

Pursuant to the provisions of § 51.52 (b)(3) of 10 CFR Part 51, the Final Environmental Statement is deemed modified to the extent that the Findings and Conclusions contained in the Partial Initial Decision differ from those in the Final Environmental Statement. As required by § 51.52(b)(3) of 10 CFR Part 51, a copy of the Partial Initial Decision which modifies the Final Environmental Statement has been transmitted to the Council on Environmental Quality, the Environmental Protection Agency, and other interested agencies and persons in accordance with § 51.56 of 10 CFR Part 51.

The Partial Initial Decision and the Final Environmental Statement are available for public inspection at the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C., and the W. H. Abel Memorial Library, 125 Main Street, South, Montesano, Washington. Copies of the Final Environmental Statement (Document No. NUREG–75/053) may be purchased, at a cost of $7.50 for printed copies and $2.25 for microfiche, from the National Technical Information Service, Springfield, Virginia 22161.

Single copies of the Partial Initial Decision may be obtained by request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Site Safety and Environmental Analysis.

Dated at Rockville, Maryland, this 6th day of May 1977.

For the Nuclear Regulatory Commission.

WM. H. REGAN, Jr.,
Chief, Environmental Projects Branch No. 2, Division of Site Safety and Environmental Analysis.

[FR Doc.77–13765 Filed 5–13–77;8:45 am]

ADVISORY COMMITTEE ON REACTOR SAFEGUARDS REACTOR FUEL SUBCOMMITTEE

Addition to Agenda

The agenda of the May 20, 1977 meeting of the Reactor Fuel Subcommittee published in the FEDERAL REGISTER on May 5, 1977, page 22965, has been changed to add the following provision:

It may be necessary for the Subcommittee to hold one or more closed sessions for the purpose of exploring matters involving proprietary information.

I have determined, in accordance with Subsection 10(d) of Pub. L. 92–463, that it is necessary to conduct the above closed sessions to protect proprietary information (5 U.S.C. 552b(c)(4)).

Persons with agreements or orders permitting access to proprietary information may attend portions of ACRS meetings where this material is being discussed upon confirmation that such agreements are effective and relate to the material being discussed.

The Executive Director of the ACRS should be informed of such an agreement at least three working days prior to the meeting so that the agreement can be confirmed and a determination can be made regarding the applicability of the agreement to the material that will be discussed during the meeting. Minimum information provided should include information regarding the date of the agreement, the scope of material included in the agreement, the project or projects involved, and the names and

titles of the persons signing the agreement. Additional information may be requested to identify the specific agreement involved. A copy of the executed agreement should be provided to Dr. Richard Savio of the ACRS Office, prior to the beginning of the meeting.

All other matters pertaining to this meeting remain unchanged.

Date: May 11, 1977.

JOHN C. HOYLE,
Advisory Committee Management Officer.

[FR Doc.77-14041 Filed 5-13-77;8:45 am]

[Docket No. 50-320]

METROPOLITAN EDISON CO., ET AL.

Order Regarding Evidentiary Hearing

In the matter of Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company (Three Mile Island Nuclear Station, Unit No. 2).

The evidentiary hearing in this matter will resume on Monday, May 16, 1977, at 1:30 p.m., at the U.S. Federal Building and Courthouse, Courtroom No. 2, 3rd and Walnut Streets, Harrisburg, Pennsylvania. The hearing will continue through Saturday, May 21, 1977.

Dated at Bethesda, Md., this 11th day of May 1977.

So ordered.

ATOMIC SAFETY AND LICENSING BOARD,
EDWARD LUTON,
Chairman.

[FR Doc.77-14027 Filed 5-13-77;8:45 am]

ADVISORY COMMITTEE ON REACTOR SAFEGUARDS

Meeting

In accordance with the purposes of Sections 29 and 182 b. of the Atomic Energy Act (42 U.S.C. 2039, 2232 b.) representatives of the Advisory Committee or Reactor Safeguards will meet with representatives of the Reaktor-Sicherheitskommission (RSK) of the Federal Republic of Germany on May 31, June 1, and June 3, 1977 at Cologne, Germany and members will visit a number of German sites on June 1 and 2.

The purpose of this meeting is to discuss items of mutual interest related to nuclear safety and regulation.

This meeting will be closed to the public. Many of the topics to be discussed are classified by the Federal Republic of Germany and by Executive Order 11652, Section 4c. Such information must be assured a degree of protection equivalent to that required by the government furnishing the information. All other topics to be discussed include commercial secrets or information which is protected from public disclosure in Germany, which will only be given to the ACRS in confidence.

I have determined in accordance with Subsection 10(d) of Public Law 92-463 that it is necessary to close this meeting to protect information which is classified and to protect commercial secrets and other information provided in confidence to the ACRS by a foreign source (5 U.S.C. 552b (c) (1), (4) and (9)(B)). Information considered exempt from disclosure will be inextricably intertwined with the discussion of non-exempt material, if any, and separation during the meeting of this material is not considered practical.

Date: May 12, 1977.

JOHN C. HOYLE,
Advisory Committee Management Officer.

[FR Doc.77-14129 Filed 5-13-77;11:52 am]

OFFICE OF MANAGEMENT AND BUDGET

REPORT FORMS ON U.S. DIRECT INVESTMENT ABROAD

Public Hearing

Pursuant to Pub. L. 92-463, notice is hereby given of a public hearing to be held by the Office of Management and Budget under the provisions of the Federal Reports Act of 1942 (44 U.S.C. 3506).

The purpose of the hearing is for the Office of Management and Budget to determine whether or not certain proposed report forms on United States direct investment abroad are necessary to the proper performance of responsibilities of the Department of Commerce under the International Investment Survey Act of 1976 (Pub. L. 94-472) and Executive Order 11961.

The hearing, to be held in Room 2010, New Executive Office Building, 726 Jackson Place, N.W., Washington, D.C. on June 8, 1977 at 9:30 a.m., will be open to public observation and participation.

Further information regarding the hearing may be obtained from the Statistical Policy Division, Office of Management and Budget, Room 10215, New Executive Office Building, Washington, D.C. 20503, Telephone (202) 395-3211.

VELMA N. BALDWIN,
Assistant to the Director for Administration.

[FR Doc.77-13907 Filed 5-13-77;8:45 am]

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-13516; File No. SR-Amex-77-7]

AMERICAN STOCK EXCHANGE, INC.

Self-Regulatory Organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on May 2, 1977 the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

STATEMENT OF TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The proposed rule change will clarify the scope of permissible contacts between listed companies and their specialists.

The text of the proposed rule change is attached as Exhibit A.

EXCHANGE'S STATEMENT OF BASIS AND PURPOSE

The basis and purpose of the foregoing proposed rule change is as follows:

The purpose of the proposed amendment to Section 411 of the Company Guide is to define the scope of permissible information which may be discussed during the course of communications between specialist and listed company officials, in order to encourage appropriate liaison between listed companies and their specialists, while making clear that disclosure of material non-public information relating to the company or to the market for its securities by either party to the other is prohibited.

The amendment to Section 411 is proposed pursuant to the authority of national securities exchanges contained in SEC Rule 11b-1 to regulate the conduct of specialists, and the obligation imposed on national securities exchanges in Section 6(b)(5) of the Act to adopt rules which are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interests.

No comments were solicited or received with respect to the proposed rule change.

The Amex has determined that no burden on competition will be imposed by the proposed rule change.

Within thirty-five days of the date of publication of this notice in the FEDERAL REGISTER, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer periods to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submission should file six (6) copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 L Street, N.W., Washington,

D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted within 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

MAY 6, 1977.

EXHIBIT A.—AMERICA STOCK EXCHANGE, INC.

Brackets [] indicate words to be deleted, and italics indicate words to be added.

§ 411. Procedures, Rules and Regulations, From time to time Company officials inquire about Exchange rules or regulations affecting their relationship to the registered specialist in their securities.

[The Exchange recognizes that, through communication with the specialist, Company officials can gain increased understanding of the auction market and its relation to the securities of their Companies.]

(a) *Specialist's Function.* The specialist is a member of the Exchange who performs two basic functions regarding the issues in which he specializes. As a broker he holds and executes orders entrusted to him by other brokers on behalf of their customers. As a dealer, [he] *the specialist* is obligated, insofar as reasonably practicable, to purchase and sell securities for his own account in order to help maintain a fair and orderly market. His aim is to provide a continuous auction market throughout the trading day, with minimum price changes between transactions. The specialist does not by his own activities determine the trend of stock prices. Rather, the price at any given moment is determined fundamentally by the balance of public buy and sell orders.

(b) Liaison. The Exchange recognizes that periodic communication between Company officials and their specialists, if appropriately conducted, can be beneficial to both parties. Such communication may provide Company officials with a better understanding of the auction market, the specialist system and their own specialist's role in relation to the Company's securities. From the specialist's viewpoint, an awareness and understanding of the Company and its affairs may aid him in discharging his responsibility for maintaining a fair and orderly market in the Company's securities.

(c) Scope of Permissible Disclosure. In view of the specialist's central and sensitive role in the auction market, it is essential that Federal securities laws, Exchange rules and a responsible code of conduct be observed in all communications between specialists and Company officials. The following summary may serve as a guide as to the scope of permissible disclosure in such communications.

A Company may make available to the specialist whatever information it has provided to its stockholders, security analysts or the general public, such as specific data and information concerning general trends relating to the Company's business, as well as industry and general economic developments that may influence the Company's welfare. It is improper, however, to furnish to the specialist any material information not previously released to the public regarding such matters as earnings, forecasts, anticipated dividend action, a proposed stock split, merger negotiations or any other undisclosed matter which is likely to have a significant effect on the price of the Company's securities or influence investment decisions.

While it is not contemplated that a Company will be in continuous contact with its specialist, the specialist may from time to time inform Company officials of unusual market problems and respond to broad questions about the market in the Company's stock. The restrictions imposed on a specialist concerning the information he may disclose are set forth in paragraph (d)(1) below.

Within this framework, Company officials and specialists should feel free to call upon each other so that a mutually beneficial understanding of the problems encountered by each is fostered.

[Numerous Exchange regulations clearly define and limit a specialist's activities. The following summary of some of these rules may be helpful to Company officials in their contacts with specialists.]

(d) *Exchange Rules Governing Specialist's Activities. In addition to certain provisions of the Securities Exchange Act of 1934, a number of Exchange regulations place clearly defined limits on a specialist's activities. An awareness of both the intent and spirit of Exchange rules, and the responsibilities the Exchange places on the specialist, will help ensure that contacts between Company officials and the specialist are conducted within the framework provided for above.*

With respect to any security in which [he is registered as] a specialist *is registered*, Exchange rules prohibit [him] *the specialist* from:

(1) [(a)] disclosing, at any time, to any person other than a Floor Official or authorized Exchange official, any information in regard to orders entrusted to [him as a] *the* specialist or the name of a buyer or seller except as may be necessary solely for the purpose of processing a transaction; *provided, however, that when requested by a member, member organization, or a representative of the issuer of the security involved, the specialist shall, to the best of his ability, disclose to such parties the names of buying and selling member organizations in completed Exchange transactions unless specifically directed to the contrary by the member organizations involved;*

(2) [(b)] effecting transactions for his own account unless such dealings are reasonably necessary to permit him to maintain a fair and orderly market;

(3) [(c)] acquiring, holding or granting an option in any such security;

(4) [(d)] being an officer or director of the issuer of any such security;

(5) [(e)] nominating, directly or indirectly, any person to be on the Board of Directors of the issuer of any such security;

(6) [(f)] effecting, directly or indirectly, any business transaction with the issuer of any such security or any officer, director or 10% stockholder of any such issuer;

(7) [(g)] accepting an order for the purchase or sale of any stock directly from the Company issuing such stock; from any officer, director or 10% stockholder of that Company; from any pension or profit-sharing fund; or from any bank, trust company, insurance company, investment company or similar institution. (This prohibition is also applicable to the member [firm or member corporation] *organization* of which the specialist is a member.)

(8) [(h)] soliciting any proxy, directly or indirectly, on behalf of himself or any other persons in respect of any such security; and

(9) [(i)] voting, directly or indirectly, in any proxy contest involving any such security and in which he has a beneficial interest.

With respect to any security in which [he is registered as] a specialist *is registered*, Exchange rules require [him] *the specialist* to report *to the Exchange:*

(1) [(a)] unusual activity or price change;

(2) [(b)] information which [he believes] may materially affect the business or financial structure of the issuer of, [any such security] or the market for, [the Company's] *such* security;

(3) [(c)] the existence of options or selling agreements;

(4) [(d)] any unusual transaction in which [he] *the specialist* participates as a broker or dealer; and

(5) [(e)] each purchase and sale for [his] *the specialist's* own account.

[Against this background, only information about a Company that would be available to the general public should be made available to the specialist by Company officials. It is the Exchange's experience that most Company officials recognize the central and sensitive role in the auction market which the specialist fills.]

[An awareness of both the intent and spirit of Exchange rules, and the responsibilities the Exchange places on the specialist, will help assure that any contacts with specialists are conducted within the framework provided by the Exchange.]

(e) *Listing Representatives.* It is Exchange policy to assign a Listing Representative in the Securities Division to each listed Company (see §§ 207, 406). The Listing Representative may serve as a communications link between a Company and the specialist and can be helpful whenever questions about activity in a Company's stock or other matters arise.

[FR Doc.77-13925 Filed 5-13-77;8:45 am]

[Release No. 34-13518; File No. SR-Amex-77-9]

AMERICAN STOCK EXCHANGE, INC.

Self-Regulatory Organization

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on May 2, 1977, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

EXCHANGE'S STATEMENT OF TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The American Stock Exchange, Inc. ("Amex") proposes to amend its policies relating to the intervals at which exercise prices of options are fixed (the "Exercise Price Amendments"). The proposed amendments to these policies are set forth below. Brackets indicate words to be deleted, and italics indicate words to be added.

Exercise prices are generally fixed at 5 point intervals for securities traded below [50] *100, and* 10 point intervals for securities trading [between 50 and 200 and 20 point intervals for securities trading above 200] *above 100.*

EXCHANGE'S STATEMENT OF BASIS AND PURPOSE

The purpose of the Exercise Price Amendments is to enable the Amex to set the exercise price of series of options opened for trading on the Amex at a price per share which is closer to the market price per share at which the

underlying stock is traded in the primary market.

When implemented the Exercise Price Amendments will result in a small increase in the number of series of options opened for trading on the Amex. At present based upon the market price of the stocks underlying the options traded on the Amex, only seven classes of options would be affected by the Exercise Price Amendments. Consequently, the Exercise Price Amendments will not adversely affect the operational capacity of the Amex.

The ability to open an options series at prices closer to the price of the underlying stock would make it easier for public customers to reduce their risks through increased hedging and other purchasing and writing strategies. Specialists and Registered Options Traders would be better able to make fair and orderly markets in these issues. The public would thus be afforded greater access to a narrow, continuous, two-sided market.

The Exercise Price Amendments are authorized by Section 6(b) (5) of the Securities Exchange Act of 1934 (the "1934 Act"). Such Amendments are designed to permit the narrowing of the markets in options dealt in on the Exchange by enabling the Amex to set the exercise price of series of options opened for trading on the Amex at a price per share which is closer to the market price per share at which the underlying stock is traded in the primary market. The Amex believes that the Exercise Price Amendments will serve to promote just and equitable principles of trade and to protect investors in exchange traded option contracts.

The Exercise Price Amendments were considered and approved by the Options Committee of the Amex which is composed of Amex members and representatives of Amex member organizations.

The Amex has determined that the Exercise Price Amendments would not impose any burden on competition.

Within 35 days of the date of publication of this notice in the FEDERAL REGISTER, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the abovementioned self-regulatory organization consents, the Commission will:

(a) by order approve such proposed rule change, or

(b) institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 L Street NW., Washington, D.C. Copies of such filings will also be available for inspection and copying at the principal office of the abovementioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted within 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

MAY 6, 1977.

[FR Doc.77-13926 Filed 5-13-77;8:45 am]

[812-4000]

AXE-HOUGHTON INCOME FUND, INC. ET AL.

Filing of Application

MAY 6, 1977.

In the matter of AXE-HOUGHTON INCOME FUND, INC., AXE-HOUGHTON FUND B, INC., AXE-HOUGHTON STOCK FUND, INC., and AXE SECURITIES CORPORATION, 400 Benedict Avenue, Tarrytown, New York 10591 (812-4000).

Notice is hereby given that Axe-Houghton Income Fund, Inc., Axe-Houghton Fund B, Inc. and Axe-Houghton Stock Fund, Inc. (the "Funds"), each of which is registered under the Investment Company Act of 1940 (the "Act") as a diversified, open-end, management investment company, and Axe Securities Corporation ("Axe Securities") (collectively "Applicants"), the principal underwriter of each of the Funds, filed an application on August 2, 1976, and amendments thereto on November 8, 1976, January 24, 1977, and April 18, 1977, pursuant to Section 6(c) of the Act, for an order of the Commission exempting Applicants from the provisions of Section 22(d) of the Act. All interested persons are referred to the application on file with the Commission for a statement of the representations made therein, which are summarized below.

Section 22(d) of the Act provides, in pertinent part, that a registered investment company and its principal underwriter must sell redeemable securities of the investment company only at the current public offering price described in the investment company's prospectus. Shares of each of the Funds are currently offered to the public at a price based on their net asset value plus a sales charge that varies with the quantity of securities purchased. The Rules promulgated under Section 22(d) permit certain variations in sales load, but Applicants state that none of them are applicable to their proposed transactions.

Applicants propose to offer to Fund shareholders, subject to the laws and regulations of the state or other jurisdiction in question, the privilege of redeeming all or part of their investment in a Fund and depositing the proceeds in a special savings account (the "Savings Account") to be established with the First Jersey National Bank (the "Bank"). Amounts continuously on deposit in such Savings Accounts could then be used to repurchase shares of any of the Funds without payment of a sales charge.

Applicants state that redemptions of Fund shares for deposit to a Savings Account (the "Redemption Deposit Privilege") will be at the Fund's then current net asset value. Amounts deposited to Savings Accounts pursuant to an exercise of the Redemption Deposit Privilege which have remained continuously on deposit by the shareholder, plus any interest credited thereon, could be reinvested in shares of any of the Funds at the then current net asset value of that Fund without paying the customary sales charge (the "Savings Reinvestment Privilege"). For the purpose of administering the proposed Privileges the Bank will establish a separate type of savings account which will be administered by its Mutual Fund branch. Deposits to these Savings Accounts will consist only of proceeds of redemptions of shares pursuant to the exercise of the Redemption Deposit Privilege and interest paid on the balance in such accounts. Withdrawals will be permitted from these Savings Accounts at any time. Depositors will be issued a statement rather than a passbook. The proposed Privileges are limited insofar as they must be exercised in amounts equal to or in excess of $1,000.

The statement for each Savings Account will indicate the date of each deposit. When a request for reinvestment pursuant to the Savings Reinvestment Privilege is received, it will be charged against the Savings Account on a "first in, first out" basis. If a shareholder withdraws money from his Savings Account without reinvesting it in one of the Funds, he could not subsequently redeposit the money in the Savings Account.

Amounts on deposit in Savings Accounts will bear interest at the same rate, and be subject to the same rules and regulations governing all other "day of deposit to day of withdrawal" passbook accounts maintained with the Bank, except that statements rather than passbooks will be issued on the Savings Accounts. The rate at which interest on such accounts presently accrues is 5 percent per year, compounded and credited monthly. The rules pertaining to such Savings Accounts and the interest paid thereon are subject to change from time to time in conformity with changes made by the Bank for other accounts of the same type. The Bank has agreed to perform the services required in administering the Redemption Deposit Privilege without charge. Axe Securities (the principal underwriter of the Funds) or the Bank will have the right to terminate both proposed Privileges at any time.

Forms for use by Fund shareholders desiring to exercise a Redemption Deposit Privilege (which concurrently will authorize the Bank to open a Savings Account) or a Savings Reinvestment Privilege will be available from either

Axe Securities or the Bank. Prospectuses of the Funds will be available from Axe Securities.

Applicants assert that the purpose of the proposed Redemption Deposit Privilege is to give shareholders who wish to change the nature of their investment the opportunity to transfer their investment in Fund shares into an interest bearing account. The proposed Savings Reinvestment Privilege will give shareholders who have transferred their investment into an interest bearing account, the opportunity to reinvest such monies in Fund shares without having to pay additional sales charges. Applicants state that the Redemption Deposit Privilege together with the Savings Reinvestment Privilege will encourage Fund shareholders to review their Fund shares as long-term investments.

Applicants argue that granting the proposed exemption will be consistent with the purposes of Section 22(d) of the Act in that the proposed Privileges will not discriminate among investors. They assert that no sales charge should be required on such reinvestments because no sales effort is involved and no commission will be paid to any dealer. Applicants also state that requiring transfers under both Privileges to be made in amounts in excess of $1,000 is necessary to reduce the possibility that a large number of small new accounts will be established which would impose an unreasonable record keeping burden on the Funds.

Section 6(c) of the Act provides, in pertinent part, that the Commission may, by order upon application, conditionally or unconditionally exempt any person or persons from any provision of the Act or from any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Notice is further given that any interested person may, not later than May 31, 1977, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the application accompanied by a statement as to the nature of his interest, the reasons for such request, and the issues, if any, of fact or law proposed to be controverted, or he may request that he be notified if the Commission shall order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request shall be served personally or by mail upon Applicants at the address stated above. Proof of such service (by affidavit, or in the case of an attorney-at-law, by certificate) shall be filed contemporaneously with the request. As provided by Rule 0-5 of the Rules and Regulations promulgated under the Act, an order disposing of the application herein will be issued as of course following said date unless the Commission thereafter orders a hearing upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77-13916 Filed 5-13-77;8:45 am]

[File No. 500-1]

BOSTON AND ALBANY RAILROAD CO.

Suspension of Trading

MAY 4, 1977.

In the matter of Trading in the Securities of Boston and Albany Railroad Company, Carthage & Adirondack Railroad Company, Cleveland-Cincinnati-Chicago & St. Louis Railway Company, Cleveland & Pittsburg Railroad Company, Connecting Railway Company, Delaware Railroad Company, Erie & Pittsburgh Railroad Company, Kanawha & Michigan Railroad Company, Lake Shore & Michigan Railroad Company, Little Miami Railroad Company, Mahoning Coal Railroad Company, Michigan Central Railroad Company, Mohawk & Malone Railroad Company, New York Central Railroad Company, New York City & Hudson River Railroad Company, New York Connecting Railroad Company, New York & Harlam Railroad Company, New York & Putnam Railroad Company, Northern Central Railway Company, Penn Central Company, Penn Central Transportation Company, Pennsylvania Railroad Company, Peoria & Eastern Railway Company, Philadelphia, Baltimore & Washington Railroad Company, Philadelphia & Trenton Railroad Company, Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, Pittsburgh, Fort Wayne & Chicago Railway Company, Pittsburgh, Youngstown & Ashtabula Railway Company, United New Jersey Railroad & Canal Company, West Shore Railroad Company, File No. 500-1, Securities Exchange Act of 1934 Section 12(k).

It appearing to the Securities and Exchange Commission that the summary suspension of trading in the securities of the above named issuers being traded on a national securities exchange or otherwise is required in the public interest and for the protection of investors;

Therefore, pursuant to Section 12(k) of the Securities Exchange Act of 1934, trading in such securities on a national securities exchange or otherwise is suspended, for the period from 3:30 p.m. (EDT) on May 4, 1977 through May 13, 1977.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77-13917 Filed 5-13-77;8:45 am]

BRADFORD SECURITIES PROCESSING SERVICES, INC.

Order Approving Rule Change Submitted by Bradford Securities Processing Services, Inc. Providing for the Establishment of Additional Branch Facilities

MAY 6, 1977.

In the matter of Bradford Securities Processing Services, Inc., 80 Pine Street, New York, New York, 10005 (File No. SR-BSPS-77-3).

On March 10, 1977 Bradford Securities Processing Services, Inc. ("BSPS") filed a proposed rule change pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (the "Act") relating to the establishment of branch facilities in Kansas City, Missouri and St. Louis, Missouri. As part of its filing, BSPS made representations relating to procedures and safeguards for the handling of securities and funds.

In accordance with Section 19(b) of the Act and Rule 19b-4 thereunder, the rule change was published in the FEDERAL REGISTER (42 FR 17545, April 1, 1977) and the public was invited to submit comments until April 22, 1977. Notice of the filing and an invitation for comments also appeared in Securities Exchange Act Release No. 34-13400. No letters of comment were received.

The Commission has reviewed the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to registered clearing agencies.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, That the rule change contained in File No. SR-BSPS-77-3 be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77-13918 Filed 5-13-77;8:45 am]

[Release No. 34-13509; File No. SR-DTC-77-4]

DEPOSITORY TRUST CO.

Self-Regulatory Organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on March 28, 1977, the above mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change[1] as follows:

STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The proposed rule change involves correction by The Depository Trust Company (DTC) of certain evident errors or omissions in deleted Miscellaneous Deliver Orders (MDOs), as described in DTC Important Notice B 3225. The fee

[1] On April 21, 1977, DTC filed Amendment No. 1 to the proposed rule change.

associated with such corrections constitutes an addition to the Fee Schedule for Major Services originally filed on Form 19b–4A, File No. SR–NYSE–75–19, as follows:

Corrections to erroneous MDOs, $2 per correction.

STATEMENT OF BASIS AND PURPOSE

The basis and purpose of the foregoing proposed rule change is as follows:

The purpose of the proposed rule change is to offer Participants the opportunity to have DTC personnel correct evident errors or omissions in deleted MDOs for re-entry into the system.

The proposed rule change will facilitate the prompt and accurate clearance and settlement of securities transactions for which DTC is responsible by increasing the number of completed deliveries and will equitably allocate fees among DTC Participants.

Participants were informed of the proposed rule change by an article in DTC's February 1977 Newsletter and by DTC Important Notice B 3225. Participants have returned signed copies of the agreement included in the Important Notice. No written comments were received. In conversations with Participants, no objections to the proposed rule change were raised.

DTC believes that no burden on competition will be caused by the proposed rule change.

Within 35 days of the date of publication of this notice in the FEDERAL REGISTER, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file 6 copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the public reference room, 1100 L Street NW., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should be submitted within 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

MAY 5, 1977.

[FR Doc.77–13927 Filed 5–13–77;8:45 am]

[812–4061]

DREYFUS LEVERAGE FUND, INC. AND IRVING TRUST CO.

Order

MAY 4, 1977.

In the matter of The Dreyfus Leverage Fund, Inc., 767 Fifth Avenue, New York, NY 10022 and Irving Trust Company, One Wall Street, New York, NY 10015 (812–4061).

On March 31, 1977, a notice was issued (Investment Company Act Release No. 9701) of the filing of an application on December 10, 1976, and an amendment thereto on March 29, 1977, by The Dreyfus Leverage Fund, Inc. (the "Fund"), a diversified, open-end investment company registered under the Investment Company Act of 1940 ("Act"), and Irving Trust Company (the "Bank"), a commercial bank organized under the laws of the State of New York, for an order pursuant to Section 17(d) of the Act and Rule 17d–1 thereunder, permitting the Fund to borrow money from the Bank under a proposed arrangement described more fully in the notice.

The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued as of course unless a hearing should be ordered. No request for a hearing has been filed and the Commission has not ordered a hear- the Commission has not ordered a hearing.

The matter having ben considered, it is found that the participation by the Fund in the proposed borrowing arrangement is consistent with the provisions, policies and purposes of the Act and is not on a basis different from or less advantageous than that of any other participant. Accordingly, *It is ordered*, pursuant to Section 17(d) of the Act and Rule 17d–1 thereunder, that the application to permit The Dreyfus Leverage Fund, Inc. and Irving Trust Company to participate in the proposed borrowing arrangement described in the application, to the extent requested, be and hereby is, granted, effective forthwith.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77–13919 Filed 5–13–77;8:45 am]

[812–4108]

E. I. DU PONT DE NEMOURS AND CO.

Filing of Application

MAY 5, 1977.

In the matter of E. I. Du Pont de Nemours and Company, 1007 Market Street, Wilmington, Delaware 19898 (812–4108).

Notice is hereby given that E. I. du Pont de Nemours and Company ("Applicant"), a Delaware corporation, filed an application on March 18, 1977, pursuant to Section 17(b) of the Investment Company Act of 1940 (the "Act"), for an order exempting from the provisions of Section 17(a) of the Act a proposed transaction involving (1) the purchase from Applicant by Dana Electronics, Inc. ("Dana"), a California corporation, of 727,500 shares (the "Shares") of common stock of Dana, representing Applicant's entire equity ownership in Dana, for $2,182,500 in cash, and (2) the prepayment by Dana of certain promissory notes held by Applicant. Dana and Applicant are described, in the application, as companies presumed to be controlled by Christiana Securities Company ("Christiana"), registered under the Act as a closed-end, non-diversified management investment company. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below.

According to the application, Dana was organized in 1961. Applicant states that it made a series of investments in Dana between 1962 and 1968, as a result of which Applicant presently owns the Shares, representing approximately 40.1 percent of Dana's outstanding common stock, and $1,250,000 principal amount of 5½ percent promissory notes ("Notes") due September, 1978. The Notes are convertible into additional shares of Dana common stock at a conversion price of $10.00 per share.

The application states that the principal reason for Applicant's investments in Dana was that Applicant envisioned that, if Dana's business developed along lines compatible with Applicant's business interests, at some time a joinder of Dana with Applicant might be mutually desirable. The application further states, however, that, as time progressed, Dana's interest in the electronic test instrumentation and telephone communication equipment fields developed in a divergent manner from Applicant's overall corporate objectives, and that early in 1974 Applicant informed Dana that it was no longer interested in considering a joinder of the two companies.

Applicant states (1) that as a partial result of Dana's unsatisfactory profit performance during several years prior to 1976, uncertainty arose regarding Dana's future; (2) that Dana has informed Applicant that this situation has been further aggravated by uncertainty regarding Applicant's long range plans for its investment in Dana; and (3) that these conditions have caused unrest and concern among Dana's employees, sales representatives and customers. Applicant asserts that, while neither Dana's profit performance nor its financial condition have, until recently, been strong enough to support Dana's purchase of the Shares, there has been a recent and marked improvement in both those factors, and that Dana's management has concluded that such a purchase, upon acceptable terms, would be advantageous to Dana and its shareholders.

The application states that negotiations regarding the purchase of the Shares culminated in an agreement (the

"Agreement"), executed by Dana and Applicant effective as of February 7, 1977, which has received the unanimous authorization and approval of Dana's Board of Directors and the unanimous approval of Applicant's Executive and Finance Committees. The Application states that there are presently six members on Dana's Board of Directors, two of whom are executives of Applicant who (1) specifically refrained from attending any meetings of Dana's Board of Directors when the Agreement or the matters covered thereby were being deliberated and considered, and (2) played no part in the negotiation of the Agreement.

Pursuant to the Agreement, Applicant has agreed to sell the Shares to Dana for a cash purchase price of $3.00 per share, or a total cash purchase price of $2,182,500. The application states that this sale of Shares is subject to the timely satisfaction of certain conditions, including the following:

1. A majority of the shares of Dana's outstanding common stock entitled to vote at Dana's 1977 annual meeting of shareholders shall have been voted in favor of the Agreement at that meeting. Applicant states that, in view of its direct interest in the transaction, it has agreed to vote the Shares on this matter in the same proportions as all other shares of Dana's common stock are voted for or against the Agreement.

2. Either the order requested in the application shall have been obtained, or Applicant's counsel shall have rendered an opinion satisfactory to Dana to the effect that the purchase and sale of the Shares pursuant to the Agreement is not prohibited by Section 17(a) of the Act.

3. On or before the closing for the purchase by Dana of the Shares, Dana shall have paid in full to Applicant all principal and interest owing as of the date of such payment on the Notes. Applicant states that it is contemplated that the Notes will be paid at the closing, which is to be held promptly after receipt of the order requested by the application.

4. Dana shall have obtained consent of its principal lender, United California Bank.

According to the application, Dana's shareholders have approved the Agreement, and the consent referred to in the fourth of the aforementioned conditions has been received.

The aplication states that Dana plans to cancel and retire the Shares if the proposed transaction is consummated. The application states further that, as a result, earnings per share of Dana's remaining outstanding stock for the year ended September 30, 1976, and the quarter ended December 31, 1976, would increase, respectively, from $.65 and $.27 on an historical basis to $.92 and $.39 on a pro forma basis, and that the net book value per share of Dana's remaining stock at December 31, 1976, would increase from $4.16 on an historical basis to $4.94 on a pro forma basis. The application also states that Dana's Board of Directors has detremined that the proposed transaction is within Dana's present financial capabilities and represents an attractive opportunity for utilization of Dana's excess cash assets, and that the sources of funds for the transaction, in addition to such excess cash assets, include unsecured bank lines of credit that have been established by Dana.

The application states that Christiana owns approximately 27.8 percent of the outstanding common stock of Applicant, which, as previously stated, owns approximately 40.1 percent of the outstanding common stock of Dana. Applicant concludes that both Applicant and Dana are (1) presumed to be controlled by Christiana, and (2) affiliated persons of Christiana, for purposes of the Act.

Section 17(a) of the Act provides, in part, that it shall be unlawfull for any affiliated person of a registered investment company, or any affiliated person of such a person, acting as principal, knowingly to purchase from such registered company, or any company controlled by such company, any security or other property. Applicant states that the proposed transaction, which involves the purchase of the Shares and the prepayment of the Notes by Dana, may therefore be prohibited by Section 17(a). It therefore requests an order exempting that proposed transaction from the provisions of Section 17(a).

Section 17(b) of the Act provides that the Commission, upon application, shall exempt a proposed transaction from the provisions of Section 17(a) of the Act if evidence establishes that the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of each registered investment company concerned and with the general purposes of the Act.

Applicant asserts that the terms of the proposed transaction are reasonable and fair and do not involve overreaching on the part of any person. In support of this assertion, Applicant has submitted the following:

1. The $3.00 per share purchase price for the Shares, which are not registered under the Securities Act of 1933, bears a reasonable relationship, Applicant believes, to (1) the bid prices in the over-the-counter market for Dana common stock, ranging from $2⅛ to $4 a share, in the four week period immediately preceding execution of the Agreement, and (2) the price in the two most recent transactions known to Applicant involving large blocks of Dana's common stock. Applicant states that these two transactions involved (1) the purchase in September, 1976, by the President and Chairman of the Board of Dana, from five Dana stockholders, of 197,767 shares at $3.50 per share, and (2) an agreement in December, 1976, for the purchase by Dana, from a stockholder who was neither an officer nor a director of Dana, of 169,388 shares at a price of $3.00 per share, such transaction having been consummated in full in January, 1977, upon the discharge of Dana's payment obligations.

2. Applicant states that it has been interested in liquidating its investment position in Dana. It believes that the proposed transaction would accomplish such liquidation on reasonable terms. In this regard, Applicant states that it insisted upon prepayment of the Notes by Dana as a condition to the sale of the Shares at a price of $3.00 per share.

3. The application states that Dana's Board of Directors believes that the proposed purchase of the Shares will eliminate remaining upcertainty regarding Dana's future, and will eliminate any adverse effect that might result from disposition of the Shares to an unknown purchaser.

4. According to the application, a 1968 agreement between the Applicant and Dana, which expires by its own terms if Applicant's ownership of Dana's capital stock becomes less than 10%, imposes various restrictions on, or affecting, Dana; Dana's Board of Directors believes that it is to Dana's advantage to be free of these restrictions.

5. The application states that Dana believes that its purchase of the Shares should make its subsidiaries elgiible for preferential treatment as small business concerns to bid on most "small business set aside" federal government procurement contracts involving their products and that such qualification might well increase Dana's annual revenues. Applicant states that such preferential treatment has heretofore been denied because of its large stock ownership of Dana.

Finally, Applicant submits that the proposed transaction is consistent with the policies of Christiana and with the general purposes of the Act.

Notice is further given that any interested person may, not later than May 27, 1977, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, or he may request that he be notified if the Commission shall order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request shall be served personally or by mail upon Applicant at the address stated above. Proof of such service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed contemporaneously with the request. As provided by Rule 0-5 of the Rules and Regulations promulgated under the Act, an order disposing of the application will be issued as of course following said date unless the Commission thereafter orders a hearing upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77-3920 Filed 5-13-77;8:45 am]

[812-4120]

MASSACHUSETTS MUTUAL LIFE INSURANCE CO. AND MASSMUTUAL CORPORATE INVESTORS, INC.

Filing of Application

MAY 5, 1977.

In the matter of Massachusetts Mutual Life Insurance Company, and MassMutual Corporate Investors, Inc., 1295 State Street, Springfield, Massachusetts 01111 (812-4120).

Notice is hereby given that Massachusetts Mutual Life Insurance Company ("Insurance Company"), a mutual life insurance company organized under the laws of the Commonwealth of Massachusetts, and MassMutual Corporate Investors, Inc. ("Fund"), a closed-end, non-diversified, management investment company registered under the Investment Company Act of 1940 ("Act") (hereinafter referred to collectively as "Applicants"), filed an application on April 6, 1977, and an amendment thereto on May 3, 1977, for an order pursuant to Section 17(b) of the Act exempting from the provisions of Section 17(a) of the Act a proposed sale by the Insurance Company to the Fund of $1,095,000 in principal amount of an issue of 10½ percent Subordinated Notes due 1987 ("Non-Convertible Notes") and $405,000 in principal amount of an issue of 10½ percent Convertible Subordinated Notes due 1989 ("Convertible Notes") of WellTech, Inc. ("WellTech"). All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below.

BACKGROUND

According to the application, the Insurance Company has contracted to purchase at direct placement from WellTech the entire principal amount ($2,920,000) of a new issue of the Non-Convertible Notes and the entire principal amount ($1,080,000) of a new issue of Convertible Notes (hereinafter referred to collectively as the "Notes"); the Notes are secured by a second lien on certain accounts receivable and fixed assets of WellTech. According to the application, WellTech intends to apply the proceeds from the sale of the Notes to the reduction of outstanding bank debt and for general corporate purposes. The application states further that the Insurance Company has purchased $2,190,000 in principal amount of the Non-Convertible Notes and $810,000 in principal amount of the Convertible Notes at a closing ("Closing") held on March 30, 1977. Applicants state that the holders of the Convertible Notes are to be permitted at any time to convert all or any portion of the Convertible Notes into shares of common stock of WellTech at a conversion price of $14.40 per share. Applicants state further that on March 30, 1977, the closing prices for the common stock of WellTech were $11⅜ bid and $11¾ asked on the over-the-counter market.

Applicants represent that WellTech has agreed (1) to register, at its expense, one public offering of common stock underlying the convertible portion of the Notes, and (2) to include the common stock underlying the convertible portion of the Notes in any other registration of WellTech common stock. Applicants also represent that the remaining $1,000,000 in principal amount of the Notes which the Insurance Company has contracted to purchase may be issued at WellTech's option on a date or dates to be selected by WellTech, but not later than June 30, 1978, and if issued, are to be purchased by the Insurance Company alone, or by the Insurance Company and the Fund, subject to the receipt of any Commission orders that may be necessary.

According to the application, WellTech is engaged in the well servicing segment of the oilfield services industry; well servicing involves the provision of mobile rigs and crews for the completion, servicing and workover of oil and gas wells on a contract basis.

Applicants state that Groco, Inc. ("Groco"), a wholly-owned subsidiary of the Insurance Company, had held, prior to the filing of the application, 198,375 shares of common stock of WellTech; these shares were acquired in December, 1976, by the conversion into common stock, at the rate of $1.60 per share, of a portion of 9 percent 7-year Convertible Subordinated Notes of WellTech purchased by Groco in 1973; the remaining portion of those Subordinated Notes was converted into common stocks in 1976 and sold. According to the application, Groco has sold 100,000 additional shares of WellTech common stock, so that it now owns 98,375 shares, or approximately 3.59 percent, of the outstanding WellTech common stock. Applicants state further that the Fund presently owns no securities of WellTech.

THE PROPOSED TRANSACTION

The Insurance Company which is the Fund's investment adviser, represents that, in its judgment, the Notes would be an attractive investment for the Fund. It states that in recent years WellTech has shown growth in both sales and earnings, and that prospects for the industry in which WellTech is engaged appear good.

According to Applicants, as of the date of the application the interest rate on the Notes, which is commensurate with prevailing market rates of interest for companies like WellTech, is attractive in light of the current yield on the Fund's portfolio, and the convertibility of the convertible portion of the Notes further enhances their value to the Fund.

The Insurance Company therefore proposes to sell to the Fund one-half of the Notes purchased from WellTech at the Closing; that is, one-half of the $2,190,000 ($1,095,000) in principal amount of the Non-Convertible Notes and one-half of the $810,000 ($405,000) in principal amount of the Convertible Notes.

Applicants state that, should the order they seek here be granted, the Insurance Company will, as soon as practicable thereafter, sell one-half of the principal amount of the Notes acquired at the Closing, as described above, to the Fund at the price paid by the Insurance Company plus accrued interest, upon receipt by the Insurance Company of appropriate investment representations from and an undertaking by the Fund to be bound by the terms and conditions subject to which the Insurance Company holds such Notes. Applicants state further that if a favorable order is not received, the entire principal amount of Notes will be retained for investment by the Insurance Company.

According to the application, so that the transfer of Notes to the Fund at the aforementioned price can be regarded as made at a fair price, Applicants propose that the transfer to the Fund be made only if such order is received prior to June 30, 1977 (three months after the Closing). In addition, Applicants represent that the Fund will not be obligated to purchase the Notes from the Insurance Company unless contemporaneously a majority of the "non-interested" directors of the Fund approve such purchase.

Applicants state that no Commission action is requested at this time with respect to: (1) any subsequent sale of the Notes; (2) exercise by the Insurance Company or the Fund of the conversion privileges of the Notes; or (3) the remaining $1,000,000 in Notes of WellTech which the Insurance Company has contracted to buy.

Section 17(a) of the Act provides, in part, that it is unlawful for any affiliated person of a registered investment company, acting as principal, knowingly to sell to such registered investment company any security or other property. Section 17(b) of the Act generally provides that, upon application, the Commission shall by order exempt a proposed transaction from the provisions of Section 17(a) if evidence establishes that the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of the registered investment company concerned and with the general purposes of the Act.

Section 2(a)(3) of the Act includes within the definition of an affiliated person of an investment company, any investment adviser thereof; thus, the Insurance Company, the Fund's investment adviser, is an affiliated person of the Fund. Applicants state that the proposed sale to the Fund by the Insurance Company would fall within the provisions of Section 17(a) of the Act. Applicants submit, however, that (1) since the consideration to be paid by the Fund equals the price paid by the Insurance Company, plus accrued interest, the terms of such a transfer would be

reasonable and fair, would not result in any disadvantage to the Fund and would not involve overreaching on the part of either the Insurance Company or the Fund; (2) the proposed transaction is consistent with the policy of the Fund as recited in its registration statements; and (3) the proposed transaction is consistent with the general purposes of the Act.

Applicants represent that, although the interests of the Insurance Company and the Fund will not be identical after such transfer because of the interest held in WellTech by Groco, the indirect interest of the Insurance Company through Groco has had no effect on the decision of the Insurance Company to make the proposed offer and sale of Notes to the Fund.

Notice is further given that any interested person may, not later than May 27, 1977, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, or he may request that he be notified if the Commission shall order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request shall be served personally or by mail upon Applicants at the address stated above. Proof of such service (by affidavit or, in the case of attorney-at-law, by certificate) shall be filed contemporaneously with the request. As provided by Rule 0–5 of the Rules and Regulations promulgated under the Act, an order disposing of the application will be issued as of course following said date unless the Commission thereafter orders a hearing upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77–13921 Filed 5–13–77;8:45 am]

[Release No. 34–13486; File No. SR–MSE–77–10]

MIDWEST STOCK EXCHANGE, INC.

Self-Regulatory Organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s (b)(1) (the "Act"), as amended by Pub. L. No. 94–29, 16 (June 4, 1975), notice is hereby given that on April 26, 1977, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

Text of the Proposed Rule Change submitted by the Midwest Stock Exchange, Inc. ("MSE").

A new article is added to the Rules of the Exchange as follows: (additions italicized).

ARTICLE XXXIV
REGISTERED MARKET MAKERS—EQUITY FLOOR
GENERAL RESPONSIBILITIES

Rule 1. A registered market maker shall effect all of his transactions in securities traded on the Exchange so that they constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market. No registered market maker shall enter into transactions or make bids or offers that are inconsistent with such a course of dealings.

OBLIGATION TO BID AND OFFER

Rule 2. A registered market maker shall, at the request of a floor broker, make a bid or offer in any security to which he is assigned or in which he is then trading such that a transaction effected thereon will contribute to the maintenance of a fair and orderly market.

ASSIGNED SECURITIES

Rule 3. A registered market maker shall engage to a reasonable degree under existing circumstances in a course of dealing in the securities to which he is assigned that is reasonably calculated to contribute to the maintenance of a fair and orderly market. The Floor Procedure Committee (or other committee appointed for the purpose by the Board) shall specify the percentage of the shares purchased and sold by a registered market maker that must be of securities to which he is assigned.

TRADING FROM OFF THE FLOOR

Rule 4. Except in unusual circumstances, no registered market maker shall initiate a transaction in his market maker account from off the floor.

RELIEF FROM RESPONSIBILITIES

Rule 5. A registered market maker may be relieved from his responsibilities under Rules 1–4 of Article XXXIV only in unusual market conditions as determined by two members of the Floor Procedure Committee.

RELATION TO SPECIALISTS

Rule 6. Registered market makers and specialists shall coordinate their activities in furtherance of the maintenance of fair and orderly markets.

ORDER ACCEPTANCE

Rule 7. A registered market maker may accept limit orders in any security to which he has been assigned that have been presented to the specialist and not accepted by him. Limit orders and market orders accepted by a registered market maker shall be handled by him in accordance with Exchange rules governing the handling of such orders by specialists.

JOINT PARTICIPATION

Rule 8. When the bids or offers of one or more registered market makers are equal to those of the specialist, the registered market maker or market makers as a group are entitled to participate in the transactions effected thereon to the extent of one-third of the total shares involved (excluding those needed to satisfy public orders).

OPENINGS

Rule 9. Registered market makers as a group are entitled to participate in opening a security on the Exchange to the extent of one-third of the net imbalance (excluding specialist participation) of purchase and sale orders on the Exchange.

PUBLIC OUTCRY

Rule 10. No specialist or market maker shall effect a transaction for his own account unless the presence of the other side of that transaction had been audibly announced at the post.

LIMIT ORDERS

Rule 11. A limit order held by a specialist or registered market maker shall be executed taking into account transactions on the Exchange as well as transactions in the New York market.

UNUSUAL CIRCUMSTANCES

Rule 12. Questions as to the respective responsibilities and rights of specialists and registered market makers shall be promptly brought to the attention of a member of the Floor Procedure Committee who shall resolve such questions subject to review by the full committee.

REGISTRATION AND APPLICATION

Rule 13. A member may be registered, upon application and subject to such requirements of training, experience, and competence as the Exchange may impose, as a registered market maker.

ASSIGNMENT

Rule 14. Each registered market maker shall be assigned one or more securities by the Floor Procedure Committee (or other committee appointed for the purpose by the Board) for which he shall have responsibility under Rule 3 of this Article.

REQUIRED CAPITAL

Rule 15. A registered market maker shall have net liquid assets (or a letter of guarantee from a member firm clearing his transactions) of not less than $10,000 per security to which he is assigned or $25,000 in total.

SUSPENSION AND TERMINATION

Rule 16. The registration of a registered market maker may be suspended or terminated by the Floor Procedure Committee (or other committee appointed for the purpose by the Board) in accordance with procedures specified in the Rules upon a determination that he violated the Constitution or Rules of the Exchange or failed adequately to fulfill his responsibilities as a registered market maker.

REGULATORY STATUS

Rule 17. Registered market makers are members registered as specialists for purposes of the Securities Exchange Act of 1934 and as such may not affect on the Exchange as broker any transactions except upon a market or limited price order.

MSE'S STATEMENT OF BASIS AND PURPOSE

The basis and purpose of the foregoing proposed rule change is as follows:

The purpose of the proposed rule change is to tie together into one trading system the best features of the unitary specialist and competing market maker systems. The result will be a system which we expect will aid the competitive position of the MSE in a national market system. It will establish a new category of market makers on the Floor of the Exchange with specific responsibilities to contribute to a fair and orderly system of trading equities.

It is anticipated that addition of a market maker function will add to the depth and liquidity of the MSE market. Therefore, the MSE asserts that the proposed rule promotes just and equitable principles of trade and removes impediments to the perfection of the mechanism of a free and open market. As such, the Exchange believes that Section 6(b)(5) of the Act provides the statutory basis for the proposed amendment.

The proposed Rule contained herein was discussed with Exchange floor members including the three Floor Governors who also serve as members of the Floor Procedure Committee. While some comments were received to the effect that some floor members would prefer the retention of a unitary specialist system, comments received in general were favorable to the proposed Rule.

The MSE believes that the proposed rule change will place no burdens on competition.

Within 35 days of the date of publication of this notice in the FEDERAL REGISTER, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file 6 copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 L Street NW., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted within twenty-one days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

APRIL 28, 1977.

[FR Doc.77-13928 Filed 5-13-77;8:45 am]

[Release No. 34-13515; File No. SR-MSE-77-9]

MIDWEST STOCK EXCHANGE, INC.

Self-Regulatory Organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on April 29, 1977, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

Statement of the Terms of Substance of the Proposed Rule Change (deletions [bracketed], additions italicized).

RULES AND PRACTICES FOR TRADING ON THE MIDWEST STOCK EXCHANGE, INCORPORATED

22. Charges by Member and Specialist for Execution of Orders.

The Specialist, Co-Specialist or Relief Specialist must render upon execution a written report on every transaction made by him. When acting as agent, he [shall charge 50 percent of the floor brokerage as provided in Rule 2(d)(1) of this Article. The Specialist to whom an order is given shall bill the originating floor broker the Specialist's floor rate and such member shall, in turn, bill the member firm or member corporation the regular floor brokerage rate.] *may charge floor brokerage to the originating floor broker who in turn may charge floor brokerage to the member firm or member corporation that initiated the order. In no event may the Specialist charge a fee for executing a market order.*

A member or member organization *acting in a non-Specialist capacity,* who buys or sells for his or its own account the securities named in an order he *or it* is executing for another member *firm,* may not charge *a* commission but such member or member organization [shall] *may* charge a handling fee therefore. [which shall be the applicable member charge as prescribed for such transaction in Rule 2(d)(1). Except if the member or member organization in acting as the assigned Specialist in named issue, he or it shall charge a handling fee equal to 50 percent of the amount as prescribed for such transaction in Rule 2(d)(1).]

Interpretations and Policies

The Specialist may charge a fee on *limit* [all] orders [executed by the Specialist] *he executes while acting in an agency capacity.* He must have taken possession of the order and have been responsible for the execution on behalf of the submitting member.

The following [exceptions] *interpretations* shall be noted:

[1. Market orders left with the Specialist for purpose of establishing a price. Example: Split market orders.]

[2]1. *The Specialist may not bill an* order[s] left with *him* [the Specialist] for the purpose of effecting an opening in the stock issue. Example: Day order to buy 100 XYZ at 42 timed 9:10 A.M. Issue opens at 41⅞ at 9:15 A.M.

[3]2. *The Specialist may not bill an* order[s] upon which the decision and responsibility of execution has remained with the floor broker. Example: Not held orders, discretion orders and orders on which the floor broker would buy or sell for his or its own acount [(a fade)].

3. [(The Committee on Floor Procedure has ruled that for purposes of this Rule,] *A* limit order split with the [primary] *New York* market with a limit price that is the same as or better than the last sale in the [primary] New York market [the order shall] *will* be treated as a market order. No fee will be charged by the Specialist.

4. There shall be no billing by the Specialist for a limit order in a dual issue which is subsequently changed to a market order.

5. Open orders entered away from the market which are executed on a subsequent opening may be billed by the Specialist provided he is not a principal in the transaction.

6. Also, the Specialist shall return the original order, if completed, along with his bill to the originating floor broker. He shall retain a copy of the billing and submit the original copy to the Clearing Comparison Room.[)]

MSE'S STATEMENT OF BASIS AND PURPOSES

The basis and purpose of the foregoing proposed rule change is as follows:

The purpose of the proposed rule change is to aid the competitive position of the Midwest Stock Exchange, Incorporated by elimination of a procedure viewed as being an impediment to an unrestricted flow of orders to a national marketplace.

The Rule as it now exists contains language which relates back to the time when fixed rates were still in existence. Therefore, the proposed rule change promotes just an equitable principles of trade and removes impediments to the perfection of the mechanism of a free and open market.

Comments have neither been solicited nor received.

The Midwest Stock Exchange, Incorporated, believes that no burdens have been placed on competition.

Within 35 days of the date of publication of this notice in the FEDERAL REGISTER, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regula-

tory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data views and arguments concerning the foregoing. Persons desiring to make written submissions should file 6 copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20504. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 L Street NW., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted with 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

MAY 6, 1977.

[FR Doc.77-13929 Filed 5-13-77;8:45 am]

[812-4031]

NOMURA CAPITAL FUND OF JAPAN, INC.

Application

MAY 6, 1977.

In the matter of Nomura Capital Fund of Japan, Inc., 100 Wall Street, New York, New York, 10004 (812-4031).

Notice is hereby given that Nomura Capital Fund of Japan, Inc. ("Applicant"), a Maryland corporation registered as a diversified, open-end management investment company under the Investment Company Act of 1940 ("Act"), filed an application on September 20, 1976, and amendments thereto on January 13, 1977, and March 4, 1977, for an order, pursuant to Sections 6(c) and 10 (f) of the Act, exempting from the provisions of Section 10(f) of the Act Applicant's proposed purchases of equity securities in Japan at a discount from market prices in public offerings in which persons affiliated with Applicant's investment advisers participate as principal underwriters. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below.

Applicant states that it was incorporated on August 5, 1976; that it has registered its shares on Form S-5 under the Securities Act of 1933 ("1933 Act"); and that it completed an initial public offering of such shares on October 20, 1976, by selling 3,165,529 shares for aggregate net proceeds of $29,439,419.70. Applicant states further that its investment objective is long-term capital appreciation, primarily through investment in equity securities of Japanese corporations; that, under normal conditions, it expects to invest at least 80% of it's assets in Japanese corporate securities; and that it contemplates that a substantial percentage (normally 80 percent or more) of the investments will be made directly in the Japanese markets. According to the application, shares of the Applicant will be sold primarily to United States investors.

The application states that the Nomura Securities Co., Ltd. ("Nomura Japan"), a Japanese corporation organized in 1925, is the largest securities firm in Japan and conducts a diversified securities business including, among other things, acting as a broker and dealer in corporate and government securities and engaging in securities research. Applicant states that Nomura Japan participates as an underwriter in a substantial number of public offerings in Japan. Applicant states further that Nomura Securities International, Inc., a New York corporation and 95%-owned subsidiary of Nomura Japan, acts as its principal underwriter in the continuous offering of its shares, and that Nomura Capital Management, Inc., a wholly-owned subsidiary of Nomura Securities International, Inc., serves as its investment adviser. According to the application, Nomura Research Institute, a Japanese corporation, wholly-owned by Nomura Japan, also serves as investment adviser to the Applicant, pursuant to an agreement with Nomura Capital Management, Inc. Applicant submits that, in view of the foregoing, its investment advisers are "affiliated persons" of Nomura Japan for purposes of the Act.

Section 10(f) of the Act provides, in part, that no registered investment company shall knowingly purchase or otherwise acquire, during the existence of any underwriting or selling syndicate, any security a principal underwriter of which is an investment adviser of such registered company, or is a person of which any such investment adviser is an affiliated person.

Rule 10f-3 promulgated under the Act exempts a transaction from the provisions of Section 10(f) if certain enumerated conditions are met. One such condition is that the securities to be purchased are part of an issue effectively registered under the 1933 Act. Applicant asserts that, in Japan, underwritten public offerings of common stocks are made at discounts (typically up to 10 percent from current market prices, but that such securities are not registered under the 1933 Act and that, therefore, Applicant will be unable to purchase securities in such offerings where Nomura Japan or any of its affiliates participates as a principal underwriter. Applicant, therefore, seeks an order exempting from the provisions of Section 10(f) its purchases of common stock in public offerings in Japan in which Nomura Japan or any of its affiliates participates as a principal underwriter, on the condition that (1) any common stocks purchased in such offerings are registered under that country's Securities Exchange Law of 1948 ("Japanese Act"); (2) such offerings are at a discount from the market price; and (3) with the exception of the aforementioned requirement of registration under the 1933 Act, all conditions of Rule 10f-3 are satisfied.

According to the application, the exemption sought would substitute the registration provisions of the Japanese Act for those of the 1933 Act. Applicant asserts that the Japanese Act is the basic securities law of Japan; that the Japanese Act was based upon the 1933 Act and the Securities Exchange Act of 1934; and that certain of the Japanese Act's provisions, including those relating to the registration of securities, closely parallel the provisions of the 1933 Act and the Securities Exchange Act of 1934. According to the application, under the Japanese Act, a public offering of securities may not lawfully be made unless a registration statement is in effect. Applicant states that such registration statements must be reviewed by the Japanese Ministry of Finance and will not become effective if the Ministry of Finance finds that full disclosure has not been made, and that no solicitations, either oral or by means of a prospectus, are permitted until the registration statement has become effective.

Applicant states that the commitments of underwriters in Japanese common stock offerings are firm and that the obligations of the various underwriters are several and not joint. In the underwriting agreement, each underwriter is obligated to purchase shares from the issuer at a fixed price (negotiated by the issuer and the underwriters); the issuer receives proceeds based on this net price regardless of the marketing results of the underwriting group.

Applicant states further that, in common stock offerings in Japan, underwriters offer the securities to the public at a public offering price disclosed in the prospectus, and that any discount from prevailing market prices is determined by the issuer and the underwriters based upon marketing considerations and is subject to administrative guidance from the Japanese Ministry of Finance. Applicant asserts that such public offering price is fixed and does not change during the offering period.

Rule 10f-3(g), as here pertinent, provides that the purchase of securities pursuant to Rule 10f-3 shall have been authorized by a resolution of the board of directors of the registered investment company concerned, or of an executive committee composed of at least three members of such board, which resolution shall state that in the judgment of the board or committee, the purchase proposed will meet all substantive requirements of Rule 10f-3, and which authorization shall have been supported by the vote of net less than a majority (consisting of at least three persons) of the board or committee who were not affiliated persons of any principal underwriter of the issue offered. Applicant represents that it will submit any proposed purchase of securities that would be permitted by the order sought herein to its Board of Directors, or to a committee

thereof consisting of at least three members of the Board who are not affiliated persons of any principal underwriter of the issue being offered, at least two of whom must be fluent in the Japanese language. Applicant states that those committee members fluent in Japanese will be supplied with the Japanese prospectus used pursuant to the Japanese Act and with such further information as such members deem necessary to make the necessary determination under Rule 10f-3(g), and that any member of the committee not fluent in Japanese will be supplied with such information in English sufficient to make such determination. Applicant asserts that, for the purposes of Rule 10f-3, registration under the Japanese Act is the substantial equivalent of effective registration under the 1933 Act. Applicant further submits that, given the significant role of Nomura Japan in underwritten public offerings in Japan, its shareholders will be prejudiced in the absence of such relief since it will be precluded from purchasing equity securities at a discount in public offerings where Nomura Japan or any of its affiliates participates as a principal underwriter.

Applicant states that, due to the uncertainty of the evolving law in the United States with respect to the recapture of underwriting commissions from affiliated underwriters and the questions raised under Japanese law by this issue, it undertakes to investigate the extent to which underwriting commissions may be recaptured under Japanese law. Applicant represents further that it will keep its independent directors completely informed of the available alternatives with respect to such recapture. Applicant undertakes further to take such steps as may be necessary to seek to implement any recapture, including the filing of applications for exemptions under the Act, if the independent directors should determine that recapture of underwriting commissions is in the best interests of Applicant or if otherwise required by developments in the law. Finally, Applicant undertakes to file a report with the staff of the Commission as to the disposition of this matter by the Board of Directors within six months after the granting of the order sought herein.

Section 10(f) of the Act also provides, in part, that the Commission by order upon application, may conditionally or unconditionally exempt any transaction or classes of transactions from any of the provisions of that Section, if and to the extent that such provision is consistent with the protection of investors.

Section 6(c) of the Act provides, in part, that the Commission, by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act or rule thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Notice is further given that any interested person may, not later than May 31, 1977, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, or he may request that he be notified if the Commission shall order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request shall be served personally or by mail upon Applicant at the address stated above. Proof of such service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed contemporaneously with the request. As provided by Rule 0-5 of the Rules and Regulations promulgated under the Act, an order disposing of the application will be issued as of course following said date unless the Commission thereafter orders a hearing upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77-13922 Filed 5-13-77;8:45 am]

[Release No. 34-13507; File No. SR-OCC-77-4]

OPTIONS CLEARING CORP.

Self-Regulatory Organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on April 20, 1977, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The proposed rule change would (i) permit OCC to pledge securities held in its Clearing Fund to secure certain borrowings necessitated by the insolvency of a Clearing Member, (ii) permit OCC to reduce its risks with respect to uncovered short positions of a suspended Clearing Member which OCC is unable to liquidate by purchasing option contracts of the same classes, (iii) provide a procedure for the automatic exercise of expiring option contracts carried in segregated long positions of a suspended Clearing Member, and (iv) effect certain other changes in OCC's liquidation procedures.

STATEMENT OF BASIS AND PURPOSE

The basis and purpose of the foregoing proposed rule change is as follows:

The purpose of the proposed rule change is to provide OCC with additional protection against risks arising in connection with the insolvency of a Clearing Member, and to improve OCC's procedures for liquidating accounts of suspended Clearing Members.

The proposed amendment to Article VIII, Section 5 of the By-Laws would permit OCC to pledge securities held in the Clearing Fund to secure borrowings which may become necessary or advisable if OCC is unable to obtain prompt delivery of assets credited to an account of a suspended Clearing Member, or to convert such assets promptly to cash. Such borrowings might become necessary if OCC experienced a delay in obtaining payment from the issuer of a letter of credit, or in obtaining delivery of underlying securities held by a bank or securities depository as a bulk, specific or escrow deposit, or if OCC were to be enjoined from liquidating assets of a suspended Clearing Member. Borrowings secured by Clearing Fund contributions would be required to be repaid as promptly as practicable.

Proposed Rule 1106(e) would permit OCC's Board of Directors, if it determined that OCC would be unable to close out or transfer, on a prompt basis, uncovered short positions of a suspended Clearing Member, to authorize the purchase for OCC's account of options of the same classes as the uncovered short positions, for the purpose of reducing the risk to OCC resulting from the continuing maintenance of the uncovered short positions. Such purchases might be deemed advisable if OCC were to be enjoined from closing out the short positions of a suspended Clearing Member, or if market conditions precluded a prompt and orderly liquidation. It is anticipated that such purchases would be made by a special Liquidation Subcommittee, appointed by OCC's Margin Committee and acting under its supervision, subject to general guidelines prescribed by OCC's Board of Directors. Gains or losses on protective purchase transactions would be credited or charged, as the case may be, to the Liquidating Settlement Account of the suspended Clearing Member. In addition, the proposed amendment to Article VII, Section 5 of the By-Laws would permit losses and expenses sustained by OCC in connection with protective purchase transactions to be reimbursed out of the Clearing Fund.

The proposed amendment to Rule 1104 would add language specifically providing that margin and Clearing Fund contributions of a suspended Clearing Member are to be liquidated in the most orderly manner practicable. The purpose is to eliminate any implication in the existing language of the Rule that OCC must liquidate all margin and Clearing Fund contributions immediately, regardless of the effect on the market.

The proposed amendment to Rule 1106(a) would provide that proceeds from the exercise, after a Clearing Member's suspension, of option contracts carried in segregated long positions, are to be credited to the special settlement accounts provided for in Rule 1105(a) rather than the suspended Clearing Member's Liquidating Settlement Account. The purpose is to conform the disposition of proceeds

from the exercise of segregated long positions to the disposition of proceeds from the closing out of the same positions. In addition, in order to avoid inadvertent failure to exercise expiring option contracts carried in segregated long positions which are "in the money" to a significant extent, the proposed amendment would provide an automatic exercise procedure similar to the one provided for in Rule 805, which would come into effect if OCC were unable to obtain satisfactory instructions from the suspended Clearing Member or its representative.

The proposed rule change contributes to the protection of investors and the public interest by providing OCC with additional protection against risks resulting from the insolvency of a Clearing Member and improving OCC's liquidation procedures.

Comments were not and are not intended to be solicited with respect to the proposed rule change.

OCC does not believe that the proposed rule change imposes any burden on competition.

Within 35 days of the date of publication of this notice in the FEDERAL REGISTER, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file 6 copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room at 1100 L Street, NW., Washington, D.C. Copies of the filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted within 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

MAY 4, 1977.

[FR Doc.77-13930 Filed 5-13-77;8:45 am]

[Release No. 34-13506; File No. SR-OCC-77-3]

OPTIONS CLEARING CORP.

Self-Regulatory Organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on April 20, 1977, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The proposed rule change would change the commencement time for option contracts to three hours after the settlement time for the transactions in which they were purchased and would modify OCC's procedures for accepting or rejecting Exchange transactions in the event of non-payment of the applicable premiums.

STATEMENT OF BASIS AND PURPOSE

The basis and purpose of the foregoing proposed rule change is as follows:

The purpose of the proposed rule change is to improve OCC's procedures for dealing with a Clearing Member's pending purchase transactions when the Clearing Member fails to make timely payment of the applicable premiums.

The proposed amendment to Article I, Section 1(cc) of the By-Laws would change the "commencement time" for an Exchange transaction (i.e. the point at which the transaction is accepted by OCC) from one hour after settlement time to three hours after settlement time. Its purpose is to give OCC additional time in which to determine whether to accept pending transactions of a defaulting Clearing Member. Such a determination is difficult to make within a period of one hour because it requires a preliminary determination that the Clearing Member will not meet its settlement obligations (which OCC may not be able to make for some period after the settlement time, because solvent Clearing Members are sometimes late in effecting settlements for mechanical reasons, followed by a review of the Clearing Member's account records (to determine whether any basis exists for rejecting closing purchase transactions, or for accepting opening purchase transactions). The proposed amendment to the definition of "commencement time" would give OCC two additional hours in which to make the necessary determinations.

The proposed amendment to Article VI, Section 8 of the By-Laws would make it clear that OCC may reject a Clearing Member's pending transactions at any time after the Clearing Member misses settlement. The present language of that provision may be construed as requiring OCC to wait until the commencement time before rejecting pending transactions. OCC will not reject pending transactions until it has concluded to its satisfaction that the purchasing Clearing Member will not effect settlement. However, once it has reached that conclusion, OCC should be in a position to take prompt action in rejecting pending transactions, so as to permit the writers to close out the rejected transactions as promptly as possible.

The proposed amendment to OCC's stated policy on the acceptance of Exchange transactions would permit OCC to accept opening purchase transactions, notwithstanding non-payment of the applicable premiums, if the transactions were executed for an account which included uncovered short positions in the same series of options consisting of an equal or greater number of option contracts. The rationale for acceptance of such transactions is that the margin on deposit in respect of the uncovered short positions should cover the applicable premiums, and the long positions resulting from the acceptance of those transactions (on which OCC will have a lien pursuant to Article VI, Section 8 of the By-Laws) will eliminate OCC's exposure with respect to the uncovered short positions in the event of an increase in the price of the underlying security, thus permitting OCC to liquidate the short positions in a more orderly fashion. The proposed amendment also conforms OCC's stated policy to Article VI, Section 8 of the By-Laws, as proposed to be amended herein, and includes language clarifying OCC's policy as previously stated.

The proposed rule change contributes to the protection of investors and the public interest by providing safer and more efficient procedures for the disposition of pending transactions of defaulting Clearing Members.

Comments were not and are not intended to be solicited with respect to the proposed rule change.

OCC does not believe that the proposed rule change imposes any burden on competition.

Within 35 days of the date of publication of this notice in the FEDERAL REGISTER, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguements concerning the foregoing. Persons desiring to make written submissions should file 6 copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room at 1100 L Street NW., Washington, D.C. Copies of the filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted within 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

MAY 4, 1977.

[FR Doc.77-13931 Filed 5-13-77;8:45 am]

[Release No. 34-13517; File No. SR-PHLX-77-5]

PHILADELPHIA STOCK EXCHANGE, INC.

Self-Regulatory Organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on April 27, 1977, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

EXCHANGE'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

The Philadelphia Stock Exchange, Inc. (PHLX) proposes to modify the fixed point intervals at which exercise prices for call options on securities trading between 50 and 100 are determined. Presently exercise prices are generally fixed at 5 point intervals for securities trading below 50, and 10 point intervals for securities trading between 100 and 200. Under the proposed modifications, these intervals for exercise prices would generally be fixed at 5 point intervals for securities trading below 100 and 10 point intervals for securities trading at or more than 100.

EXCHANGE'S STATEMENT OF BASIS AND PURPOSE

The proposed rule change narrows the strike price intervals in certain cases in order to enhance the depth and liquidity of the PHLX options market.

PHLX believes that it is consistent with the standards set forth in 6b(5) of the Act designated for the protection of investors and the public interest to narrow the exercise price intervals and to establish exercise prices at levels that are closer to the actual market price of the underlying security at the time of adoption. Experience demonstrates that investor interest is greatest in those series of options which have exercise prices closest to the current market price of the underlying stock. Thus, the depth and liquidity of the marketplace are improved.

Comments were not solicited with respect to the proposed rule change.

The PHLX does not believe that the proposed rule change imposes any burden on competition.

Within 35 days of the date of publication of this notice in the FEDERAL REGISTER, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

a) By order approve such proposed rule change; or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file 6 copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted within 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

MAY 6, 1977.

[FR Doc.77-13932 Filed 5-13-77;8:45 am]

[812-4095]

PUTNAM CONVERTIBLE FUND, INC. ET AL.

Filing of Application

MAY 9, 1977.

In the matter of Putnam Convertible Fund, Inc., Putnam Equities Fund, Inc., The George Putnam Fund of Boston, The Putnam Growth Fund, The Putnam Income Fund, Inc., Putnam Investors Fund, Inc., Putnam Tax Exempt Income Fund, Putnam Vista Fund, Inc., Putnam Voyager Fund, Inc., Putnam Option Income Trust, and Putnam Fund Distributors, Inc., 265 Franklin Street, Boston, Massachusetts, 02110 (812-4095).

Notice is hereby given that Putnam Convertible Fund, Inc., Putnam Equities Fund, Inc., The George Putnam Fund of Boston, The Putnam Growth Fund, The Putnam Income Fund, Inc., Putnam Investors Fund, Inc., Putnam Tax Exempt Income Fund, Putnam Vista Fund, Inc., Putnam Voyager Fund, Inc. and Putnam Option Income Trust (the "Putnam Funds"), and Putnam Fund Distributors, Inc. ("Distributors") (collectively referred to as "Applicants"), have filed an application on February 24, 1977 and an amendment thereto on April 29, 1977, for an order, pursuant to Section 6(c) of the Investment Company Act of 1940 ("Act"), exempting Applicants from the provisions of Section 22(d) of the Act and Rule 22d-1 thereunder to the extent necessary to permit sales of the Putnam Funds' securities at net asset value to certain tax qualified employee benefit plans for employees of Distributors and its affiliates. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below.

The Putnam Funds are each registered under the Act as diversified, open-end investment companies, and are organized as Massachusetts corporations or established as Massachusetts business trusts. The Putnam Funds, other than Putnam Option Income Trust, are currently engaged in continuous public offerings of their shares at public offering prices equal to net asset value plus a sales load which varies with the size of the purchase. Distributors acts as principal underwriter for each of the Putnam Funds. Putnam Option Income Trust, which was recently organized, expects to commence an initial public offering of its shares in the near future. Applicants also expect to commence a continuous offering in shares of Putnam Option Income Trust not less than 30 days following the close of its initial public offering. Applicants state that Distributors will act as principal underwriter for shares of Putnam Option Income Trust which will be sold with a sales charge equal to that charged by the other Putnam Funds, except for Putnam Tax Exempt Income Fund.

Distributors is a wholly-owned subsidiary of March and McLennan Management Company, a holding company whose other subsidiaries include The Putnam Management Company, Inc., which serves as investment adviser to the Putnam Funds, and Putnam Administrative Services Company, Inc., the Putnam Funds' shareholder servicing agent. Marsh and McLennan Management Company is a wholly-owned subsidiary of Marsh and McLennan Companies, Inc., a publicly owned holding company whose principal operating subsidiaries are international insurance brokers and employee benefit consultants. Marsh and McLennan Companies, Inc., and all of its corporate affiliates, including any acquired or formed subsequent to the date of the application, are hereinafter referred to as the "Marsh and McLennan Companies."

Applicants state that employees of the Marsh and McLennan Companies are covered by certain trusteed employee benefit plans qualified under Section 401 of the Internal Revenue Code, certain of which are empowered to invest in shares of certain of the Putnam Funds. The application represents that these plans currently include the Putnam Profit Sharing Plan, the Marsh and McLennan Savings Plan and the Marsh and McLennan Pension Plan (collectively the "Putnam Affiliated Employee Benefit Plans"). According to the application, the Putnam Affiliated Employee Benefit Plans which may invest in shares of the Putnam Funds had 3,434 participants and investments of approximately $11,368,000 in the Putnam Funds as of December 31, 1976.

It is asserted that, as a result of concern that certain provisions of the Employee Retirement Income Security Act of 1974 and parallel provisions of the Internal Revenue Code might prohibit an employee benefit plan covering employees of a mutual fund, its investment adviser or principal underwriter and

their affiliates (an "In-house Plan or Plans") from investing in shares of such mutual fund (an "In-house Fund"), the mutual fund industry applied to the Department of Labor and the Internal Revenue Service for an interpretation or an exemption. These two agencies have issued a notice of a proposed class exemption which would permit In-house Plans, such as the Putnam Affiliated Employee Benefit Plans, to invest in shares of the In-house Fund, such as each of the Putnam Funds, provided that certain conditions are met. One such condition requires that In-house Plans not pay any sales commission on the investment in In-house Fund shares. On March 31, 1977, the proposed class exemption was adopted with the condition that all transactions with In-house Plans occurring more than 60 days after the granting of the exemption be made without any sales commissions. Applicants submit that, under the current prospectuses of the Putnam Funds, accounts the size of the Putnam Affiliated Employee Benefit Plans would pay a sales charge of 1 percent of the public offering price on purchases of shares of the Putnam Funds.

Section 22(d) of the Act provides in pertinent part that no registered investment company shall sell any redeemable security issued by it to any person except either to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and if such class of security is being currently offered to the public by or through an underwriter, no principal underwriter of such security and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus. Applicants submit that the sale of shares of the Putnam Funds to the Putnam Affiliated Employee Benefit Plans at net asset value appears to conflict with the provisions of Section 22(d) of the Act unless, excepted by the Rules under such section.

Applicants assert that an argument may be made that purchases of Putnam Fund shares by the Putnam Affiliated Employee Benefit Plans are permitted by Rule 22d-1(f). That rule provides for elimination of sales charges upon the sale pursuant to a uniform offer described in the prospectus and made to employees' trust, pension, profit-sharing or other employee benefit plans qualified under Section 401 of the Internal Revenue Code. Applicants submit that, notwithstanding interpretive advice from the staff of the Commission which would possibly permit sales of In-house Fund shares only to In-house Plans at net asset value, Applicants have determined to seek an exemption from Section 22(d) of the Act and the Rules thereunder, pursuant to Section 6(c) of the Act, in order to obtain the certainty of a Commission order which does not attach to interpretive advice.

Section 6(c) of the Act provides, in pertinent part, that the Commission, by order upon application, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions from any provision or provisions of the Act or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

It is stated in the application that the purposes of Section 22(d) of the Act are to prevent discrimination among purchasers and to provide for orderly distribution of mutual fund shares by preventing their sale at a price less than that fixed in the prospectus. It is submitted that reduced sales charges are appropriate where mutual fund shares are sold without a complete bundle of selling services and no unjust discrimination exists among investors where differences in sales charges relate to differences in selling costs and services. Applicants state that investment by the Putnam Affiliated Employee Benefit Plans in shares of the Putnam Funds at net asset value is supported by strong policy considerations, and that such sales would result in demonstrable economies in sales effort and sales related expense as compared with other sales, and would not be unjustly discriminatory.

Applicants state that prospectuses and existing sales literature of the Putnam Funds will be available to those persons making investment decisions for the Putnam Affiliated Employee Benefit Plans, but no individual sales effort will be expended, and no independent dealers will be involved. It is represented that Distributors will coordinate such sales and will provide such normal sales related services as are specifically requested by the investment committees or beneficiaries of the plans. Applicants do not anticipate that there will be many such requests for services. Applicants submit that periodic investments by the Putnam Affiliated Employee Benefit Plans can be expected to be relatively large in terms of the size of each purchase, the frequency of purchases should be relatively low, and funds for purchases are expected to be remitted from only a few sources (the trustees of each plant). According to the application, Applicants have concluded that sales of Putnam Fund shares at net asset value to tax qualified employee benefit plans should be limited to the Putnam Affiliated Employee Benefit Plans on the ground that the employees covered by such Plans and the persons who make investment decisions with respect to such Plans, because of their familiarity with, and loyalty to, the Putnam Funds generally can be expected to result in a need for less selling effort and expense than would be the case with regard to sales to other tax qualified employee benefit plans.

Notice is further given that any interested person may, not later than May 31, 1977, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, or he may request that he be notified if the Commission shall order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request shall be served personally or by mail upon Applicants at the address stated above. Proof of such service (by affidavit, or in case of an attorney-at-law, by certificate) shall be filed contemporaneously with the request. As provided by Rule O-5 of the Rules and Regulations promulgated under the Act, an order disposing of the application will be issued as of course following said date unless the Commission thereafter orders a hearing upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77-13923 Filed 5-13-77;8:45 am]

[812-4083]

PUTNAM TAX EXEMPT INCOME FUND ET AL.

Filing of Application

MAY 9, 1977.

In the matter of Putnam Tax Exempt Income Fund, Putnam Convertible Fund, Inc., Putnam Daily Dividend Trust, Putnam Equities Fund, Inc., The George Putnam Fund of Boston, The Putnam Growth Fund, The Putnam Income Fund, Inc., Putnam Investors Fund, Inc., Putnam Vista Fund, Inc., Putnam Voyager Fund, Inc., Putnam Option Income Trust, Putnam Fund Distributors, Inc., 265 Franklin Street, Boston, Massachusetts, 02110 (812-4083).

Notice is hereby given that Putnam Tax Exempt Income Fund ("Putnam Tax Exempt"), Putnam Convertible Fund, Inc., Putnam Equities Fund, Inc., The George Putnam Fund of Boston, The Putnam Growth Fund, The Putnam Income Fund, Inc., Putnam Investors Fund, Inc., Putnam Vista Fund, Inc., Putnam Voyager Fund, Inc. and Putnam Option Income Trust ("Putnam Option") (collectively the "Putnam Funds"), Putnam Daily Dividend Trust (the "Trust"), and Putnam Fund Distributors, Inc. ("Distributors"), (all collectively referred to as "Applicants"), have filed an application on January 31, 1977 and an amendment thereto on April 29, 1977, for an order, pursuant to Section 11(a) of the Investment Company Act of 1940 ("Act"), to permit an offer of exchange of the shares of Putnam Tax Exempt for the shares of the other Putnam Funds on a basis other than the relative net

asset values of the shares to be exchanged. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below.

The Putnam Funds and the Trust are each registered under the Act as diversified, open-end investment companies and organized as Massachusetts corporations or Massachusetts business trusts. Distributors, a wholly-owned subsidiary of March & McLennan Management Company, serves as principal underwriter for the Putnam Funds and the Trust.

The application states that the Putnam Funds, other than Putnam Option, and the Trust are engaged in continuous public offerings of their shares. The Putnam Funds, other than Putnam Tax Exempt and Putnam Option, offer their shares at public offering prices equal to net asset value plus a sales charge which varies with the size of the purchase from 8.5 percent on an investment of less than $10,000 to 1.0 percent on an investment of $1,000,000 and over.

Putnam Option, which was recently organized, expects to commence an initial public offering of its shares in June, 1977. Applicants also expect to commence a continuous offering in shares of Putnam Option not less than 30 days following the close of its initial public offering with Distributors acting as principal underwriter. Applicants state that it is expected that the sales charge for both the initial and continuous public offering of shares of Putnam Option will be the same as the other Putnam Funds, except for Putnam Tax Exempt.

Shares of Putnam Tax Exempt are offered at a public offering price equal to net asset value plus a sales charge which is lower than the sales charge for the other Putnam Funds and which varies with the size of the purchase from 4.75 percent on an investment of less than $25,000 to 1.0 percent on an investment of $1,000,000 and over. The Trust offers its shares at net asset value without any sales charge.

According to the application, the current prospectuses of the Putnam Funds, other than Putnam Tax Exempt and Putnam Option, provide for exchanges among such funds at net asset value of the shares being exchanged next determined following receipt of an exchange request and any other required documentation. There is an administrative fee of $5 charged on each exchange, which is retained by the Putnam Funds' shareholder servicing agent. Applicants submit that, after the continuous offering of Putnam Option shares has begun, it is expected that shares of Putnam Option may be exchanged for shares of the other Putnam Funds and that shares of the other Putnam Funds, other than Putnam Tax Exempt, may be exchanged for shares of Putnam Option, in each case at net asset value. It is stated in the application that shares of the Trust may currently be redeemed and the proceeds used to purchase shares of the Putnam Funds (other than Putnam Option), provided the investor pays the applicable sales charge on the Putnam Funds' shares acquired in the transaction. It is further stated that Trust shares acquired through an exchange from the Putnam Funds, other than Putnam Tax Exempt (and shares credited as dividend reinvestments with respect to such shares), may be exchanged again for shares of the Putnam Funds (other than Putnam Option) without any sales charge.

According to the application, the prospectus for the initial offering of shares of Putnam Tax Exempt provided that after the commencement of the continuous offering, shareholders of that fund could exchange their shares held six months or more for shares of the other Putnam Funds at net asset value and that shareholders who purchased shares of Putnam Tax Exempt in its initial offering, so long as exchanges are permitted between the Putnam Funds, would continue to be able to exchange such shares after six months at net asset value, and to exchange shares acquired from reinvestment of dividend distributions on such shares, at net asset value without any holding period.

Applicants propose to permit shares of Putnam Tax Exempt acquired at the public offering price in its continuous offering (and shares of the Trust acquired through an exchange from Putnam Tax Exempt) and shares acquired from dividend reinvestment with respect to such shares to be exchanged for shares of each of the other Putnam Funds that are then offered for sale to the general public on the basis of the relative net asset values per share plus the amount by which the sales charge stated in the then current prospectus of the Putnam Fund whose shares are being acquired in the exchange exceeds the sales charge stated in the then current prospectus of Putnam Tax Exempt. The application provides that, where Putnam Tax Exempt shares being exchanged were acquired through a prior exchange from one of the other Putnam Funds or from dividend reinvestment with respect to such shares, the exchange will be on the basis of relative net asset values per share. Applicants represent that the prospectuses of the Putnam Funds and the Trust will describe the terms of such exchanges, including the $5.00 administrative fee on each exchange. It is submitted in the application that if shareholders of Putnam Tax Exempt who purchased shares in such fund's initial offering desire to exchange such shares prior to the expiration of the six month holding period, they will be permitted to do so in accordance with the terms of the exchange offer in the then current Putnam Tax Exempt prospectus.

Section 11(a) of the Act provides in pertinent part that it shall be unlawful for any registered open-end company or principal underwriter for such a company to make or cause to be made an offer to the holder of a security of such company or of any other open-end investment company to exchange his security for a security in the same or another such company on any basis other than the relative net asset values of the respective securities to be exchanged, unless the terms of the offer have first been submitted to and approved by the Commission.

Applicants assert that the purpose of the proposed exchange offer at other than net asset value with respect to Putnam Tax Exempt, like the purpose of the exchange offers at net asset value contained in the current prospectuses of the other Putnam Funds, is to permit a shareholder whose investment objective has changed to change investments without having to pay again the sales charge which was paid at the time of initial investment. Applicants state that it would be discriminatory to permit the exchange of shares of Putnam Tax Exempt for shares of the other Putnam Funds at net asset value, because the exchanging Putnam Tax Exempt shareholders would have paid substantially lower sales charges on their investment than the shareholders of the other Putnam Funds. Applicants submit that, if exchanges between Putnam Tax Exempt and the other Putnam Funds were at net asset value, investors could avoid the higher sales charges in effect for the other funds by purchasing shares of Putnam Tax Exempt and then exchanging those shares at net asset value for shares of the other Putnam Funds. It is asserted that this practice would be contrary to the policies underlying the price maintenance provisions of the Act and could present difficulties in managing Putnam Tax Exempt consistent with its investment objectives and could increase its expenses in the event of any material incidence of investors purchasing shares of Putnam Tax Exempt with a view toward exchanging into another Putnam Fund to avoid the higher sales charge. Applicants state that such transitory investments in Putnam Tax Exempt could result in increased custodian and shareholder servicing fees and a need for greater liquidity in the portfolio of Putnam Tax Exempt than would otherwise be the case.

Notice is further given that any interested person may, not later than May 31, 1977, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, or he may request that he be notified if the Commission shall order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request shall be served personally or by mail upon Applicants at the address stated above. Proof of such service (by affidavit, or in case of an attorney-at-law, by certificate) shall be filed contemporaneously with the request. As provided by Rule 0-5 of the Rules and Regulations promulgated under the Act, an order disposing of the application will be issued as of course following said date unless the Commission thereafter orders a hearing upon request or upon the Com-

mission's own motion. Persons who request a hearing (or advice as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

GEORGE A. FITZSIMMONS,
Secretary.

[FR Doc.77-13924 Filed 5-13-77;8:45 am]

DEPARTMENT OF STATE

Office of the Secretary

[Public Notice CM-7/66]

SHIPPING COORDINATING COMMITTEE, SUBCOMMITTEE ON SAFETY OF LIFE AT SEA

Meeting

The working group on ship design and equipment of the Subcommittee on Safety of Life at Sea, a subcommittee of the Shipping Coordinating Committee, will hold an open meeting at 8:00 a.m. on Thursday, June 9, 1977, in Rooms 8236 and 8238 of the Department of Transportation, 400 Seventh Street, SW., Washington, D.C.

The purpose of the meeting is to discuss the agenda items for the 17th Session of the Subcommittee on Ship Design and Equipment of the Intergovernmental Maritime Consultative Organization (IMCO) scheduled to be held July 25–29, 1977 in London. The agenda includes work in the following areas:

Requirements for machinery and electrical installations for mobile offshore drilling units and offshore supply vesels;

Requirements for special purpose ships including training and research vessels, mobile offshore drilling units, and offshore supply vessels;

Safety requirements for nuclear ships, unification of definitions and provisions used in various IMCO instruments; and

Requirements for automation.

Requests for further information on the meeting should be directed to CAPT C. B. Glass, United States Coast Guard. He may be reached by telephone on (area code 202) 426–2167.

The Chairman will entertain comments from the public as time permits.

RICHARD K. BANK,
Chairman, Shipping Coordinating Committee.

MAY 9, 1977.

[FR Doc.77-13998 Filed 5-13-77;8:45 am]

[Public Notice No. 545; Delegation of Authority No. 138]

ASSISTANT SECRETARY FOR OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS

Delegation of Authority

Pursuant to the authority vested in me by section 4 of the Act of May 26, 1949 (63 Stat. 111; 22 U.S.C. 2658), I hereby delegate to the Assistant Secretary for Oceans and International Environmental and Scientific Affairs of the Department of State the performance of all the functions which the Secretary of State is authorized to perform pursuant to and under the authority of section 204 of the Fishery Conservation and Management Act of 1976 (Pub. L. 94–265). This authority may be redelegated.

Dated: April 29, 1977.

CYRUS VANCE,
Secretary of State.

[FR Doc. 77-13869 Filed 5-13-77;8:45 am]

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[FRA Waiver Petition No. RST-77-1]

CHICAGO, MILWAUKEE, ST. PAUL, AND PACIFIC RAILROAD CO.

Petition for Waiver of Track Safety Standards

Notice is hereby given that the Chicago, Milwaukee, St. Paul and Pacific Railroad (Milwaukee) has petitioned the Federal Railroad Administration (FRA) for a temporary waiver of compliance with certain provisions of the Track Safety Standards (49 CFR Part 213). The temporary waiver is sought for the Milwaukee trackage between Faithorn and Seymour in the State of Illinois, a ditstance of approximately thirty eight miles.

The Milwaukee indicates that recent inspections have disclosed that this trackage fails to meet all the requirements for track geometry prescribed in §§ 213.51 through 213.63 (49 CFR 213.51–63) applicable to FRA Class I track. The Milwaukee seeks a temporary waiver of compliance with these provisions in order to continue operations over this trackage while a track rehabilitation program is completed.

The Milwaukee is initiating a rehabilitation program for this line which is designed to bring the track into compliance with the standards within a period of one year or less. This temporary waiver is sought to permit Milwaukee to operate over the trackage for the one year period that will be needed to complete the restoration of the tracks to compliance with the standards.

The Milwuakee indicates that it desires this waiver in order to continue to serve the Louisville, Kentucky, gateway and that it has been unable to arrange for an alternate route to the Louisville gateway by-passing the track for which the waiver has been requested.

Interested persons are invited to participate in this proceeding by submitting written data, views, or comemnts. FRA does not anticipate scheduling an opportunity for oral comment on this petition since the facts do not appear to warrant it. An opportunity to present oral comments will be provided, however, if requested by any interested person prior to May 27, 1977. All communications concerning this petition should identify the appropriate Docket Number (FRA Waiver Petition Docket Number RST-77-1) and shall be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street SW., Washington, D.C. 20950. Communications received before June 17, 1977, will be considered by the FRA before final action is taken. Comments received after that date will be considered so far as practicable. All comments received will be available, both before and after the closing date for communications, for examination by interested persons during regular business hours in Room 5101, Nassif Building, 400 Seventh Street SW., Washington, D.C. 20590.

This notice is issued under the authority of 45 U.S.C. 431; and § 1.49(n) of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49(n).

Issued in Washington, D.C., on May 9, 1977.

DONALD W. BENNETT,
Chairman, Railroad Safety Board.

[FR Doc.77-13902 Filed 5-13-77;8:45 am]

National Highway Traffic Safety Administration

[Docket No. 77-04; Notice 1]

ELECTRIC AND HYBRID VEHICLES

Meeting and Invitation for Applications for Financial Assistance

This notice announces that the National Highway Traffic Safety Administration (NHTSA) will hold a public meeting to permit interested persons to present oral and written views on the applicability of Federal motor vehicle safety standards to electric and hybrid vehicles. This notice also announces an invitation for applications for financial assistance by participants with respect to the public meeting.

On September 17, 1976, Congress enacted into law the Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976 (Pub. L. 94–413). Section 13(d) of that Act directs the NHTSA (delegation of authority by the Secretary of Transportation) to conduct a study on the current and future applicability of safety standards and regulations to electric and hybrid vehicles. The results of that study are to be reported to the Administrator of the Energy Research and Development Administration (ERDA) and to Congress by September 17, 1977. The NHTSA has determined that the most effective way to gather information for the study is through a public meeting at which the unique safety aspects of current and future electric and hybrid vehicles, anticipated usage of electric private and commercial vehicles, appropriateness of current and future safety standards to protect occupants of such vehicles, and safeguards for electric and hybrid vehicles when involved in collisions with conventional vehicles would be discussed. In order to ensure that the information presented at the meeting fully addresses the subject of the study, it is requested

that the presentations focus on the following points:

(1) Anticipated usage by private individuals of small and intermediate size electric and hybrid automobiles.

(2) Anticipated size and usage by commercial establishments or municipalities of electric and hybrid vehicles such as delivery vans, trucks, and buses.

(3) Appropriateness of existing Federal motor vehicle safety standards for electric and hybrid vehicles.

(4) Development of new Federal motor vehicle safety standards to address safety problems unique to electric and hybrid vehicles. Possible areas of concern are as follows:

(a) Shock hazard from batteries, either in normal use or in a collision environment.

(b) Spillage of electrolyte from batteries during a collision.

(c) Potential for explosion of batteries.

(d) Violent movement of batteries during a collision.

(e) Slower acceleration than conventional vehicles, increasing chances of collision during merging into traffic.

(f) Uncontrolled release of energy (e.g., during a collision) from an energy storage device in a hybrid vehicle, such as a hydraulic system or a flywheel.

(5) Application of Federal motor vehicle safety standards to electric and hybrid vehicles based upon their usage and other factors.

Interested persons are invited to attend the meeting and to present oral or written comments. Persons wishing to make written comments only, must submit those comments to the docket by July 12, 1977. Persons making oral statements are encouraged to submit their comments in written form either at the meeting or by mail. All written submissions should be mailed to Docket No. 77-04, Notice 1, Docket Section, National Highway Traffic Safety Administration, Room 5108, 400 Seventh Street, SW., Washington, D.C. 20590.

Persons who desire to make an oral presentation should contact Mr. Sam Daniel, Motor Vehicle Programs, NHTSA, Washington, D.C. 20590 (202-426-2264) by June 27, 1977, so that time limitations (if necessary) and the need for any special equipment, such as projectors, can be discussed and final arrangements can be made. A general outline of the planned presentation should also be submitted at the same time. Persons whose presentations include slides, motion pictures, or other visual aids should plan to submit copies of them for the record at the meeting.

An agenda will be available at the meeting. A transcript of the meeting will be made, and will be available for examination in the NHTSA Docket Section, Room 5108, approximately 5 days after the meeting.

The meeting will be held on July 11, 1977, in Room 2230 of the Nassif Building, 400 Seventh Street, SW., Washington, D.C., 20590, beginning at 9:30 a.m. The meeting will continue on July 12, 1977, if additional time is necessary to hear all presentations.

Applications for financial assistance from parties who wish to participate in the public meeting are requested. The NHTSA may provide financial assistance to individuals or organizations which can effectively supplement the record of the proceeding but which are financially unable to participate. This invitation is issued pursuant to the Department of Transportation's recently established (41 FR 2863, January 13, 1977) one-year demonstration program.

All applications submitted by Monday, June 6, 1977, will be evaluated by a panel of NHTSA and DOT officials to determine whether each applicant is eligible to receive funding under the regulations. In general, an applicant is deemed eligible if (1) it represents an interest the representation of which can reasonably be expected to contribute to a full and fair determination of the issues in the proceeding, (2) its participation is reasonably necessary to represent that interest, (3) it can competently represent that interest, and (4) it lacks sufficient financial resources to participate in the absence of such assistance. If more than one applicant representing the same or similar interest is deemed eligible, the panel either will select the applicant which can make the strongest presentation or, will select more than one applicant if the eligible applicants seek to present significantly different points of view or proposals. Payment is made as soon as possible after the selected applicant has completed its work and submitted a claim. Interested persons may obtain a copy of the regulations for the demonstration program from Ms. Jeannette Feldman, Office of the Administrator, NHTSA, Washington, D.C. 20590 (202-426-1614).

Each application submitted pursuant to this notice should identify which issues the applicant proposes to address and the manner in which the applicant proposes to do so.

Applicants are urged to submit their applications by the deadline specified above. Under the regulations for the demonstration program, consideration of late applications is at the discretion of the panel of officials that will review the applications.

Applications should be submitted to Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Applications should be clearly marked for the attention of the Associate Administrator for Motor Vehicle Programs.

The principal authors of this notice are Mr. Sam Daniel, Office of Crashworthiness, and Ms. Kathy DeMeter, Office of Chief Counsel.

(Secs. 103, 119, Pub. L. 89-563, 80 Stat. 718 (15 U.S.C. 1392, 1407); Sec. 13, Pub. L. 94-413, 90 Stat. 1260 (15 U.S.C. 2512); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8.)

Issued on May 11, 1977.

ROBERT L. CARTER,
Associate Administrator,
Motor Vehicle Programs.

[FR Doc.77-13913 Filed 5-11-77;4:14 pm]

INTERSTATE COMMERCE COMMISSION

[Notice No. 390]

ASSIGNMENT OF HEARINGS

MAY 11, 1977.

Cases assigned for hearing, postponement, cancellation or oral argument appear below and will be published only once. This list contains prospective assignments only and does not include cases previously assigned hearing dates. The hearings will be on the issues as presently reflected in the Official Docket of the Commission. An attempt will be made to publish notices of cancellation of hearings as promptly as possible, but interested parties should take appropriate steps to insure that they are notified of cancellation or postponements of hearings in which they are interested.

MC 67818 (Sub-No. 85), Michigan Express, Inc., now assigned June 14, 1977, at Lansing, Mich. is postponed indefinitely.

MC 142549, Walnut Hill Wrecker Service, Inc. now assigned June 1, 1977 at Dallas, Texas and will be held in Room 5A15-17, New Federal Building, 1100 Commerce Street.

AB 20 Sub 1, Texas and Pacific Railway Company Abandonment Between Barnsdall and Pawhuska in Osage County, Oklahoma now assigned June 6, 1977 at Pawhuska, Oklahoma and will be held in the District Court Room, 3rd Floor, Osage County Courthouse, Grandview Avenue.

MC 106644 Sub 227, Superior Trucking Co., Inc. now assigned June 6, 1977 at Dallas, Texas and will be held in Room 5A15-17, Federal Building, 1100 Commerce Street.

MC 113678 Sub 632, Curtis, Inc. now assigned June 6, 1977 at Seattle, Washington and will be held in Room 2866, Federal Building, 915 Second Avenue.

MC 107452 Sub 7, R. D. Brown, dba Brown Trucking now assigned June 1, 1977 at Billings, Montana and will be held in Room 2222, Federal Building, 316 North 26th Street.

MC 138875 Sub 32, Shoemaker Trucking Co. now assigned June 7, 1977 at Seattle, Washington and will be held in Room 2866, Federal Building, 915 Second Avenue.

MC 141867 Sub 1, Specialized Trucking Service, Inc. now assigned June 9, 1977 at Seattle, Washington and will be held in Room 2866, Federal Building, 915 Second Avenue.

MC 128527 Sub 70, May Trucking Co. now assigned June 13, 1977 at Portland, Oregon and will be held in Room 103, Pioneer Courthouse, 555 S.W. Yamhill Street.

AB 52 Sub 7, Atchison, Topeka and Santa Fe Railway Company Abandonment Between Cushing and Shawnee in Payne, Lincoln and Pottawatomie Counties, Oklahoma and will be held in the City Hall, Commission Conference Room, Corner of Broadway and 9th Streets.

MC 142639, Kelly McKnight, dba Kelly McKnight Wrecker Service now assigned June 8, 1977 at Dallas, Texas and will be held in Room 5A15-17, Federal Building, 1100 Commerce Street.

MC 110166 Sub 22, Tennessee Carolina Transportation, Inc. now assigned June 1, 1977 at Raleigh, North Carolina and will be held in Room 208, Century Post Office, 300 Fayetteville Street.

MC 130198 Sub 1, Robert Gavin & Associates, Inc. now assigned June 1, 1977 at Madison, Wisconsin and will be held in Room 404, State Office Building, 4802 Sheboygan Avenue.

MC-C 9382, Tucker Freight Lines, Inc., Investigation and Revocation of Certificates

now assigned June 1, 1977 at Chicago, Illinois and will be held June 1 through June 3 in Room 1319, Everett McKinley Dirksen Building, 219 South Dearborn Street and June 6 through June 10 in Room 1903 at the Same Address.

MC-FC 75721, General Movers, Inc., East St. Louis, Illinois, Transferee and Fasgo Motor Express, Inc., East St. Louis, Illinois, Transferor and Modern Truck Lines, Inc., East St. Louis, Illinois, Transferor, MC 120879 Sub 3, General Movers, Inc. Extension, East St. Louis, Illinois and MC 120879 Sub 2, General Movers, Inc. now assigned June 6, 1977 at Chicago, Illinois and will be held in Room 1319, Everett McKinley Dirksen Building, 219 South Dearborn Street on June 1st through the 3rd and June 6th through the 10th in Room 1903 at the Same address.

MC 3281 Sub 7, Powell Truck Line, Inc. now being assigned June 28, 1977 (2 days) for continued hearing at Memphis, Tennessee and will be held at the Executive Plaza Inn, 1471 East Brooks Road.

No. 36434, Petition For Declaratory Order and Reconsideration (Commuter Fares-Consolidated Rail Corporation, New Jersey and New York and No. 36474, *Benjamin A. Gilman* v. *Consolidated Rail Corporation, et al.* are now being dismissed.

MC 138762 (Sub-No. 1), Municipal Tank Lines Limited, now assigned June 14, 1977, at Buffalo, N.Y. will be held in Room No. 1440, Federal Building, 111 West Huron Street.

MC-C-9025, *Kane Transfer Company* v. *Jacobs Transfer, Inc.*, MC 59909 (Sub-No. 1), Jacobs Transfer, Inc. and MC 59909 (Sub-No. 13), Jacobs Transfer, Inc. now being assigned for continued hearing on the 17th day of May 1977, at the Offices of the Interstate Commerce Commission, Washington, D.C.

ROBERT L. OSWALD,
Secretary.

[FR Doc.77-13934 Filed 5-13-77;8:45 am]

[Docket No. AB-141]

KANAWHA CENTRAL RAILWAY COMPANY ABANDONMENT IN KANAWHA COUNTY, WEST VIRGINIA

Findings

Notice is hereby given pursuant to Section 1a of the Interstate Commerce Act (49 U.S.C. 1a) that by a Certificate and Order dated May 6, 1977, a finding, which is administratively final, was made by the Commission, Division 3, stating that, subject to the conditions for the protection of railway employees prescribed by the Commission in New Orleans Union Passenger Terminal Case, 232 I.C.C. 271, and those provided pursuant to Section 405 of the Rail Passenger Service Act (45 U.S.C. 565), the present and future public convenience and necessity permit the abandonment by The Kanawha Central Railway Company of its entire line of railroad extending from Brounland, West Virginia, to milepost 4.7 at Knickerbocker, West Virginia, a distance of 4.7 miles in Kanawha County, West Virginia. A certificate of public convenience and necessity permitting abandonment was issued to The Kanawha Central Railway Company. Since no investigation was instituted, the requirement of Section 1121.38(a) of the Regulations that publication of notice of abandonment decisions in the FEDERAL REGISTER be made only after such a decision becomes administratively final was waived.

Upon receipt by the carrier of an actual offer of financial assistance, the carrier shall make available to the offeror the records, accounts, appraisals, working papers, and other documents used in preparing Exhibit I (Section 1121.45 of the Regulations). Such documents shall be made available during regular business hours at a time and place mutually agreeable to the parties.

The offer must be filed and served on or before May 31, 1977. The offer, as filed, shall contain information required pursuant to Section 1121.38(b) (2) and (3) of the Regulations. If no such offer is received, the certificate of public convenience and necessity authorizing abandonment shall become effective June 30, 1977.

ROBERT L. OSWALD,
Secretary.

[FR Doc.77-13933 Filed 5-13-77;8:45 am]

[Notice No. 62]

MOTOR CARRIER TEMPORARY AUTHORITY APPLICATIONS

MAY 9, 1977.

The following are notices of filing of applications for temporary authority under Section 210a(a) of the Interstate Commerce Act provided for under the provisions of 49 CFR 1131.3. These rules provide that an original and six (6) copies of protests to an application may be filed with the field official named in the FEDERAL REGISTER publication no later than the 15th calendar day after the date the notice of the filing of the application is published in the FEDERAL REGISTER. One copy of the protest must be served on the applicant, or its authorized representative, if any, and the protestant must certify that such service has been made. The protest must identify the operating authority upon which it is predicated, specifying the "MC" docket and "Sub" number and quoting the particular portion of authority upon which it relies. Also, the protestant shall specify the service it can and will provide and the amount and type of equipment it will make available for use in connection with the service contemplated by the TA application. The weight accorded a protest shall be governed by the completeness and pertinence of the protestant's information.

Except as otherwise specifically noted, each applicant states that there will be no significant effect on the quality of the human environment resulting from approval of its application.

A copy of the application is on file, and can be examined at the Office of the Secretary, Interstate Commerce Commission, Washington, D.C., and also in the ICC Field Office to which protests are to be transmitted.

MOTOR CARRIERS OF PROPERTY

No. MC 43685 (Sub-No. 21TA), filed April 27, 1977. Applicant: MERCER TRUCKING COMPANY, INC., N. 1414 Fancher Road, P.O. Box 11585, Spokane, Wash. 99211. Applicant's representative: George H. Hart, 110 IBM Building, Seattle, Wash. 98101. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Cants*, from those ports of entry on the International Boundary line between British Columbia, Canada and the United States, east of U.S. Highway 97 to Tualatin and Portland, Oreg., restricted to transportation of traffic originating in British Columbia, Canada, for 180 days. Supporting shipper: Conrad Veneers, Inc., 7300 SW Childs Road, Tualatin, Oreg. 97602, Nicolai Company, P.O. Box 17215, Portland, Oreg. 97217. Send protests to: L. D. Boone, Transportation Specialist, Bureau of Operations, Interstate Commerce Commission, 858 Federal Bldg., Seattle, Wash. 98174.

No. MC 61396 (Sub-No. 330TA), filed April 26, 1977. Applicant: HERMAN BROS. INC., 2565 St. Marys Avenue, P.O. Box 189, Omaha, Nebraska 68101. Applicant's representative: John E. Smith, II (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Phosphatic fertilizer solution*, in bulk, in tank vehicles, from Elk Creek, Nebr., to points in Kansas and Missouri, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: David Coward, Manager of Transportation, Kaiser Agricultural Chemicals, Division of Kaiser Aluminum & Chemical Corp., P.O. Box 246, Savannah, Ga. 31401. Send protests to: Carroll Russell, District Supervisor, Interstate Commerce Commission, Suite 620, 110 North 14th Street, Omaha, Nebr. 68102.

No. MC 82492 (Sub-No. 155TA), filed April 27, 1977. Applicant: MICHIGAN & NEBRASKA TRANSIT CO., INC., 2109 Olmstead Road, P.O. Box 2853, Kalamazoo, Mich. 49003. Applicant's representative: Jack H. Blanshan, Suite 200, 205 West Touhy Avenue, Park Ridge, Ill. 60068. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Petroleum products*, in containers, from the facilities of Pennzoil Company, located at or near Rouseville and Reno, Pa., to points in the Lower Peninsula of Michigan, restricted to the transportation of traffic originating at the named origins and destined to the named destinations, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Pennzoil Company, Oil City, Pa. 16301. Send protests to: C. R. Flemming, District Supervisor, Bureau of Operations, Interstate Commerce Commission, 225 Federal Building, Lansing, Mich. 48933.

No. MC 103051 (Sub-No. 396TA), filed April 28, 1977. Applicant: FLEET TRANSPORT COMPANY, INC., 934 44th Avenue, North, P.O. Box 90408, Nashville, Tenn. 37209. Applicant's representative: Russell E. Stone (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Lard*, in bulk, in tank vehicles, from Knoxville,

Tenn. to Detroit, Mich., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Carl Paul Vogt, P.O. Box 5477, Philadelphia, Pa. 19131. Send protests to: Joe J. Tate, District Supervisor, Bureau of Operations, Interstate Commerce Commission, Suite A–422, U.S. Court House, 801 Broadway, Nashville, Tenn. 37203.

No. MC 107295 (Sub-No. 847 TA), filed April 14, 1977. Applicant: PRE-FAB TRANSIT CO., 100 South Main St., Farmer City, Ill. 61842. Applicant's representative: Duane Zehr (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Roofing, building and installation materials* (except iron and steel articles and commodities in bulk), from the plantsite and warehouse facilities of CertainTeed Corporation in Erie County, Ohio, to points in Indiana, Kentucky, and Michigan, for 180 days. Supporting shipper: Edward J. Finn, Assistant Director of Transportation, CertainTeed Corporation, Shelter Materials Group, P.O. Box 860, Valley Forge, Pa. 19482. Send protests to: Harold C. Jolliff, District Supervisor, Interstate Commerce Commission, P.O. Box 2418, Springfield, Ill. 62705.

No. MC 107403 (Sub-No. 1008 TA), filed April 13, 1977. Applicant: MATLACK, INC., Ten West Baltimore Ave., Lansdowne, Pa. 19050. Applicant's representative: Martin C. Hynes, Jr. (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Muriatic acid*, in bulk, in tank vehicles, from Deer Park, Tex., to points in Arkansas, Louisiana, Mississippi, and Oklahoma, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Arkla Chemical Corporation, P.O. Box 751, Little Rock, Ark. 72203. Send protests to: Monica A. Blodgett, Transportation Assistant, Interstate Commerce Commission, 600 Arch St., Rm. 3238, Philadelphia, Pa. 19106.

No. MC 111302 (Sub-No. 105TA), filed April 29, 1977. Applicant: HIGHWAY TRANSPORT, INC., P.O. Box 10470, 1500 Amherst Rd., Knoxville, Tenn. 37921. Applicant's representative: David A. Petersen (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Liquid lard*, in bulk, in tank vehicles, from Clarksville, Tenn., to Birmingham, Ala.; Detroit, Mich.; Helena, Ark.; Lima, Ohio; New Orleans, La.; and Pawtucket, R.I., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Frosty Morn Meats, Clarksville, Tenn. 37040. Send protests to: Joe J. Tate, District Supervisor, Bureau of Operations, Interstate Commerce Commission, Suite A–411, U.S. Court House, 801 Broadway, Nashville, Tenn. 37203.

No. MC 113434 (Sub-No. 75TA), filed April 29, 1977. Applicant: GRA-BELL TRUCK LINE, INC., 679 Lincoln Avenue, Holland, Mich. 49423. Applicant's representative: Wilhelmina Boersma, 1600 First Federal Building, Detroit, Mich. 48226. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Plastic products*, from the plantsite and warehouse facilities of Amoco Plastic Products Company at Seymour, Ind., to Milwaukee, Wis., for 180 days. Supporting shipper: Amoco Plastic Products Company, Seymour, Ind. 47274. Send protests to: C. R. Flemming, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 225 Federal Building, Lansing, Mich. 48933.

No. MC 114211 (Sub-No. 299TA), filed April 26, 1977. Applicant: WARREN TRANSPORT, INC., P.O. Box 420, 324 Manhard Street, Waterloo, Iowa 50704. Applicant's representative: Singer & Sullivan, 327 South La Salle, Chicago, Ill. 60604. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Pressure treated and untreated lumber mill products*, from Plainview, Ark., to Iowa, Minnesota, Michigan, Wisconsin, South Dakota, Nebraska, Kansas, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Plainview Lumber Co., Inc., Plainview, Ark. 72857. Send protests to: Herbert W. Allen, District Supervisor, Bureau of Operations, Interstate Commerce Commission, 518 Federal Building, Des Moines, Iowa 50309.

No. MC 115311 (Sub-No. 220TA), filed April 28, 1977. Applicant: J & M TRANSPORTATION CO., INC., P.O. Box 488, Milledgeville, Ga. 31061. Applicant's representative: K. Edward Wolcott, 1600 First Federal Bldg., Atlanta, Ga. 30303. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Gypsum and gypsum products*, from the facilities of United States Gypsum Company at New Orleans, La., to points in Texas, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: United States Gypsum Company, 53 Perimeter Center East, Atlanta, Ga. 30346. Send protests to: Sara K. Davis, Transportation Assistant, Bureau of Operations, Interstate Commerce Commission, 1252 W. Peachtree St. NW., Rm. 546, Atlanta, Ga. 30309.

No. MC 115841 (Sub-No. 537TA), filed April 27, 1977. Applicant: COLONIAL REFRIGERATED TRANSPORTATION, Inc., P.O. Box 168, Concord, Tenn. 37922. Applicant's representative: Mike G. Moneymaker (same address as above). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Confectionery and confectionery products* (except in bulk), in vehicles equipped with mechanical refrigeration, from Hampden Township, Cumberland County, Pa., to Arizona, Illinois, California, Michigan, Ohio, Utah, Indiana, Kansas, and Nebraska; restricted to traffic originating at the plantsite and storage facilities of M&M Mars Company at the above named origin and destined to the above named destinations, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: M&M Mars, a division of Mars, Inc., High Street, Hackettstown, N.J. 07840. Send protests to: Joe J. Tate, District Supervisor, Bureau of Operations, Interstate Commerce Commission, Suite A–422, U.S. Court House, 801 Broadway, Nashville, Tenn. 37203.

No. MC 116273 (Sub-No. 209TA), filed March 16, 1977. Applicant: D & L TRANSPORT, INC., 3800 S. Laramie Avenue, Cicero, Ill. 60650. Applicant's representative: William R. Lavery (same address above). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Plastic granules*, in bulk, in tank vehicles, from Ypsilanti, Mich., to Anderson, Ind., and Alliance and Carey, Ohio, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Thermofil, Inc., John B. Luce, Vice President, 884 Railroad Street, Ypsilanti, Mich. 48197. Send protests to: Transportation Assistant Patricia A. Roscoe, Interstate Commerce Commission, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Rm. 1386, Chicago, Ill. 60604.

No. MC 117119 (Sub-No. 625TA), filed April 27, 1977. Applicant: WILLIS SHAW FROZEN EXPRESS, INC., P.O. Box 188, Elm Springs, Ark. 72728. Applicant's representative: L. M. McLean (same address as above). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Heating and air conditioning units, parts and accessories*, from the facilities of Rheem Mfg. Co. at Fort Smith, Ark., to points in California, Oregon, Arizona, and Washington for 180 days. Supporting shipper: Rheem Manufacturing Company, 5600 Old Greenwood Road, Fort Smith, Ark. 72906. Send protests to: District Supervisor William H. Land, Jr., 3108 Federal Office Building, 700 West Capitol, Little Rock, Ark. 72201.

No. MC 118989 (Sub-No. 157TA), filed April 13, 1977. Applicant: CONTAINER TRANSIT, INC., 5223 S. 9th St., Milwaukee, Wis. 53221. Applicant's representative: Rolland Draves (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Fibreboard cans* with or without metal ends, from West Chicago, Ill. to points in Cincinnati, Ohio, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Boise Cascade Corporation, P.O. Box 7747, Boise, Idaho. Send protests to: Gail Daugherty, Transportation Assistant, Interstate Commerce Commission, Bureau of Operations, U.S. Federal Bldg. and Courthouse, 517 East Wisconsin Ave., Rm. 619, Milwaukee, Wis. 53202.

No. MC 119880 (Sub-No. 95TA), filed April 15, 1977. Applicant: DRUM TRANSPORT, INC., P.O. Box 2056, 617 Chicago St., East Peoria, Ill. 61611. Applicant's representative: Nancy Drum (same address as applicant). Authority

sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Alcoholic liquors*, in bulk, in tank vehicles, from points in California to Long Prairie, Minn., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Minnesota Distillers, Inc., David Becker, General Manager, 609 6th St. NE., Long Prairie, Minn. Send protests to: Transportation Assistant Patricia A. Roscoe, Interstate Commerce Commission, Everett McKinley Dirksen Bldg., 219 S. Dearborn St., Rm. 1396, Chicago, Ill. 60604.

No. MC 120646 (Sub-No. 18TA), filed April 26, 1977. Applicant: BRADLEY FREIGHT LINES, INC., P.O. Box 5875, Asheville, N.C. 28803. Applicant's representative: Henry E. Seaton, 915 Pennsylvania Building, 13th and Pennsylvania Ave. NW., Washington, D.C. 20004. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: (1) *New furniture*, from the plant sites and warehouse facilities of Broyhill Industries at or near Arcadia, Louisiana, to points in the United States, and (2) *materials, supplies and equipment* used in the manufacture of new furniture from points in the United States to the origin points named in number one above, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Broyhill Industries, P.O. Box 700, Broyhill Park, Lenoir, N.C. 28645. Send protests to: District Supervisor Terrell Price, 800 Briar Creek Rd., Rm. CC516, Mart Office Building, Charlotte, N.C. 28205.

No. MC 121240 (Sub-No. 5TA) (correction), filed March 7, 1977, published in the FEDERAL REGISTER of March 28, 1977, republished as corrected this issue. Applicant: ABC TRUCK LINES, INC., P.O. Box 1824, 728 E. Idaho, Elko, Nev. 89801. Applicant's representative: Antoinette M. Bloch (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Chemicals*, viz. *borax and boric acid*, from the plantsite of U.S. Borax Co., at or near Boron, Calif., and the plantsite of Kerr-McGee Corp., at or near Trona, Calif., to Great Falls, Mont., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Van Waters & Rogers, Box 2021, Billings, Mont. 59103. Send protests to: William J. Huetig, Interstate Commerce Commission, 203 Federal Bldg., 705 N. Plaza St., Carson City, Nev. 89701. The purpose of this republication is to correct the applicant's request of authority.

No. MC 123407 (Sub-No. 369TA), filed April 27, 1977. Applicant: SAWYER TRANSPORT, INC., South Haven Square, U.S. Highway 6, Valparaiso, Ind. 46383. Applicant's representative: H. E. Miller, Jr. (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Uncrated flat glass in trailers with metal "A" frames*, from the plantsite of Guardian Industries Corporation at or near Carleton, Mich., to Ports of Entry on International Boundary between the United States and Canada located at Detroit, Mich., and Buffalo and Niagara Falls, N.Y., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Guardian Industries Corporation, 14600 Romine Road, Carleton, Mich. 48117. Send protests to: J. H. Gray, District Supervisor, Bureau of Operations, Interstate Commerce Commission, 343 West Wayne Street, Suite 113, Fort Wayne, Ind. 46802.

No. MC 126473 (Sub-No. 29), filed April 28, 1977. Applicant: HAROLD DICKEY TRANSPORT, INC., Packwood, Iowa 52580. Applicant's representative: Kenneth F. Dudley, P.O. Box 279, Ottumwa, Iowa 52501. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Nitrogen fertilizer solutions* in bulk in tank vehicles, from the Fulton River Terminal at Fulton, Ill., to points in Iowa and Easton, Minn., restricted to traffic originating at the Fulton River Terminal, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: First Miss, Inc., P.O. Box 328, Ft. Madison, Iowa 52627. Send protests to: Herbert W. Allen, District Supervisor, Bureau of Operations, Interstate Commerce Commission, 518 Federal Building, Des Moines, Iowa 50309.

No. MC 128007 (Sub-No. 98TA), filed April 12, 1977. Applicant: HOFER, INC., P.O. Box 583, 4032 Parkview Drive, Pittsburg, Kans. 66762. Applicant's representative: Larry E. Gregg, 641 Harrison St., Topeka, Kans. 66603. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Prepared animal, fish and poultry feed*, dry (except in bulk), from the plantsite or storage facilities of Doane Products Company in Jasper County, Mo., to points in Colorado, Kansas (on and west of U.S. Highway 81), New Mexico, Oklahoma, and Texas, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Doane Products Company, P.O. Box 879, Joplin, Mo. 64801. Send protests to: M. E. Taylor, District Supervisor, Interstate Commerce Commission, Suite 101 Litwin Bldg., 110 North Market, Wichita, Kans. 67202.

No. MC 129643 (Sub-No. 10TA), filed April 26, 1977. Applicant: GEORGE SMITH, doing business as GEORGE SMITH TRUCKING CO., 433 Mountain Avenue, Winnipeg, Manitoba, Canada R2W 1K5. Applicant's representative: George Smith (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Frozen bakery products*, from points in Oregon and Washington to port of entry located at Eastport, Idaho, restricted to traffic destined to Manitoba, Canada, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Oroweat Bakers, Inc., 1604 North 34th Street, Seattle, Wash. 98103. Send protests to: Ronald R. Mau, District Supervisor, Bureau of Operations, Interstate Commerce Commission, PO Box 2340, Fargo, N. Dak. 58102.

No. MC 134286 (Sub-No. 23TA), filed April 26, 1977. Applicant: ILLINI EXPRESS, INC., P.O. Box 1584, Sioux City, Iowa 51102. Applicant's representative: Charles J. Kimball, Suite 530, Capitol Life Center, 1600 Sherman Street, Denver, Colo. 80203. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Vegetable oil shortening, lard, edible tallow, cooking oils, and margarine*, from the plansite and or warehouse facilities of Swift Edible Oil Company located at or near Bradley, Ill., to points in New Jersey, New York, Maryland, Pennsylvania, Massachusetts, the District of Columbia, and the specified points of Manassas, Williamsburg Richmond, and Newport News, Va.; Dover, Rehoboth Beach, and Wilmington, Del.; Levitt City, New Haven, New London, Hartford, Meriden, Colchester, and Stamford, Conn.; Burlington, Brattleboro, Rutland, and White River Junction, Vt.; Dover, Concord, and Manchester, N.H.; Fairfield, Lewiston, Portland, and Augusta, Maine; Providence and Cranston, R.I., and the commercial zones of the respectively named cities. Restriction: The operations authorized herein are restricted to the transportation of traffic originating at the named origin and destined to the above-described destinations, for 180 days. Supporting shipper: Arnold A. Johnson, Distribution Manager-Service, Swift Edible Oil Company, 115 W. Jackson Blvd., Chicago, Ill. 60604. Send protests to: Carroll Russell, District Supervisor, Interstate Commerce Commission, Suite 620, 110 North 14th Street, Omaha, Nebr. 68102.

No. MC 134970 (Sub-No. 13TA), filed April 15, 1977. Applicant: UNZICKER TRUCKING, INC., P.O. Box 35, Rt. No. 24 East, El Paso, Ill. 61738. Applicant's representative: Dana Throckmorton (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular, transporting: *Frozen pork sausage*, from the plantsite of Bird Provision Company at or near Pekin, Ill. to points in Indiana, Michigan, Kentucky, Ohio, Wisconsin and Missouri (except St. Louis), for 180 days. Supporting shipper: Bird Provision Company, Edward P. Lobello, Vice President, 420 Washington, Pekin, Ill. 61554. Send protests to: Transportation Assistant Patricia A. Roscoe, Interstate Commerce Commission, Everett McKinley Dirksen Bldg., 219 S. Dearborn St., Rm. 1386, Chicago, Ill. 60604.

No. MC 135684 (Sub-No. 32TA), filed April 15, 1977. Applicant: BASS TRANSPORTATION CO., INC., P.O. Box 391, Old Croton Rd., Flemington, N.J. 08822. Applicant's representative: Herbert A. Dubin, Federal Bar Bldg. West, 1819 H Street NW., Suite 1030, Washington, D.C. 20006. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Tile and*

floor and wall coverings, and supplies, materials, and equipment used in the maintenance and installation of tile and floor and wall coverings, from Compton, Calif. to points in Arizona, Oregon and Washington, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Color Tile Supermart, Inc., No. 3 Tandy Center, First & Throckmorton, Fort Worth, Tex. 76102. Send protests to: Dieter H. Harper, District Supervisor, Interstate Commerce Commission, 428 East State Street, Room 204, Trenton, N.J. 08608.

No. MC 136275 (Sub-No. 22TA), filed April 28, 1977. Applicant: WHITFIELD ASSOCIATED TRANSPORT, INC., 28 San Marcos Drive, El Paso, Tex. 79922. Applicant's representative: H. B. Dudley (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Slag*, in bulk, in pneumatic type vehicles, from El Paso, Tex., to points in New Mexico and points in Arizona, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: H. M. Hedrick Company, 9720 Town Park, Suite 101, Houston, Tex. 77036. Send protests to: Haskell E. Ballard, District Supervisor, Interstate Commerce Commission, Bureau of Operations, Box H-4395 Herring Plaza, Amarillo, Tex. 79101.

No. MC 138420 (Sub-No. 15TA), filed April 28, 1977. Applicant: CHIZEK ELEVATOR & TRANSPORT, INC., P.O. Box 147, Cleveland, Wis. 53015. Applicant's representative: Wayne W. Wilson, P.O. Box 8004, Madison, Wis. 53708. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: (1) *Malt beverages and related advertising materials and supplies and malt beverage dispensing equipment* when moving therewith from LaCrosse, Wis., to points in the St. Louis, Mo. Commercial Zone, (2) *rejected shipments and empty malt beverage containers*, from the St. Louis, Mo., Commercial Zone to LaCrosse, Wis., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Mid-America Beer Dist., Inc., 4400 Gustine Avenue, St. Louis, Mo. 63116 (Gerald R. Woodward). Send protests to: Gail Daugherty, Transportation Asst. Interstate Commerce Commission, Bureau of Operations, U.S. Federal Building & Courthouse, 517 East Wisconsin Avenue, Rm. 619, Milwaukee, Wis. 53202.

No. MC 138471 (Sub-No. 8TA), filed April 27, 1977. Applicant: LEONARD TRUCKING, INC., 1605 Westside Highway, Kelso, Wash. 98626. Applicant's representative: David C. White, 2400 S.W. Fourth Avenue, Portland, Oreg. 97201. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: (1) *Wine* from Sonoma, San Jose, Ripon, Saratoga, Modesto and Los Gatos, Calif., to Longview, Chehalis, Olympia, Aberdeen, Bremerton and Seattle, Wash.; and (2) *malt beverages*, from Irvine and Fairfield, Calif.; to Longview, Raymond and Olympia, Wash., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shippers: There are approximately 5 statements of support attached to the application, which may be examined at the Interstate Commerce Commission, in Washington, D.C., or copies thereof which may be examined at the field office named below. Send protests to: R. V. Dubay, District Supervisor, Bureau of Operations, Interstate Commerce Commission, 114 Pioneer Courthouse, Portland, Oreg. 97204.

No. MC 140463 (Sub-No. 4TA), filed April 27, 1977. Applicant: ORREN J. LEE, 2312 Braemer Drive, Sioux Falls, S. Dak. 57105. Applicant's representative: Mark Menard, S.D. Transport Services, Inc., 5301 N. Cliff Ave., P.O. Box 480, Sioux Falls, S. Dak. 57101. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Dairy products* as described in Section B of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and supplies used in the production and distribution of dairy products from points in Iowa, Minnesota, Nebraska and South Dakota to Sioux Falls, South Dakota, under a continuing contract or contracts with Terrace Park Dairy, 1501 West Tenth St., Sioux Falls, S. Dak. for 180 days. Supporting shipper: Terrace Park Dairy, 1501 West Tenth Street, Sioux Falls, S. Dak. 57104. Send protests to: J. L. Hammond, District Supervisor, Interstate Commerce Commission, Bureau of Operations, Rm. 369, Federal Building, Pierre, S. Dak. 57501.

No. MC 142204 (Sub-No. 5TA), filed April 27, 1977. Applicant: ROBERT R. GUNVILLE, JR., P.O. Box 27, Iron Mountain, Mich. 49801. Applicant's representative: John Duncan Varda, 1212 S. Pinckney Street, Madison, Wis. 53701. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Bark, sawdust, wood pulp fines, screening, and any other wood refuse* (except wood chips), for use as fuel in vehicles equipped with self-unloading devices, from points in Marquette, Iron, Menominee and Dickson Counties, Mich., to the facilities of (1) Connor Forest Industries, Laona, Wis., (2) Louisiana-Pacific Corp., Goodman, Wis., and (3) Niagara of Wisconsin Paper Corp., Niagara, Wis. for 180 days. Supporting shippers: There are approximately 3 statements of support attached to the application which may be examined at the Interstate Commerce Commission in Washington, D.C., or copies may be examined at the field office named below. Send protest to: C. R. Flemming, District Supervisor, Bureau of Operations, Interstate Commerce Commission, 225 Federal Building, Lansing, Mich. 48933.

No. MC 143089 (Sub-No. 1TA), filed April 28, 1977. Applicant: Floyd A. Raley, doing business as RALEY TRUCKING, Route 2, Box 433, Mechanicsville, Md. 20659. Applicant's representative: Edward N. Button, 1329 Pennsylvania Avenue, P.O. Box 1417, Hagerstown, Md. 21740. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Dry fertilizer, agricultural chemical and agricultural lime* (except in bulk, in tank vehicles), from Wilmington and Seaford, Del.; Lynchburg, Va.; Wilmington, N.C.; and York, Pa.; and their respective commercial zones to points in Anne Arundel, Calvert, Prince George's and St. Mary's Counties, Md.; under a continuing contract or contracts with Royster Company, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Royster Company, Charlotte Hall, Md. Send protests to: Interstate Commerce Commission, 12th & Constitution Avenue, NW., Room 1413, District Supervisor W. C. Hersman, Washington, D.C. 20423.

No. MC 143207TA, filed April 27, 1977. Applicant: COLUMBIA-PACIFIC TRANSPORT CO., P.O. Box 6377, 208 No. Gum Street, Kennewick, Wash. 99336. Applicant's representative: Neil F. Lampson (same address as above). Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Contractor's materials and supplies, heavy crawlers, heavy lift rigging and materials* used in the construction of heavy crawlers and heavy life rigging, between construction sites in North Dakota, South Dakota, Montana, Wyoming, Utah, Idaho, Colorado, New Mexico, Arizona, Nevada, California, Oregon, Washington and Alaska, restricted to movements for and under a continuing contract with Neil F. Lampson, Inc., Kennewick, Wash., for 180 days. Supporting shipper: Neil F. Lampson, Inc., P.O. Box 6407, Kennewick, Wash. 99336. Send protests to: L.D. Boone, Transportation Specialist, Bureau of Operations, Interstate Commerce Commission, 858 Federal Building, 915 Second Avenue, Seattle, Wash. 98174.

PASSENGER APPLICATION

No. MC 46879 (Sub-No. 11TA), filed April 27, 1977. Applicant: WALTERS TRANSIT CORP., 525 11th Avenue, New York, N.Y. 10018. Applicant's representative: Kenneth Engelhardt, (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Passengers and their baggage* in the same vehicle with passengers, beginning and ending at New York, N.Y., and extending to the Milford Jai-Alai Fronton and Milford, Conn., in round-trip special operations, during the Jai-Alai season of each year, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Dania Jai-Alai of Connecticut, Inc., Milford Jai-Alai, P.O. Box 351, Milford, Conn. Send protests to: Maria B. Kejss, Transportation Assistant, Interstate Commerce Commission, 26 Federal Plaza, New York, N.Y. 10007.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[FR Doc.77-13935 Filed 5-13-77;8:45 am]

sunshine act meetings

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409), 5 U.S.C. 552b(e)(3).

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1

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10 a.m., May 17, 1977.

PLACE: 5th Floor Hearing Room, 2033 K Street NW., Washington, D.C.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Portion open to the public: 1. Uniform Minimum Financial Rules.

Portions closed to the public: 1. Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION:

Jane K. Stuckey (254-6314).

[S-402-77 Filed 5-12-77;9:03 am]

2

MAY 10, 1977.

AGENCY HOLDING THE MEETING: Council on Environmental Quality.

TIME AND DATE: 10 a.m.-4:30 p.m., Monday, June 6; 9:30 a.m.-4:30 p.m., Tuesday, June 7; 10 a.m.-4:30 p.m., Wednesday, June 8.

PLACE: Room 2008, New Executive Office Building, 17th Street NW., between Pennsylvania Avenue and H Street.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Council will hold three days of public hearings on the reform of the implementation of the National Environmental Policy Act (42 U.S.C. 4321, et seq.) and the revision of the Council's Guidelines for the Preparation of Environmental Impact Statements (40 CFR Part 1500).

FEDERAL REGISTER CITATIONS OF PREVIOUS ANNOUNCEMENTS: A more complete explanation and notice of public hearing is found at 42 FR 21836 (Friday, April 29).

CONTACT PERSON FOR MORE INFORMATION:

Sally Mallison, 202-382-2903, 722 Jackson Place NW., Washington, D.C. 20060. Interested persons should consult the April 29 FEDERAL REGISTER notice prior to contacting the Council for further information.

NICHOLAS C. YOST,
Acting General Counsel.

[S-398-77 Filed 5-11-77;5:02 pm]

3

AGENCY HOLDING THE MEETING: Federal Home Loan Bank Board.

TIME AND DATE: At the conclusion of the open meeting to be held at 9:30 a.m., May 18, 1977.

PLACE: 320 First Street NW., Room 630, Washington, D.C.

STATUS: Closed meeting.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Robert Marshall (202-376-3012).

MATTERS TO BE CONSIDERED: Consideration of Federal Home Loan Bank Assessments. No. 24, May 11, 1977.

[S-401-77 Filed 5-11-77;5:02 pm]

4

AGENCY HOLDING THE MEETING: Federal Home Loan Bank Board.

TIME AND DATE: 9:30 a.m., May 18, 1977.

PLACE: 320 First Street NW., Room 630, Washington, D.C.

STATUS: Open meeting.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Robert Marshall (202-376-3012).

MATTERS TO BE CONSIDERED:

Branch Office Application—First Federal Savings and Loan Association of Lake Worth, Lake Worth, Florida.

Application for Additional Activity by First Clearwater Corporation—First Federal Savings and Loan Association of Clearwater, Clearwater, Florida.

Application for Permission to Organize a New Federal Association—Manual Jara, et al., Fort Worth, Texas.

Agency Office Application—Midland Buckeye Federal Savings and Loan Association, Alliance, Ohio.

Branch Office Application—First Federal Savings and Loan Association of Hollywood, Hollywood, California.

Application for Purchase of Land for future Office Site—Volunteer Federal Savings and Loan Association of Madisonville, Madisonville, Tennessee.

Application for Modification of Condition—Clover Savings and Loan Association, Camden, New Jersey.

Branch Office Application—Pasadena Federal Savings and Loan Association, Pasadena, California.

Application for Insurance of Accounts—Timberland Savings Association, Nacogdoches, Texas.

No. 23, May 11, 1977.

[S-400-77 Filed 5-11-77;5:02 pm]

5

AGENCY HOLDING THE BRIEFINGS: Nuclear Regulatory Commission.

TIME AND DATE: Tuesday, May 17, 1977.

PLACE: Commissioners' Conference Room, 1717 H St. NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

10 a.m.—Briefings: 1. Zero-Base Budgeting (Approx. 1 hr.); 2. Reactor Licensing Schedules (Approx. 1 hr.).

1:30 p.m.—Briefings (continued): 3. Task Force Report on Reporting Requirements (Approx. 1 hr.); 4. Radiation Epidemiology (Approx. 1 hr.).

CONTACT PERSON FOR MORE INFORMATION:

Walter Magee (202-634-1410).

WALTER A. MAGEE,
Office of the Secretary.

[S-410-77 Filed 5-12-77;2:18 pm]

6

AGENCY HOLDING THE MEETING: The Renegotiation Board.

DATE AND TIME: Monday, May 9, 1977, 2:20 p.m.

PLACE: Conference Room, 4th Floor, 2000 M Street NW., Washington, D.C. 20446.

STATUS: Matters 1, 5, 7, 8, 9 were open to the public; matters 2, 3, 4, and 6 were closed to the public.

MATTERS CONSIDERED:

1. Description of existing staff organization and responsibilities.
2. Elimination of certain staff positions.
3. Personnel actions.
4. Discussion of staff personnel.
5. Supplemental budget request.
6. Discussion of Board vacancies.
7. Staff presentation on industry statistics and a comparative statistical data program.
8. Delegation of administrative authority.
9. Division assignments.

CONTACT PERSON FOR MORE INFORMATION:

Kelvin H. Dickinson, Assistant General Counsel—Secretary, 2000 M Street NW., Washington, D.C. 20446, 202-254-8277.

Dated: May 11, 1977.

GOODWIN CHASE,
Chairman.

[S-392-77 Filed 5-11-77;3:44 pm]

7

AGENCY HOLDING THE MEETING: The Renegotiation Board.

DATE AND TIME: Monday, May 16, 1977, at 10 a.m.

PLACE: Conference Room, 4th Floor, 2000 M Street NW., Washington, D.C. 20446.

STATUS: Closed to the public.

MATTERS TO BE CONSIDERED: 1. Regional Board Vacancy and Candidates.

CONTACT PERSON FOR MORE INFORMATION:

Kelvin H. Dickinson, Assistant General Counsel—Secretary, 2000 M Street NW., Washington, D.C. 20446, 202–254–8277.

GOODWIN CHASE,
Chairman.

[S-393-77 Filed 5-11-77;3:44 pm]

8

AGENCY HOLDING THE MEETING: The Renegotiation Board.

DATE AND TIME: Tuesday, May 17, 1977 at 10:00 a.m.

PLACE: Conference Room, 4th Floor, 2000 M Street, NW., Washington, D.C. 20446

STATUS: Matters 1 through 7 will be open to public; matter 8 will be closed to public; matter 9 is not applicable.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of meeting held May 10, 1977, and other meetings, if any.
2. Claim for Partial Mandatory Exemption of New Durable Productive Equipment: Cincinnati Milacron Inc. Fiscal year ended December 28, 1974.
3. Claim for Partial Mandatory Exemption of New Durable Productive Equipment: Amsted Industries, Inc. Fiscal year ended September 30, 1975.
4. Application for Commercial Exemption (List #2988):
   a. Atlas Corporation. Fiscal year ended June 30, 1976.
   b. Burroughs Wellcome Co. Fiscal year ended August 28 1976.
   c. Parker Hannifin Corporation. Fiscal year ended June 30, 1976.
   d. Stanley Aviation Corporation. Fiscal year ended June 30, 1976.
   e. VSI Corporation. Fiscal year ended June 30, 1976.
   f. West Point Pepperell Inc. Fiscal year ended August 28, 1976.
5. Application for Commercial Exemption (List No. 2989):
   a. Digital Equipment Corporation. Fiscal year ended July 3, 1976.
   b. Digital Equipment Corporation de Puerto Rico. Fiscal year ended July 3, 1976.
   c. Washington Steel Corporation. Fiscal year ended September 30, 1976.
6. Recommended Clearances Without Assignment (List No. 1866):
   a. Systems Consultants' Incorporated. Fiscal year ended November 30, 1975.
   b. Ducommun Incorporated. Fiscal year ended December 31, 1975.
   c. Kierulff Electronics, Inc. Fiscal year ended December 31, 1975.
   d. Ampco-Pittsburgh Corporation. Fiscal year ended December 31, 1975.
   e. Campbell Industries, Inc. Fiscal year ended March 31, 1974.
   f. San Diego Marine Construction Corp. Fiscal year ended March 31, 1974.
   g. National Union Electric Corporation. Fiscal years ended December 8, and 31, 1975.
7. Recommended clearances Without Assignment (List No. 1868):
   a. Schiller Industries, Inc. Fiscal year ended March 31, 1975.
   b. NuMac Corporation. Fiscal year ended March 31, 1975.
   c. Tri-Tech Electronic Corporation. Fiscal year ended March 31, 1975.
   d. DeVault Ultra Precision Inc. Fiscal year ended March 31, 1975.
   e. Machine Products Company, Inc. Fiscal year ended December 31, 1975.
8. Recommended Finding or Determination of Excessive Profits and Clearance: Plastoid Corporation. Fiscal years ended November 30, 1966, 1967 and 1968. Concurrent with: Plastoid Corporation of California. Fiscal year ended November 30, 1966.
9. Approval of Agenda for other meetings.

CONTACT PERSON FOR MORE INFORMATION:

Kelvin H. Dickinson, Assistant General Counsel-Secretary, 2000 M Street NW., Washington, D.C. 20446, 202/254–8277.

Dated: May 11, 1977.

GOODWIN CHASE,
Chairman.

[S-394-77 Filed 5-11-77;3:45 pm]

9

AGENCY HOLDING THE MEETING: The Renegotiation Board.

DATE AND TIME: Wednesday, May 18, 1977 at 10:00 a.m.

PLACE: Conference Room, 4th Floor, 2000 M Street NW., Washington, D.C. 20446.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: 1. Reorganization of the Board.

CONTACT PERSON FOR MORE INFORMATION:

Kelvin H. Dickinson, Assistant General Counsel-Secretary, 2000 M Street, NW., Washington, D.C. 20446, 202/254–8277.

Dated: May 11, 1977.

GOODWIN CHASE,
Chairman.

[S-395-77 Filed 5-11-77;3:44 pm]

10

AGENCY HOLDING THE MEETING: The Renegotiation Board.

DATE AND TIME: Tuesday, May 24, 1977 at 10:00 a.m.

PLACE: Conference Room, 4th Floor, 2000 M Street, N.W., Washington, D.C. 20446.

STATUS: Matters 1 through 15 will be open to public; Matter 16 will be closed to public; Matters 17 and 18 are not applicable.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of meeting held May 17, 1977, and other Board meetings, if any
2. Recommended Clearances Without Assignment (List #1869):
   a. Baldwin Electronics, Inc. Fiscal year ended September 30, 1975.
   b. Cordon International Corporation. Fiscal year ended December 31, 1974.
   c. H. & R. Products, Inc. Fiscal year ended December 31, 1975.
   d. Owens Corning Fiberglas Corporation. Fiscal year ended December 31, 1975.
   e. Revere Copper and Brass, Incorporated. Fiscal year ended December 31, 1975.
   f. C.T.S. Knights, Inc. Fiscal year ended December 31, 1975.
   g. C.T.S. Microelectronics, Inc. Fiscal year ended December 31, 1975.
   h. C.T.S. Keene, Inc. Fiscal year ended December 31, 1975.
   i. C.T.S. Berne, Inc. Fiscal year ended December 31, 1975.
   j. Whittaker Corporation. Fiscal year ended November 2, 1975.
   k. Yardney Electric Corporation. Fiscal year ended April 30, 1975.
3. Recommended Clearances Without Assignment (List No. 1870):
   a. Aluminum Company of America. Fiscal year ended December 31, 1975.
   b. Alcoa Steamship Company, Inc. Fiscal year ended December 31, 1975.
   c. Wear-Ever Aluminum, Inc. Fiscal year ended December 31, 1975.
   d. Composite Materials Corporation. Fiscal year ended December 31, 1975.
   e. American Powdered Metals Company. Fiscal year ended December 31, 1975.
   f. Alcoa Marine Corporation. Fiscal year ended December 31, 1975.
   g. Ross-Meehan Foundries. Fiscal year ended September 30, 1975.
   h. Standard Container Company. Fiscal year ended September 24, 1972.
   i. Galileo Electro-Optics Corporation. Fiscal year ended September 30, 1975.
   j. Mesta Machine Company. Fiscal year ended December 31, 1975.
   k. Electronic Modules Corporation. Fiscal year ended September 30, 1975.
4. Recommended Determination of Clearance: Continental Air Services, Inc. Fiscal year ended December 31, 1972.
5. Recommended Determination of Clearance: Greenwood Mills, Inc. (Formerly Greenwood Mills). Fiscal year ended December 28, 1974.
6. Recommended Determination of Clearance: Greenwood Mills, Inc. (S.C.), SII. to Greenwood Mills, Inc. (N.Y.). Fiscal year ended December 28, 1974.
7. Recommended Determination of Clearance: Pioneer Systems, Inc. (Consolidated). Fiscal year ended December 2, 1972. Fiscal year ended December 1, 1973.

8. Recommended Assignment to a Division: Poloron Products, Inc. (Consolidated). Fiscal year ended November 30, 1969.

9. Proposed Special Accounting Agreement: Black Crow & Eidsness, Inc. Fiscal year ending on or after December 31, 1972.

10. Recommended Letter Not to Proceed: Petroleum Technology Corporation. Fiscal year ended October 31, 1974.

11. Partial Mandatory Exemption of New, Durable Productive Equipment: Ingersoll-Rand Company, Fiscal year ended December 31, 1974.

12. Application for Commercial Exemption (List No. 2990):

a. Cadillac Gage Company. Fiscal year ended November 30, 1976.

b. Eastmet Corporation. Fiscal year ended June 30, 1976.

c. Industrial Service Centers, Inc. Fiscal year ended June 30, 1976.

d. Raychem Corporation. Fiscal year ended June 30, 1976.

13. Recommended Clearances Without Assignment (List No. 1871):

a. Cyclops Corporation. Fiscal year ended December 31, 1974.

b. Detroit Steel Corporation. Fiscal year ended December 31, 1974.

c. Rapistan, Incorporated, Fiscal year ended November 30, 1975.

d. Stewart and Stevenson Service. Fiscal year ended January 31, 1975.

e. New Bradford Dyeing Association, Inc. Fiscal year ended October 31, 1975.

f. SSP Products Incorporated. Fiscal year ended February 29, 1976.

g. Hubbell Metals Incorporated. Fiscal year ended December 31, 1974.

14. Request for Exemption of Receipts or Accruals of Common Carriers of Ocean Shipments of Cargo at or at rates below, rates filed with the Federal Maritime Commission and under Prime Contracts with the Military Sealift Command for Transportation of Cargo at rates based on the Manifest Measurement or Manifest Weight of such cargo. Calendar Year 1976.

15. Application for Commercial Exemption (List No. 2991):

a. Anchor Coupling Company, Inc. Fiscal year ended June 30, 1976.

b. Eltra Corporation. Fiscal year ended September 30, 1976.

c. Garlock, Inc. Fiscal year ended December 28, 1975.

16. Application for Commercial Exemption (List No. 2991): Rank Xerox Limited. Fiscal year ended October 31, 1976.

17. Approval of Agenda for meeting to be held June 7, 1977.

18. Approval of Agenda for other meetings.

Dated: May 11, 1977.

GOODWIN CHASE,
Chairman.

[S-396-77 Filed 5-11-77;3:44 pm]

11

AGENCY HOLDING THE MEETING: The Renegotiation Board.

DATE AND TIME: Tuesday, May 31, 1977 at 10:00 a.m.

PLACE: Conference Room, 4th Floor, 2000 M Street, N.W., Washington, D.C. 20446.

STATUS: Matters 1 through 7 will be open to public; Matters 8 and 9 will be closed to public; Matters 10 and 11 are not applicable.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of meeting held May 24, 1977, and other Board meetings, if any.

2. Recommended Clearances Without Assignment (List # 1872):

a. T. & P. Sales and Services, Inc. Fiscal year ended May 31, 1976.

b. Systems Research Laboratories, Inc. Fiscal years ended December 31, 1974 and 1975.

c. Synergy, Inc. Fiscal years ended December 31, 1974 and 1975.

d. Systems Technology Corporation. Fiscal years ended December 31, 1974 and 1975.

e. B. H. Aircraft Company, Inc. Fiscal year ended April 30, 1976.

f. Harsco Corporation. Fiscal year ended December 31, 1975.

g. SKF Industries, Incorporated. Fiscal year ended December 28, 1975.

h. Harris-Intertype Corporation. Fiscal years ended June 30, 1972 and 1973.

3. Recommended Clearances Without Assignment (List No. 1873):

a. Science Applications. Fiscal year ended January 31, 1975.

b. La Jolla Research Business. Fiscal year ended January 31, 1975.

c. SAI Comsystems Corporation. Fiscal year ended January 31, 1975.

d. JRB Associates Incorporated. Fiscal year ended January 31, 1975.

e. Alco Standard Corporation. Fiscal years ended September 30, 1973, 1974 and 1975.

f. Davey Compressor Company. Fiscal years ended September 30, 1973 and 1974.

g. Otto Knonigslow Manufacturing Co. Fiscal years ended September 30, 1973, 1974 and 1975.

h. Unisource Corporation. Fiscal years ended September 30, 1973, 1974 and 1975.

i. Synthane Taylor Corporation. Fiscal years ended September 30, 1973, 1974 and 1975.

j. Boston Insulated Wire and Cable. Fiscal year ended December 31, 1975.

k. Oklahoma Aerotronics, Inc. Fiscal year ended July 3, 1976.

l. Hydrosystems, Inc. Fiscal year ended February 28, 1976.

4. Recommended Determination of Clearance: Arcturus Manufacturing Corporation. Fiscal year ended June 30, 1974.

5. Recommended Determination of Clearance: Weyerhaeuser Company. Fiscal years ended December 26, 1971 and 1972.

6. Recommended Determination of Clearance: Sierra Research Corporation. Fiscal year ended December 31, 1974.

7. Special Accounting Agreement to Use the Accrual Basis Instead of the Cash Basis: Decisions and Designs Incorporated. LPI No. 97861.

8. Recommendations of Excessive Profits and Clearance: Service Equipment Company, Inc. Fiscal Years ended August 31, 1971 and 1972.

9. Recommended Finding or Determination of Excessive Profits: American Manufacturing Comany of Texas. Fiscal years ended December 31, 1966-1970.

10. Approval of Agenda for meeting to be held June 14, 1977.

11. Approval of Agenda for other meetings.

Dated: May 11, 1977.

GOODWIN CHASE,
Chairman.

[S-397-77 Filed 5-11-77;3:44 pm]

12

AGENCY HOLDING THE MEETING: Securities and Exchange Commission: Monday, May 16, 1977, Tuesday, May 17, 1977, Wednesday, May 18, 1977 and Thursday, May 19, 1977, at 10:000 a.m., and Thursday, May 19, 1977 at 2:00 and 4:30 p.m., room 825, 500 North Capitol Street, Washington, D.C. Closed meetings will be held on Tuesday, May 17, 1977 and Thursday, May 19, 1977 at 4:30 p.m. The remaining meetings are open.

The Commissioners, their legal assistants, the Secretary of the Commission and recording secretaries will attend the closed meetings. Certain staff members who are responsible for the calendared matters may be present.

The General Counsel of the Commission or his designee, has certified, that in his opinion, the items to be considered at the closed meetings may be so considered pursuant to one or more of the exemptions set forth in 5 U.S.C. 552(c) (4) (8) (9) A and (10) and 17 CFR 200.-402(a) (4) (8) (9) (i) and (10).

Commissioners Loomis, Evans and Pollack voted to hold the aforesaid closed meetings in closed session.

The subject matter of the open meeting scheduled for Monday, May 16, 1977 will be:

Proposed Rule Relating to "going private" transactions.

The subject matter of the closed meeting scheduled for Tuesday, May 17, 1977 will be:

1. Formal Orders of Investigation.
2. Institution of Injunctive actions.
3. Settlement of Injunctive actions.
4. Other litigation matters.
5. Referral of investigative files to Federal, State or Self Regulatory authorities.
6. Suspension of trading.
7. Institution of Administrative Proceedings.
8. Institution and settlement of Administrative proceedings.
9. Opinion.
10. Propriety of certain industry practice.

The subject matter of the open meeting scheduled for 10:00 a.m. Wednesday, May 18, 1977 will be:

1. Recommendation that the Commission authorize transmittal of a letter drafted by the Office of the General Counsel informing petitioner Holding Trust that the Commission declines to issue an order of the type requested.

2. Proposed legislation respecting certain transactions by Foreign financial institutions.

3. Recommendations with respect to the regulation of advertising by registered investment companies.

4. Recommendation that the Commission adopt Proposed Rule 206(3)–2 under the Investment Advisers Act of 1940 as revised to reflect meaningful public comments.

5. Recommendation that the Commission publish a release which states the Division's opinions on certain disclosure and regulatory matters concerning registered investment companies which invest principally in tax-exempt bonds.

6. Recommendation that the Commission authorize publication for comment the petition of Tax Analysts and Advocates for expansion of the Commission's disclosure requirements regarding income tax expense.

7. Recommendation that the Commission authorize the publication of a final release to correct errors in the publication in ASR 197 of the amendment to quarterly reporting requirements for life insurance companies and related holding companies and make a technical amendment to Rule 3–16(t) of Regulation S–X regarding foreign private issuers.

8. Recommendation of the publication for comment of a release which announces the Division's intention to develop disclosure guidelines for electric and gas utility companies and requests suggestions on the content of such guidelines.

The subject matter of the open meeting scheduled for 2:00 P.M. on Wednesday, May 18, 1977 will be:

1. Recommendation that the Commission authorize issuance of a release announcing the adoption of amendments and interpretations to Rules 15c3–1 and 15c3–3 under the Exchange Act.

2. Recommendation for extension of time period for Commission action on applications for registration by clearing agencies and proposal to seek public comment on standards relating to the registration of clearing agencies.

3. Proposed amendment of Rules 15b10–6 and 17a–4 under the Securities Exchange Act of 1934 to establish an orderly procedure for the disposition of broker-dealer books and records upon the liquidation of the broker-dealer.

4. Proposed Rule 15b7–1 under the Exchange Act.

5. Recommendation that the Commission approve the New York Stock Exchange proposal to redefine the term "percentage order" and to adopt procedures for the execution of such orders.

6. Recommendation that the Commission issue an order granting Bradford National Clearing Corporation an exemption from registration as a securities information processor.

The subject matter of the open meeting scheduled for May 19, 1977 at 10:00 a.m. will be:

1. Recommendation that the Commission authorize issuance of an opinion and order granting to Central Power and Light Company an extension of time for the acquisition of interests in fuel exploration and development and denying motions of Texas Utilities Company and Houston Lighting and Power Company motions for hearing and consolidation.

2. Recommendation that the Commission authorize issuance of an opinion and order granting the application of West Texas Utilities Company authority for the proposed acquisition of interests in fuel exploration and development activities and denying requests of Texas Utilities Company and Houston Lighting and Power Company for hearings and a motion to consolidate the proceeding with another pending proceeding.

3. Recommendation that the Commission authorize issuance of an opinion and order authorizing a proposed charter amendment of Central and South West Corporation and denying the motion of Texas Utilities Company for a hearing and consolidation of this proceeding with another pending proceeding.

4. Recommendation that the Commission authorize issuance of an opinion and order in the matter of Central and South West Corporation, Transok Pipe Line Company and Public Service Company of Oklahoma authorizing proposed acquisition of interests in coal and lignite acquisition and development projects and denying motions of Texas Utilities Company and Houston Power and Lighting Company to intervene and for a hearing and consolidation with another pending proceeding.

5. Proposal for Public Comment on Revisions to Rule 19b–4.

6. Proposed amendment to Rule 12a–6 under the Exchange Act to extend the exemption from registration under section 12(a) of that Act to certain underlying securities which are traded solely in the over-the-counter market.

The subject matter of the open meeting scheduled for May 19, 1977 at 2:00 p.m. will be: Oral presentation by officials of the American Stock Exchange, Inc. on a request that the Commission reconsider its position that that exchange should require its options specialists to be subject to position limits applicable to all other persons.

The subject matter of the closed meeting scheduled after the completion of the meeting at 2:00 p.m. on May 19 will be: Investigation re option trading practices.

For information contact Howard B. Scherer (202) 755–1280.

Dated: May 9, 1977.

GEORGE A. FITZSIMMONS,
Secretary.

[S–399–77 Filed 5–11–77;5:02 pm]

Federal Register

MONDAY, MAY 16, 1977

PART II

DEPARTMENT OF TRANSPORTATION

Coast Guard

■

ADDITIONAL EQUIPMENT FOR VESSELS OF 10,000 GROSS TONS OR MORE; INERT GAS SYSTEM; TANK VESSELS CARRYING OIL IN TRADE; IMPROVED EMERGENCY STANDARDS FOR OIL TANKERS

Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Coast Guard

[33 CFR Part 157]

[CCG 77-058]

TANK VESSELS CARRYING OIL IN TRADE

Protection of Marine Environment

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

SUMMARY: The Coast Guard is considering amending the rules for the protection of the marine environment relating to tank vessels carrying oil in bulk by requiring all oil tankers of 20,000 tons deadweight (DWT) or more, U.S. and foreign, that call at American ports to have segregated ballast capabilities and that those built under a contract awarded after [December 31, 1979], or delivered after [December 31, 1981], have double bottoms. This amendment is in response to that portion of the President's March 17, 1977, message to Congress relating to double bottoms and segregated ballast on tankers over 20,000 tons DWT entering U.S. ports. The adoption of this amendment would result in reduced amounts of oil spillage into the navigable waters of the United States and oceans..

DATES: 1. Comments must be received on or before: September 1, 1977.

2. Public hearings: The Coast Guard will hold two public hearings on this proposal. The first will be held commencing at 9:00 a.m. on June 16, 1977, and continuing until all commentors have been heard, in the Santa Fe Helix del Mar Room, Town and Country Hotel, 500 Hotel Circle North, San Diego, California 92138. The second will be held commencing at 9:00 a.m. on June 21, 1977, and continuing until all commentors have been heard, in Room 2230, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590.

ADDRESSES: Comments should be submitted to Commandant (G-CMC/81), U.S. Coast Guard, Washington, D.C. 20590. Comments will be available for examination at the Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590 (202 426-1477). A copy of the economic evaluation from which the economic summary in this document is taken and the draft environmental impact statement are also available for examination at the above address.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590 (202 426-1477).

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rulemaking by submitting written data, views, or arguments. Written comments should include the docket number (GCD 77-058), the name and address of the person submitting the comments, the specific section of the proposal to which the comment applies, and the reason for the comment.

All comments received will be considered before final action is taken on this proposal. Interested persons are invited to attend the hearing and present oral or written statements on the proposal. It is requested that anyone desiring to make comments notify Captain Greiner at least 10 days before the scheduled date of the public hearing and specify the approximate length of time needed for the presentation. It is urged that a written summary or copy of the oral presentation be included with the notification.

Drafting Information

The principal persons involved in drafting this proposal are: Commander Richard A. Sutherland, Project Manager, Office of Merchant Marine Safety, and Mr. Stanley Colby, Project Attorney, Office of the Chief Counsel.

Discussion of the Proposed Regulations

The President's message of March 17, 1977, to Congress included measures designed to reduce oil pollution caused by tanker accidents and by routine operational discharges from all vessels. The President informed Congress that the Secretary of Transportation would be instructed to develop new rules within 60 days for all oil tankers 20,000 tons DWT or more, U.S. and foreign, that call at American ports. Included were rules for double bottoms in tankers built in the future and segregated ballast on all tankers. The proposal in this document is in response to the President's initiative.

The regulations would require a double bottom beneath the cargo carrying portion of a seagoing vessel's hull if the vessel is 20,000 tons DWT or more and is constructed under a contract awarded after [December 31, 1979] or if it is to be delivered after [December 31, 1981]. As authorized in the President's message, the Coast Guard may accept technological improvements or alternatives which will result in equivalent pollution protection in grounding accidents.

The regulations would also require that all seagoing vessels of 20,000 tons DWT or more have a segregated ballast capability by [January 1, 1982]. Again, provision is made for acceptance of technological improvements or alternatives which will result in equivalent pollution protection against operational discharges.

The regulations would apply to vessels over 20,000 tons DWT which enter the navigable waters of the United States to engage in trade.

It will be noted that implementation dates in this proposal are enclosed in brackets. This is to indicate that the dates are tentative and may be advanced or delayed by as much as one year, depending upon comments received and the outcome of current international negotiations directed at developing international standards of comparable scope.

This proposal has been reviewed for economic effects under Department of Transportation "Policies to Improve Analysis and Review of Regulations" (41 FR 16200).

The analysis shows that allowing for some market compression, approximately 1250 foreign tank vessels and 220 U.S. seagoing tank vessels would be affected by the segregated ballast retrofit requirement. In addition, approximately 25 new double bottom tankers will have to be built in the United States to meet domestic shipping demands. The projected costs of the requirements to the U.S. seagoing transportation industry is estimated to be $77 million in the 2 year period, 1981 and 1982. Total added costs to be passed on to the U.S. consumer by way of higher freight rates is estimated to be $125 million annually.

The expected benefits of the requirements are reduced amounts of spillage of oil into the navigable water of the U.S. as a result of vessel groundings, reduced amounts of operational discharge to the oceans from deballasting and tank cleaning, and conservation of oil.

In consideration of the foregoing, it is proposed to amend Part 157 of Title 33, Code of Federal Regulations, as follows:

1. Section 157.07 is revised to read as follows:

§ 157.07 Equivalents.

The Coast Guard may accept, in accordance with the procedure in 46 CFR Part 30.15-1, techologically improved or alternate design or equipment as equivalent to a design or any equipment required under this part.

2. Section 157.10 is added to read as follows:

§ 157.10 Segregated ballast and double bottoms.

(a) After [December 31, 1981,] a vessel of 20,000 tons DWT or more must have segregated ballast tanks that have a total capacity to allow the vessel to meet the draft and trim requirements in paragraph (b) of this section without recourse to the use of oil tanks for water ballast.

(b) In any ballast condition during any part of a voyage, including that of lightweight with only segregated ballast, the vessel's drafts and trim must have the capability of meeting each of the following requirements.

(1) The molded draft amidship (dm) in meters without vessel deformation must not be less than dm in the following mathematical relationship:

$$dm = 2.0 + 0.02L$$

(2) The drafts at the forward and after perpendiculars must correspond to those determined by the draft amidship as specified in paragraph (b)(1) of this section, in association with trim by the stern of no more than 0.015L.

(3) The minimum allowable draft at the after perpendicular is that which is necessary to obtain full immersion of the propeller.

(c) A vessel may have pollution protection against operational discharges equivalent to paragraph (b) of this section that is accepted under §157.07.

(d) The vessel may be designed to carry ballast water in cargo tanks during the condition described in § 157.35.

(e) A vessel of 20,000 tons DWT or more for which the construction contract is awarded after [December 31, 1979] or which is delivered after [December 31, 1981] must—

(1) Have a double bottom that does not carry oil and that is at least the molded breadth divided by fifteen ($^B/_{15}$) or two meters in height, whichever is less, under each oil cargo tank; or

(2) Have pollution protection against groundings equivalent to paragraph (e) (1) of this section that is accepted under § 157.07.

(f) Any excess capacity of segregated ballast under paragraph (b) of this section that exceeds the double bottom capacity must be distributed adjacent to the side shell of the vessel.

3. Subpart B is amended by adding § 157.24a to read as follows:

§ 157.24a Submission of segregated ballast calculations.

After [December 31, 1981,] the owner of a vessel under § 157.10(b) shall submit the following to the Coast Guard before that vessel enters the navigable waters of the United States:

(a) Calculations to substantiate compliance with the segregated ballast distribution requirements in § 157.10(b).

(b) Plans and specifications for the vessel that include—

(1) Design characteristics;

(2) A lines plan;

(3) Curves of form (hydrostatic curves) or hydrostatic tables;

(4) A general arrangement plan of each deck and level;

(5) Inboard and outboard profile plans showing oiltight and watertight bulkheads;

(6) A midship section plan;

(7) A capacity plan showing the capacity and the vertical and longitudinal centers of gravity of each cargo space, tank, and similar space;

(8) Tank sounding tables or tank capacity tables;

(9) Draft mark locations;

(10) Detailed plans of watertight doors; and

(11) Detailed plans of vents.

(c) A certified statement accepting the design of the vessel by the classification society that oversees the vessel if that design meets the classification society's rules and the requirements of § 157.10.

(Title II, Sec. 201, 86 Stat. 427, as amended (46 U.S.C. 391a); 49 CFR 1.46(n)(4))

NOTE.—The Coast Guard has determined that this document contains a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended, and OMB Circular A-107 and certifies that an Economic Impact Statement has been prepared.

Dated: May 6, 1977.

O. W. SILER,
Admiral, U.S. Coast Guard,
Commandant.

[FR Doc.77-13896 Filed 5-13-77;8:45 am]

[33 CFR Part 157]

[CGD 77-063]

IMPROVED EMERGENCY STEERING STANDARDS FOR OIL TANKERS

AGENCY: Coast Guard, DOT.

ACTION: Proposed Rules.

SUMMARY: The Coast Guard is proposing to amend the rules for the protection of the marine environment relating to tank vessels carrying oil in bulk by requiring improved emergency steering standards for all oil tankers of 20,000 deadweight tons or more, both U.S. and foreign, that call at U.S. ports. This proposal implements the portion of the President's message of March 17, 1977, to Congress concerning measures for reducing pollution caused by tanker accident. The President's message directed that the standards in this proposal and other regulations would be developed. Adoption of the regulations in this proposal would reduce the probability of collision and grounding of oil tankers caused by steering failure and would, therefore, reduce the risk of oil pollution as well as property damage, personal injury, and death that could result from these accidents.

DATES: 1. Comments must be received on or before: September 1, 1977.

2. Public hearings: The Coast Guard will hold two public hearings on this proposal. The first will be held commencing at 9:00 a.m. on June 16, 1977, and continuing until all commenters have been heard, in the Santa Fe Helix del Mar Room, Town and Country Hotel, 500 Hotel Circle North, San Diego, California 92138. The second will be held commencing at 9:00 a.m. on June 21, 1977, and continuing until all commenters have been heard, in Room 2230, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590.

ADDRESSES: Comments should be submitted to Commandant (G-CMC/81), U.S. Coast Guard, Washington, D.C. 20590. Comments will be available for examination at the Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. Copies of the economic evaluation from which the economic summary in this document is taken are available for examination at the above address. Copies of the environmental impact declaration are also available at the above address.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. (202-426-1477).

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rule making by submitting written data, views, or arguments. Written comments should include the docket number (CGD 77-063), the name and address of the person submiting the comments, the specific section of the proposal to which the comment applies, and the reason for the comment. The proposal may be changed in light of comments received. All comments received will be considered before final action is taken on this proposal.

Interested persons are invited to attend the hearing and present oral or written statements on this proposal. It is requested that anyone desiring to make comments notify Captain Greiner at least 10 days before the scheduled date of the public hearing and specify the approximate length of time needed for the presentation. It is urged that a written summary or copy of the oral presentation be included with the notification.

DRAFTING INFORMATON

The principal persons involved in drafting this proposal are: Commander Robert G. Williams, Project Manager for the Office of Merchant Marine Safety, and Mr. William R. Register, Project Attorney for the Office of Chief Counsel.

DISCUSSION OF THE PROPOSED REGULATIONS

1. The President's message of March 17, 1977, to Congress included initiatives designed to reduce oil pollution caused by tanker accidents and by routine operational discharges from all vessels. The President informed Congress that the Secretary of Transportation would be instructed to develop new rules within 60 days for all oil tankers of 20,000 deadweight tons or more, both U.S. and foreign, that call at U.S. ports. Included were rules to improve emergency steering standards on oil tankers. The proposal in this document is in response to the President's initiative.

2. As provided in the President's message, acceptance of technological improvements or alternatives which will result in equivalent pollution protection will be allowed in lieu of the equipment proposed in this notice. Procedures for acceptance of equivalents are currently contained in § 157.07 of Part 157. Section 157.07 is being revised in accordance with the President's commitment and is contained as a proposal in the "Proposed Rules for Tank Vessels Carrying Oil in Trade", which appears in this issue of the FEDERAL REGISTER.

3. Sufficient time is needed for existing and new vessels to comply with the equipment requirements in these propos-

als and to develop operating procedures with respect to using the equipment. Accordingly, the effective date proposed for the regulations is one year after they are published as final rules.

4. The proposed regulations would apply to all oil tankers of 20,000 deadweight tons or more that call at U.S. ports. The purpose of the proposed regulations is to reduce the probability of collision or grounding of oil tankers caused by a steering failure. A reduction in the probability of these accidents would reduce the risk of oil pollution as well as property damage, personal injury, and death that could result from these accidents.

A Coast Guard review of vessel casualty reports shows that 87 casualties involving failure of steering gear or a steering gear control system were reported between 1963 and 1976 on tank vessels of 20,000 deadweight tons and over. Forty of these casualties occurred on foreign vessels operating in U.S. navigable waters and the remaining casualties occurred on U.S. vessels. Though no deaths or pollution incidents were reported as a result of these casualties, vessel damage and other property damage occurred and the potential of pollution resulting from collision or grounding was present in each casualty. The potential for collision or grounding and subsequent pollution as a result of steering failure cannot be ignored when considering the increasing number of vessels being used to transport oil in bulk.

5. In addition to the proposals in this notice, the Coast Guard is preparing proposed amendments to Subchapter J of Title 46, Code of Federal Regulations, that in part contain provisions for steering gear power and control systems on new U.S. vessels. The proposals in Subchapter J are based upon the recommendations for steering gear power and control systems contained in International Maritime Consultative Organization (IMCO) Resolution A.325 (IX) entitled "Recommendations Concerning Regulations for Machinery and Electrical Installations in Passenger and Cargo Ships." IMCO Resolution A.325 (IX) was adopted by the IMCO Assembly on November 12, 1975.

6. The Coast Guard recognizes that problems of steering failure are not limited to oil tankers and in the future will be considering proposals to make the rules in this notice applicable to other tank vessels as well as to other types of vessels.

7. The proposals in this notice contain requirements for steering failure alarms, requirements for recovering rudder control after failure of a steering gear control system, and requirements for submitting steering control information to the Coast Guard and in certain cases for retaining the information on board the vessel.

8. Section 157.03(aa) contains a definition of "steering gear control system" as the term is used in the proposed regulations. This definition will also appear in the proposed amendments to Subchapter J of Title 46 that are currently being prepared. The definition would include a differential control unit as a component of a steering gear control system. Accordingly, on an existing vessel that utilizes a common differential control unit for its steering gear control systems, an additional differential control unit would be required in order to comply with the requirement in § 157.20(a), which requires the capability to recover rudder control after a failure in the steering gear control system in use. If the failure occurred in the differential control unit, a second unit would be needed in order to assure recovery of rudder control.

9. Proposed § 157.20 requires each oil tanker of 20,000 deadweight tons or more to have a steering failure alarm that would provide an audible and visible warning in the pilothouse in the event of loss of rudder control from the pilothouse. The 5 degree position variation and 30 second time period proposed in this requirement are necessary to prevent nuisance alarms caused by normal variation between the rudder position ordered and the actual rudder position.

Proposed § 157.20 applies only to a vessel that has a steering gear control system of the type required by 46 CFR 58.25–45(a). Section 58.25–45(a) of Title 46 in part requires that the arrangement of the steering gear control system and the steering gear components must provide full follow-up control of the rudder. If the vessel is steered by other means, constant use of a rudder angle indicator is necessary; or, if automatic steering gear control equipment is used, alarms are built into the equipment. In either event, early warning of a steering failure is provided when using these other means of steering without the need of an additional warning.

Proposed § 157.20 also requires the proposed alarm system to be separate from and independent of each steering gear control system on the vessel. The purpose of providing separate arrangement of the alarm system is to minimize the probability of simultaneous damage to both the alarm system and a steering gear control system from a source external to these systems. The alarm system must be independent of each steering gear control system so that failure of a component of a steering gear control system will not result in failure of the alarm.

10. Proposed § 157.20a requires that a means be provided to recover control of the rudder within 45 seconds after detection of a failure of the steering gear control system in use. The proposed 45 second time limit is needed to perform necessary operations to regain steering control such as transferring control switches, shifting hydraulic systems, and engaging a trick wheel.

Paragraph (b) of § 157.20a describes the measure of rudder control that must be recovered after failure of a steering gear control system. This capability is the same as the capability recommended in IMCO Resolution A.325 (IX) for operation of auxiliary steering gear.

In order to comply with proposed § 157.20a, equipment modifications to present steering gear control systems on vessels may be necessary though in many instances vessel operators could elect to provide manning of steering stations in lieu of making equipment modifications.

11. Proposed § 157.24b provides that in the case of a U.S. vessel information showing compliance with the proposed alarm and rudder control requirements must be submitted to the Coast Guard. The proposal also provides that in the case of a foreign vessel this information must be on board whenever the vessel operates in the navigable waters of the United States.

12. Proposed § 157.51 contains a requirement to follow the procedure in § 157.20a for recovering rudder control.

13. This proposal has been reviewed for economic effects under Department of Transportation "Policies to Improve Analysis and Review of Regulations" (41 FR 16200). Approximately 1800 oil tankers of 20,000 deadweight tons or more call at U.S. ports. The total costs for these vessels to comply with the requirements proposed in this notice during the first two years after they become effective are expected to be approximately $16,575,000. The estimated costs to U.S. vessels during the first two years are expected to be $820,000 to install steering failure alarm systems and $3,100,000 to comply with the requirement to recover steering control. The remaining costs would be associated with foreign vessels. The total, estimated costs assume that approximately 50 percent of the affected vessels would comply with the requirements by means of manning of steering stations other than the pilothouse.

Compliance with the proposed requirements should result in fewer groundings and collisions and in a corresponding reduction in probability of pollution, property damage, injury, and death.

In consideration of the foregoing, it is proposed to amend Part 157 of Title 33, Code of Federal Regulations, as follows:

1. Section 157.03(aa) is added to read as follows:

§ 157.03 Definitions.

* * * * *

(aa) "Steering gear control system" means a group of devices and cables forming a network that regulates and guides the operation of a steering gear.

2. Section 157.20 is added to read as follows:

§ 157.20 Steering failure alarm.

(a) This section applies to each vessel of 20,000 deadweight tons or more that has a steering gear control system of the type required by 46 CFR 58.25–45.

(b) Each vessel must have an alarm system that activates an alarm in the pilothouse whenever the actual rudder position differs for thirty or more seconds by more than five degrees from the rudder position selected by the helmsman.

(c) The alarm system must be separate from and independent of each steering gear control system, except that the alarm system may receive input from the steering wheel shaft.

(d) The alarm must be both audible and visual and must be of a type distinctive from each other alarm in the pilothouse.

NOTE.—This section becomes effective one year after the final regulations are published.

3. Section 157.20a is added to read as follows:

§ 157.20a Recovery of rudder control.

(a) Each vessel of 20,000 deadweight tons or more that calls at a U.S. port must have equipment and procedures to recover adequate control of the rudder within 45 seconds after a failure in the steering gear control system in use has been detected.

(b) A vessel meets the requirements in paragraph (a) of this section if it has either of the following combinations of procedures and equipment, although other combinations are possible:

(1) Two separate and independent steering gear control systems, associated equipment in the pilothouse for switching from one system to another, and procedures for operating the associated equipment.

(2) Procedures and associated equipment for manning steering gear spaces and emergency steering stations, as necessary, which ensure compliance with the requirement in paragraph (a) for recovering rudder control.

(c) For the purposes of this section, adequate control of the rudder is recovered if the vessel regains the capability to move the rudder from 15 degrees on one side to 15 degrees on the other side in not more than 60 seconds when the vessel is underway at its deepest draft and at one half of its maximum speed ahead or 7 knots, whichever is greater.

NOTE.—This section becomes effective one year after the final regulations are published.

4. Section 157.24b is added to read as follows:

§ 157.24b Submission of steering control information.

(a) The owner of a U.S. vessel of 20,000 deadweight tons or more shall submit the following information to the Coast Guard before the vessel operates in the navigable waters of the United States.

(1) Plans and specifications of the steering failure alarm system required by § 157.20 that contain enough detail to show compliance with that section.

(2) Plans, specifications, and procedures that contain enough detail to show compliance with the requirements in § 157.20a for regaining rudder control.

(b) The owner of each foreign vessel of 20,000 deadweight tons or more that calls at a U.S. port shall have on board the information described in paragraph (a) of this section whenever operating in the navigable waters of the United States.

NOTE.—This section becomes effective one year after the final regulations are published.

5. Section 157.51 is added to read as follows:

§ 157.51 Procedures for recovery of rudder control.

The master of a vessel of 20,000 deadweight tons or more that calls at a U.S. port must ensure that the procedures required by 157.20a for recovering rudder control are followed whenever the vessel is operating on the navigable waters of the United States.

(Title II, sec. 201, 86 Stat. 427, as amended (46 U.S.C. 391a); 49 CFR 1.46.)

NOTE.—The Coast Guard has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended, and OMB Circular A-107.

Dated: May 9, 1977.

O. W. SILER,
Admiral, U.S. Coast Guard,
Commandant.

[FR Doc.77-13897 Filed 5-13-77;8:45 am]

[33 CFR Part 164]

[CGD 77-016]

VESSELS OF 10,000 GROSS TONS OR MORE

Proposed Additional Equipment

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

SUMMARY: The Coast Guard is considering amending the Navigation Safety Regulations by adding a requirement for vessels of 10,000 gross tons or more, both U.S. and foreign vessels calling at United States ports, to have a second radar system and collision avoidance equipment. This amendment could implement that part of the President's March 17, 1977, message to Congress concerning a requirement for backup radar systems with collision avoidance equipment on all tankers over 20,000 deadweight tons (dwt) entering U.S. ports. The adoption of this amendment could result in tangible savings for industry and government including less vessel damage or loss, and lower investigation, search and rescue, and pollution clean-up costs.

DATES: 1. Comments must be received on or before September 1, 1977. 2. Public Hearings: The Coast Guard will hold public hearings on this proposal. The first hearing will be held commencing at 9:00 a.m. on June 16, 1977, and continuing until all commentors have been heard, in the Santa Fe Helix del Mar Room, Town and Country Hotel, 500 Hotel Circle North, San Diego, California 92138. The second will be held commencing at 9:00 a.m. on June 21, 1977, and continuing until all commentors have been heard, in Room 2230, Department of Transportation, Nassif Building, 400 Seventh Street SW., Washington, D.C. 20590.

ADDRESSES: Comments should be submitted to Commandant (G-CMC/81), U.S. Coast Guard, Washington, D.C. 20590. Comments will be available for examination at the Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street SW, Washington, D.C. Copies of studies referred to in this document are available for examination at the above address. A copy of the economic evaluation from which the economic summary in this document is taken is also available for examination at the above address.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street SW, Washington, D.C. 20590, 202-426-1477.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments. Written comments should include the docket number (CGD 77-016), the name and address of the person submitting the comments and the specific section of the proposal to which each comment is addressed. All comments received will be considered before final action is taken on this proposal. Interested persons are invited to attend the hearings and present oral or written statements on this proposal. It is requested that anyone desiring to make oral comments notify Captain Greiner at least 10 days before the scheduled date of the public hearing and specify the approximate length of time needed for the presentation. It is urged that a written summary or copy of the oral presentation be included with the request.

DRAFTING INFORMATION

The principal persons involved in drafting this proposal are Mr. Fred Schwer, Project Manager, Office of Marine Environment and Systems, and Mr. Stanley Colby, Project Attorney, Office of the Chief Counsel.

DISCUSSION OF THE PROPOSED REGULATIONS

An advance notice of proposed rulemaking entitled "Marine Traffic Requirements" was published in the FEDERAL REGISTER on June 28, 1974 (39 FR 24157). Among the many concepts advanced were proposals to require a second radar and an "anti collision device" on all vessels of more than 10,000 gross tons operating on the navigable waters of the U.S. Three commenters responded negatively regarding the second radar, primarily because of the retrofit costs. Four commenters responded negatively concerning the "anti collision device". They stated that: (1) the variety of such devices is so great as to make compliance difficult without "tighter" specifications; and (2) the collision avoidance capability of those devices is based on a presumed steady state of relative motion between vessels—a condition which rarely prevails on inland waters.

Navigation Safety Regulations were proposed in the May 6, 1976, issue of the FEDERAL REGISTER (41 FR 18766). The

proposed requirement for a second marine radar system was retained despite the three negative comments. In the Coast Guard's view, loss of radar capability on a vessel of 10,000 gross tons or more imposes an unacceptable risk factor. Redundancy was deemed necessary for safety. However, the proposed requirement for a collision avoidance system was dropped in light of the comments mentioned above.

Fifteen commenters responded to the proposed second radar requirement. Five suggested that we further specify one 3-cm and one 10-cm radar. Four requested additional specifications, such as stabilization, PPI scope size, mode of presentation, and reflection plotter. Six comments were negative, again citing retrofit costs, limited usefulness in confined waters, and complaining of "useless" redundancy. The June 30, 1974, Advance Notice of Proposed Rulemaking proposed a requirement for both 3-cm and 10-cm radars. The Notice of Proposed Rulemaking of May 6, 1976, did not specify wavelengths. Generally speaking, the longer wavelength radar gives better adverse-weather performance because of its ability to penetrate water droplets. This advantage is gained at the cost of resolution. The signal of the shorter wavelength radar is attenuated more by moisture, but it gives better resolution in good weather. A requirement for a second radar could be based either on a perceived need for operational flexibility or on a need for redundancy. Operational flexibility, the Coast Guard feels, is best left to the vessel operator. The objective of this proposal is to provide, for certain vessels, a degree of radar redundancy and to provide for installation of a collision avoidance device on those vessels.

Seventeen commenters objected to the removal of the proposed requirement for a collision avoidance system. For the most part, the arguments advanced were not persuasive. However, the volume of comments suggested that further study was warranted.

Navigation Safety Regulations (33 CFR 164) were published in the FEDERAL REGISTER (42 FR 5956) as a final rule on January 31, 1977. The regulation did not include a requirement for collision avoidance systems, citing instead the planned issuance of this notice. The proposed requirement for a second radar system was not included pending resolution of the question of collision avoidance system.

On March 17, 1977, President Carter conveyed to Congress a message concerning oil spill risk. In it he directed several initiatives, including the development within 60 days of certain regulations, including "Backup radar systems, including collision avoidance equipment, on all tankers [over 20,000 deadweight tons]". This notice is directly responsive to that mandate. The 10,000 gross ton criteria listed in the advance and proposed notices of rulemaking is (as to tankers) roughly comparable to the 20,000 deadweight tons specified in the President's initiatives of March 17, 1977. As collisions between vessels are not related to their cargo or trade, it was determined that the proposed requirement for a second marine radar and a collision avoidance system should apply to all vessels of 10,000 gross tons or more.

As noted above, the May 6, 1976, notice proposed a requirement for a second marine radar system on all vessels of 10,000 gross tons or more. That requirement was withheld from the final rulemaking in anticipation of this proposal that a collision avoidance system be installed on those same vessels. Some collision avoidance systems have a radar display, actual or synthetic, integrated into the system. Others "add on" to the basic radar system. Delaying implementation of the second radar requirement until a decision is made on possible requirement of a collision avoidance system will allow the ship owner maximum flexibility in compliance.

A collision avoidance system is designed basically to aid mariners in identifying and resolving vessel relative motion problems. Just as a pocket calculator replaces paper and pencil in arithmetic computations, the basic collision avoidance system replaces manual maneuvering board solutions. Experience and good judgment are still the determining factors in safe navigation, with or without a collision avoidance system.

As has been pointed out by several commenters, electronic resolution of the threat posed by closing contacts is far faster than manual methods and does not distract the "conning" officer from other functions. Moreover, an electronic system can handle simultaneously more contacts than a manual system, thus to a point eliminating the problem of saturation by multiple contacts. Additionally, the system can be designed to give warning of closing contacts and to operate in a "trial maneuver" mode to predict the outcome of various responses. This "trial maneuver" capability is entirely dependent upon a steady state of relative motion between vessels. This predicted outcome can be negated by a change of target course or speed. Single or few contacts may be adequately handled by manual methods using a plotter. However, these manual methods do not favorably compare in speed of solution or convenience of data presentation with the computer assisted systems.

The U.S. Maritime Administration requires that collision avoidance systems be installed on all new construction tankers subsidized by that agency and recommends that they be installed on all subsidized vessels engaged in foreign trade. A study by the National Research Council, entitled "Human Error in Merchant Marine Safety", published in June 1976, recommends that the systems be required on oceangoing merchant vessels to reduce human error casualties stemming from lack of vigilance. A report of recent British investigations indicates that collision avoidance systems decrease workload and increase operator understanding of the situation around his ship. Conversely, a recent study by Operations Research, Inc., of Silver Spring, Md., commissioned by the Coast Guard, concludes in part that requiring the systems would not appear to be cost-beneficial in preventing vessel casualties on the navigable waters of the U.S.

The Coast Guard has determined that a collision avoidance system in each vessel of 10,000 gross tons or more could contribute positively to the safety of that vessel and to the protection of the environment, particularly in waters in which vessels are not closely confined and are not making repeated course changes dictated by geographic or other conditions.

Economic impact. This proposal has been reviewed for economic effects under Department of Transportation "Policies to Improve Analysis and Review of Regulations" (41 FR 16200). It is estimated that 2,000 foreign and 400 U.S. vessels might be affected if the proposal is adopted. Basic collision avoidance systems range in price from $90,000 to $150,000. At an average cost of $120,000 per vessel, installed, the projected first year cost to the U.S. shipping industry would be $43,200,000 and the impact on the U.S. economy would approximate $76,800,000. Assuming a 10 year amortization period, the second through tenth year impacts would be about $28,800,000 per year. Impact on the U.S. economy would total $307,200,000 over the 10 year period.

The benefits from having this equipment could result in tangible savings, including less vessel damage or loss, less post-vessel-casualty costs, including investigation costs, and search and rescue costs, and less pollution clean up costs. Significant intangible benefits could accrue, including less loss of life or injury and less pollution and resulting harm to the environment.

If adopted, the final regulations would contain a specific effective date on which collision avoidance systems would be required to be onboard vessels of 10,000 gross tons or more while operating on the navigable waters of the U.S. This effective date would follow by one year the publication of the final regulations in order to allow sufficient time for the procurement and installation of the required equipment.

Accordingly, it is proposed to add § 164.37, to Part 164, published in the January 31, 1977, issue of the FEDERAL REGISTER (42 FR 5969), to read as follows:

§ 164.37 Additional Equipment: vessels of 10,000 gross tons or more.

Each vessel of 10,000 gross tons or more must have, in addition to the radar system required in § 164.35(a), a second marine radar system with a computer aided collision avoidance system meeting the specification entitled "Performance Specification For a Computer Aided Collision Avoidance Sytem For Merchant Ships", published by the Radio Technical Commission for Marine Services (RTCM Paper 171-76/EC 205/SC 65-226, Revised January 19, 1977).

NOTE.—Performance Specification For a Computer Aided Collision Avoidance System For Merchant Ships is published in Appendix A for reader's convenience.

(Titles I and II, 86 Stat. 426, 427 (33 USC 1224; 46 USC 391a); 49 CFR 1.46(n)(4)).

NOTE.—The Coast Guard has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended, and OMB Circular A-107.

O. W. SILER,
Admiral, U.S. Coast Guard, Commandant.

MAY 9, 1977.

APPENDIX A—PERFORMANCE SPECIFICATION FOR COMPUTER-AIDED COLLISION AVOIDANCE SYSTEM FOR MERCHANT SHIPS

NOTE: Published by the Radio Technical Commission for Marine Services (RTCM), under the Federal Communications Commission, as RTCM Paper 171-76/EC-205/SC 65-226 (revised as of January 19, 1977 and superseding Paper 145-76/SC 65-220).

1. Purpose. The purpose of this document is to specify minimum performance standards for a computer-aided collision avoidance system to assist in correctly interpreting radar data in a manner that will help avoid collisions.

2. Scope. This document provides specifications for the capabilities, data presentation, warning features and necessary inputs of a shipboard computer-aided collision avoidance system, suitable for use on board merchant ships.

3. Inputs to the system. The system shall be capable of accepting signals from the ship's radar(s), gyro compass, speed log (or equivalent speed input), and from a manual speed input. The system shall clearly indicate the speed source selected. The system, whether operating normally or having failed, must not introduce any spurious signals or otherwise degrade the performance of the equipments providing inputs.

4. PPI display. The effective size of the PPI display shall be equivalent to or greater than that provided by a 16" diameter CRT.

The display may be separate or it may be a ship's radar PPI with the collision avoidance data superimposed.

The system shall have both true and relative[1] presentation modes. As a minimum, a capability for relative motion display shall be provided. Projected target track lines should be selectable in either true or relative motion.[2] In addition, the system may provide for true motion. If true motion is provided, the operator shall be able to select for his display either true or relative motion.

Computer generated data for each displayed target shall be in the form of a vector or line indicating target true course or relative motion, with a length proportional to speed, giving both present and extrapolated future positions. The capability to cancel the line or vector presentation of non-threatening targets shall be provided.

The display presentation may be entirely synthetic or synthetics superimposed on the radar video. If the display is superimposed on radar video, means shall be provided to independently adjust the brilliance of the synthetic presentation and of the radar video, including their complete elimination.

Own ship's heading indicator shall be presented on the display in all modes. The indicator shall appear on the display either as a heading line or as a heading marker on the periphery, and shall be accurate within 0.5 degree exclusive of sensor errors. Provision shall be made for adjusting its brilliance and for momentary extinguishing of the heading line. A bearing ring which may be movable shall also be provided.

The system shall be capable of simultaneously representing fixed targets, moving targets and land masses.

The equipment should be provided with at least four range scales, the smallest of which is not more than 3 nautical miles (nm) and the greatest of which is not less than 24 nm.

The brilliance of the display shall be adjustable to the level where it is sufficiently bright to be observed in the normal ambient sunlight expected in a wheelhouse, without the use of a hood, except that a shield may be provided to block direct rays of the sun. The display shall be usable without destroying night vision on a darkened bridge. To enable night vision protection, the display phosphor shall include wavelengths within the band 600 to 750 nanometers, in order to permit the use, where desired, of a red filter. A red phosphor that emits solely within the 600 to 750 nanometer band is an acceptable alternative to the red filter.

For targets having a range of less than 10 miles, within one minute after the moment that:

(a) The target appears on the radar display and is within the acquisition range of the collision avoidance system (for automatic acquisition systems), or

(b) The operator initiates acquisition (for manual acquisition systems), the system should present, as a minimum, an indication of target motion trend. Within 3 minutes a fully accurate target course and speed should be presented on the display and/or in alphanumeric form, assuming the associated radar has a scanning rate of at least once in three seconds. If more than two targets on the same bearing are required, the above presentation times may be degraded. This degradation factor must be restricted to a maximum of two times the above limits for a quantity of four targets on the same bearing and three times for a quantity of six targets on the same bearing, etc.

5. Target acquisition. Target acquisition may be manual or automatic. The system shall be able to track at least (20) targets automatically. The tracked targets shall be marked on the display by distinct tracking symbols.

6. Warning alarms. For a manual acquisition system, audio and visual alarms shall be initiated by any target closing to a preset minimum range, or guard ring. After target acquisition, similar alarms shall be initiated in all systems by any target that is predicted to close to less than a preset minimum range. The target causing the alarms to be initiated shall be clearly identifiable on the display.

For both manual and automatic acquisition systems, means shall be provided to silence the audio alarm for a given threat but the alarm shall resound upon a subsequent threat. A visual indication shall continue until all threats have been eliminated.

7. Alpha-numeric information presentation. For any acquired target, where alphanumeric information is provided, the following shall, as a minimum, be included:

Present range to the target;
Present bearing of the target;
Predicted target range at the closest point of approach (CPA);
Predicted time to CPA (TCPA);
Present course of the target;
Present speed of the target.

This information may be presented on the system display or on a separate display device.

When steady-state tracking conditions have been obtained for a non-maneuvering target, the computational errors introduced by the collision avoidance device shall be no greater, for the parameter under consideration, than the unit value of the least significant digit displayed of that parameter.

8. Accuracy. Operationally the equipment is required to present data on a target of interest with adequate accuracy in a reasonable time. Equipment which can satisfy the following test condition will be deemed to meet this requirement.

For a vessel on a constant collision course at a range of 4 nm, with a relative speed of 20 knots, the equipment shall determine the relative speed to within 10 percent within 3 minutes from the time of acquisition. Further, for a vessel passing 1 nm ahead with a relative speed of 10 knots and a constant direction of relative motion (DRM) of 090°, the equipment shall determine its DRM to within 3 degrees in the same time period.

The above requirements pertain to computational accuracy of the system and do not encompass the inaccuracies of the input sensors.

9. Trial maneuver. The system is to provide necessary information regarding possible maneuvers in order to avoid collisions. The system shall have the capability of simulating possible future situations and presenting such situations on the display. The trial maneuver shall indicate the results of a simulated course change. It may indicate, in addition, the result of a simulated speed change or of a speed change in conjunction with a course change. The simulation shall be initiated by the depression either of a spring-loaded switch or of a function key with a positive identification on the display. The indication of the simulation shall be deleted and the display shall revert to normal operation either by the release of the spring-loaded switch, or after the lapse of a present time not to exceed one minute in the case of the function key. During a simulation the system shall activate warning alarms related to the real traffic situation.

10. Environmental conditions. The Collision Avoidance System, including all components shall be capable of operating in the environment normally found on the bridge and/or associated areas. Requirements as specified in Appendix A shall be used as the minimum required to meet the intent of this specification.

11. Compass-Safe Distances. System units must operate with no effect on the standard magnetic or steering magnetic compass when positioned no closer than the manufacturers specified "Compass Safe Distance".

12. Power supply. The system shall be capable of normal operation when encountering the following variations:

	Percent
AC variations from nameplate voltage	±10
Variations from nameplate frequency	±6
DC variations from nameplate voltage:	
110-250V	−20+10
24-32V	−10+25

The equipment shall have impulse voltage transient protection from pulse transients with amplitudes of ±1200 peak volts, rise times of 2 usec to 10 usec, and durations up to 20 usec.

13. Failure alarms. Suitable visual and audio alarms shall be provided to alert the operator in the event of overall system failure, loss of incoming sensor signals (radar, gyro and speed log) or any other failure detected by the system's self-test capabilities. These alarms shall be in the form of flashing lights, repeating sound signals or some other

[1] A course-up presentation is an acceptable variation of the relative presentation.

[2] For those Collision Avoidance Systems utilizing a combination vector/predicted area of danger (PAD) assessment presentation, projected target track lines may be either true or relative.

method to alert the watch officer when the equipment is unattended. Provision shall be made to silence the audio alarm but visual signals shall remain until the failure is corrected, reset by the operator, or the system shut down.

14. Recording capability. Continuous recording capability of not less than one half hour, of the collision avoidance data to reproduce the display(s) may be provided. Such recording shall be capable of being started and stopped "at will" at the display. Provision shall be made to save the data, when desired, for playback through a suitable device.

[FR Doc.77-13894 Filed 5-13-77;8:45 am]

[CGD 77-057]

[46 CFR Parts 30, 32]

INERT GAS SYSTEM

Proposed Amendment

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

SUMMARY: This document proposes to extend the inerting system requirements from tank vessels of 100,000 deadweight tons (dwt) or more to tank vessels of 20,000 dwt or more. This proposal is in response to that part of the President's March 17, 1977, message to Congress concerning a requirement for inert gas systems on all U.S. and foreign flag oil tankers of 20,000 dwt calling at American ports. If the systems are installed, there should be a reduction in the number of in-tank explosions on board tankers.

DATES: 1. Comments must be received on or before:

2. Public Hearings: The Coast Guard will hold two public hearings on this proposal. The first will be held commencing at 9:00 a.m. on June 16, 1977, and continuing until all commenters have been heard, in the Santa Fe Helix del Mar Room, Town and Country Hotel, 500 Hotel Circle North, San Diego, California 92138. The second will be held commencing at 9:00 a.m. on June 21, 1977, and continuing until all commenters have been heard, in Room 2230, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590.

ADDRESSES: Comments should be submitted to the Commandant (G-CMC/81), U.S. Coast Guard, Washington, D.C. 20590. Comments will be available for examination at the Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. A copy of the economic evaluation from which the economic summary in this document is taken is available for examination at the above address.

FOR FURTHER INFORMATION CONTACT:

Captain George K. Greiner, Marine Safety Council (G-CMC/81), Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590 (202-426-1477).

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rulemaking by submitting written views, data, or arguments. Each person submitting a written comment should include his name and address, identify this notice (CGD 77-057), and give the reason for the comment. This proposal may be changed in light of the comments received. All comments received will be considered before final action is taken on this proposal. Copies of all written comments received will be available for examination by interested persons.

Interested persons are invited to attend the hearing and present oral or written statements on this proposal. It is requested that anyone desiring to make comments notify Captain Greiner at least 10 days before the scheduled date of the public hearing and specify the approximate length of time needed for the presentation. It is urged that a written summary or copy of the oral presentation be included with the request.

Drafting Information

The principal persons involved in drafting this proposal are: Mr. Daniel F. Sheehan, Project Manager, Office of Merchant Marine Safety, and Mr. Stanley Colby, Project Attorney, Office of the Chief Counsel.

Discussion of Proposal

On January 26, 1976, the Coast Guard published regulations in the Federal Register (41 FR 3838) concerning tank vessel fire protection that incorporated the substance of IMCO Resolution A.271 (VIII), adopted by the Assembly of the Inter-Governmental Maritime Consultative Organization on November 20, 1973. These regulations contain provisions that increase the overall level of safety of tank vessels. One of the provisions of this rulemaking was the requirement that inert gas systems be fitted on new tank vessels of 100,000 dwt or more and combination carriers of 50,000 dwt or more. In the preamble of that document, the Coast Guard made a commitment to reexamine the international recommendations concerning the implementation limits for inert gas systems. That reexamination is reflected in this proposal.

In order to detail the rationale for this proposal, it is necessary to review the history and development of the original decision, the intervening events which have influenced that decision, and the action taken in the international forum.

In 1968, a working group was formed as part of the IMCO Subcommittee on Fire Protection. The purpose of this group was to develop a series of international recommendations to improve tank vessel fire safety. This effort was initiated by the United States through both formal and informal channels within the IMCO forum. The work was divided into two primary areas of concern: protection for the cargo tank area; and protection for the accommodation and service spaces.

After considerable debate, the working group accepted the premise that the accommodations and service spaces should utilize the concept of non-combustible construction, a practice successfully employed in U.S.-flag tank vessels for many years.

During the deliberations concerning the recommendations for cargo tank protection, three very large crude carriers (VLCC's), the *Mactra*, *Marpessa*, and the *Hong Haakong* suffered tank explosions, adding a new dimension to the considerations. The similarity between the casualties led several countries to propose requirements related only to the potential problem of in-tank fires and explosions. U.S. requirements protected against in-tank explosions by preventive techniques and required the fitting of a deck foam firefighting system to mitigate on deck or in-tank fires. This position was the basis for the deliberations.

Owners, operators, and assurers were deeply concerned about the unexplained loss of the VLCC's. This concern resulted in a collective research effort which attempted to determine the causative factors involved in the explosions. The area of greatest concentration centered around tank cleaning methods and techniques. The investigation produced significant results in that tank cleaning methods were found to cause an increase in static electricity generation within the tank itself, thereby serving as a potential source of ignition.

As a result of the inability to determine the exact causes of the problem, several steps were taken to attempt to minimize the possibility of reccurence. On a voluntary basis, owners and operators were invited to utilize the International Chamber of Shipping, "Guidelines for Tank Washing," which were operational steps taken to minimize static electricity generation. The IMCO Assembly proposed a convention amendment (IMCO Res. A.271 (VIII)), "Fire Safety Measures for New Tank Vessels," which until adopted was issued as an interim recommendation. Emphasizing its high priority, all countries were urged by the Assembly to bring the recommendation into force on July 1, 1974 on a voluntary basis. In the intervening time period, an additional Assembly recommendation (IMCO Res. A.326 (IX)), was developed which requires cargo tank protection for vessels that was not as stringent as the previous document. The new recommendation required the fitting of a deck foam system with an augmented foam storage supply if an inert gas system was not fitted. During subsequent deliberations, numerous proposals were presented to require the fitting of inert gas systems for vessels of different sizes under IMCO Res. A.271 (VIII). Proposals ranged from a different tonnage cutoff point to a proposal that concerned the capacity of fixed tank vessel washing machines.

As a result of the explosions aboard the VLCC's, the use of inert gas systems on these vessels increased significantly throughout the world. During this time

period, detailed experience was gained concerning the operation, maintenance and reliability of the system. This information indicated that—

1. There were certain hazards associated with the fitting and use of inert gas systems; and

2. Their reliability had a direct link to the maintenance of the system.

It was found that the inert gas systems (IGS) which were designed to provide protection during the hazardous tank washing process were, in fact, generators of static electricity themselves. In fact, the IGS systems were capable of generating more static electricity than the tank washing machines. In the second instance, the Norwegian Classification Society, Det Norske Veritas determined that approximately 70% of the systems inspected had major maintenance problems that could have seriously affected their use and reliability. Detailed maintenance and operation requirements for this type of system will be the subject of a future proposal in the FEDERAL REGISTER.

After the publication of the substance of IMCO Res. A.271 (VIII) into Subpart 32.53, the problem of tank vessel explosions caused by external sources of ignition was examined in further detail by the Coast Guard which noted that normal tank vessel operation would permit the tank of a vessel to be within the explosive range during loading, transit, and off loading in some cases.

The fact that this condition exists or can exist is known by both designers and operators. In order to prevent ignition of the flammable atmopshere, a U.S.-flag tank vessel must meet specific design and operational requirements:

1. The cargo tank block is classed as a hazardous area and sources of ignition are controlled by mandating explosion proof equipment, prohibition of smoking, and no open flaming devices.

2. Flame screens are required to be fitted in openings into cargo storage tanks and specific operational procedures are prescribed to protect the vessel from ignition sources.

3. Vents are required to be equipped with pressure vacuum valves for Grades A–C cargoes.

4. Cargo discharge and loading is required to be conducted under the supervision of ships' officers and certificated tankermen.

All of these provisions are directed at minimizing the potential for tank vessel fire and explosion. The casualties summarized in the following paragraphs indicate that casualties will occur despite the required safety systems.

For a variety of reasons design and operational requirements have not proven completely successful. The *Corinthos* and *Elias* were conventional tank vessels. For fire safety in the cargo area, they depended basically on identification of, and protection from, potential ignition sources. This protection, however, was not sufficiently comprehensive and when an ignition source, which was not provided for, ignited flammable vapors in the cargo tank, an explosion was initiated. In each case, this explosion then progressed unchecked through the entire cargo tank area. Due to the fact that each vessel was unloading or had just completed off loading, some portion of the vapor space of all cargo tanks was in the flammable range and was, therefore, vulnerable to explosion, when an ignition source developed.

LOSS OF THE TANKER "CORINTHOS"

On January 31, 1975, the U.S.-flag chemical tanker *Edgar M. Queeny* struck the outboard side of the moored 54,000 dwt Liberian flag crude carrier *Corinthos*. A low order explosion immediately resulted within the breached cargo tank and was followed within seconds by a series of increasingly more violent explosions. The explosions spread from tank to tank and the entire deck area of *Corinthos* was soon engulfed in flames and as a result, the vessel broke and sank alongside the British Petroleum dock No. 1, Marcus Hook, PA. Twenty-six persons were killed. Intense firefighting efforts were required for at least 12 hours after the first explosion.

LOSS OF THE TANKER "ELIAS"

On April 9, 1974, the 30,000 dwt Greek flag tanker *Elias* suffered massive multiple explosions, burned, and sank in the Delaware River alongside the Atlantic Richfield Oil Terminal, Fort Mifflin, PA. At the time of accident, the vessel was in the last stages of off loading a cargo of crude oil from the Bachaquero field in Venzuela. A total of 13 persons aboard the vessel (including all principals involved in cargo transfer) were killed. The hull of the vessel came to rest in an upright position on the river bottom. The ensuing fire was fought from the shore by units of the Philadelphia Fire Department and from the water side by units of the U.S. Navy, U.S. Coast Guard, and commercial tugs. Over 30 firefighting and support units were involved at the height of the fire.

In both cases the exact ignition source remains unknown. An ignition source somehow reached the flammable vapors within the cargo tanks. The explosion then progressed through the other cargo tanks on the vessel. Total losses will probably exceed $25,000,000.

TANKERS 20,000 DWT OR MORE: WORLDWIDE CASUALTIES

In the period between 1950 and 1973, there were an estimated 515 fires and explosions on board vessels that occurred either in the cargo tanks or outside the tanks. This figure excludes fires and explosions in the engine spaces. Of that 515, approximately 243 (47%) occurred inside the cargo tanks. Those vessels that were 20,000 dwt or more had over 50% of the intank fires and explosions. The following table is for the period 1950–1973.

	Total number	Percentage
Vessel fires and explosions	515	100
Cargo tank fire and explosions	243	47
Casualties on tankers 20,000 dwt or more	120	53

BENEFITS ACCRUED

As indicated in a preceding paragraph, the requirement for inert gas systems, as recommended in IMCO Resolution A.271 (VIII), developed as a result of the necessity to protect tank vessels of certain sizes during tank cleaning operations. This represents a relatively small portion of a tank vessel's life cycle. The benefits derived from inert gas systems are not limited to this time period. For example:

1. A tank which is inerted cannot sustain an intank explosion if the boundaries of the tank are intact. This provides assurance against intank explosions during other periods when the vessel is not undergoing tank cleaning.

2. Good quality inert gas reduces internal tank corrosion.

3. Higher discharge rates may be obtained by utilizing inert gas system pressure to aid the cargo pumps, thereby reducing tank vessel turn around time.

BACKGROUND OF PROPOSED AMENDMENTS

The President's March 17, 1977 message to Congress included direction that certain ship construction and equipment standards be reformed. Included in the direction was instructions to the Secretary of Transportation to develop new rules within 60 days for inert gas systems on all oil tankers of 20,000 dwt or more, U.S. and foreign, that call at American ports. The proposal in this document is in response to the President's instructions.

Subpart 32.53 currently applies to each tankship of 100,000 dwt or more (metric) and each combination carrier of 50,000 dwt or more (metric) that has a keel laying date after December 31, 1974. The following are excepted from the subpart:

1. Vessels that carry Grade E cargo at a temperature that is 5° C (9° F) or more below its flashpoint or that carry only liquefied gas cargo.

2. Foreign flag tankships of a nation signatory to the International Convention for the Safety of Life at Sea, 1960 that have on board a current valid Safety Equipment Certificate.

It is proposed to retain the substance of this applicability but withdraw the exception to foreign tankships having on board a current valid Safety Equipment Certificate.

U.S.-flag vessels required to fit inert gas systems under 46 CFR Subpart 32.53, which was effective on February 26, 1976 (published in the January 26, 1976 FEDERAL REGISTER (41 FR 3838)) would not be allowed to extend the application of the subpart to the new effective date of this proposed amendment.

In addition, it is proposed to add to the applicability of the subpart tankships and combination carriers of 20,000 dwt or more. In order to allow orderly implementation by industry, it is proposed that those U.S. and foreign tankships or combination carriers that are constructed or converted under a contract awarded before [a date would be inserted that is 6 months after publication of the rule] would have to comply with the inert gas systems requirements within five years after the effective date of the amendment. U.S. tankships or combination carriers contracted for after [a date would be inserted that is 6 months after publication of the rule] would be required to fit an inert gas system on or after the effective date of the amendment. Foreign tankships or combination carriers contracted for after [a date would be inserted that is 6 months after publication of the rule] would have to comply with the inert gas system requirements within five years after the effective date of the amendment.

Since the proposal applies to foreign vessels, in addition to the U.S. vessels currently being regulated, the terms flammable or combustible cargo are used in Subpart 32.53 in lieu of grade classifications to aid comprehension by any reader not familiar with the United States classification of oil cargoes.

Proposed Exceptions. The President's message stated that all oil tankers would be required to be fitted with the provisions outlined in his message. In this proposal, the present exception to the requirement for fitting of an inert gas system on a tankship if it carries Grade E cargoes is continued since in context the President's direction was to extend applicability to smaller vessels rather than to bring low risks substances under regulations. Grade E cargo is by definition a high flashpoint cargo of relatively low risk. Both the international recommendation, IMCO Res. A.271 (VIII), and Coast Guard regulations in 46 CFR 32.53, recognize this and incorporate an exception for high flashpoint liquids.

This proposal has been reviewed for economic effects under Department of Transportation "Policies to Improve Analysis and Review of Regulations" (41 FR 16200).

The analysis shows that approximately 1000 foreign flag and 250 U.S.-flag tank vessels would be affected by the requirement for the fitting of inert gas systems. The projected costs of the requirements to the U.S. consumer over a 9 year period is estimated at one billion seven hundred million dollars.

The expected benefit of the requirement is a reduction in the number of intank explosions. These explosions in the past have not only endangered the ship and its crew but port facilities and related waterways.

In accordance with the preceding, it is proposed to amend Subchapter D of Title 46, Code of Federal Regulations, as follows:

§ 30.01–5 [Amended]

1. By amending § 30.01–5(e)(1) of Subpart 30.01 by striking the words "and the safety and cargo handling requirements in Subparts 35.30 and 35.35 of this subchapter" and inserting "Subpart 32.53, Subpart 35.30, and Subpart 35.35 of this subchapter" in place thereof.

2. By revising § 32.53–1 of Subpart 32.53 to read as follows:

§ 32.53–1 Application—T/All.

(a) Except as provided in paragraph (b) of this section, this Subpart applies to tankships or combination carriers of 20,000 dwt tons or more as follows:

(1) Each U.S. Flag tankship that is certificated to carry Grades A, B, C, and D liquids.

(2) Each foreign flag tank vessel engaged in the trade of carrying flammable or combustible liquids to or from a U.S. port, or place, or any such vessel destined from one port or place in the United States to another port or place in the United States.

(b) This Subpart does not apply to vessels designed to carry only—

(1) Liquefied gas cargo; or

(2) Cargo that has a flashpoint of 65.5°C (150°F) or higher by an open cup test (Grade E).

NOTE.—(1) A U.S. tankship of 100,000 dwt tons or more or a U.S. combination carrier of 50,000 dwt tons or more, with a keel laying date on or after January 1, 1975, must comply with Subpart 32.53 after February 25, 1976.

(2) U.S. and foreign flag vessels under § 32.53–1, except those vessels described in note 1, that are constructed or converted under a contract awarded before the effective date of the rule must comply with Subpart 32.53 within 60 months after the effective date of the rule.

(3) A foreign flag vessel under § 32.53–1 that is constructed or converted under a contract awarded after the effective date of rule must comply with Subpart 32.53 within 60 months after the effective date of the rule.

(4) A U.S. vessel under § 32.53–1 that is constructed or converted under a contract awarded after the effective date of the rule must comply with Subpart 32.53 at the time of building or conversion.

(Sec. 201, 86 Stat. 427, as amended (46 U.S.C. 391a); 49 CFR 1.46(n)(4)).

NOTE.—The Coast Guard has determined that this document contains a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended, and OMB Circular A–107 and certifies that an Economic Impact Statement has been prepared.

Dated: May 9, 1977.

O. W. SILER,
Admiral, U.S. Coast Guard,
Commandant.

[FR Doc.77–13895 Filed 5–13–77;8:45 am]

Federal Register

MONDAY, MAY 16, 1977

PART III

OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS

■

TRADE POLICY STAFF NEGOTIATIONS

Generalized System of Preferences

OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS

TRADE POLICY STAFF COMMITTEE

Generalized System of Preferences

SUMMARY: The purposes of this notice are to (1) publish results of the review of proposals for changes in product coverage in the Generalized System of Preferences (GSP) (see part I below and Annexes I and II); (2) solicit public views on possible improvements in the operation of the GSP program (see part II below); (3) publish notice of a review of pending requests (see part III below); and (4) publish notice of the deadline for receipt of petitions concerning GSP product eligibility for the next full review (see part IV below).

I. *Further Results of Review of Proposals for Changes in the Product Coverage of the GSP.* This part announces further results of the second semiannual GSP product coverage review. Earlier results appeared in Part VIII of the February 16, 1977 FEDERAL REGISTER (42 FR 9636) and were implemented by Executive Order No. 11974 of February 25, 1977 (42 FR 11230A). For further information see 42 FR 9636, February 16, 1977.

Cases on which final decisions were made are listed in Annex I. Cases that remain pending are listed in Annex II. It is anticipated that results of these pending cases, wherever possible, will be announced at the same time as the results of the review referred to in part III below.

II. *Solicitation of Public Views on Improving the Operation of the GSP Program.* The Trade Policy Staff Committee (TPSC) has begun a review of the GSP program in light of its first year of operation. The TPSC invites public comments on possible improvements in the operation of the GSP program. Written comments should be submitted by Thursday, June 9, 1977 to the GSP Subcommittee of the TPSC, Room 720, 1800 G Street, N.W., Washington, D.C. 20506.

III. *Notice of Review.* Present regulations provide for reviews of pending petitions at least once every six months. In order to fulfill this requirement, while the operation of the GSP program is being reviewed, notice is hereby given that the TPSC will conduct a review of accepted petitions for changes in the list of articles eligible for duty-free treatment under the GSP of Title V of the Trade Act of 1974 (88 Stat. 2066–2071, 19 U.S.C. 2461–2465). Pending petitions that have been accepted for the review will be announced shortly.

For additional petitions to be included in this review they must be (1) received not later than thirty days following the date of publication of this notice in the FEDERAL REGISTER, and, (2) considered by the TPSC to be of an urgent nature. Petitioners seeking consideration on an urgent basis should include a statement attached to their petition justifying their request. A list of any petitions accepted on an urgent basis will be published in the FEDERAL REGISTER.

Public hearings on accepted petitions will begin on July 14, 1977 at a time and place to be announced in the FEDERAL REGISTER. Requests for review that are not deemed to be of an urgent nature will be considered during the next GSP review announced below in part IV of this notice.

Petitioners should be guided in the preparation of their petitions by the GSP regulations codified in 15 C.F.R. Ch. XX Part 2007 (40 FR 60041, December 31, 1975) and the "Guidance for Petitioners" set forth in the FEDERAL REGISTER of Monday, October 18, 1976 (41 FR 45923).

IV. *Notice of Deadline for Receipt of Petitions Requesting Modification of the List of Articles Eligible for Duty-Free Treatment Under the GSP.* Notice is hereby given that, in order to be considered in the next full review of products covered by the GSP, petitions for modification of the list of articles receiving duty-free treatment under the GSP must be received no later than the close of business on Thursday, September 15, 1977. A notice of proposed rulemaking will be published soliciting public comments on changes in the GSP regulations to permit the review of petitions annually instead of semi-annually.

Any results of the review of the operation of the GSP program referred to in part II of this notice affecting this next full GSP product coverage review will be published in the FEDERAL REGISTER. Any modifications in the Guidance for Petitioners resulting from the review of the operation of the program will be published in sufficient time to enable petitioners to meet the September 15, 1977 deadline.

WILLIAM B. KELLY,
Chairman, Trade Policy Staff Committee.

Annex I: Case Reviews Completed

(A) Petitions

Case No.	TSUS or TSUSA 1/ item No.	Article	Petitioner	Action requested	Action taken
76-B-3	136.91 (part)	Pearl onions	Hanover Brands, Inc.	Designate for GSP benefits	New TSUS (136.92) designated by E.O. 11974
76-B-15	155.20	Sugars, sirups, and molasses, derived from sugar cane or sugar beets	American Farm Bureau Federation Park Ridge, Ill.	Withdraw GSP benefits	Petition denied
76-B-16	152.7620	Strawberry paste or pulp	Pascual Foods, Inc. San Antonio, Texas	Designate for GSP benefits	Petition denied
76-B-25 (part)	170.20	Filler tobacco, not stemmed	Cigar Assoc. of America, Inc. Washington, D.C.	Designate for GSP benefits	This part of petition denied
	170.25	Filler tobacco, stemmed		Do.	Do.
	170.40	Other tobacco, not stemmed		Do.	Do.
	170.45	Other tobacco, stemmed		Do.	Do.
	170.60	Scrap tobacco		Do.	Do.
76-B-30 (part)	732.40	Doll carriages	United Furniture Workers of America New York, N.Y.	Withdraw GSP benefits	This part of petition denied

1/ Tariff Schedules of the United States Annotated (19 U.S.C. 1202).

Annex I: Case Reviews Completed

(B) Articles Considered by the TPSC on its own Motion

TSUS item 1/	Article	Action taken
	(The bracketed language in this list is included only to clarify the scope of the numbered items.)	
	Birds (dead), fresh, chilled, or frozen, if whole, or if plucked, beheaded, or eviscerated, or cut into pieces (including edible offal), but not otherwise prepared or preserved:	
	Birds, whole, or which have been plucked only:	
	/Chickens, ducks, geese, and guineas/	
	/Turkeys/	
105.30	Other	Designated as eligible article
	Birds which have been plucked, beheaded, and eviscerated (including birds with any edible offal retained in or returned to the abdominal cavity), whether or not the feet have been removed, but not cut into pieces:	
	/Chickens/	
	/Turkeys/	
105.60	Other	Do.
	Garden and field seeds:	
126.71	Pepper	Do.
	Vegetables, dried, desiccated, or dehydrated, whether or not reduced in size or reduced to flour (but not otherwise prepared or preserved):	
	Dried, desiccated, or dehydrated:	
	Chickpeas or garbanzos:	
140.20	Split	Do.
	Cowpeas:	
140.25	Black-eye	Do.
140.35	Lentils	Do.
140.38	Lupines	Do.
140.50	Potatoes	Not designated

1/ Tariff Schedules of the United States (19 U.S.C. 1202).

TSUS item 1/	Article	Action taken
	Vegetables (whether or not reduced in size), packed in salt, in brine, pickled, or otherwise prepared or preserved (except vegetables in subpart B of part 8 of schedule 1 of the Tariff Schedules of the United States):	
	/Beans, cabbage, chickpeas or garbanzos, black-eye cowpeas, onions, peas, pimientos, tomatoes, waterchestnuts/	
	Other:	
141.75	Packed in salt, in brine, or pickled, except artichokes	New TSUS (141.77) designated by E.O. 11974
	Berries, fresh, or prepared or preserved:	
	/Fresh or in brine/	
	/Dried/	
	Otherwise prepared or preserved:	
146.73	Black currants, gooseberries, lingon or partridge berries, and loganberries	Designated as eligible article
	Fruit flours:	
	/Banana and plantain/	
152.05	Other	Do.
166.20	Ginger ale, ginger beer, lemonade, and soda water	Do.
	Marine-animal oils:	
	/Fish-liver oils/	
	Fish oils other than liver oils:	
177.12	Anchovy	Do.
	/Cod/	
177.16	Shark	Do.
	/Eulachon/	
177.22	Herring	Do.
177.24	Menhaden	Do.
177.26	Other	Do.
193.10	Tonka beans	Do.

1/ Tariff Schedules of the United States (19 U.S.C. 1202).

TSUS item 1/	Article	Action taken
	Gold (including platinum- or silver-plated gold but not rolled gold), unwrought (except bullion, dore, and precipitates) or semimanufactured:	
605.27	Platinum- or silver-plated	Designated as eligible article
	Brads, nails, spikes, staples, and tacks, all the foregoing, not described in the foregoing provisions of subpart D of part 3 of schedule 6 of the Tariff Schedules of the United States, of base metal:	
	Of iron or steel (except articles with heads of nonferrous metals):	
	Of one piece construction:	
	Made of round wire:	
646.25	Under 1 inch in length and under 0.065 inch in diameter	Not designated
646.26	1 inch or more in length and 0.065 inch or more in diameter	Do.

1/ Tariff Schedules of the United States (19 U.S.C. 1202).

Annex II: Case Reviews Pending

(A) Petitions

Case No.	TSUS or TSUSA 1/ item No.	Article	Petitioner	Action requested
		(The bracketed language in this list is included only to clarify the scope of the numbered items.)		
76-B-14		Clasps, handbag and similar frames incorporating clasps, and snap fasteners; all the foregoing and parts thereof: Valued not over 20 cents per dozen pieces or parts:	Newey Brothers, Inc. New York, N.Y.	Designate the article as eligible for GSP benefits
	745.63 (part)	Sew-on fasteners, and parts thereof (except fasteners of plastic, in clips suitable for use in a mechanical attaching device)		
76-B-19		Ferroalloys:	Eminecorp, Inc. New York, N.Y.	Designate the article as eligible for GSP benefits
	607.65	Ferrotungsten and ferrosilicon tungsten		
76-B-22 (part)		Pipe and tube fittings of iron or steel: Cast-iron fittings, not malleable: For cast-iron pipe:	American Pipe Fittings Assoc. Stamford, Conn.	Withdraw GSP benefits
	610.62	Cast iron, other than alloy cast iron		
		Cast-iron fittings, malleable: Not advanced in condition by operations or processes subsequent to the casting process:		
	610.70	Cast iron, other than alloy cast iron		
	610.74	Advanced in condition by operations or processes subsequent to the casting process		
76-B-30 (part)		Furniture, and parts thereof, not specially provided for: Of wood: /Cane-wood furniture, and parts thereof/ Other:	United Furniture Workers of America New York, N.Y.	Withdraw GSP benefits
	727.30 (part)	Folding chairs		
76-B-38	206.30	Wood doors with or without their hardware	United Brotherhood of Carpenters and Joiners of America Washington, D.C.	Withdraw GSP benefits
76-B-47		Articles not specially provided for of a type used for household, table, or kitchen use; toilet and sanitary wares; all the foregoing and parts thereof, of metal: Articles, wares, and parts, of base metal, not coated or plated with precious metal: Of iron or steel: Not enameled or glazed with vitreous glazes: Other: Other: /Stainless steel/ /Chrome-plated ware/ Other:	Atlanta Stove Works, Inc. Atlanta, Ga.	Withdraw GSP benefits
	653.9560 or 653.9560 (part)	Cooking ware or Cast-iron cooking ware		
76-25 2/		Stoves, central-heating furnaces and burners, ranges, cookers, grates, space heaters and similar heating or cooking apparatus, all the foregoing, of base metal, not electrically operated, of types used in the household, hotels, restaurants, or offices; and parts thereof, of base metal: /Portable types designed to be operated by propane or other gas, or by compressed air and kerosene or gasoline/	Washington Stove Works Everett, Washington	Withdraw GSP benefits
	653.50 or 653.50 (part)	Other or Cast-iron household stoves, cast-iron parts of household stoves, and cast-iron fireplace grates		

1/ Tariff Schedules of the United States Annotated (19 U.S.C. 1202).
2/ Pending from first biannual review, June 1976.

ANNEX II: CASE REVIEWS PENDING

(B) Articles Considered by the TPSC on Its Own Motion

TSUS item: [1]	*Article*
416.40	Inorganic acids: Tungstic.[2]
417.40	Ammonium compounds: Tungstate.[2]
418.30	Calcium compounds: Tungstate.[2]
420.32	Potassium compounds: Tungstate.[2]
421.56	Sodium compounds: Tungstate.[2]
422.40	Tungsten compounds: Carbide.[2]
422.42	Other.[2]
423.92	Mixtures of two or more inorganic compounds: In chief value of tungsten.[2]
601.54	Metal-bearing ores and the dross or residum from burnt pyrites: Tungsten ore.

[1] Tariff Schedules of the United States (19 U.S.C. 1202).

[2] Pending advice on tungsten ore (item 601.54).

[FR Doc.77-13749 Filed 5-13-77;8:45 am]

Federal Register

MONDAY, MAY 16, 1977

PART IV

FEDERAL ENERGY ADMINISTRATION

■

ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT

Intent To Issue Construction Orders to Certain Major Fuel Burning Installations

FEDERAL ENERGY ADMINISTRATION

ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT

Intent To Issue Construction Orders to Certain Major Fuel Burning Installations

The Federal Energy Administration (FEA) hereby gives notice of its intention to issue Construction Orders pursuant to Section 2(c) of the Energy Supply and Environmental Coordination Act of 1974, as amended (ESECA), and Title 10, Code of Federal Regulations (10 CFR), Parts 303 and 307 to the following installations in the early planning process:

Docket No.	Owner	Installation	Number of units	Location
OCU-7410-3-1	United States Steel Corp.	Fairfield	2	Fairfield, Ala.
OCU-7410-3-2				
OCU-3990-1-1	International Paper Co.	Georgetown mill	1	Georgetown, S.C.
OCU-6650-5-1	Shell Oil Co.	Mobile chemical plant	2	Mobile, Ala.
OCU-6650-5-2				
OCU-1300-1-1	Goodyear Tire & Rubber Co.	Goodyear Gadsden plant	1	Gadsden, Ala.
OCU-7060-1-1	J. P. Stevens & Co., Inc.	Delta 3	1	Wallace, S.C.
OCU-4210-1-1	Kimberly-Clark Corp.	Memphis mill	1	Memphis, Tenn.
OCU-4920-1-1	Philip Morris, Inc./Miller Brewing Co.	Eden plant	3	Eden, N.C.
OCU-4920-1-2				
OCU-4920-1-3				
OCU-3280-1-1	B. F. Goodrich Co./B. F. Goodrich Chemical Co.	Louisville plant	1	Louisville, Ky.
OCU-2820-1-1	Federal Paper Board Co., Inc.	Rieglewood operations	1	Rieglewood, N.C.

FEA hereby also gives notice of the opportunity for written and oral presentation of data, views, and arguments by interested persons regarding these proposed Construction Orders.

The proposed orders would require the above-named installations in the early planning process to be designed and constructed to be capable of using coal as their primary energy source.

Prior to the issuance of a Construction Order to an installation, Section 2(c) of ESECA and 10 CFR 303.46(b), 307.3, and 307.3(c) require that FEA find that the installation is in the early planning process. They also prohibit FEA from issuing a Construction Order if FEA finds that an adequate and reliable supply of coal and coal transportation facilities are not reasonably expected to be available. FEA's proposed findings, as well as its proposed conclusions and rationale with respect to these findings, for the powerplant are set out in Section I of the Appendix to the notice. These findings, conclusions and rationale may be amended as a result of comments received by FEA pursuant to this notice and other information available to FEA. The findings, conclusions and rationale will be included, with any amendments, in the Construction Order if it is issued.

In addition, Section 2(c) of ESECA and 10 CFR 303.46(b), 307.3(d) require that FEA consider certain other factors prior to issuance of a Construction Order. FEA's initial conclusions and a brief statement of the rationale for each, with respect to such considerations, are set out in Section II of the Appendix to this notice. The conclusions and rationale may be amended as a result of comments received by FEA pursuant to this notice and other information available to FEA. The conclusions and rationale will be included, with any amendments, in the Construction Order if it is issued.

Upon completion of the proceeding described in this notice, FEA may determine to issue Construction Orders to some or all of the above-named installations. The Construction Orders will not become effective, however, until FEA has considered the environmental impact of each order, pursuant to 10 CFR 208.3(a)(4), and 307.7, and has served the affected installation with a Notice of Effectiveness, as provided in 10 CFR 303.10(b), 303.47(b), and 307.5. 10 CFR 307.7(c) requires that, prior to the issuance of a Notice of Effectiveness to an installation, FEA shall perform an analysis of the environmental impact of the issuance of such Notice of Effectiveness. That analysis shall result in either (1) a declaration that the Construction Order will not, if made effective by a Notice of Effectiveness, be likely to have a significant impact on the quality of the human environment; or, (2) the preparation by FEA of an environmental impact statement covering the significant site-specific impacts that are likely to result from the Construction Order and that have not been adequately addressed in the Final Programmatic Environmental Impact Statement or in other official documents made publicly available. If FEA prepares an environmental impact statement covering significant site-specific impacts from the Construction Order, the statement shall be prepared and published for comment in accordance with Section 102(2)(c) of the National Environmental Policy Act of 1969 prior to issuance of a Notice of Effectiveness. Interested persons may request a public hearing pursuant to 10 CFR 303.173 to comment on the contents of a draft environmental impact statement.

Public comment on the proposal to issue a Construction Order to the installations listed above is invited in the form of written and oral presentation of data, views and arguments.

Comments should address (1) the adequacy and validity of each of the proposed findings and the conclusions and rationale in support of these findings, as well as the conclusions with respect to the other factors FEA must consider and rationale in support of these conclusions, (2) the environmental impact of the issuance of making effective a Construction Order, including any site specific environmental impacts, and (3) any other aspects or impacts of the proposed Construction Order, believed to be relevant.

Any installation issued a Construction Order will have to comply with applicable new source performance standards prescribed by the Environmental Protection Agency under the Clean Air Act, as amended (42 U.S.C. 1857 et seq.).

Pursuant to 10 CFR 303.173 (a) and (d), FEA hereby announces that a public hearing to receive oral presentation of data, views and arguments from interested persons will be held beginning at 9 a.m. on May 26 and 27, 1977, at the Atlanta Civic Center, Room 104, 395 Piedmont Avenue NE., Atlanta, Georgia 30308. Any person who has an interest in the subject of the hearing, may make a written request or a verbal request if confirmed in writing, for an opportunity to make an oral presentation. That request should be directed to Warren Zurn, FEA Region IV, 1655 Peachtree Street NE., Atlanta, Georgia 30309, 405-881-4463. The request should be received before 4:30 p.m., Friday May 20, 1977. The request should describe the person's interest in the issue(s) involved; if appropriate, it should state why the person is an appropriate representative of the group or class of persons which has such an interest; it should give a concise summary of the proposed oral presentation and a phone number where the person may be contacted through May 25, 1977. Speakers should submit 10 copies of their oral presentation if possible, unless such presentation is less than five (5) pages, in which case only one copy is required to Donald Allen, Regional Administrator, Federal Energy Administration, 1655 Peachtree Street NE., Atlanta, Georgia 30309, before 4:30 p.m., Wednesday May 25, 1977. Speakers will be contacted by an FEA representative before 4:30 p.m., Monday, May 23, 1977, to confirm receipt of the written request.

Detailed technical data, views, and arguments should be contained in a written submission in support of the oral presentation. The oral presentation itself should be a summary of those written comments.

While FEA will endeavor to provide adequate opportunity to all who desire to speak, FEA reserves the right to limit the number of persons to be heard at the hearing, to schedule their respective presentations, and to establish the procedures governing the conduct of the hearing. The length of time allocated to each presentation may be limited on the basis of the number of persons requesting to be heard. The FEA will prepare an agenda that shall provide, to the extent possible, for the presentation of all relevant data, views, and arguments.

An FEA official will be designated to preside at the hearing, which will not be a judicial or evidentiary hearing. During oral presentations, only those conducting the hearing may ask questions. There will be no cross-examination. At the conclusion of all initial oral presentations, each person who has made an oral statement will be given the opportunity, if he or she so desires, to make a rebuttal

statement. The rebuttal statements will be given in the order in which the initial statements were made and will be subject to time limitations.

Any interested person may submit written questions to the presiding officer to be asked of any person making an oral presentation. The presiding officer will determine whether to ask the question, having first determined whether the question is relevant, and whether adequate time may be afforded for an answer.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made and it, together with any written comments submitted in the course of the hearing, will be retained by the FEA and made available for inspection and copying at the Freedom of Information Reading Room, Room 2107, Federal Building, 12th and Pennsylvania Avenue NW., Washington, D.C., and the FEA Regional Office 1655 Peachtree Street NE., 7th Floor, Atlanta, Georgia 30309, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday. Anyone may purchase a copy of the transcript from the reporter.

Interested persons are invited to submit written comments consisting of data, views, or arguments with respect to the proposed Construction Orders to Executive Communications, Federal Energy Administration, Federal Building, Room 3317, Box MK, Washington, D.C. 20461.

Comments and other documents submitted to FEA Executive Communications should be identified on the outside of the envelope in which they are transmitted and on the document itself with the designation "Proposed Construction Order for the _____ Installation." Fifteen copies should be submitted.

All written comments received by 4:30 p.m., Tuesday, June 14, 1977, all oral presentations, and all other relevant information submitted to or otherwise available to FEA will be considered by FEA prior to issuance of a Construction Order.

Any information or data considered by the person furnishing it to be confidential must be so identified and submitted in writing, one copy only. The FEA reserves the right to determine the confidential status of the information or data and to treat it in accordance with that determination.

Copies of the regulations implementing Section 2 of ESECA (10 CFR Parts 303 and 307) are available from the FEA Regional Offices:

FEDERAL ENERGY ADMINISTRATION, REGIONAL OFFICES

Region, Address, and Phone

I. Robert Mitchell, Regional Administrator, 150 Causeway Street, Room 700, Boston, Mass. 02113—617-223-3701.

II. Alfred Kleinfeld, Regional Administrator, 26 Federal Plaza, Room 3206, New York, N.Y. 10007—212-264-1021.

III. J. A. LaSala, Regional Administrator, 1421 Cherry Street, Room 1001, Philadelphia, Pa. 19102—215-597-3390.

IV. Donald Allen, Regional Administrator, 1655 Peachtree Street NW., 8th Floor, Atlanta, Ga. 30309—404-526-2837.

V. N. Allen Andersen, Regional Administrator, Federal Office Building, Room A-333, 175 West Jackson Blvd., Chicago, Ill. 60604—312-353-0540.

VI. Delbert Fowler, Regional Administrator, P.O. Box 35228, 2626 West Mockingbird Lane, Dallas, Tex. 214-749-7345.

VII. Neil Adams, Regional Administrator, 1150 Grand Avenue, Kansas City, Mo. 64106—816-374-2061.

VIII. Dudley Faver, Regional Administrator, P.O. Box 26247, Belmar Branch, 1075 South Yukon Street, Lakewood, Colo. 80226—303-234-2420.

IX. William Arntz, Regional Administrator, 111 Pine Street, San Francisco, Calif. 94111—415-556-7216.

X. Jack B. Robertson, Regional Administrator, 1992 Federal Building, 915 Second Avenue, Seattle, Wash. 98174—206-442-7280.

MFBI CONSTRUCTION ORDER CANDIDATE IDENTIFICATION AND SELECTION METHODOLOGY

FEA has conducted a two part process in which it first identified the potential universe of major fuel burning installations (MFBI's) that were in the early planning process in order to determine which MFBI's might be subject to Construction Orders requiring that the MFBI be designed and constructed to be capable of using coal as its primary energy source. FEA then performed a detailed analysis of individual potential order recipients to determine whether the facts would warrant publication of a Notice of Intention (NOI) to Issue a Construction Order to any of the potential order recipients.

I. *Determination of candidate universe.* On February 3, 1977, FEA published in the FEDERAL REGISTER (42 FR 6621) a notice requiring owners of MFBI's in the early planning process to complete Schedules A-1 and A-2 of Form FEA C-607-S-0, entitled "Major Fuel Burning Installation Early Planning Process Identification Report." (An MFBI has entered the early planning process by completing its preliminary feasibility study.) Respondents were required to complete these schedules if the MFBI's were planned with at least the minimum required design firing rate (generally 100 MM Btu per hour).

Schedulue A-1 contained basic identifying data for a particular MFBI. Schedule A-2 is designed to provide FEA with information on combustor capacity, combustor use, the primary energy source, and the design and construction schedule, including the processing status of any required government permits.

After receiving the information on Schedules A-1 and A-2, FEA first determined which MFBI's were no longer in the early planning process according to Section 307.2 of the FEA regulations, which states that the early planning process terminates when the MFBI "can no longer be ordered, to be designed and constructed so as to be capable of burning coal as its primary energy source without suffering significant financial or operational detriment due to the impairment of prior commitments."

In addition, FEA deferred from further consideration certain other MFBI's based on the information contained in Schedulues A-1 and A-2. To date, consideration of the following types of MFBI's has been deferred:

(a) Those planning to use exclusively non-fossil fuels as their primary energy source, usually wood waste, bagasse, or electricity;

(b) Those planned so as to be capable of using only coal as their primary energy source;

(c) Those planning to construct units that will be used exclusively for process uses that require utilization of natural gas or petroleum products (process use is defined in section 303.2 of the FEA regulations (10 CFR 303.2) as that fuel use for which alternate fuels are not technically feasible);

(d) Those planning exclusively to use waste gas that would not be added to the nationwide pipeline supply, or petroleum by-products that are not suitable for general commercial uses (typically these fuels are waste gases or petroleum by-products generated by refinery processes and are used in refinery steam generators).

Issuing orders to the first category of MFBI's, above, would not contribute to the saving of any oil or natural gas. Burning of non-fossil fuels, furthermore, contributes to the purpose of ESECA to aid in meeting the essential needs of the United States for fuels in the same manner as does the increased burning of coal.

In addition, FEA has exercised its administrative discretion to defer consideration of MFBI's currently planning to burn coal as their only energy source because of programmatic necessity to establish reasonable priorities. Should either units planning to use a non-fossil fuel, or units planning to burn only coal change their current plans they are to amend their response to Form FEA C-607-S-0.

FEA has applied its administrative discretion and technical expertise to determine that certain types of facilities should be covered by the "process use" exemption referred to in subparagraph (c) above. Certain of these processes reflect uses for which the burning of coal is not technically feasible. The following types of facilities have been included to date in the "process use" exemption:

(1) Refinery heaters and furnaces;

(2) Copper refining and melting furnaces;

(3) Chemical plant process heaters and recovery furnaces;

(4) Oxygen blown steelmaking vessels;

(5) Primary float glass tanks;

(6) Direct fired kilns and dryer burners (producing low alkaline products).

FEA has also determined that deferring issuance of NOI's to those MFBI's that use waste gas or petroleum by-products not suitable for other commercial uses would best serve the purposes of ESECA. The uses to which these waste fuels are currently put represent efficient use of national resources. Prohibiting the

use of these waste fuels would not significantly conserve national supplies of scarce fuels.

MFBI's deferred on the basis of the above criteria are notified by letter that they will not be required to submit further information at this time. All other MFBI's in the early planning process are required by FEA to complete Schedule A–3 of Form FEA C–607–S–0. Schedule A–3 is designed to elicit detailed financial information about the MFBI owner's estimate of capital costs that would be associated with the construction of a coal capable unit. Comparative fuel costs and the net operating cost differential resulting from burning coal are also elicited by Schedule A–3. The owner's financial history and information on coal availability are also obtained.

After receipt of the information contained in Schedule A–3, FEA analyzes the capability of the owner of the MFBI to recover any increase in projected capital investment costs required as a result of a Construction Order. An owner of an MFBI is capable of recovering any increase in projected capital investment that might be required as a result of a Construction Order if the MFBI is able to make the original investment planned (prior to issuance of a Construction Order) plus any increase required as a result of a Construction Order and continue in business in at least a financially breakeven posture over the long run. FEA presumes that an MFBI owner's capability to recover capital is confirmed when that owner can both raise the necessary capital for construction of an MFBI with coal burning capability and can show an historical profit profile. Factors used in analyzing that presumption include the size of the additional capital investment necessary to comply with a Construction Order, net property and plant assets, historical construction expenditures and total equity of the owner. FEA also considers any loss of revenue resulting from a delay caused by a Construction Order. Such losses, if any, are considered in terms of increased or additional costs which an MFBI incurs for goods or services, including power, which must be purchased by the MFBI to replace those goods or services which the MFBI would have produced for itself but for the issuance of a Construction Order. Such costs will be limited to the difference between the anticipated cost of production of the goods or services at the MFBI, and the cost of purchasing replacement goods or services.

In addition, section 2(c) of ESECA indicates that FEA may not issue Construction Order NOI's to an MFBI if it determines that an adequate and reliable supply of coal is not expected to be available. To meet this statutory requirement, FEA considers the availability nationwide of total tonnages of coal, based upon the presumption that an MFBI in the early planning process can be designed and constructed to use a wide range of coal types available.

FEA also considers, prior to issuance of an MFBI Construction Order NOI, the existence and effects of any contractual commitment for the construction of the MFBI upon the owner's capability to recover any increase in capital investment required as a result of a Construction Order.

It is to be noted that much of the information used by FEA to make its practicability findings is arguably confidential under 18 U.S.C. 1905. Therefore, such information has not appeared in the Appendix to the NOI. The calclulations have been explained in each case and the data are available to the representatives of the owner of the MFBI.

Any questions regarding this Notice should be directed to the FEA National Office as follows: Federal Energy Administration, Code OCU (Construction Order: _____ Installation), Washington, D.C. 20461, 202–566–7941.

(Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 791 et seq.), as amended by Pub. L. 94–163; Federal Energy Administration Act of 1974 (15 U.S.C. 761 et seq.), as amended by Pub. L. 94–385; E.O. 11790 (39 FR 23185).)

Issued in Washington, D.C., May 9, 1977.

ERIC J. FYGI,
Acting General Counsel,
Federal Energy Administration.

APPENDIX—PROPOSED FINDINGS AND RATIONALE FOR NOTICE OF INTENTION TO ISSUE A CONSTRUCTION ORDER

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit	Location
OCU-7410-3-1 OCU-7410-3-2	United States Steel Corp.	Fairfield	Boiler 9 Boiler 10	Fairfield, Ala.

These findings, determinations, and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

United States Steel Corporation shall be referred to as the "owner." Fairfield Boilers 9 and 10 shall be referred to as the "MFBI's."

I. *Proposed findings.* A. *The MFBI's are in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C–607–S–0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI's are in the early planning process. This proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A–2 of Form FEA C–607–S–0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the early planning process for these MFBI's has not terminated.

3. Schedule A–2 of Form FEA C–607–S–0 submitted by the owner shows that the MFBI's meet the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to be available.* This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.* (a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability.

(b) *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

(1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	701.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	Production (million tons)
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the auhtority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	Demand (million tons)
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	Demand (million tons)
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

(c) *State or local laws:* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from these MFBI's and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c) of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal production potential in 1985 cited in paragraph 2.(a), above, tends to underestimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once these MFBI's and others become operational.

FEA expects, however, (based on an analysis of the "BOM Survey", the Coal Mine Expansion Study, the FEA 1976 National Energy Outlook, and the "Availability Report", cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to meet the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for these MFBI's once they become operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to the MFBIs' location. FEA observes, however, that the MFBI's could purchase coal in other markets as such production becomes available. (The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond, School of Engineering, University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.*

A. *The existence and effects of any contractual commitment for the construction of the MFBI's.* FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI's which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C-607-S-0 Schedule A-3, or otherwise. FEA has considered the additional costs which would be incurred in connection with existing contractual commitments should FEA require that the MFBI's be designed and constructed to be capable of using coal as their primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a result of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI's to be capable of burning coal as their primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the Dun and Bradstreet Reference Book, (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II. A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI's resulting from a Construction Order, the owner's historical profit profile, and a presumed useful life of the MFBI's after construction of 40 years.

In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit profile.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue a Construction Order

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Number of units	Location
OCU-3300-1-1	International Paper Co.	Georgetown mill	6	Georgetown, S.C.

These findings, determinations and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

International Paper Company shall be referred to as the "owner". Georgetown Mill 6 shall be referred to as the "MFBI".

I. *Proposed findings.*—A. *The MFBI is in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C-607-S-0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI is in the early planning process. This proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the early planning process for this MFBI has not terminated.

3. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the MFBI meets the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to*

be available. This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.*—(a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) (hereafter "BOM Survey")). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability.

(b) *Nation coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99 percent of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

(1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study, (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977, (hereafter "Availability Report") indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

(c) *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from this MFBI and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c) of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal production potential in 1985 cited in paragraph 2.(a), above, tends to underestimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once this MFBI and others become operational.

FEA expects, however, (based on an analysis of the "BOM Survey", the Coal Mine Expansion Study, the FEA 1976 National Energy Outlook, and the "Availability Report", cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to meet the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for this MFBI once it becomes operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for this MFBI will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location. FEA observes, however, that the MFBI could purchase coal in other markets as such production becomes available. (The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond, School of Engineering, University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.*—A. *The existence and effects of any contractual commitment for the construction of the MFBI.* FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C-607-S-0 Schedule A-3, or otherwise, FEA has considered the additional costs which would be incurred in connection with existing contractual commitments should FEA require that the MFBI be designed and constructed to be capable of using coal as its primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a result of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI to be capable of burning coal as its primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply wtih applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the Dun and Bradstreet Reference Book, (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II.A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI resulting from a Construction Order, the owner's historical profit profile, and a presumed useful life of the MFBI after construction of 40 years.

In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit profile.

APPENDIX—PROPOSED FINDINGS AND RATIONALE FOR NOTICE OF INTENTION TO ISSUE A CONSTRUCTION ORDER

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit	Location
OCU-6650-5-1 OCU-6650-5-2	Shell Oil Co.	Mobile Chemical plant	EPP-MOP-BLR-1 EPP-MOP-BLR-2	Mobile, Ala.

These findings, determinations and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

Shell Oil Company shall be referred to as the "owner". Mobile Chemical Plant EPP-MOP-BLR-1 and EPP-MOP-BLR-2 shall be referred to as the "MFBI's".

I. *Proposed findings.*—A. *The MFBI's are in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C-607-S-0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI's are in the early planning process. This proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the early planning process for these MFBI's has not terminated.

3. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the MFBI's meet the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to be available.* This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.* (a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability.

(b) *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99 percent of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

(1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's *Coal Mine Expansion Study* (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, *Coal Availability Report*, April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (*FEA 1976 National Energy Outlook*):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

(c) *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from these MFBI's and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c) of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal production potential in 1985 cited in paragraph 2.(a), above, tends to underestimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once these MFBI's and others become operational.

FEA expects, however, (based on an analysis of the "BOM Survey", the *Coal Mine Expansion Study*, the *FEA 1976 National Energy Outlook*, and the *"Availability Report"*, cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to meet the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for these MFBI's once they become operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location. FEA observes, however, that the MFBI's could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond*, School of Engineering, University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.*

A. *The existence and effects of any contractual commitment for the construction*

of the MFBI's. FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI's which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C–607–S–0 Schedule, A–3, or otherwise. FEA has considered the additional costs which would be incurred in connection with existing contractual commitments should FEA require that the MFBI's be designed and constructed to be capable of using coal as their primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a result of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI's to be capable of burning coal as their primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the *Dun and Bradstreet Reference Book* (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II.A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI's resulting from a Construction Order, the owner's historical profit profile, and a presumed useful life of the MFBI's after construction of 40 years.

In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit profile.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue a Construction Order

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBI named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit	Location
OCU–1300–1–1	Goodyear Tire and Rubber Co.	Goodyear Gadsden plant	Boiler 1	Gadsden, Ala.

These findings, determinations and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

Goodyear Tire and Rubber Company be referred to as the "owner". Goodyear Gadsden Plant Boiler 1 shall be referred to as the "MFBI".

I. *Proposed findings.*

A. *The MFBI is in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C–607–S–0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI is in the early planning process. The proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A–2 of Form FEA C–607–S–0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the early planning process for this MFBI has not terminated.

3. Schedule A–2 of Form FEA C–607–S–0 submitted by the owner shows that the MFBI meets the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to be available.* This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.*— (a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (*Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974,* Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1% or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability.

(b) *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

(1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 project therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

(c) *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from this MFBI and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c) of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully development because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal production potential in 1985 cited in paragraph 2.(a), above, tends to underestimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once this MFBI and others become operational.

FEA expects, however, (based on a analysis of the "BOM Survey", the *Coal Mine Expansion Study,* the *FEA 1976 National Energy Outlook,* and the "Availability Report", cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to meet the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for this MFBI once it becomes operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for this MFBI will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location. FEA observes, however, that the MFBI could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond,* School of Engineering, University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.*

A. *The existence and effects of any contractual commitment for the construction of the MFBI.* FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C-607-S-0 Schedule A-3, or otherwise. FEA has considered the additional costs which would be incurred in connection with existing contractual commitments should FEA require that the MFBI be designed and constructed to be capable of using coal as its primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a result of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI to be capable of burning coal as its primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the *Dun and Bradstreet Reference Book,* (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II.A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI resulting from a Construction Order, the owner's historical profit profile, and a presumed useful life of the MFBI after construction of 40 years.

In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit profile.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue a Construction Order

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBI named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit	Location
OCU-7050-1-1	J. P. Stevens and Co., Inc.	Delta 3	6	Wallace, S.C.

These findings, determinations and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

J. P. Stevens and Company, Incorporated shall be referred to as the "owner". Delta 3, Unit 6 shall be referred to as the "MFBI".

I. *Proposed findings.*—A. *The MFBI is in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C-607-S-0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI is in the early planning process. This proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the early planning process for this MFBI has not terminated.

3. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the MFBI meets the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to be available.* This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.*—(a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) (hereafter "BOM Survey")). Within these recoverable reserves approximately 200 billion tons contain 1% or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability.

(b) *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from responses to a survey of coal producing companies) shows that there there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

(1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

(c) *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from this MFBI and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c) of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal production potential in 1985 cited in paragraph 2.(a), above tends to under estimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once this MFBI and others become operational. FEA expects, however, (based on an analysis of the "BOM Survey", the Coal Mine Expansion Study, the FEA 1976 National Energy Outlook, and the "Availability Report", cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to meet the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for this MFBI once it becomes operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for this MFBI will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location. FEA observes, however, that the MFBI could purchase coal in other markets as such production becomes available. (The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond, School of Engineering, University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.*—A. *The existence and effects of any contractual commitment for the construction of the MFBI.* FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C-607-S-0 Schedule A-3, or otherwise. FEA has considered the additional costs which would be incurred in connection with existing contractual commitments should FEA require that the MFBI be designed and constructed to be capable of using coal as its primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a resut of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI to be capable of burning coal as its primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the *Dun and Bradstreet Reference Book,* (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II.A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI resulting from a Construction Order, the owner's historical profit profile, and a presumed useful life of the MFBI after construction of 40 years.

In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit profile.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue A Construction Order

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBI named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit	Location
OCU-4210-1-1	Kimberly-Clark Corp.	Memphis mill	Boiler 5	Memphis, Tenn.

These findings, determinations and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

Kimberly-Clark Corporation shall be referred to as the "owner". Memphis Mill Boiler 5 shall be referred to as the "MFBI".

I. *Proposed findings.*

A. *The MFBI is in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C-607-S-0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI is in the early planning process. This proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the

early planning process for this MFBI has not terminated.

3. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the MFBI meets the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to be available.* This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.*—(a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data shows a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, with together provide the best current evidence as to coal availability.

(b) *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99 percent of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

(1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

(c) *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from this MFBI and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c), of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal prdouction potential in 1985 cited in paragraph 2.(a), above, tends to underestimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once this MFBI and others become operational.

FEA expects, however, (based on an analysis of the "BOM Survey", the *Coal Mine Expansion Study*, the *FEA 1976 National Energy Outlook*, and the "Availability Report", cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to meet the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for this MFBI once it becomes operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for this MFBI will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location. FEA observes, however, that the MFBI could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expended Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond*, School of Engineering, University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.*

A. *The existence and effects of any contractual commitment for the construction of the MFBI.* FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C-607-S-0 Schedule A-3, or otherwise. FEA has considered the additional costs which would be incurred in connection with existing contractual commitments should FEA require that the MFBI be designed and constructed to be capable of using coal as its primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a result of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI to be capable of burning coal as its primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the *Dun and Bradstreet Reference Book*, (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II.A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI resulting from a Construction Order, the own-

er's historical profit profile, and a presumed useful life of the MFBI after construction of 40 years.

In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit profile.

APPENDIX—PROPOSED FINDINGS AND RATIONALE FOR NOTICE OF INTENTION TO ISSUE A CONSTRUCTION ORDER

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit	Location
OCU-4920-1-1 OCU-4920-1-2 OCU-4920-1-3	Phillip Morris, Inc./Miller Brewing Co.	Eden plant	Combustion engineering. Riley 1 Riley 2	Eden, N.C.

These findings, determinations and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

Phillip Morris, Incorporated/Miller Brewing Company shall be referred to as the "owner". Eden Plant Combustion Engineering, Riley 1 and Riley 2 shall be referred to as the "MFBI's".

I. *Proposed findings.*—A. *The MFBI's are in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C-607-S-0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI's are in the early planning process. This proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the early planning process for these MFBI's has not terminated.

3. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the MFBI's meet the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to be available.* This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.* (a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability.

(b) *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99 percent of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

(1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
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1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977 (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	843
1982	887
1983	935
1984	985
1985	1,040

(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

(c) *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from these MFBI's and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c) of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal production potential in 1985 cited in paragraph 2.(a), above tends to underestimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once these MFBI's and others become operational FEA expects, however, (based on an analysis of the "BOM Survey", the Coal Mine Expansion Study, the FEA 1976 National Energy Outlook, and the "Availability Report", cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to meet the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for these MFBI's once they become operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location. FEA observes, however, that the MFBI's could purchase coal in other markets as such production becomes available. (The Feasibility of Considering Expanded Use of Western Coal by Midwest-

ern and Eastern Utilities in the Period 1978 and Beyond, School of Engineering University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.*—A. *The existence and effects of any contractual commitment for the construction of the MFBI's.* FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI's which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C–607–S–0 Schedule A–3, or otherwise. FEA has considered the additional costs which would be incurred in connection with existing contractural commitments should FEA require that the MFBI's be designed and constructed to be capable of using coal as their primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a result of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI's to be capable of burning coal as their primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the Dun and Bradstreet Reference Book, (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II. A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI's resulting from a Construction Order, the owner's historical profit profile, and a presumed useful life of the MFBI's after construction of 40 years. In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit-profile.

APPENDIX—PROPOSED FINDINGS AND RATIONALE FOR NOTICE OF INTENTION TO ISSUE A CONSTRUCTION ORDER

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBIs named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit	Location
OCU-3280-1-1	B. F. Goodrich Co./B. F. Goodrich Chemical Co.	Louisville plant.	Boiler 7	Louisville, Ky.

These findings, determinations and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

B. F. Goodrich Company/B. F. Goodrich Chemical Company shall be referred to as the "owner". Louisville Plant Boiler 7 shall be referred to as the "MFBI".

I. *Proposed findings.*

A. *The MFBI is in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C–607–S–0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI is in the early planning process. This proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A–2 of Form FEA C–607–S–0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the early planning process for this MFBI has not terminated.

3. Schedule A–2 of Form FEA C–607–S–0 submitted by the owner shows that the MFBI meets the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to be available.* This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.* (a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability.

(b) *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99 percent of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production. (1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from *FEA's Coal Mine Expansion Study* (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977 (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	Demand (million tons)
1978	11.0
1979	22.4
1980	32 5
1981	35. 8
1982	57. 4
1983	59. 8
1984	59. 8

(c) *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from this MFBI and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c) of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal production potential in 1985 cited in paragraph 2.(a), above, tends to underestimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once this MFBI and others become operational.

FEA expects, however, (based on an analysis of the "BOM Survey", the *Coal Mine Expansion Study,* the *FEA 1976 National Energy Outlook,* and the "Availability Report", cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to meet the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for this MFBI once it becomes operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for this MFBI will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location. FEA observes, however, that the MFBI could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond,* School of Engineering, University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.* A. *The existence and effects of any contractual commitment for the construction of the MFBI.* FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C-607-S-0 Schedule A-3, or otherwise. FEA has considered the additional costs which would be incurred in connection with existing contractual commitments should FEA require that the MFBI be designed and constructed to be capable of using coal as its primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a result of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI to be capable of burning coal as its primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the *Dun and Bradstreet Reference Book* (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II.A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI resulting from a Construction Order, the owner's historical profit profile, and a presumed useful life of the MFBI after construction of 40 years.

In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit profile.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue A Construction Order

ESECA and the FEA regulations require FEA to make certain findings and determinations and to consider certain factors before issuing a Construction Order to a Major Fuel Burning Installation (MFBI). FEA's proposed findings, as well as its proposed conclusions with respect to the factors FEA has considered, are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit	Location
OCU-2820-1-1	Federal Paper Board Co., Inc.	Rieglewood operations.	Power boiler 5	Rieglewood, N.C.

These findings, determinations and considerations, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Construction Order.

Federal Paper Board Company, Incorporated shall be referred to as the "owner". Rieglewood Operations Power Boiler 5 shall be referred to as the "MFBI".

I. *Proposed findings.*

A. *The MFBI is in the early planning process.* Based on an analysis of the information submitted to FEA by the owner on Form FEA C-607-S-0 and information provided by the owner in response to subsequent inquiry to assure the continued applicability and currency of such information, including, as appropriate, an on-site inspection visit, FEA proposes to find that the MFBI is in the early planning process. This proposed finding is based on the facts, assumptions and reasoning referenced below:

1. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the preliminary feasibility study was completed.

2. Information supplied by the owner or otherwise acquired by FEA indicates that the early planning process for this MFBI has not terminated.

3. Schedule A-2 of Form FEA C-607-S-0 submitted by the owner shows that the MFBI meets the minimum design firing rate requirement.

B. *Within the terms of ESECA, FEA has been unable to determine that an adequate and reliable supply of coal is not expected to be available.* This proposed determination is based upon the facts, interpretations and assumptions stated below:

1. *Coal availability.*—(a) *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the future. United States Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (*Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974,* Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1% or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein which together provide the best current evidence as to coal availability.

(b) *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned coal production (derived from re-

sponses to a survey of coal producing companies) shows that there should be sufficient Op 31-10; J. 90-000; Fol. 1122; Mach. 68 production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets over 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

(1) *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

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1982	369.9
1983	396.2
1984	475.5
1985	544.9

(2) *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
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1979	764
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1981	842
1982	887
1983	935
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(3) *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from all Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

(c) *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

(d) *Conclusion.* Potential coal demand from this MFBI and from all other MFBI's which are currently under consideration to receive Notices of Intention to issue Construction Orders under authority of Section 2(c) of ESECA is not included in the total national demand stated in paragraph 1.(b)(2), above. Coal demand from such MFBI's is also not calculated in currently projected ESECA generated demand since it is infeasible to anticipate specific quality characteristics for the coal that will be required by these MFBI's so far in advance of their actual construction.

As noted previously, plans for new coal production beyond 1980 are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future. The projection for national coal production potential in 1985 cited in paragraph 2.(a), above, tends to underestimate actual production potential.

FEA has considered these facts and the fact that the potential annual demand for coal will increase once this MFBI and others become operational.

FEA expects, however, (based on an analysis of the "BOM Survey", the *Coal Mine Expansion Study,* the *FEA 1976 National Energy Outlook,* and the "Availability Report," cited above) that national coal production potential will substantially exceed the total national demand for coal in amounts sufficient in any year to met the estimated potential additional demand for coal if all MFBI's currently under consideration were to receive Construction Orders under Section 2(c) of ESECA. Within the terms of ESECA, FEA has been unable to determine that coal is not expected to be available for this MFBI once it becomes operational. The best available evidence suggests that coal production potential will, in fact, considerably exceed all demand for the years pertinent to this proposed order.

The coal for this MFBI will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location. FEA observes, however, that the MFBI could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond,* School of Engineering, University of Pennsylvania, November 7, 1975.)

(e) *Coal transportation.* FEA has considered the availability of national coal transportation facilities. Generally, FEA considers construction lead times pertinent to MFBI's in the early-planning process to be sufficient to allow owners to secure appropriate coal transportation and coal transportation facilities prior to becoming operational.

II. *Factors which ESECA requires FEA to consider.*

A. *The existence and effects of any contractual commitment for the construction of the MFBI.* FEA has considered the existence and effects of any contractual commitment for the construction of the MFBI which the owner has reported to FEA in a Schedule of Plan Change Costs attachment to a Form FEA C-607-S-0 Schedule A-3, or otherwise. FEA has considered the additional costs which would be incurred in connection with existing contractual commitments should FEA require that the MFBI be designed and constructed to be capable of using coal as its primary energy source. Accordingly, FEA has included these costs in its consideration of the capability of the owner to recover any increase in capital investment required as a result of a Construction Order.

B. *The capability of the owner to recover any increase in projected capital investment required as a result of a construction order.* FEA has considered, in the manner described below, the capability of the owner to raise and to recover the increased capital investment expected to result from the issuance of a Construction Order.

1. *Increased capital investment required as a result of a construction order.* FEA has evaluated the additional capital investment costs required in order to design and construct the MFBI to be capable of burning coal as its primary energy source. This calculation is based on existing FEA information and analysis, as well as information filed with FEA by the owner concerning the cost of equipment and facilities that would have to be acquired. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

2. *Capability of the owner to raise the increased capital investment.* This analysis is based upon an evaluation of the owner's current financial position as reported in the *Dun and Bradstreet Reference Book,* (March 1977). Where necessary, FEA has performed an independent analysis of the owner's financial capability. In those cases in which an independent analysis of the owner's ability to recover the additional capital investment was performed, FEA related the additional capital investment costs discussed in paragraph B.1., above, and the plan change costs discussed in paragraph II.A., above, to the owner's net property and plant assets, the owner's reported recent construction expenditures and the owner's equity.

In considering the owner's ability to recover the increased capital investment costs, FEA has compared these increased costs, the demonstrated ability of the owner to raise the additional capital, any loss of revenue resulting from a delay, if any, in the commencement of operations of the MFBI resulting from a Construction Order, the owner's historical profit profile, and a presumed useful life of the MFBI after construction of 40 years.

In light of such considerations, FEA presumes that the owner's capability to recover any increase in capital is confirmed since the owner can both raise the necessary additional capital for construction with coal burning capability and has historically shown a profit profile.

[FR Doc.77-13701 Filed 5-13-77;8:45 am]

ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT

Intent To Issue Prohibition Orders To Certain Installations

The Federal Energy Administration (FEA) hereby gives notice of its intention to issue Prohibition Orders, pursuant to the authorities granted it by Section 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974, as amended (ESECA), and Title 10, Code of Federal Regulations (10 CFR), Parts 303 and 305 to the following installations:

Docket No.	Owner	Installation	Unit No.	Location
OCU-0342	Union Camp Corp.	Savannah plant	10	Savannah, Ga.
OCU-0651	Scott Paper Co.	Mobile plant	4,6	Mobile, Ala.
OCU-0778	International Paper Co.	Vicksburg plant	1	Vicksburg, Miss.
OCU-0991	Continental Forest Industries, a member of the Continental Group, Inc.	Port Wentworth mill	1,2,3,4	Port Wentworth, Ga.
OCU-1396	Weyerhaeuser Co.	Plymouth plant	2,3	Plymouth, N.C.
OCU-2057	Monsanto Co.	Pensacola plant	1,2,3,4,5,6	Pensacola, Fla.
OCU-2612	Bowater Southern Paper Corp.	Calhoun mill	1,2,3,4,5	Calhoun, Tenn.
OCU-3066	Westvaco Corp.	Charleston plant	4,5	Charleston, S.C.

FEA hereby also gives notice of the opportunity for oral and written presentation of data, views, and arguments by interested persons regarding these proposed Prohibition Orders.

The proposed orders would prohibit the above-named installations from burning natural gas or petroleum products as their primary energy source.

Prior to issuance of a Prohibition Order to an installation, Section 2(a) of ESECA and 10 CFR 303.36(b) and 305.4(b) require that FEA find that the installation had the capability and necessary plant equipment to burn coal as of June 22, 1974. A Prohibition Order may not be issued unless FEA can find that the prohibition of the utilization of natural gas or petroleum products as a primary energy source is practicable and consistent with the purposes of ESECA and that coal and coal transportation facilities will be available during the period the Prohibition Order will be in effect. FEA's proposed findings, as well as its proposed conclusions and rationale with respect to these findings, for each installation are set out in the Appendix to this notice. These findings, conclusions, and rationale may be amended as a result of comments received by FEA pursuant to this notice and other information available to FEA. The findings, conclusions, and rationale will be included, with any amendments, for each Prohibition Order that is issued.

Upon completion of the proceedings described in this notice, FEA may determine to issue Prohibition Orders to some or all of the above-named installations. These Prohibition Orders will not become effective, however, until (1) either (a) the Administrator of the Environmental Protection Agency (EPA) notifies the FEA, in accordance with Section 119(d)(1)(B) of the Clean Air Act, that the installation is able to burn coal and to comply with all applicable air pollution control requirements without a compliance date extension under Section 119(c) of such Act, or (b) if such notification is not given by EPA, the date that the Administrator of EPA certifies, pursuant to Section 119(d)(1)(B) of the Clean Air Act, is the earliest date that the installation will be able to comply with all applicable requirements of Section 119 of that Act, and (2) FEA has considered the environmental impact of making the order effective, pursuant to 10 CFR 208.3(a)(4) and 305.9, and has served the affected installation with a Notice of Effectiveness, as provided in 10 CFR 303.10(b), 303.37(b), and 305.7. The date the Prohibition Order will be effective will be stated in the Notice of Effectiveness.

10 CFR 305.9 requires that, prior to issuance of a Notice of Effectiveness to an installation, FEA shall perform an analysis of the environmental impact of the issuance of such Notice of Effectiveness. That analysis shall result in either (1) issuance of a declaration that the Prohibition Order will not, if made effective by issuance of a Notice of Effectiveness, be likely to have a significant impact on the quality of the human environment, or (2) the preparation by FEA of an environmental impact statement covering significant site-specific impacts that are likely to result from the Prohibition Order and that have not been adequately addressed in the Final Programmatic Environmental Impact Statement or in other official documents made publicly available. If FEA prepares an environmental impact statement covering significant site-specific impacts resulting from making a Prohibition Order effective, the statement shall be prepared and published for comment in accordance with Section 102(2)(C) of the National Environmental Policy Act of 1969 prior to issuance of a Notice of Effectiveness. Interested persons may request a public hearing pursuant to 10 CFR 303.173 to comment on the contents of a draft environmental impact statement. With respect to comments regarding any impact on air quality that might result from a proposed Prohibition Order, however, it should be recognized that ESECA has assigned to EPA the primary responsibility for analyzing the effect of any such order on the Nation's air quality and for determining the applicable air pollution control requirements that apply to the installation that has been issued an order. It is expected that, in almost every case, an installation to which a Prohibition Order is issued will be eligible to apply to EPA for a compliance date extension. In connection with that application, EPA must also provide an opportunity for written comment and oral presentation of data, views, and arguments by interested persons. Enclosed with the Notice of Effectiveness may be a compliance reporting schedule to insure that the installation will be able to comply with the prohibition of the burning of natural gas or petroleum products as a primary energy source on the effective date specified in the Notice of Effectiveness.

Public comment on the proposals to issue Prohibition Orders to the installations listed above is invited in the form of written and oral presentation of data, views, and arguments. Comments should relate to individual docket numbers and should make clear to which docket number the individual comment is addressed.

Comments should address (1) the adequacy and validity of each of the proposed findings and the conclusions and rationale in support of these findings, (2) the environmental impact of making effective a Prohibition Order, including any site-specific environmental impacts, and (3) any other aspects or impacts of the proposed Prohibition Order believed to be relevant.

Pursuant to 10 CFR 303.173 (a) and (d) and 305.5, FEA hereby announces that a public hearing to receive oral presentation of data, views, and arguments of interested persons will be held beginning at 9 a.m. on May 26 and 27, 1977, at the Atlanta Civic Center, Room 104, 395 Piedmont Avenue NE., Atlanta, Georgia 30308. Any person who has an interest in the subject of the hearing or who is a representative of a group or class of persons which has an interest in the subject of the hearing may make a written request, or a verbal request if confirmed in writing, for an opportunity to make an oral presentation. That request should be directed to Warren Zurn, FEA Region IV, 1655 Peachtree Street NE., Atlanta, Georgia 30309, 405-881-4463. The request should be received before 4:30 p.m., Friday May 20, 1977. The request should describe the person's interest in the issue(s) involved; if appropriate, it should state why the person is an appropriate representative of the group or class of persons which has such an interest; it should give a concise summary of the proposed oral presentation and a phone number where the person may be contacted through May 25, 1977. Speakers should submit ten (10) copies of their oral presentation if possible, unless such presentation is less than five (5) pages, in which case only one copy is required, to Donald Allen, Regional Administrator, Federal Energy Administration, 1655 Peachtree Street N.E., Atlanta, Georgia 30309, before 4:30 p.m., Wednesday, May 25, 1977. Speakers will be contacted by an FEA representative before 4:30 p.m., Monday, May 23, 1977, to confirm receipt of the written request.

Detailed technical data, views, and arguments should be contained in a written submission in support of the oral presentation. The oral presentation itself should be a summary of those written comments.

While FEA will endeavor to provide adequate opportunity to all who desire to speak, FEA reserves the right to limit the number of persons to be heard at the hearing, to schedule their respective presentations and to establish the procedures governing the conduct of the hearing. The length of time allocated to each presentation may be limited on the basis of the number of persons requesting to be heard. The FEA will prepare an agenda that shall provide, to the extent possible, for the presentation of all relevant data, views, and arguments.

An FEA official will be designated to preside at the hearing which will not be a judicial or evidentiary hearing. During oral presentations only those conducting the hearing may ask questions. There will be no cross-examination. At the conclusion of all initial oral presentations, each person who has made an oral statement will be given the opportunity, if he or she so desires, to make a rebuttal statement. The rebuttal statements will be given in the order in which the initial statements were made and will be subject to time limitations.

Any interested person may submit written questions to the presiding officer to be asked of any person making an oral presentation. The presiding officer will determine whether to ask the question, having first determined whether the question is relevant, and whether adequate time may be afforded for an answer.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made and it, together with any written comments submitted in the course of the hearing, will be retained by the FEA and made available for inspection and copying at the Freedom of Information Reading Room, Room 2107, Federal Building, 12th and Pennsylvania Avenue NW., Washington, D.C. 20461, and the FEA Regional Office, 1655 Peachtree Street NE., 7th Floor, Atlanta, Georgia 30309, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday. Anyone may purchase a copy of the transcript from the reporter.

Interested persons are invited to submit written comments consisting of data, views, and arguments with respect to these proposed Prohibition Orders to Executive Communications, Box MK, Federal Energy Administration, Federal Building, Room 3317, 12th and Pennsylvania Avenue NW., Washington, D.C. 20461.

Comments and other documents submitted to FEA Executive Communications should be identified on the ouside of the envelope in which they are transmitted and on the document itself with the designation "Proposed Prohibition Order for the _____ Installation." Fifteen copies should be submitted.

All written comments received by 4:30 p.m., Tuesday, June 14, 1977, all oral presentations, and all other relevant information submitted to or available to FEA will be considered by FEA prior to issuance of a Prohibition Order.

Any information or data considered to be confidential by the person furnishing it must be so identified and submitted in writing, one copy only. The FEA reserves the right to determine the confidential status of the information or data and to treat it in accordance with that determination.

Copies of the regulations implementing Section 2 (a) and (b) of ESECA (10 CFR Parts 303 and 305) are available from the following FEA Regional Offices:

REGION, ADDRESS, AND PHONE

I. Robert Mitchell, Regional Administrator, 150 Causeway Street, Room 700, Boston, Mass. 02113—617-223-3701.

II. Alfred Kleinfeld, Regional Administrator, 26 Federal Plaza, Room 3206, New York, N.Y. 10007—212-264-1021.

III. J. A. LaSala, Regional Administrator, 1421 Cherry Street, Room 1001, Philadelphia, Pa. 19102—215-597-3390.

IV. Donald Allen, Regional Administrator, 1655 Peachtree Street NW., 8th Floor, Atlanta, Ga. 30309—404-526-2837.

V. N. Allen Anderson, Regional Administrator, Federal Office Building, 175 West Jackson Blvd., Room A-333, Chicago, Ill. 60604—312-353-0540.

VI. Delbert Fowler, Regional Administrator, Post Office Box 35228, 2626 West Mockingbird Lane, Dallas, Tex. 75235—214-749-7345.

VII. Neil Adams, Regional Administrator, 1150 Grand Avenue, Kansas City, Mo. 64106—816-374-2061.

VIII. Dudley Faver, Regional Administrator, Post Office Box 26247, Belmar Branch, 1075 South Yukon Street, Lakewood, Colo. 80226—303-234-2420.

IX. William Arntz, Regional Administrator, 111 Pine Street, San Francisco, Calif. 94111—415-556-7216.

X. Jack B. Robertson, Regional Administrator, 1992 Federal Building, 915 Second Avenue, Seattle, Wash. 98174—206-442-7280.

MFBI PROHIBITION ORDER CANDIDATE IDENTIFICATION AND SELECTION METHODOLOGY

FEA has engaged in a two year, two part, process in which it first identified, after extensive information gathering, the potential universe of major fuel burning installations (MFBI's) in order to determine which MFBI's might be subject to Prohibition Orders. FEA then performed a detailed analysis of individual potential order recipients to determine whether facts would warrant publication of a Notice of Intention (NOI) to Issue a Prohibition Order to any of the potential order recipients.

I. *Determination of candidate universe.* On March 20, 1975, by Notice in the FEDERAL REGISTER (40 FR 12706), FEA required MFBI's with design firing rates in excess of 100 million BTU's per hour to provide basic identifying information. (FEA in its regulations published on May 9, 1975, (40 FR 20463) adopted the 100 million BTU's per hour design firing rate as the minimum size MFBI that would be eligible for a Prohibition Order).

On April 18, 1975, FEA published notice in the FEDERAL REGISTER (40 FR 17328) that it would mail to all then known MFBI's a questionnaire, entitled "Major Fuel Burning Installation Coal Conversion Report" (Form FEA C-602-S-0), designed to provide FEA with additional information needed to help determine whether the MFBI's would be candidates for Prohibition Orders. Questionnaires were mailed to those respondents to the March 20, 1975, FEDERAL REGISTER notice and to other MFBI's identified through data provided by FEA regional personnel, the Environmental Protection Agency, other Federal agencies, and through contact with trade associations. A total of 822 parent companies responded to the survey, identifying 3,482 installations and 6,289 individual units.

The first survey provided FEA with historical information on quantity and quality of fuel use and preliminary pollution control data relative to the facilities in question.

Compilation and evaluation of the information received from the survey led to development of a supplemental questionnaire (Form FEA C-602-S-1) to elicit data on the financial situation of owners of MFBI's, including information designed to ascertain what the effects of a Prohibition Order would be on an individual company basis. This questionnaire was designed to provide a basis for subsequent analysis of the MFBI in terms of financial capability, additional capital investment costs resulting from a Prohibition Order, operating cost differentials and coal and coal transportation availability. This supplemental questionnaire was sent in June 1976 to various owners of MFBI's to obtain information on 161 sites and 281 individual units.

Most of the supplemental questionnaires (involving 138 sites and 246 units) were sent to owners of MFBI's identified as capable of burning coal in the first questionnaire and which, in 1974, burned at least 150,000 barrels of oil or 921,000,000 cubic feet of natural gas or a Btu equivalent combination. These MFBI's were chosen because of their potential for large fuel savings and the potential low conversion costs to fuel savings ratio.

The other supplemental questionnaires were sent to MFBI's which had indicated an intention to discontinue coal use (23 sites at which there were 35 units).

In September 1976, after responses to the supplemental questionnaires had been received, FEA consulted with the Environmental Protection Agency (EPA) to obtain EPA's best estimate as to the means by which these MFBI's could burn coal and comply with all applicable air pollution control requirements. EPA indicated whether particular MFBI's would require upgrading, or installation of electrostatic precipitators, installation of flue-gas desulfurization devices, or whether the MFBI could burn coal that would conform to air pollution control requirements without pollution control equipment.

II. *Site specific analysis.* Once FEA had gathered the supplemental data relating to the 161 sites, it then conducted a technical analysis for each respondent to the supplemental questionnaire.

FEA prepared a technical summary based on the information provided to enable the Agency to analyze each respondent's potential amenability to receipt of an NOI. The technical summary consisted of the following data:

(a) Expected remaining useful life (respondent's and FEA's estimates);

(b) Unit capacity;

(c) Fuel consumption for 1975;

(d) The last year coal was burned at the installation;

(e) Costs of converting to coal, including pollution control equipment costs, if any (respondent's and FEA's estimates);

(f) Type of pollution control equipment, if any, required (respondent's and EPA's estimates); and

(g) Other relevant factors, such as percent sulfur content in coal that would be required to insure compliance with environmental standards.

FEA eliminated or deferred from further consideration those MFBI's for which the following criteria were applicable:

(a) Remaining useful life of the MFBI on January 1, 1978 would be less than one year (based on an expected useful life of 40 years);

(b) The utilization factor of the MFBI was less than 20 percent;

(c) Space required for coal use at the installation was inadequate or unavailable;

(d) Since filing the original questionnaire, the MFBI had been converted to coal as its primary energy source or the owner has certified that the MFBI will be so converted in the near future;

(e) The MFBI used (in the latest year for which fuel use figures are available) significantly less than 2×10^{12} BTU's of oil or natural gas.

Items a or b above, would prevent FEA from finding that burning coal by the MFBI would be practicable. FEA assumed a forty-year useful life as a reasonable estimate based on general industrial averages. FEA has decided not to analyze MFBI's that have already converted to coal, since the basic purposes of ESECA have already been accomplished by such conversions and FEA has concluded that its resources would be better allocated by concentrating on those MFBI's which are not now burning coal.

Certain MFBI's were eliminated from further analysis upon FEA's determination that one or more of the factors which FEA must consider pursuant to Section 305.44(c) of its regulations would have resulted in disqualification of a particular MFBI. Such eliminations were based on factors such as process fuel uses peculiar to the MFBI's, inadequate land or space for coal related facilities, unique or unusual environmental constraints, and other similar disqualifying considerations.

If in FEA's judgment, analysis of the summary information raised issues that required further investigation, FEA conducted visits to the specific sites. Site visits were employed in circumstances in which large discrepancies between FEA's and the MFBI's cost estimates were observed, unusual technical problems were presented by the MFBI with respect to coal use, and when other disparities occurred between the information submitted by the MFBI and that developed independently by FEA. Information developed during the site visits served to either eliminate an MFBI from further consideration, through the aforementioned criteria, or served to demonstrate that FEA should continue its analysis.

For each MFBI not eliminated through any of the above criteria, FEA has calculated the net operating cost differential between using coal as the MFBI's primary energy source and using either natural gas or petroleum products.

A. *Calculation of net operating cost differential.* The net operating cost differential consists of the sum of (1) annualized increased capital investment costs required for conversion to coal, (2) differences in operating and maintenance costs (including the fuel cost differential), and (3) the potential tax consequences attendant to conversion. Initially, FEA performs two calculations in determining the net operating cost differential, one using cost figures supplied by the MFBI and the other using FEA's own estimates. When the MFBI's figures are within a reasonable range of FEA's estimates, FEA generally accepts the MFBI's figures. Gross discrepancies are examined in more detail by FEA to determine the reasonableness of the differing estimates and to reconcile differences.

The elements of the three parts of the net operating cost differential are explained below:

1. *Capital investment costs.* The primary element in this part is the cost of equipment acquisition and refurbishment required for conversion to coal, including refurbishment or acquisition of pollution control equipment. In determining the estimated annual increase fixed costs to the owner resulting from such capital investment, FEA calculates the annual depreciation of equipment costs over the expected remaining useful service life of the MFBI (including consideration of the investment tax credit) and adds the estimated annual cost of capital.

Annual depreciation is calculated as follows: (a) Determine cost of new equipment (including pollution control equipment) minus investment tax credit of 10 percent.

(b) Divide the figure in a, above, by the expected remaining useful life of the MFBI after conversion is completed. FEA presumes that the MFBI's determination of remaining useful life is correct if it results in a total useful life of at least 40 years. Otherwise, FEA will conduct a more detailed examination of the MFBI.

Calculation of the approximate annual cost of capital is as follows: (a) New and refurbished equipment costs minus the investment tax credit, plus.

(b) Twice the cost of land acquisitions required for conversions to coal burning.

(c) The total of (1) and (2) is divided by 2 and then multiplied by a 10 percent interest rate.

2. *Operating and maintenance costs.* The primary factor considered in this calculation is the annual fuel cost differential which represents the difference between operating the MFBI with coal as its primary energy source in lieu of petroleum products or natural gas. (If the current supply of natural gas to the MFBI is curtailed, then the calculation of the fuel cost differential does not include natural gas as part of the MFBI's current fuel use to the extent of that curtailment. In such cases the NOCD was calculated on the basis of actual fuel usage.) FEA has generally accepted the coal price reported by the MFBI's. If FEA considered the stated price to be unreasonable, it further examined coal prices based upon an analysis of delivered prices of coal in the area of the MFBI under consideration and an analysis of likely coal sources. Projected coal use after conversion was calculated by converting latest annual fuel data to its Btu equivalent for coal.

Determination of the differential relating to labor costs and the differential relating to other operating and maintenance costs was based upon estimates supplied by the MFBI's.

3. *Potential tax effects.* Federal and state tax rates have been applied to the net operating differential to determine maximum potential tax effects resulting from a Prohibition Order.

If the NOCD for an MFBI was positive, i.e., projects an increase in annual costs of operations, then a calculation of the cost per barrel of oil saved was performed by dividing the NOCD by the number of barrels of oil actually used on an annual basis (or, if the MFBI was a natural gas user, the number of barrels of oil which would be required to replace the gas use on an equivalent Btu basis). This figure (cost per barrel of oil saved) was then considered in terms of the number of barrels of oil and/or MCF of natural gas that would be saved by issuance of a Prohibition Order, the effect of the NOCD on the MFBI owner's operating expenses, as well as various environmental and other factors in reaching the final determination as to which candidates should receive an NOI.

It is to be noted that much of the information used by FEA to make its practicability findings is arguably confidential under 18 U.S.C. 1905. Therefore, such information has not appeared in the Appendix to the NOI. The calculations have been explained in each case and the data are available to the representatives of the owner of the MFBI.

Any questions regarding this Notice should be directed to the FEA National Office as follows: Federal Energy Administration, Code OCU (Prohibition Order: _____ Installation), Washington, D.C. 20461, (202) 566-7941.

(Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 791 et seq.), as amended by Pub. L. 94-163; Federal Energy Administration Act of 1974 (15 U.S.C. 761 et seq.), as amended by Pub. L. 94-385; E.O. 11790 (39 FR 23185).)

Issued in Washington, D.C., May 9, 1977.

ERIC J. FYGI,
Acting General Counsel,
Federal Energy Administration.

APPENDIX—PROPOSED FINDINGS AND RATIONALE FOR NOTICE OF INTENTION TO ISSUE A PROHIBITION ORDER

ESECA and the FEA regulations require FEA to make certain findings before issuing a Prohibition Order to a major fuel burning installation (MFBI). FEA's proposed findings are set out below with respect to the MFBI named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit No.	Location
OCU-0342	Union Camp Corp.	Savannah plant	10	Savannah, Ga.

These findings, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Prohibition Order.

Union Camp Corporation shall be referred to as the "owner" and as "Union Camp." Savannah Plant Unit 10 shall be referred to as the "MFBI" and as "Savannah 10."

I. *Capacibility and necessary plant equipment to burn coal.*

FEA proposes to find that on June 22, 1974, Savannah 10 had the capability and necessary plant equipment to burn coal. This proposed finding is based on the facts and interpretations stated below:

A. Union Camp, in a Major Fuel Burning Installation Coal Conversion Report, Section II, Questions 6, and 12–14, (Form FEA C–602–S–0) filed on May 20, 1975 indicated that the MFBI had in place on June 22, 1974, a boiler that was capable of burning coal. The boiler had been designed and constructed or modified to burn coal as its primary energy source, notwithstanding the fact that on June 22, 1974, the MFBI may not have been burning coal as its primary energy source.

B. Based on information Union Camp filed with FEA dated March 7, 1977 and other information available to FEA, the following plant equipment and facilities at Savannah 10 would have to be acquired or refurbished in order for this MFBI to burn coal as its primary energy source:

1. Air heaters.
2. Combustors.
3. Ash handling equipment.
4. Storage bunkers.
5. Conveyors.
6. Crushers.
7. Pulverizers.
8. Soot blowers.
9. Instruments and controls.
10. Scales.
11. Feeders.
12. Fans and ducts.
13. Unloaders.

C. FEA proposes to find that on June 22, 1974, Savannah 10 had all other significant plant equipment and facilities associated with the burning of coal.

D. Within the meaning of ESECA and the regulations promulgated pursuant thereto, the equipment and facilities listed in paragraph B, above, do not individually or in combination constitute a lack of capability and necessary plant equipment to burn coal as of June 22, 1974.

II. *The burning of coal in lieu of natural gas or petroleum products is practicable and consistent with the purposes of ESECA.*

FEA proposes to find that the burning of coal in lieu of petroleum products or natural gas at Savannah 10 is practicable and consistent with the purposes of ESECA. This proposed finding is based upon an analysis by FEA of the fuel consumption of this boiler for the period 1973–1975, the remaining useful service life of the boiler after conversion, the net operating cost differential that would result from compliance with a Prohibition Order, as well as the facts and interpretations referenced below:

A. *The burning of coal is practicable.*

1. *Anticipated fuel supplies.—Curtailment of natural gas supply.* Based on information obtained from the Federal Power Commission, the natural gas supplier, and in certain cases the owner, FEA presumes that the MFBI will experience a substantial curtailment of its present supply of natural gas. The curtailment will result in increased reliance on alternate fuels in the future.

2. *Costs associated with burning coal.—*a. *Capital investment costs.* The total estimated initial capital investment costs, including financing costs, that would result from the acquisition and refurbishment of equipment and facilities associated with the burning of coal at Savannah 10 have been determined.

This determination was based on existing FEA information and analysis as well as information filed with FEA by the owner. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

b. *Annual operating and maintenance costs.* The expected increase in operating and maintenance costs, exclusive of fuel costs, that would result from the burning of coal has been calculated based on information supplied by the owner or otherwise acquired by FEA.

c. *Fuel costs.* Based on an analysis of annual fuel consumption and fuel cost information supplied by the owner and/or, in appropriate circumstances, upon FEA's fuel cost estimates, FEA has determined that the burning of coal in lieu of natural gas or petroleum products at Savannah 10 will result in a decrease in annual fuel costs.

d. *Net operating cost differential.* Based on the factors stated in paragraphs A.1.a–3., above, as well as the expected remaining useful life of the boiler after conversion, FEA has determined that the net annual operating cost differential hereafter "NOCD", (which represents the difference between operating the boiler with coal and alternate fuel(s) as its primary energy source), resulting from the conversion of Savannah 10 will represent an annual savings.

3. *Reasonableness of additional costs of burning coal.* The following analysis of the costs of conversion provides the basis for deciding that compliance with the proposed order is not unreasonable. By converting from burning natural gas to burning coal as the primary energy source the MFBI would experience a net annual operating cost increase, but would save a substantial amount of natural gas. This cost would only be incurred for a limited period because the MFBI will eventually experience a substantial curtailment of its supply of natural gas. If the prohibition order were not issued to the MFBI it could alternately replace its current natural gas supply with either petroleum products or coal for the period following such substantial curtailment of its natural gas supply.

In the calculation of the NOCD, FEA has considered oil as a substitute fuel for curtailed natural gas. In calculating the NOCD, in those instances where the MFBI has experienced no curtailment of its natural gas supply, FEA considered the present fuel usage. The net annual operating cost differential for this MFBI resulting from operating on coal as the primary energy source, instead of petroleum products (and/or natural gas where applicable), will represent an annual savings.

Since the use of the coal alternative, instead of petroleum products, could be expected to result in a net cost savings, FEA has determined that the prohibition against burning natural gas or petroleum products as the primary energy source at this MFBI is not unreasonable.

The additional costs that would be incurred from prohibiting the burning of natural gas as the primary energy source at this MFBI would only be incurred for a limited period of time. In view of the scarcity of national supplies of natural gas and the likelihood that Savannah 10 will experience a substantial curtailment of its present supply of natural gas in the future, FEA has determined that the cost of burning coal in lieu of natural gas is not unreasonable (*Final Report Oil and Gas Resources, Reserves, and Productive Capacities Volumes I and II* Federal Energy Administration October 1975). This determination is further supported by consideration of the savings that would result from the burning of coal in lieu of potential alternate petroleum products for the period after which the natural gas supply to Savannah 10 would be substantially curtailed.

4. *Financial capability of the owner.—*a. *Recovery of capital investment.* FEA proposes to find that compliance with a Prohibition Order by Savannah 10 would be economically feasible. FEA's analysis took into consideration the financial capability of the owner and is based upon the owner's financial position as reported in the *Dun and Bradstreet Reference Book* (March 1977). Where necessary FEA performed an independent analysis of the owner's financial capability, considering such factors as the owner's current financial statement and the additional capital investment required for the owner to comply with this NOI and all other NOI's which are currently under consideration, as well as additional capital investment costs related to all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to MFBI's owned by Union Camp. FEA related these additional capital investment costs to the total capitalization of Union Camp and the remaining useful life after conversion of Savannah 10.

FEA does not consider the effect of the added capital investment costs to represent an unreasonable burden given the financial capabilities of Union Camp to assume such costs.

b. *Total annual costs associated with conversion.* The total estimated annual increase in costs (amortized increased capital investment costs and other costs, exclusive of fuel costs) associated with the burning of coal as opposed to natural gas attributable to compliance with this NOI and all other NOI's which are currently under consideration has been determined. FEA also took into consideration total annual costs resulting from compliance with all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Sec-

tion 2 (a) and (c) of ESECA to Union Camp MFBI's.

However, due to the potential offsetting value of fuel cost savings attributable to compliance with this NOI and all other NOI's currently under consideration, Union Camp total annual costs should decrease.

B. *Consistency with the purposes of ESECA.* Because of the issuance of a Prohibition Order to Savannah 10 will discourage the use of natural gas or petroleum products and encourage the increased use of coal, FEA proposes to conclude that this action would be consistent with the purpose of ESECA to provide a means to assist in meeting the essential needs of the United States for fuels.

On the basis of the environmental analysis which FEA is required to conduct prior to issuance of a Notice of Effectiveness of a Prohibition Order, as well as the necessity for this MFBI to comply with the Clean Air Act and other applicable environmental protection requirements, FEA proposes to conclude that a Prohibition Order to Savannah 10 would be consistent with the purpose of ESECA to provide for a means to assist in meeting the essential needs of the United States for fuels in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment.

III. *Coal and coal transportation facilities will be available to this MFBI during the period until December 31, 1984.*

A. *Coal availability.*—1. *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the foreseeable future. U.S. Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (*Demonstrated Coal Reserve Base of the United States by Sulfur Category*, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1% or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability for the period ending December 31, 1984.

2. *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned national coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

a. *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977, (hereafter "Availability Report") indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production potential (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

b. *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

c. *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

3. *Characteristic coal production and demand.* FEA's "Availability Report" identifies coal of specific quality characteristics available for use at this MFBI. The survey is based on data from 31 mining companies that supplied useful information on 96 mining units. Responses from these companies identified planned production of coal which is not now committed to a specific buyer. For those companies which did not respond to the survey, FEA estimated their uncommitted planned production based on their 1974 production.

a. *Characteristic coal requirements for this MFBI.* FEA's "Availability Report" has determined that a boiler, of the type used at Savannah 10 will be able to burn coal of the following characteristics and comply with all applicable air pollution control requirements.

Btu's per pound (minimum)	10,000
Moisture (percent maximum)	15
Ash (percent maximum)	20
Volatile (percent minimum)	15
Ash softening temperature (degrees fahrenheit, minimum)	2,200
Sulfur (percent maximum, approximate)	1.5

b. *Characteristic coal demand from this MFBI.* The potential demand for coal, of the type described above, which would result from this NOI is estimated to be as follows:

	Demand (thousand tons)
1980 and thereafter	137

c. *National planned production, characteristic coal.* FEA's "Availability Report" has determined that coal of the type described in paragraph A.3.a., above, is uncommitted to a specific buyer and will be potentially available to this MFBI in a nationwide market as follows:

Year:	*Production (thousand tons)*
1978	67,900
1979	127,100
1980	158,900
1981	189,300
1982	200,300
1983	214,800
1984	253,700

d. *National ESECA prohibition order demand for coal, regardless of characteristics.* The national planned production of characteristic coal, as stated in paragraph A.3.c., above, exceeds potential demand for coal regardless of characteristic expected from this NOI, from all other Notices of intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. National ESECA Prohibition Order demand as previously stated in paragraph A.2.c., above, is no more than the following ("Availability Report"):

Year:	*Demand (thousand tons)*
1978	11,032
1979	22,434
1980	32,483
1981	35,755
1982	57,362
1983	59,815
1984	59,815

e. *Regional planned production, characteristic coal.* Coal with the characteristics described in paragraph A.3.a., above, is uncommitted and will be potentially available to this MFBI (in a probable regional supply/demand relationship related to the location of this MFBI) from BOM Districts 7, 8 and 13 as follows ("Availability Report"):

Year:	*Production (thousand tons)*
1978	26,032
1979	47,383
1980	53,082
1981	61,661
1982	65,354
1983	70,552
1984	80,964

f. *Regional ESECA prohibition order demand for coal, regardless of characteristic.* The expected regional production of characteristic coal, as stated in paragraph A.3.c., above, exceeds the potential demand for coal regardless of characteristic from BOM Districts 7, 8 and 13 expected to result from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. This potential regional demand is estimated in FEA's "Availability Report" to be no more than the following:

Year:	Demand (thousand tons)
1978	3,268
1979	9,149
1980	16,321
1981	18,005
1982	23,682
1983	24,095
1984	24,095

g. *Regional ESECA prohibition order demand for coal by sulfur characteristic.* The potential regional demand for coal from BOM Districts 7, 8 and 13 with a 1.41–1.8% sulfur content (which includes the 1.5% maximum sulfur content described in paragraph A.3.a., above) resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under the authority of Section 2(a) of ESECA is estimated in FEA's "Availability Report" to be no more than the following:

Year:	Demand (thousand tons) percent sulfur, 1.41–1.8
1978	226
1979	1,773
1980	1,773
1981	1,773
1982	1,773
1983	1,773
1984	1,773

The regional planned production of coal stated in paragraph A.3.e., above, with the characteristics described in paragraph A.3.a., above, far exceeds this potential ESECA regional demand for coal by sulfur characteristic.

4. *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

5. *Conclusion.* FEA's "Availability Report" has identified nationally and in BOM Districts 7, 8 and 13 uncommitted coal production that meets the requirements of Savannah 10 as described in paragraph A.3.a., above. FEA proposes to find that this uncommitted coal exists in amounts sufficient in any year to meet the estimated additional demand for coal, both nationally and from these Districts, resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. Coal for this MFBI will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location from BOM Districts 7, 8 and 13. FEA observes, however, that the MFBI could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond*, School of Engineering, University of Pennsylvania, November 7, 1975.)

B. *Coal transportation.*—1. *Location of MFBI and coal supply.* Based on an FEA study, *Coal Transportation Availability Report*, April 1977, (hereafter "Transportation Availability Report"), coal for Savannah 10 would probably come from BOM District 8 as a primary source and from BOM District 6 as an alternate source. While these supply areas are the nearest available potential sources able to supply complying coal to this MFBI, complying coal can be transferred by rail from other identified sources within the United States as well. The analysis of transportation availability is based on the most likely route as well as two alternate routes. These routes were chosen to demonstrate transportation availability.

2. *Route of coal shipment.* The primary route for coal delivery for Savannah 10 originates in BOM District 8 in the Corbin, Kentucky area on the Louisville and Nashville (L&N). The L&N would move it via Knoxville, Tennessee to Atlanta, Georgia where Southern Railway Co. would then deliver it to Savannah 10 via Macon and Midville, Georgia. The total rail distance is about 575 miles.

The alternate route for coal delivery from the primary supply area originates in BOM District 8 in the St. Paul Kentucky area on the L&N. The L&N would route it on its affiliate, Clinchfield Line, to Spartanburg, South Carolina, where Seaboard Coast Line (SCL) would pick up and deliver the coal to Savannah 10. The total rail distance is about 490 miles.

An alternate route from the alternate supply area originates in BOM District 6 in the Devon, West Virginia area on the Norfolk and Western (N&W). The N&W would move the coal to Martinsville, West Virginia and on to Winston-Salem, North Carolina where Southern would pick up and deliver the coal to Savannah 10. The total rail distance is approximately 633 miles.

3. *Originating trunk carrier.* The L&N, the originating carrier of coal for Savannah 10, has over 34,000 hopper cars in service and has been increasing this number by about 2,000 cars per year. Using an average number of 20 deliveries per year per 75-ton car, the L&N may need as many as 117 additional cars to handle the increased demand from Savannah 10. This estimate asumes that the railroad would neither have access originating capacity nor obtain cars from other carriers in the originating vicinity.

FEA's "Transportation Availability Report" concluded that for all potential Prohibition Order candidates studied, there would be no major constraints in transporting coal. This study examined existing rail transportation car capacity, water transportation capacity, including unloading docks, where applicable, and took into account projections made by all carriers to meet the anticipated demand for all types of transportation facilities assuming all MFBI's studied were to receive orders under Section 2(a) of ESECA.

FEA has not found nor has it been informed of any apparent constraints to carrying coal for any alternate or intermediate carriers should they be used.

4. *Destination carrier and MFBI facilities.* Savannah 10 has indicated that no coal has been used in the past, but in case of conversion to coal, Seaboard Coast Line and Souther could deliver coal to the plant.

There are no other obstacles to the delivery of coal to Savannah 10.

5. *Conclusion.* Coal transportation facilities will be available for the period a Prohibition Order is expected to be in effect since no major constraints to coal delivery over the primary route to Savannah 10 presently exist, and alternate routes are available.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue a Prohibition Order

ESECA and the FEA regulations require FEA to make certain findings before issuing a Prohibition Order to a major fuel burning installation (MFBI). FEA's proposed findings are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit No.	Location
OCU-055	Scott Paper Co	Mobile plant	4,6	Mobile, Ala.

These findings, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Prohibition Order.

Scott Paper Company shall be referred to as the "owner" and as "Scott Paper". Mobile Plant units 4 and 6 shall be referred to as the "MFBI's" and as "Mobile 4 and 6".

I. *Capability and necessary plant equipment to burn coal.* FEA proposes to find that on June 22, 1974, Mobile 4 and 6 had the capability and necessary plant equipment to burn coal. This proposed finding is based on the facts and interpretations stated below:

A. Scott Paper, in a Major Fuel Burning Installation Coal Conversion Report, Section II, Questions 6, and 12–14, (Form FEA C-602–S–0), filed on May 8, 1975, indicated that each MFBI had in place on June 22, 1974, a boiler that was capable of burning coal. The boilers had been designed and constructed or modified to burn coal as their primary energy source, notwithstanding the fact that on June 22, 1974, the MFBI's may not have been burning coal as their primary energy source.

B. Based on information Scott Paper filed with FEA dated March 18, 1977, and other information available to FEA, the following plant equipment and facilities at Mobile 4 and 6 would have to be acquired or refurbished in order for these MFBI's to burn coal as their primary energy source:

1. Unloaders; 2. Conveyors; 3. Crushers; 4. Pulverizers; 5. Air heaters; 6. Combustors; 7. Soot blowers; 8. Instruments and controls; 9. Ash handling equipment; 10. Storage bunkers; 11. Scales; 12. Feeders; 13. Storage property.

C. FEA proposes to find that on June 22, 1974, Mobile 4 and 6 had all other significant plant equipment and facilities associated with the burning of coal.

D. Within the meaning of ESECA and the regulations promulgated pursuant thereto, the equipment and facilities listed above, do not individually or in combination constitute a lack of capability and necessary plant equipment to burn coal, as of June 22, 1974.

II. *The burning of coal in lieu of natural gas and petroleum products is practicable and consistent with the purposes of ESECA.* FEA proposes to find that the burning of coal in lieu of petroleum products or natural gas at Mobile 4 and 6 is practicable and consistent with the purposes of ESECA. This proposed finding is based upon an analysis by FEA of the fuel consumption of these boilers for the period 1973–1976, the remaining useful service life of each boiler after conversion, the net operating cost differential that would result from compliance with a Prohibition Order, as well as the facts and interpretations referenced below:

A. *The burning of coal is practicable.*—1. *Anticipated fuel supplies—Curtailment of natural gas supply.* Based on information obtained from the Federal Power Commission, the natural gas supplier, and in certain cases the owner, FEA presumes that these MFBI's will experience a substantial curtailment of their present supply of natural gas. This curtailment will result in in-

creased reliance on alternate fuels in the future.

2. *Costs associated with burning coal.*—a. *Capital investment costs.* The total estimated initial capital investment costs, including financing costs, that would result from the acquisition and refurbishment of equipment and facilities associated with the burning of coal at Mobile 4 and 6 have been determined.

This determination was based on existing FEA information and analysis as well as information filed with FEA by the owner. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

b. *Annual operating and maintenance costs.* The expected increase in operating and maintenance costs, exclusive of fuel costs, that would result from the burning of coal has been calculated based on information supplied by the owner or otherwise acquired by FEA.

c. *Fuel costs.* Based on an analysis of annual fuel consumption and fuel cost information supplied by the owner and/or, in appropriate circumstances, upon FEA's fuel cost estimates, FEA has determined that the burning of coal in lieu of natural gas and petroleum products at Mobile 4 and 6 will result in a decrease in annual fuel costs.

d. *Net operating cost differential.* Based on the factors stated in paragraphs A.1. a.–c., above, as well as the expected remaining useful life of the boilers after conversion, FEA has determined that the net annual operating cost differential, hereafter "NOCD", (which represents the difference between operating the boilers with coal and alternate fuels as their primary energy source), resulting from the conversion of Mobile 4 and 6, will represent an annual cost increase of $144,998.

3. *Reasonableness of additional costs of burning coal.* The following analysis of the costs of conversion provides the basis for deciding that compliance with the proposed order is not unreasonable.

By converting from burning natural gas to burning coal as a primary energy source these MFBI's would experience a net annual operating cost increase, but would save a substantial amount of natural gas. This cost would be incurred for a limited period because these MFBI's will eventually experience a substantial curtailment of their supply of natural gas. If the prohibition order were not issued to these MFBI's they could alternately replace their current natural gas supply with either petroleum products or coal for the period following such substantial curtailment of their natural gas supply.

In the calculation of the NOCD, FEA has considered oil as a substitute fuel for curtailed natural gas. In calculating the NOCD, in those instances where the MFBI has experienced no curtailment of its natural gas supply, FEA considered the present fuel usage. The net annual operating cost increase for these MFBI's resulting from operating on coal as their primary energy source, instead of petroleum products (and/or natural gas where applicable), will be approximately $144,998.

Although the use of the coal alternative, instead of potential petroleum products, could be expected to result in a net annual operating cost increase, FEA has determined that the prohibition of burning natural gas or petroleum products as the primary energy source at Mobile 4 and 6 is not unreasonable.

Burning of coal by these MFBI's as their primary energy source instead of petroleum products would result in additional capital investment costs and annual operating and maintenance costs exclusive of fuel costs. Any additional conversion costs would, however, be mitigated by the savings in fuel costs inherent in burning coal. Notwithstanding the fact that these MFBI's could experience annual savings in their total fuel costs should they convert to coal instead of converting to petroleum products, there would be a net increase in the costs to these MFBI's.

Although conversion to the burning of coal instead of petroleum products would be expected to increase the costs incurred by Mobile 4 and 6 by $144,998 per year, FEA proposes to find that such increased cost, per barrel of oil saved is not unreasonable given the purposes of ESECA. This determination is based on consideration of the substantial potential oil savings that would result from conversion to coal. The determination that the costs of burning coal instead of petroleum products would not be unreasonable is further supported by consideration of such costs in relation to the expected remaining useful life of these MFBI's, the size and resources of the owner as examined in the following discussion of financial capability, and the nature of the expected operations of these MFBI's.

The additional costs that would be incurred if FEA were to prohibit the burning of natural gas or petroleum products as the primary energy source at Mobile 4 and 6 would only be incurred for a limited period of time. In view of the scarcity of national supplies of natural gas and the likelihood that Mobile 4 and 6 will experience a substantial curtailment of their present natural gas supply in the future, FEA has determined that the cost of burning coal in lieu of natural gas is not unreasonable. (Final Report Oil and Gas Resources, Reserves, and Productive Capacities Volumes I and II, Federal Energy Administration, October 1975).

4. *Financial capability of the owner.*—a. *Recovery of capital investment.* FEA proposes to find that compliance with a Prohibition Order by Mobile 4 and 6 would be economically feasible. FEA's analysis took into consideration the financial capability of the owner and is based upon the owner's financial position as reported in the Dun and Bradstreet Reference Book (March 1977). Where necessary, FEA performed an independent analysis of the owner's financial capability, considering such factors as the owner's current financial statement and the additional capital investment required for the owner to comply with this NOI and all other NOI's which are currently under consideration, as well as additional capital investment costs related to all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to MFBI's owned by Scott Paper. FEA related these additional capital investment costs to the total capitalization of Scott Paper and the remaining useful life after conversion of Mobile 4 and 6.

FEA does not consider the effect of the added capital investment costs to represent an unreasonable burden given the financial capabilities of Scott Paper to assume such costs.

b. *Total annual costs associated with conversion.* The total estimated annual increase in costs (amortized increased capital investment costs and other costs, exclusive of fuel costs) associated with the burning of coal as opposed to oil and natural gas attributable to compliance with this NOI and all other NOI's which are currently under consideration has been determined. FEA also took into consideration total annual costs resulting from compliance with all other Notices of Intention, to date, if any, to issue Prohibition or Construtcion Orders, and from all outsanding Prohibitoin or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to Scott Paper MFBI's.

Notwithstanding the potential offsetting aggregate value of fuel cost savings attributable to compliance with this NOI, and all other NOI's currently under consideration, Scott Paper's total annual costs after conversion will increase by $622,998.

B. *Consistency with the purposes of ESECA.* Because the issuance of a Prohibition Order to Mobile 4 and 6 will discourage the use of natural gas or petroleum products and encourage the increased use of coal, FEA proposes to conclude that this action would be consistent with the purpose of ESECA to provide a means to assist in meeting the essential needs of the United States for fuels.

On the basis of the environmental analysis which FEA is required to conduct prior to issuance of a Notice of Effectiveness of a Prohibition Order, as well as the necessity for these MFBI's to comply with the Clean Air Act and other applicable environmental protection requirements, FEA proposes to conclude that a Prohibition Order to Mobile 4 and 6 would be consistent with the purpose of ESECA to provide for a means to assist in meeting the essential needs of the United States for fuels in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment.

III. *Coal and coal transportation facilities will be available to these MFBI's during the period until December 31, 1984.*—A. *Coal availability*—1. *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the foreseeable future. U.S. Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1% or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability for the period ending December 31, 1984.

2. *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage or uncommitted planned national coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

a. *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	723.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	Production (million tons)
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

b. *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	Demand (million tons)
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

c. *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	Demand (million tons)
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

3. *Characteristic coal production and demand.* FEA's "Availability Report" identifies coal of specific quality characteristics available for use at these MFBI's. The survey is based on data from 31 mining companies that supplied useful information on 96 mining units. Responses from these companies identified planned production of coal which is not now committed to a specific buyer. For those companies which did not respond to the survey, FEA estimated their uncommitted planned production based on their 1974 production.

a. *Characteristic coal requirements for these MFBI's.* FEA's "Availability Report" has determined that boilers of the type used at Mobile 4 and 6 will be able to burn coal of the following characteristics and comply with all applicable air pollution control requirements:

Btu's/lb	[1] 10,000
Moisture (percent)	[2] 15
Ash (percent	[2] 20
Volatile (percent)	[2] 15
Ash softening temperature (°F)	[1] 2,200
Sulfur (approximately) (percent)	[2] 0.9

[1] Minimum.
[2] Maximum.

b. *Characteristic coal demand from these MFBI's.* The potential demand for coal, of the type described above, which would result from this NOI is estimated to be as follows:

Year:	Demand (thousand tons)
1980 and thereafter	107

c. *National planned production, characteristic coal.* FEA's "Availability Report" has determined that coal of the type described in paragraph A.3.a., above, is uncommitted to a specific buyer and will be potentially available to these MFBI's in a nationwide market as follows:

Year:	Production (thousand tons)
1978	54,090
1979	97,325
1980	124,328
1981	149,252
1982	158,268
1983	170,320
1984	201,207

d. *National ESECA prohibition order demand for coal, regardless of characteristics.* The national planned production of characteristic coal, as stated in paragraph A.3.c., above, exceeds potential demand for coal regardless of characteristic expected from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. National ESECA Prohibition Order demand as previously stated in paragraph A.2.c., above, is no more than the following ("Availability Report"):

Year:	Demand (thousand tons)
1978	11,302
1979	22,434
1980	32,483
1981	35,755
1982	57,362
1983	59,815
1984	59,815

e. *Regional planned production, characteristic coal.* Coal with the characteristics described in paragraph A.3.a., above, is uncommitted and will be potentially available to these MFBI's (in a probable regional supply/demand relationship related to the location of these MFBI's) from BOM Districts 7, 8 and 13 as follows ("Availability Report"):

Year:	Production (thousand tons)
1978	19,953
1979	33,160
1980	37,779
1981	44,246
1982	47,145
1983	51,293
1984	58,891

f. *Regional ESECA prohibition order demand for coal, regardless of characteristic.* The expected regional production of characteristic coal, as stated in paragraph A.3.e., above, exceeds the potential demand for coal regardless of characteristic from BOM Districts 7, 8 and 13 expected to result from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. This potential regional demand is estimated in FEA's "Availability Report" to be no more than the following:

Year:	Demand (thousand tons)
1978	3,268
1979	9,149
1980	16,321
1981	18,005
1982	23,682
1983	24,095
1984	24,095

g. *Regional ESECA prohibition order demand for coal by sulfur characteristic.* The potential regional demand for coal from BOM Districts 7, 8 and 13 with a 0.61 to 1.0 percent sulfur content (which includes the 0.9 percent maximum sulfur content described in paragraph A.3.a., above) resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is estimated in FEA's "Availability Report" to be no more than the following:

Year:	Demand (thousand tons) percent sulfur, 0.61 to 1.0
1978	2,831
1979	5,578
1980	9,839
1981	11,028
1982	16,292
1983	16,292
1984	16,292

The regional planned production of coal stated in paragraph A.3.e., above, with the characteristics described in paragraph A.3.a., above, far exceeds this potential ESECA regional demand for coal by sulfur characteristic.

4. *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

5. *Conclusion.* FEA's "Availability Report" has identified nationally and in BOM Districts 7, 8 and 13 uncommitted coal production that meets the requirements of Mobile 4 and 6 as described in paragraph A.3.a., above. FEA proposes to find that this uncommitted coal exists in amounts sufficient in any year to meet the estimated additional demand for coal, both nationally and from these Districts, resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA.

Coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location from BOM Districts 7, 8 and 13. FEA observes, however, that the MFBI's could purchase coal in other markets as such production becomes available. (The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond, School of Engineering, University of Pennsylvania, November 7, 1975.)

B. *Coal transportation.* 1. *Location of MFBI's and coal supply.* Based on an FEA study, Coal Transportation Availability Re-

port, April 1977, (hereafter "Transportation Availability Report"), coal for Mobile 4 and 6 would probably come from BOM District 8 as the primary supply area and from BOM District 13 as the alternate supply area. While these supply regions are among the nearest available sources able to supply complying coal to the plant, complying coal could be transferred by rail from other identified sources within the United States as well. The analysis of transportation availability is based on the most likely route as well as two alternate routes. These routes were chosen to demonstrate transportation availability.

2. *Route of coal shipment.* The primary route for coal delivery for Mobile 4 and 6 originates coal in BOM District 8 near Madisonville, Kentucky on the Louisville and Nashville (L&N) Railroad. The L&N would move the coal via Nashville, Tennessee to Birmingham, Alabama. The Southern Railway would pick it up and move it to Mobile 4 and 6 via Tuscaloosa, Baligee and Kimbrough, Alabama. The total rail distance is about 595 miles.

The alternate route for coal delivery from the primary source originates coal in BOM District 8 in the Somerset, Kentucky area on the Southern Railway. The Southern Railway would move it via Chattanooga, Tennessee and Birmingham, Alabama to Mobile 4 and 6. The total rail distance is approximately 619 miles.

An alternate route from the alternate supply area is to originate coal in BOM District 13 in the Tuscaloosa, Alabama area on the L&N. The L&N would take it to Mobile 4 and 6 via Parkwood and Montgomery, Alabama. The total rail distance is about 313 miles.

3. *Originating trunk carrier.* The L&N, the originating carrier of coal for Mobile 4 and 6 has over 34,000 hopper cars in service and has been increasing this number by about 2,000 cars per year. Using a average number of 20 deliveries per year per 75-ton car, the L&N may need as many as 74 additional cars to handle the increased demand from Mobile 4 and 6. This estimate assumes that the railroad would neither have excess originating capacity nor obtain cars from other carriers in the originating vicinity.

FEA's "Transportation Availability Report" concluded that for all potential Prohibition Order candidates studied, there would be no major constraints in transporting coal. This study examined existing rail transportation car capacity, water transportation capacity, including unloading docks, where applicable, and took into account projections made by all carriers to meet the anticipated demand for all types of transportation facilities assuming all MFBI's studied were to receive orders under Section 2(a) of ESECA.

FEA has not found nor has it been informed of any apparent constraints to carrying coal for any alternate or intermediate carriers should they be used.

4. *Destination carrier and MFBI facilities.* Mobile 4 and 6 have never used coal before and coal storage or coal unloading facilities do not currently exist. It is expected that these installations can be accomplished prior to the effective date for coal burning.

There are no other obstacles to the delivery of coal to Mobile 4 and 6.

5. *Conclusion.* Coal transportation facilities will be available for the period a Prohibition Order is expected to be in effect since no major constraints to coal delivery over the primary route to Mobile 4 and 6 presently exist, and alternate routes are available.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue A Prohibition Order

ESECA and the FEA regulations require FEA to make certain findings before issuing a Prohibition Order to a major fuel burning installation (MFBI). FEA's proposed findings are set out below with respect to the MFBI named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit No.	Location
OCU-0778	International Paper Co.	Vicksburg plant	1	Vicksburg, Miss.

These findings, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Prohibition Order.

International Paper Company shall be referred to as the "owner" and as "International". The Vicksburg Plant Unit 1 shall be referred to as the "MFBI" and as "Vicksburg 1".

I. *Capability and necessary plant equipment to burn coal.*

FEA proposes to find that on June 22, 1974, Vicksburg 1 had the capability and necessary plant equipment to burn coal. This proposed finding is based on the facts and interpretations stated below:

A. International, in a Major Fuel Burning Installation Coal Conversion Report, Section II, Questions 6, and 12–14, (Form FEA C–602–S–0), filed on May 20, 1975, indicated that the MFBI had in place on June 22, 1974, a boiler that was capable of burning coal. The boiler had been designed and constructed or modified to burn coal as its primary energy source, notwithstanding the fact that on June 22, 1974, the MFBI may not have been burning coal as its primary energy source.

B. Based on information International filed with FEA dated August 11, 1976, and other information available to FEA, the following plant equipment and facilities at Vicksburg 1 would have to be acquired or refurbished in order for this MFBI to burn coal as its primary energy source:

1. Combustors.
2. Air heaters.
3. Soot blowers.
4. Special instrumentation and controls.
5. Crushers.
6. Pulverizers.
7. Scales.
8. Feeders.
9. Ash handling equipment.
10. Unloaders.
11. Conveyors.

C. FEA proposes to find that on June 22, 1974, Vicksburg 1 had all other significant plant equipment and facilities associated with the burning of coal.

D. Within the meaning of ESECA and the regulations promulgated pursuant thereto, the equipment and facilities listed in paragraph B, above, do not individually or in combination constitute a lack of capability and necessary plant equipment to burn coal as of June 22, 1974.

II. *The burning of coal in lieu of natural gas or petroleum products is practicable and consistent with the purposes of ESECA.*

FEA proposes to find that the burning of coal in lieu of petroleum products or natural gas at Vicksburg 1 is practicable and consistent with the purposes of ESECA. This proposed finding is based upon an analysis by FEA of the fuel consumption of this boiler for the period 1973–75, the remaining useful service life of the boiler after conversion, the net operating cost differential that would result from compliance with a Prohibition Order, as well as the facts and interpretations referenced below:

A. *The burning of coal is practicable.* 1. *Anticipated fuel supplies. Curtailment of natural gas supply.* Based on information obtained from the Federal Power Commission, the natural gas supplier, and in certain cases the owner, FEA presumes that the MFBI will experience a substantial curtailment of its present supply of natural gas. This curtailment will result in increased reliance on alternate fuels in the future.

2. *Costs associated with burning coal.* a. *Capital investment costs.* The total estimated initial capital investment costs, including financing costs, that would result from the acquisition and refurbishment of equipment and facilities associated with the burning of coal at Vicksburg 1 have been determined.

This determination was based on existing FEA information and analysis as well as information filed with FEA by the owner. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

b. *Annual operating and maintenance costs.* The expected increase in operating and maintenance costs, exclusive of fuel costs, that would result from the burning of coal has been calculated based on information supplied by the owner or otherwise acquired by FEA.

c. *Fuel costs.* Based on an analysis of annual fuel consumption and fuel cost information supplied by the owner and/or, in appropriate circumstances, upon FEA's fuel cost estimates, FEA has determined that the burning of coal in lieu of natural gas or petroleum products at Vicksburg 1 will result in a decrease in annual fuel costs.

d. *Net operating cost differential.* Based on the facts stated in paragraphs A.1.a.–c., above, as well as the expected remaining useful life of the boiler after conversion, FEA has determined that the net annual operating cost differential, hereafter "NOCD" (which represents the difference between operating the boiler with coal and alternate fuel(s) as its primary energy source), resulting from the conversion of Vicksburg 1, will represent an annual savings.

3. *Reasonableness of additional costs of burning coal.* The following analysis of the costs of conversion provides the basis for deciding that compliance with the proposed order is not unreasonable.

By converting from burning natural gas to burning coal as the primary energy source the MFBI would experience a net annual operating cost increase, but would save a substantial amount of natural gas. This cost would only be incurred for a limited period because the MFBI will eventually experience a substantial curtailment of its supply of natural gas. If the prohibition order were not issued to the MFBI it could alternately re-

place its current natural gas supply with either petroleum products or coal for the period following such substantial curtailment of its natural gas supply.

In the calculation of the NOCD, FEA has considered oil as a substitute fuel for curtailed natural gas. In calculating the NOCD in those instances where the MFBI has experienced no curtailment of its natural gas supply, FEA considered the present fuel usage. The net annual operating cost differential for this MFBI resulting from operating on coal as the primary energy source, instead of petroleum products (and/or natural gas where applicable), will represent an annual savings.

Since the use of the coal alternative, instead of petroleum products, could be expected to result in a net cost savings, FEA has determined that the prohibition against burning natural gas or petroleum products as the primary energy source at this MFBI is not unreasonable.

The additional costs that would be incurred from prohibiting the burning of natural gas as the primary energy source at this MFBI would only be incurred for a limited period of time. In view of the scarcity of national supplies of natural gas and the likelihood that Vicksburg 1 will experience a substantial curtailment of its present supply of natural gas in the future, FEA has determined that the cost of burning coal in lieu of natural gas is not unreasonable. (Final Report Oil and Gas Resources, Reserves, and Productive Capacities Volumes I and II, Federal Energy Administration, October 1975.) This determination is further supported by consideration of the savings that would result from the burning of coal in lieu of potential alternate petroleum products for the period after which the natural gas supply to Vicksburg 1 would be substantially curtailed.

4. *Financial capability of the owner.*—a. *Recovery of capital investment.* FEA proposes to find that compliance with a Prohibition Order by Vicksburg 1 would be economically feasible. FEA's analysis took into consideration the financial capability of the owner and is based upon the owner's financial position as reported in the Dun and Bradstreet Reference Book (March 1977). Where necessary, FEA performed an independent analysis of the owner's financial capability, considering such factors as the owner's current financial statement and the additional capital investment required for the owner to comply with this NOI and all other NOI's which are currently under consideration, as well as additional capital investment costs related to all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2(a) and (c) of ESECA to MFBI's owned by International. FEA related these additional capital investment costs to the total capitalization of International and the remaining useful life after conversion of Vicksburg 1.

FEA does not consider the effect of the added capital investment costs to represent an unreasonable burden given the financial capabilities of International to assume such costs.

b. *Total annual costs associated with conversion.* The total estimated annual increase in costs (amortized increased capital investment costs and other costs, exclusive of fuel costs) associated with the burning of coal as opposed to natural gas attributable to compliance with this NOI and all other NOI's which are currently under consideration has been determined. FEA also took into consideration total annual costs resulting from compliance with all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any issued to date under authority of Section 2 (a) and (c) of ESECA to International MFBI's.

Notwithstanding the potential offsetting aggregate value of fuel cost savings attributable to compliance with this NOI and all other NOI's currently under consideration, International's total annual costs after conversion will increase by $738,345.

B. *Consistence with the purposes of ESECA.* Because the issuance of a Prohibition Order to Vicksburg 1 will discourage the use of natural gas and encourage the increased use of coal, FEA proposes to conclude that this action would be consistent with the purpose of ESECA to provide a means to assist in meeting the essential needs of the United States for fuels.

On the basis of the environmental analysis which FEA is required to conduct prior to issuance of a Notice of Effectiveness of a Prohibition Order, as well as the necessity for this MFBI to comply with the Clean Air Act and other applicable environmental protection requirements. FEA proposes to conclude that a Prohibition Order to Vicksburg 1 would be consistent with the purpose of ESECA to provide for a means to assist in meeting the essential needs of the United States for fuels in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment.

III. *Coal and coal transportation facilities will be available to this MFBI during the period until December 31 1984.*—A. *Coal availability.*—1. *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the foreseeable future. U.S. Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM"]). Within these recoverable reserves approximately 200 billion tons contain 1% or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability for the period ending December 31, 1984.

2. *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned national coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

a. *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production Potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1976	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	369.2
1984	475.5
1985	544.9

b. *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

c. *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

3. *Characteristic coal production and demand.* FEA's "Availability Report" identifies coal of specific quality characteristics available for use at this MFBI. The survey is based on data from 31 mining companies that supplied useful information on 96 mining units. Responses from these companies identified planned production of coal which is not now committed to a specific buyer. For those companies which did not respond to the survey, FEA estimated their uncommitted planned production based on their 1974 production.

a. *Characteristic coal requirements for this MFBI.* FEA's "Availability Report" has determined that a boiler of the type used at Vicksburg 1 will be able to burn coal of the following characteristics and comply with all applicable air pollution control requirements.

Btu's/lb	[1] 10,000
Moisture (percent)	[2] 15
Ash (percent)	[2] 20
Volatile (percent)	[1] 15
Ash softening temp. (°F)	[1] 2,200
Sulfur (percent) (approx.)	[2] 0.7

[1] Minimum.
[2] Maximum.

b. *Characteristic coal demand from this MFBI.* The potential demand for coal, of the type described above, which would result from this NOI is estimated to be as follows:

Year:	Demand (thousand tons)
1979 and thereafter	117

c. *National planned production, characteristic coal.* FEA's "Availability Report" has determined that coal of the type described in paragraph A.3.a., above, is uncommitted to a specific buyer and will be potentially available to this MFBI in a nationwide market as follows:

Year:	Production (thousand tons)
1978	54,090
1979	97,325
1980	124,328
1981	149,252
1982	158,268
1983	170,320
1984	201,207

d. *National ESECA prohibition order demand for coal, regardless of characteristics.* The national planned production of characteristics coal, as stated in paragraph A.3.c., above, exceeds potential demand for coal regardless of characteristic expected from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. National ESECA Prohibition Order demand as previously stated in paragraph A.2.c., above, is no more than the following ("Availability Report"):

Year:	Demand (thousand tons)
1978	11,032
1979	22,434
1980	32,483
1981	35,755
1982	57,362
1983	59,815
1984	59,815

e. *Regional planned production, characteristic coal.* Coal with the characteristics described in paragraph A.3.a., above, is uncommitted and will be potentially available to this MFBI (in a probable regional supply/demand relationship related to the location of this MFBI) from BOM Districts 7, 8, and 13 as follows ("Availability Report"):

Year:	Production (thousand tons)
1978	19,952
1979	33,160
1980	37,779
1981	44,246
1982	47,145
1983	51,293
1984	58,891

f. *Regional ESECA prohibition order demand for coal, regardless of characteristic.* The expected regional production of characteristic coal, as stated in paragraph A.3.e., above, exceeds the potential demand for coal regardless of characteristic from BOM Districts 7, 8 and 13 expected to result from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. This potential regional demand is estimated in FEA's "Availability Report" to be no more than the following:

Year:	Demand (thousand tons)
1978	3,268
1979	9,149
1980	16,321
1981	18,771
1982	23,682
1983	24,095
1984	24,095

g. *Regional ESECA prohibition order demand for coal by sulfur characteristic.* The potential regional demand for coal from BOM Districts 7, 8 and 13 with a 0.61–1.0 percent sulfur content (which includes the 0.7 percent maximum sulfur content described in paragraph A.3.a., above) resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under the authority of Section 2(a) of ESECA is estimated in FEA's "Availability Report" to be no more than the following:

Year:	Demand (thousand tons) percent sulfur 0.61 to 1.0
1978	2,831
1979	5,578
1980	9,839
1981	11,028
1982	16,292
1983	16,292
1984	16,292

The regional planned production of coal stated in paragraph A.3.e., above, with the characteristics, described in paragraph A.3.a., above, far exceeds this potential ESECA regional demand for coal by sulfur characteristic.

4. *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

5. *Conclusion.* FEA's "Availability Study" has identified nationally and in BOM Districts 7, 8 and 13 uncommitted coal production that meets the requirements of Vicksburg 1 as described in paragraph A.3.a., above, FEA proposes to find that this uncommitted coal exists in amounts sufficient in any year to meet the estimated additional demand for coal, both nationally and from these Districts, resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA.

Coal for this MFBI will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location from BOM Districts 7, 8 and 13. FEA observes, however, that the MFBI could purchase coal in other markets as such production becomes available. (The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond, School of Engineering, University of Pennsylvania, November 7, 1975.)

B. *Coal transportation.*—1. *Location of the MFBI and coal supply.* Based on an FEA study, Coal Transportation Availability Report, April 1977 (hereafter "Transportation Availability Report"), coal for Vicksburg 1 would probably come from BOM District 8 as the primary supply area and from BOM District 9 as the alternate supply area. While these supply regions are among the nearest available sources able to supply complying coal to the plant, complying coal could be transferred by rail from other identified sources within the United States as well. The analysis of transportation availability is based on the most likely route as well as two alternate routes. These routes were chosen to demonstrate transportation availability.

2. *Route of coal shipment.* The primary route for coal delivery to Vicksburg 1 originates in BOM District 8 on the Louisville and Nashville (L&N) north of Knoxville, Tennessee. The L&N would move the coal to Memphis, Tennessee, where the Illinois Central Gulf (ICG) picks it up for delivery to Vicksburg 1. The total rail distance is about 655 miles.

The alternate route from the primary supply area originates northwest of Knoxville, Tennessee, on the Southern Railway (SOU). The SOU would move the coal via Chattanooga, Tennessee, and Birmingham, Alabama, to Meridian, Mississippi, where the ICG would then pick up the coal for delivery to Vicksburg 1. The total rail distance is about 555 miles.

An alternate route for coal delivery from the alternate supply area would originate coal in BOM District 9 in Western Kentucky with barges of the Ohio River Company or the Crounse Corporation barging the coal on the Green River, the Ohio River, and Mississippi River for delivery to Vicksburg 1. The total water distance is about 800 miles.

3. *Originating trunk carrier.* The L&N, originating carrier of coal for Vicksburg 1, has approximately 34,000 hopper cars in service and has been increasing this number by about 2,000 cars per year. Using an average number of deliveries of 20 per year per 75-ton car, the L&N may need as many as 90 additional cars to handle the increased demand from Vicksburg 1. This estimate assumes that the railroad would neither have excess originating capacity nor obtain cars from other carriers in the originating vicinity.

FEA's "Transportation Availability Report" concluded that for all potential Prohibition Order candidates studied, there would be no major constraints in transporting coal. This study examined existing rail transportation car capacity, water transportation capacity, including unloading docks where applicable and took into account projections made by all carriers to meet the anticipated demand for all types of transportation facilities assuming all MFBI's studied were to receive orders under Section 2(a) of ESECA.

The L&N indicated that transportation facilities at those mine sites within BOM District 8 served by the L&N are in good condition and that loading facilities are adequate to handle the required coal volumes.

FEA has not found nor has it been informed of any apparent constraints to carrying coal for any alternate or intermediate carriers should they be used.

4. *Destination carrier and MFBI facilities.* Rail delivery service to Vicksburg 1 is provided by the ICG. Vicksburg 1 has indicated that coal unloading and handling facilities would need to be added. It is expected that these installations can be accomplished prior to the effective date for coal burning.

There are no other obstacles to the delivery of coal to Vicksburg 1.

5. *Conclusion.* Coal transportation facilities will be available for the period a Prohibition Order is expected to be in effect since no major constraints to coal delivery over the primary route to Vicksburg 1 presently exist, and alternate routes are available.

APPENDIX—PROPOSED FINDINGS AND RATIONALE FOR NOTICE OF INTENTION TO ISSUE A PROHIBITION ORDER

ESECA and the FEA regulations require FEA to make certain findings before issuing a Prohibition Order to a major fuel burning installation (MFBI). FEA's proposed findings are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit No.	Location
OCU-0991	Continental Forest Industries, a member of the Continental Group, Inc.	Port Wentworth mill	1, 2, 3, 4	Port Wentworth, Ga.

These findings, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Prohibition Order.

Continental Forest Industries, a member of the Continental Group, Inc. shall be referred to as the "owner" and as "Continental". Port Wentworth Mill Units 1, 2, 3, and 4 shall be referred to as the "MFBI's" and as "Port Wentworth 1, 2, 3, and 4".

I. *Capability and necessary plant equipment to burn coal.* FEA proposes to find that on June 22, 1974, Port Wentworth 1, 2, 3, and 4 had the capability and necessary plant equipment to burn coal.

This proposed finding is based on the facts and interpretations stated below:

A. It has been indicated, either in a Major Fuel Burning Installation Coal Conversion Report, Section II, Questions 6, and 12–14 (Form FEA C–602–S–0), filed on May 20, 1975, by Continental, or by other information acquired by FEA, that each MFBI had in place on June 22, 1974, a boiler that was capable of burning coal. The boilers had been designed and constructed or modified to burn coal as their primary energy source, notwithstanding the fact that on June 22, 1974, the MFBI's may not have been burning coal as their primary energy source.

B. Based on information Continental filed with FEA dated March 4, 1977, and other information available to FEA, the following plant equipment and facilities at Port Wentworth 1, 2, 3 and 4 would have to be acquired or refurbished in order for these MFBI's to burn coal as their primary energy source:

1. Burners; 2. Conveyors; 3. Pulverizers; 4. Instrumentation and controls; 5. Ash handling equipment and ponding equipment; 6. Unloaders; 7. Scales and feeders; 8. Hoppers; 9. Air heaters; 10. Combustors.

C. FEA proposes to find that on June 22, 1974, Port Wentworth 1, 2, 3, and 4 had all other significant plant equipment and facilities associated with the burning of coal.

D. Within the meaning of ESECA and the regulations promulgated pursuant thereto, the equipment and facilities listed in paragraph B, above, do not individually or in combination constitute a lack of capability and necessary plant equipment to burn coal as of June 22, 1974.

II. *The burning of coal in lieu of natural gas or petroleum products is practicable and consistent with the purposes of ESECA.* FEA proposes to find that the burning of coal in lieu of petroleum products and natural gas at Port Wentworth 1, 2, 3, and 4 is practicable and consistent with the purposes of ESECA.

This proposed finding is based upon an analysis by FEA of the fuel consumption of these boilers for the period 1973–1975, the remaining useful service life of each boiler after conversion, the net operating cost differential that would result from compliance with a Prohibition Order, as well as the facts and interpretations referenced below:

A. *The burning of coal is practicable.* 1. *Anticipated fuel supplies—Curtailment of natural gas supply.* Based on information obtained from the Federal Power Commission, the natural gas supplier, and in certain cases the owner, FEA presumes that these MFBI's will experience a substantial curtailment of their present supply of natural gas. This curtailment will result in increased reliance on alternate fuels in the future.

2. *Costs associated with burning coal.* a. *Capital investment costs.* The total estimated initial capital investment costs, including financing costs, that would result from the acquisition and refurbishment of equipment and facilities associated with the burning of coal at Port Wentworth 1, 2, 3, and 4 have been determined.

This determination was based on existing FEA information and analysis as well as information filed with FEA by the owner. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

b. *Annual operating and maintenance costs.* The expected increase in operating and maintenance costs, exclusive of fuel costs, that would result from the burning of coal has been calculated based on information supplied by the owner or other wise acquired by FEA.

c. *Fuel costs.* Based on an anlysis of annual fuel consumption and fuel cost information supplied by the owner and/or, in appropriate circumstaces, upon FEA's fuel cost estimates, FEA has determined that the burning of coal in lieu of natural gas or petroleum products at Port Wenworth 1, 2, 3, and 4 will result in a decrease in annual fuel costs.

d. *Net operating cost differential.* Based on the factors stated in paragraph A.1. a.–c., above, as well as the expected remaining useful life of the boilers after conversion, FEA has determined that the net annual operating cost differential, hereafter "NOCD", (which represents the difference between operating the boilers with coal and alternate fuel(s) as their primary energy source), resulting from the conversion of Port Wentworth 1, 2, 3, and 4 will represent an annual savings.

3. *Reasonableness of additional costs of burning coal.* The following analysis of the costs of conversion provides the basis for deciding that compliance with the proposed order is not unreasonable.

By converting from burning natural gas to burning coal as their primary energy source these MFBI's would experience a net annual operating cost increase, but would save a substantial amount of natural gas. This cost would only be incurred for a limited period because these MFBI's will eventually experience a substantial curtailment of their supply of natural gas. If the prohibition order were not issued to these MFBI's they could alternately replace their current natural gas supply with either petroleum products or coal for the period following such substantial curtailment of their natural gas supply.

In the calculation of the NOCD, FEA has considered oil as a substitute fuel for curtailed natural gas. In calculating the NOCD, in those instances where the MFBI has experienced no curtailment of its natural gas supply, FEA considered the present fuel usage. The net annual operating cost differential for these MFBI's resulting from operating on coal as their primary energy source, instead of petroleum products (and/or natural gas where applicable), will represent an annual savings.

Since the use of the coal alternative, instead of petroleum products, could be expected to result in a net cost savings, FEA has determined that the prohibition against burning natural gas or petroleum products as their primary energy source at these MFBI's is not unreaconable.

The additional costs that would be incurred from prohibiting the burning of natural gas as the primary energy source at Port Wentworth 1, 2, 3, and 4 would only be incurred for a limited period of time. In view of the scarcity of national supplies of natural gas and the likelihood that Port Wentworth 1, 2, 3, and 4 will experience a subsantial curtailment of their present supply of natural gas in the future, FEA has determined that the cost of burning coal in lieu of natural gas is not unreasonable. (Final Report Oil and Gas Recources, Reserves, and Productive Capacities Volumes I and II, Federal Energy Administration, October 1975.)

This determination is further supported by consideration of the savings that would result from the burning of coal in lieu of potential alternate petroleum products for the period after which the natural gas supply to Port Wentworth 1, 2, 3, and 4 would be substantially curtailed.

4. *Financial capability of the owner.* a. *Recovery of capital investment.* FEA proposes to find that compliance with a Prohibition Order by Port Wentworth 1, 2, 3, and 4 would be economically feasible. FEA's analysis took into consideration the financial capability of the owner and is based upon the owner's financial position as reported in the Dun and Bradstreet Reference Book (March 1977). Where necessary, FEA performed an independent analysis of the owner's financial capability, considering such factors as the owner's current financial statement and the additional capital investment required for the owner to comply with this NOI and all other NOI's which are currently under consideration, as well as additional capital investment costs related to all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to MFBI's owned by Continental. FEA related these additional capital investment costs to the total capitalization of Continental and the remaining useful life after conversion of Port Wentworth 1, 2, 3, and 4.

FEA does not consider the effect of the added capital investment costs to represent an unreasonable burden given the financial capabilities of Continental to assume such costs.

b. *Total annual costs associated with conversion.* The total estimated annual increase in costs (amortized increased capital investment costs and other costs, exclusive of fuel costs) associated with the burning of coal as opposed to oil attributable to compliance with this NOI and all other NOI's which are currently under consideration has been determined. FEA also took into consideration total annual costs resulting from compliance with all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to Continental MFBI's.

However, due to the potential offsetting aggregate fuel cost savings attributable to compliance with this NOI and all other NOI's currently under consideration, Continental's total annual costs after conversion should decrease.

B. *Consistency with the purposes of ESECA.* Because the issuance of a Prohibition Order to Port Wentworth 1, 2, 3, and 4 will discourage the use of natural gas or petroleum products and encourage the increased use of coal, FEA proposes to conclude that this action would be consistent with the purpose of ESECA to provide a means to assist in meeting the essential needs of the United States for fuels.

On the basis of the environmental analysis which FEA is required to conduct prior to issuance of a Notice of Effectiveness of a Prohibition Order, as well as the necessity for these MFBI's to comply with the Clean Air Act and other applicable environmental protection requirements, FEA proposes to conclude that a Prohibition Order to Port Wentworth 1, 2, 3, and 4 would be consistent with the purpose of ESECA to provide for a means to assist in meeting the essential

needs of the United States for fuels in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment.

III. *Coal and coal transportation facilities will be available to these MFBI's during the period until December 31, 1984.* A. *Coal availability.* 1. *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the foreseeable future. U.S. Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974. Bureau of Mines (May 1975) (hereafter "BOM Survey")). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine certain quantities of these reserves are expected to be available FEA has examined several studies referenced herein which together provide the best current evidence as to coal availability for the period ending December 31, 1984.

2. *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned national coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets 99 percent of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

a. *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's *Coal Mine Expansion Study* (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, *Coal Availability Report*, April 1977 (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
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1982	369.9
1983	396.2
1984	475.5
1985	544.9

b. *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (*FEA 1976 National Energy Outlook*):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

c. *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

3. *Characteristic coal production and demand.* FEA's "Availability Report" identifies coal of specific quality characteristics available for use at these MFBI's. The survey is based on data from 31 mining companies that supplied useful information on 96 mining units. Responses from these companies identified planned production of coal which is not now committed to a specific buyer.

For those companies which did not respond to the survey, FEA estimated their uncommitted planned production based on their 1974 production.

a. *Characteristic coal requirements for these MFBI's* FEA's "Availability Report" has determined that boilers, of the type used at Port Wentworth 1, 2, 3 and 4 will be able to burn coal of the following characteristics and comply with all applicable air pollution control requirements.

Btu's per pound (minimum)	10,000
Moisture (percent maximum)	15
Ash (percent maximum)	20
Volatile (percent minimum)	15
Ash softening temperature (degrees fahrenheit, minimum)	2,200
Sulfur (percent maximum)	[1] 3.0

[1] Approximate.

b. *Characteristic coal demand from these MFBI's.* The potential demand for coal, of the type described above, which would result from the NOI is estimated to be as follows:

Year:	*Demand (thousand tons)*
1980 and thereafter	112

c. *National planned production, characteristic coal.* FEA's "Availability Report" has determined that coal of the type described in paragraph A.3.a., above, is uncommitted to a specific buyer and will be potentially available to these MFBI's in a nationwide market as follows:

Year:	*Production (thousand tons)*
1978	124,300
1979	243,100
1980	293,300
1981	350,000
1982	369,900
1983	396,200
1984	475,500

d. *National ESECA prohibition order demand for coal, regardless of characteristics.* The national planned production of characteristic coal, as stated in paragraph A.3.c., above, exceeds potential demand for coal regardless of characteristic expected from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA, National ESECA Prohibition Order demand as previously stated in paragraph A.2.c., above is no more than the following ("Availability Report"):

Year:	*Demand (thousand tons)*
1978	11,032
1979	22,434
1980	32,483
1981	35,755
1982	57 362
1983	59,815
1984	59,815

e. *Regional planned prdouction, characteristic coal.* Coal with the characteristics described in paragraph A.3.a., above, is uncommitted and will be potentialy available to these MFBI's (in a probable regional supply/demand relationship related to the location of these MFBI's) from BOM Districts 7, 8 and 13 as follows ("Availability Report"):

Year:	*Production (thousand tons)*
1978	28,934
1979	52,077
1980	58,306
1981	67,882
1982	71,985
1983	77,068
1984	89,345

f. *Regional ESECA prohibition order demand for coal, regardless of characteristic.* The expected regional production of characteristic coal, as stated in paragraph A.3.e., above, exceeds the potential demand for coal regardless of characteristic from BOM Districts 7, 8 and 13 expected to result from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. This potential regional demand is estimated in FEA's "Availability Report" to be no more than the following:

Year:	*Demand (thousand tons)*
1978	3,268
1979	9,140
1980	16,321
1981	18,005
1982	23,682
1983	24,095
1984	24,095

g. *Regional ESECA prohibition order demand for coal by sulfur characteristic.* The potential regional demand for coal from BOM Districts 7, 8 and 13 with a 2.21–3.1% sulfur content (which includes the 3.0% maximum sulfur content described in paragraph A.3.a., above) resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is estimated in FEA's "Availability Report" to be no more than the following:

Year:	*Demand (thousand tons) percent sulfur 2.12–3.1*
1978	77
1978	1,330
1980	1,530
1981	1,531
1982	1,531
1983	1,531
1984	1,531

The regional planned production of coal stated in paragraph A.3.e., above, with the characteristics described in paragraph A.3.a., above, far exceeds this potential ESECA regional demand for coal by sulfur characteristic.

4. *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

5. *Conclusion.* FEA's "Availability Report" has identified nationally and in BOM Districts 7, 8 and 13 uncommitted coal production that meets the requirements of Port Wentworth 1, 2, 3 and 4 paragraph A.3.a., above. FEA proposes to find that this uncommitted coal exists in amounts sufficient in any year to meet the estimated additional demand for coal, both nationally and from these Districts, resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA.

Coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location from BOM Districts 7, 8 and 13.

FEA observes however, that the MFBI's could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond,* School of Engineering, University of Pennsylvania, November 7, 1975.)

B. *Coal transportation.*

1. *Location of MFBI's and coal supply.* Based on an FEA study, *Coal Transportation Availability Report,* April 1977, (hereafter "Transportation Availability Report"), coal for Port Wentworth 1, 2, 3 and 4 would probably come from BOM District 8 as the primary source and from BOM District 6 as an alternate source. While these supply regions are among the nearest available sources able to supply complying coal to the plant, complying coal could be transferred by rail from other identified sources within the United States as well. The analysis of transportation availability is based on the most likely route as well as two alternate routes. These routes were chosen to demonstrate transportation availability.

2. *Route of coal shipment.* The primary route for coal delivery for Port Wentworth 1, 2, 3 and 4 originates in BOM District 8 the Corbin, Kentucky area on the Louisville and Nashville (L&N) Railroad. The L&N would move it via Knoxville, Tennessee to Atlanta, Georgia where the Southern Railway would pick it up and delivery the coal to Port Wentworth 1, 2, 3 and 4 via Macon and Midville, Georgia. The total rail distance is about 557 miles.

The alternate route from the primary supply area would originate in the St. Paul, Kentucky area on the L&N which would move the coal via its affiliate Clinchfield line to Spartanburg, South Carolina . Another affiliate, the Seaboard Coast Line RR (SCL) would then move it via Augusta to Savannah, Georgia where the Southern System (SOU) would pick it up and deliver it to Port Wentworth 1, 2, 3 and 4. The total rail distance is about 495 miles.

An alternate route from the alternate supply area would originate coal in BOM District 6 in the Devon, West Virginia area on the Norfolk and Western (N&W), which would move it via Martinsville, Virginia to Winston-Salem, North Carolina where the SOU would pick it up and carry it via Charlotte to Columbia, South Carolina. SCL would then pick it up and carry it to Savannah, Georgia where the SOU would then deliver it to Port Wentworth 1, 2, 3 and 4. The total rail distance is about 651 miles.

3. *Originating trunk carrier.* The L&N, the originating carrier of primary source coal for Port Wentworth 1, 2, 3 and 4 plant, has about 34,000 hopper cars with an estimated average capacity of 75 tons. Using an average number of 20 deliveries per year per 75-ton car, the L&N may need as many as 97 additional cars to handle the increased demand from Port Wentworth 1, 2, 3 and 4. This estimate assumes that the railroad would neither have excess originating capacity nor obtain cars from other carriers in the originating vicinity.

FEA's "Transportation Availability Report" concluded that for all potential Prohibition Order candidates studied, there would be no major constraints in transporting coal. This study examined existing rail transportation car capacity, water transportation capacity, including unloading docks, where applicable, and took into account projections made by all carriers to meet the anticipated demand for all types of transportation facilities assuming all MFBI's studied were to receive orders under Section 2(a) of ESECA.

The L&N indicated that transportation facilities at those mine sites within BOM District 8 served by the L&N are in good condition and that loading facilities could handle the required coal volumes.

FEA has not found nor has it been informed of any apparent constraints to carrying coal for any alternate or intermediate carriers should they be used.

4. *Destination carrier and plant facilities.* Port Wentworth 1, 2, 3 and 4 has indicated that no coal has been used in the past, but in case of conversion to coal the Southern Railway could deliver coal to Port Wentworth 1, 2, 3 and 4.

There are no other obstacles to the delivery of coal to Port Wentworth 1, 2, 3 and 4.

5. *Conclusion.* Coal transportation facilities will be available for the period a Prohibition Order is expected to be in effect since no major constraints to coal delivery over the primary route to Port Wentworth 1, 2, 3 and 4 presently exist, and alternate routes are available.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue a Prohibition Order

ESECA and the FEA regulations require FEA to make certain findings before issuing a Prohibition Order to a major fuel burning installation (MFBI). FEA's proposed findings are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit No.	Location
OCU-136	Weyerhaeuser Co.	Plymouth plant	2, 3	Plymouth, N.C.

These findings, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Prohibition Order.

Weyerhaeuser Company shall be referred to as the "owner" and as "Weyerhaeuser". Plymouth Plant Units 2 and 3 shall be referred to as the "MFBI's" and as "Plymouth 2 and 3".

I. *Capability and necessary plant equipment to burn coal.* FEA proposes to find that on June 22, 1974, Plymouth 2 and 3 had the capability and necessary plant equipment to burn coal. This proposed finding is based on the facts and interpretations stated below:

A. Weyerhaeuser, in a Major Fuel Burning Installation Coal Conversion Report, Section II, Questions 6, and 12-14, (Form FEA C-602-S-0), filed on May 22, 1975, indicated that each MFBI had in place on June 22, 1974, a boiler that was capable of burning coal. The boilers had been designed and constructed or modified to burn coal as their primary energy source, notwithstanding the fact that on June 22, 1974, the MFBI's may not have been burning coal as their primary energy source.

B. Based on information Weyerhaeuser filed with FEA dated August 13, 1976, and other information available to FEA, the following plant equipment and facilities at Plymouth 2 and 3 would have to be acquired or refurbished in order for these MFBI's to burn coal as their primary energy source:

1. Crushers; 2. Pulverizers; 3. Combustion controls; 4. Boiler retubing; 5. Soot blowers; 6. Feeders; 7. Instrumentation/controls; 8. Coal handling equipment; 9. Boiler equipment.

C. FEA proposes to find that on June 22, 1974, Plymouth 2 and 3 had all other significant plant equipment and facilities associated with the burning of coal.

D. Within the meaning of ESECA and the regulations promulgated pursuant thereto, the equipment and facilities listed in paragraph B, above, do not individually or in combination constitute a lack of capability and necessary plant equipment to burn coal as of June 22, 1974.

II. *The burning of coal in lieu of natural gas or petroleum products is practicable and consistent with the purposes of ESECA.* FEA proposes to find that the burning of coal in lieu of petroleum products or natural gas at Plymouth 2 and 3 is practicable and consistent with the purposes of ESECA. This proposed finding is based upon an analysis by FEA of the fuel consumption of these boilers for the period 1973-1975, the remaining useful service life of each boiler after conversion, the net operating cost differential that would result from compliance with a Prohibition Order, as well as the facts and interpretations referenced below:

A. *The burning of coal is practicable.*—1. *Costs associated with burning coal.*—a. *Capital investment costs.* The total estimated initial capital investment costs, including financing costs, that would result from the acquisition and refurbishment of equipment and facilities associated with the burning of coal at Plymouth 2 and 3 have been determined.

This determination was based on existing FEA information and analysis as well as information filed with FEA by the owner. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

b. *Annual operating and maintenance costs.* The expected increase in operating and maintenance costs, exclusive of fuel costs, that would result from the burning of coal has been calculated based on information

supplied by the owner or otherwise acquired by FEA.

c. *Fuel costs.* Based on an analysis of annual fuel consumption and fuel cost information supplied by the owner and/or, in appropriate circumstances, upon FEA's fuel cost estimates, FEA has determined that the burning of coal in lieu of natural gas or petroleum products at Plymouth 2 and 3 will result in a decrease in annual fuel costs.

d. *Net operating cost differential.* Based on the factors stated in paragraph A.1. a.–c., above, as well as the expected remaining useful life of the boilers after conversion, FEA has determined that the net annual operating cost differential (which represents the difference between operating the boilers with coal and alternate fuel(s) as their primary energy source), resulting from the conversion of Plymouth 2 and 3, will represent an annual cost increase of $5,948.

2. *Reasonableness of costs of conversion.* The foregoing analysis of the costs of conversion provided the basis for deciding whether the conversion of Plymouth 2 and 3 is reasonable.

As a result of conversion, Weyerhaeuser will incur additional capital investment costs, including financing costs, and additional annual operating and maintenance costs, exclusive of fuel costs, but will experience an annual savings in its total fuel costs for the expected remaining useful service life of the boilers after conversion.

Increased costs of conversion will be mitigated by the decrease in fuel costs. The net result, however, will be an increase in the annual cost of operating the boilers.

The use of coal at Plymouth 2 and 3 will result in a substantial annual savings of barrels of oil that otherwise would be used as a boiler fuel.

Although conversion to the burning of coal would be expected to increase the cost of operating at Plymouth 2 and 3, FEA proposes to find that such increased cost per barrel of oil saved is not unreasonable. This determination is based on consideration of the substantial savings of oil that will result from this conversion. The determination that the costs of converting are not unreasonable is further supported by consideration of such costs in relation to the expected remaining useful life of the boilers after conversion, the size and resources of Weyerhaeuser as examined in the following analysis of financial capability, the nature of the expected operation of these boilers, and potential future increases in the fuel cost differential in favor of coal.

3. *Financial capability of the owner.*—a. *Recovery of capital investment.* FEA proposes to find that compliance with a Prohibition Order by Plymouth 2 and 3 would be economically feasible. FEA's analysis took into consideration the financial capability of the owner and is based upon the owner's financial position as reported in the Dun and Bradstreet Reference Book (March 1977). Where necessary, FEA performed an independent analysis of the owner's financial capability considering such factors as the owner's current financial statement and the additional capital investment required for the owner to comply with this NOI and all other NOI's which are currently under consideration, as well as additional capital investment costs related to all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to MFBI's owned by Weyerhaeuser. FEA related these additional capital investment costs to the total capitalization of Weyerhaeuser and the remaining useful life after conversion of Plymouth 2 and 3.

FEA does not consider the effect of the added capital investment costs to represent an unreasonable burden given the financial capabilities of Weyerhaeuser to assume such costs.

b. *Total annual costs associated with conversion.* The total estimated annual increase in costs (amortized increased capital investment costs and other costs, exclusive of fuel costs) associated with the burning of coal as opposed to oil attributable to compliance with this NOI and all other NOI's which are currently under consideration has been determined. FEA also took into consideration total annual costs resulting from compliance with all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2(a) and (c) of ESECA to Weyerhaeuser MFBI's.

Notwithstanding the potential offsetting value of fuel cost savings, attributable to compliance with this NOI and all other NOI's currently under consideration, Weyerhaeuser's total annual costs after conversion will increase by $5,948.

B. *Consistency with the purposes of ESECA.* Because the issuance of a Prohibition Order to Plymouth 2 and 3 will discourage the use of natural gas or petroleum products and encourage the increased use of coal, FEA proposes to conclude that this action would be consistent with the purpose of ESECA to provide a means to assist in meeting the essential needs of the United States for fuels.

On the basis of the environmental analysis which FEA is required to conduct prior to issuance of a Notice of Effectiveness of a Prohibition Order, as well as the necessity for these MFBI's to comply with the Clean Air Act and other applicable environmental protection requirements, FEA proposes to conclude that a Prohibition Order to Plymouth 2 and 3 would be consistent with the purpose of ESECA to provide for a means to assist in meeting the essential needs of the United States for fuels in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment.

III. *Coal and coal transportation facilities will be available to these MFBI's during the period until December 31, 1984.*—A. *Coal availability*—1. *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the foreseeable future. U.S. Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States, by Sulfur Category, on January 1, 1974, Bureau of Mines May 1975 [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability for the period ending December 31, 1984.

2. *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned national coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets 99 percent of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

a. *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, *Coal Availability Report*, April 1977 (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

b. *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (*FEA 1976 National Energy Outlook*):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

c. *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

3. *Characteristic coal production and demand.* FEA's "Availability Report" identifies coal of specific quality characteristics available for use at these MFBI's. The survey is based on data from 31 mining companies that supplied useful information on 96 mining

units. Responses from these companies identified planned production of coal which is not now committed to a specific buyer. For those companies which did not respond to the survey, FEA estimated their uncommitted planned production based on their 1974 production.

a. *Characteristic coal requirements for these MFBI's.* FEA's "Availability Report" has determined that boilers of the type used at Plymouth 2 and 3 will be able to burn coal of the following characteristics and comply with all applicable air pollution control requirements.

Btu's per pound (minimum)	10,000
Moisture (percent maximum)	15
Ash (percent maximum)	20
Volatile (percent minimum)	15
Ash softening temperature (degrees fahrenheit, minimum)	2,200
Sulfur (percent maximum)	[1] 1.5

[1] Approximate.

b. *Characteristic coal demand from these MFBI's.* The potential demand for coal, of the type described above, which would result from this NOI is estimated to be as follows:

	Demand (thousand tons)
1979 and thereafter	188

c. *National planned production, characteristic coal.* FEA's "Availability Report" has determined that coal of the type described in paragraph A.3.a., above, is uncommitted to a specific buyer and will be potentially available to these MFBI's in a nationwide market as follows:

Year:	Production (thousand tons)
1978	67,937
1979	127,138
1980	158,932
1981	189,318
1982	200,259
1983	214,838
1984	253,700

d. *National ESECA prohibition order demand for coal, regardless of characteristics.* The national planned production of characteristic coal, as stated in paragraph A.3.c., above, exceeds potential demand for coal regardless of characteristic expected from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. National ESECA Prohibition Order demand as previously stated in paragraph A.2.c., above, is no more than the following ("Availability Report"):

Year:	Demand (thousand tons)
1978	11,032
1979	22,434
1980	32,483
1981	35,755
1982	57,362
1983	59,815
1984	59,815

e. *Regional planned production, characteristic coal.* Coal with the characteristics described in paragraph A.3.a., above, is uncommitted and will be potentially available to these MFBI's (in a probable regional supply/demand relationship related to the location of these MFBI's) from BOM Districts 7, 8 and 13 as follows ("Availability Report"):

Year:	Production (thousand tons)
1978	26,032
1979	47,383
1980	53,082
1981	61,661
1982	65,354
1983	70,552
1984	80,964

f. *Regional ESECA prohibition order demand for coal, regardless of characteristic.* The expected regional production of characteristic coal, as stated in paragraph A.3.e., above, exceeds the potential demand for coal regardless of characteristic from BOM Districts 7, 8 and 13 expected to result from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. This potential regional demand is estimated in FEA's "Availability Report" to be no more than the following:

Year:	Demand (thousand tons)
1978	3,268
1979	9,149
1980	16,321
1981	18,005
1982	23,682
1983	24,095
1984	24,095

g. *Regional ESECA prohibition order demand for coal by sulfur characteristic.* The potential regional demand for coal from BOM Districts 7, 8 and 13 with a 1.41–1.8% sulfur content (which includes the 1.5% maximum sulfur content described in paragraph A.3.a., above) resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is estimated in FEA's "Availability Report" to be no more than the following:

Year:	Demand (thousand tons) percent sulfur 1.41–1.8
1978	226
1979	897
1980	1,773
1981	1,773
1982	1,773
1983	1,773
1984	1,773

The regional planned production of coal stated in paragraph A.3.e., above, with the characteristics described in paragraph A.3.a., above, far exceeds this potential ESECA regional demand for coal by sulfur characteristic.

4. *State of local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

5. *Conclusion.* FEA's "Availability Report" has identified nationally and in BOM Districts 7, 8 and 13 uncommitted coal production that meets the requirements of Plymouth 2 and 3 as described in paragraph A.3.a., above. FEA proposes to find that this uncommitted coal exists in amounts sufficient in any year to meet the estimated additional demand for coal, both nationally and from these Districts, resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA.

Coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location from BOM Districts 7, 8 and 13. FEA observes, however, that the MFBI's could purchase coal in other markets as such production becomes available.

(*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond*, School of Engineering, University of Pennsylvania, November 7, 1975.)

B. *Coal transportation.*—1. *Location of MFBI's and coal supply.* Based on an FEA study, *Coal Transportation Availability Report*, April 1977 (hereafter "Transportation Availability Report"), coal for Plymouth 2 and 3 would probably come from BOM District 8 as the primary supply area and from BOM District 1 as the alternate supply area. While these supply regions are among the nearest available sources able to supply complying coal to the plant, complying coal could be transferred by rail from other identified source within the United States as well. The analysis of transportation availability is based on the most likely route as well as two alternate routes. These routes were chosen to demonstrate transportation availability.

2. *Route of coal shipment.* The primary route for coal delivery for Plymouth 2 and 3 is to originate coal near Corbin, Kentucky on the Louisville and Nashville Railroad (L&N) which would carry it to Knoxville, Tennessee where the Southern Railway Co. would pick the coal up and move it via Morristown, Tennessee, Asheville, Salisbury and Greensboro, North Carolina to Raleigh, North Carolina. The Norfolk Southern Railway Co. (NS) would then deliver it to Plymouth 2 and 3 via Wilson and Washington, North Carolina. The total distance is about 409 miles by rail.

The alternate route from the primary supply area is to originate coal in the Devon, West Virginia area on the Norfolk and Western (N&W) which would move it via Roanoke to Jarrett, Virginia. The Seaboard Coast Line (SCL) would then pick it up and carry it to Plymouth 2 and 3. The total rail distance is about 475 miles.

An alternate route from the alternate supply area would originate coal in the Altoona, Pennsylvania area on Consolidated Railroad (Conrail). Conrail would move the coal via York, Pennsylvania and Baltimore, Maryland to Washington, D.C. The Richmond, Fredericksburg and Potomac Railroad Company would pick it up and carry it to Richmond, Virginia where SCL would pick it up and deliver it to Plymouth 2 and 3. The total rail distance is approximately 545 miles.

3. *Originating trunk carrier.* The L&N, the originating carrier of coal for Plymouth 2 and 3 has about 34,000 hopper cars with an estimated average capacity of 75 tons. Using an average number of 20 deliveries per year per 75-ton car, the L&N may need as many as 265 additional cars by 1979 to handle the increased demand of the Plymouth Plant. This estimate assumes that the railroad would neither have excess originating capacity nor obtain cars from other carriers in the originating vicinity.

FEA's "Transportation Availability Report" concluded that for all potential Prohibition Order candidates studied, there would be no major constraints in transporting coal. This study examined existing rail transportation car capacity, water transportation capacity, including unloading docks, where applicable, and took into account projections made by all carriers to meet the anticipated demand for all types of transportation facilities assuming all MFBI's studied were to receive orders under Section 2(a) of ESECA.

The L&N indicated that transportation facilities at mine sites within BOM District 8 served by the L&N are in good condition and loading facilities could handle the required coal volume.

FEA has not found nor has it been informed of any apparent constraints to carrying coal for any alternate or intermediate carriers should they be used.

4. *Destination carrier and MFBI facilities.* The destination carriers have delivered coal to the plant in the past. Coal can now be burned at Plymouth 2 and 3.

There are no other obstacles to the delivery of coal to Plymouth 2 and 3.

5. *Conclusion.* Coal transportation facilities will be available for the period a Prohibition Order is expected to be in effect since no major constraints to coal delivery over the primary route to Plymouth 2 and 3 presently exist, and alternate routes are available.

APPENDIX—PROPOSED FINDINGS AND RATIONALE FOR NOTICE OF INTENTION TO ISSUE A PROHIBITION ORDER

ESECA and the FEA regulations require FEA to make certain findings before issuing a Prohibition Order to a major fuel burning installation (MFBI). FEA's proposed findings are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit No.	Location
OCU-2057	Monsanto Co	Pensacola plant	1,2,3,4,5,6	Pensacola, Fla.

These findings, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Prohibition Order.

Monsanto Company shall be referred to as the "owner" and as "Monsanto". Pensacola Units 1 through 6 shall be referred to as the "MFBI's" and as "Pensacola 1, 2, 3, 4, 5 and 6".

I. *Capability and necessary plant equipment to burn coal.*

FEA proposes to find that on June 22, 1974, Monsanto had the capability and necessary plant equipment to burn coal. This proposed finding is based on the facts and interpretations stated below:

A. Monsanto, in a Major Fuel Burning Installation Coal Conversion Report, Section II, Questions 6 and 12–14 (Form FEA C–602–S–0), filed on May 20, 1975, indicated that each MFBI had in place on June 22, 1974, a boiler that was capable of burning coal. The boilers had been designed and constructed or modified to burn coal as their primary energy source, notwithstanding the fact that on June 22, 1974, the MFBI's may not have been burning coal as their primary energy source.

B. Based on information Monsanto filed with FEA dated August 3, 1976, and other information available to FEA, the following plant equipment and facilities at Monsanto would have to be acquired or refurbished in order for these MFBI's to burn coal as their primary energy source:

1. Combustors
2. Heaters.
3. Special instrumentation and controls.
4. Unloaders.
5. Conveyors.
6. Ash handling equipment.
7. Hoppers.
8. Silos.

C. FEA proposes to find that on June 22, 1974, Pensacola 1, 2, 3, 4, 5 and 6 had all other significant plant equipment and facilities associated with the burning of coal.

D. Within the meaning of ESECA and the regulations promulgated pursuant thereto, the equipment and facilities listed in paragraph B, above, do not individually or in combination constitute a lack of capability and necessary plant equipment to burn coal as of June 22, 1974.

II. *The burning of coal in lieu of natural gas or petroleum products is practicable and consistent with the purposes of ESECA.*

FEA proposes to find that the burning of coal in lieu of petroleum products or natural gas at Pensacola 1, 2, 3, 4, 5 and 6 is practicable and consistent with the purposes of ESECA. This proposed finding is based upon an analysis by FEA of the fuel consumption of these boilers for the period 1973–1977, the remaining useful service life of each boiler after conversion, the net operating cost differential that would result from compliance with a Prohibition Order, as well as the facts and interpretations referenced below:

A. *The burning of coal is practicable.*

1. *Anticipated fuel supplies. Curtailment of natural gas supply.* Based on information obtained from the Federal Power Commission, the natural gas supplier, and in certain cases the owner, FEA presumes that these MFBI's will experience a substantial curtailment of their present supply of natural gas. This curtailment will result in increased reliance on alternate fuels in the future.

2. *Costs associated with burning coal.* a. *Capital investment costs.* The total estimated initial capital investment costs, including financing costs, that would result from the acquisition and refurbishment of equipment and facilities associated with the burning of coal at Pensacola 1, 2, 3, 4, 5 and 6 have been determined.

This determination was based on existing FEA information and anlysis as well as information filed with FEA by the owner. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

b. *Annual operating and maintenance costs.* The expected increase in operating and maintenance costs, exclusive of fuel costs, that would result from the burning of coal has been calculated based on information supplied by the owner or otherwise acquired by FEA.

c. *Fuel costs.* Based on an analysis of annual fuel consumption and fuel cost information supplied by the owner and/or, in appropriate circumstances, upon FEA's fuel cost estimates, FEA has determined that the burning of coal in lieu of natural gas or petroleum products at Pensacola 1, 2, 3, 4, 5 and 6 will result in a decrease in annual fuel costs.

d. *Net operating cost differential.* Based on the factors stated in paragraphs A.1.a.–c., above, as well as the expected remaining useful life of the boilers after conversion, FEA has determined that the net annual operating cost differential, hereafter "NOCD", (which represents the difference between operating the boilers with coal and alternate fuel(s) as their primary energy source), resulting from the conversion of Pensacola 1, 2, 3, 4, 5 and 6 will represent an annual cost increase of $1,454,883.

3. *Reasonableness of additional costs of burning coal.* The following analysis of the costs of conversion provides the basis for deciding that compliance with the proposed order is not unreasonable.

By converting from burning natural gas to burning coal as their primary energy source these MFBI's would experience a net annual operating cost increase, but would save a substantial amount of natural gas. This cost would only be incurred for a limited period because these MFBI's will eventually experience a substantial curtailment of their supply of natural gas. If the Prohibition Order were not issued to these MFBI's they could alternately replace their current natural gas supply with either petroleum products or coal for the period following such substantial curtailment of their natural gas supply.

In the calculation of the NOCD, FEA has considered oil as a substitute fuel for curtailed natural gas. In calculating the NOCD, in those instances where the MFBI has experienced no curtailment of its natural gas supply, FEA considered the present fuel usage. The net annual operating cost increase for these MFBI's resulting from operating on coal as their primary energy source, instead of petroleum products (and/or natural gas where applicable), will be approximately $1,454,883.

Although the use of the coal alternative, instead of potential petroleum products, could be expected to result in a net annual operating cost increase, FEA has determined that the prohibition of burning natural gas or petroleum products as the primary energy source at Pensacola 1, 2, 3, 4, 5, and 6 is not unreasonable.

Burning of coal by these MFBI's as their primary energy source instead of petroleum products would result in additional capital investment costs and annual operating and maintenance costs exclusive of fuel costs. Any additional conversion costs would, however, be mitigated by the savings in fuel costs inherent in burning coal. Notwithstanding the fact that these MFBI's could experience annual savings in their total fuel costs should they convert to coal instead of converting to petroleum products, there would be a net increase in the costs to these MFBI's.

Although conversion to the burning of coal instead of petroleum products would be expected to increase the costs incurred by Pensacola 1, 2, 3, 4, 5, and 6 by $1,454,883 per year, FEA proposes to find that such increased cost, per barrel of oil saved is not unreasonable given the purposes of ESECA. This determination is based on consideration of the substantial potential oil savings that would result from conversion to coal. The determination that the costs of burning coal instead of petroleum products would not be unreasonable is further supported by consideration of such costs in relation to the expected remaining useful life of these MFBI's, the size and resources of the owner as examined in the following discussion of financial capability, and the nature of the expected operations of these MFBI's.

The additional costs that would be incurred if FEA were to prohibit the burning of natural gas or petroleum products as the primary energy source at Pensacola 1, 2, 3, 4, 5, and 6 would only be incurred for a limited period of time. In view of the scarcity of national supplies of natural gas and the likelihood that Pensacola 1, 2, 3, 4, 5, and 6 will experience a substantial curtailment of their present natural gas supply in the future, FEA has determined that the cost of burning coal in lieu of natural gas is not unreasonable. (Final Report Oil and Gas Resources, Reserves, and Productive Capacities Volumes I and II, Federal Energy Administration, October 1975.)

4. *Financial capability of the owner.* a. *Recovery of capital investment.* FEA proposes to find that compliance with a Prohibition Order by Pensacola 1, 2, 3, 4, 5 and 6 would be economically feasible. FEA's analysis took into consideration the financial capability of the owner and is based upon the owner's financial position as reported in the Dun and Bradstreet Reference Book (March 1977). Where necessary, FEA performed an independent analysis of the

owner's financial capability, considering such factors as the owner's current financial statement and the additional capital investment required for the owner to comply with this NOI and all other NOI's which are currently under consideration, as well as additional capital investment costs related to all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to MFBI's owned by Monsanto. FEA related these additional capital investment costs to the total capitalization of Monsanto and the remaining useful life after conversion of Pensacola 1, 2, 3, 4, 5 and 6.

FEA does not consider the effect of the added capital investment costs to represent an unreasonable burden given the financial capabilities of Monsanto to assume such costs.

b. *Total annual costs associated with conversion.* The total estimated annual increase in costs (amortized increased capital investment costs and other costs, exclusive of fuel costs) associated with the burning of coal as opposed to oil and and natural gas attributable to compliance with this NOI and all other NOI's which are currently under consideration has been determined. FEA also took into consideration total annual costs resulting from compliance with all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2(a) and (c) of ESECA to Monsanto MFBI's.

Notwithstanding the potential offsetting value of fuel cost savings, attributable to compliance with this NOI and all other NOI's currently under consideration, Monsanto's total annual costs after conversion will increase by $1,454,883.

B. *Consistency with purposes of ESECA.* Because the isuance of a Prohibition Order to Pensacola 1, 2, 3, 4, 5, and 6 will discourage the use of natural gas or petroleum products and encourage the increased use of coal, FEA proposes to conclude that this action would be consistent with the purpose of ESECA to provide a means to assist in meeting the essential needs of the United States for fuels.

On the basis of the environmental analysis which FEA is required to conduct prior to issuance of a Notice of Effectiveness of a Prohibition Order, as well as the necessity for these MFBI's to comply with the Clean Air Act and other applicable environmental protection requirements, FEA proposes to conclude that a Prohibition Order to Pensacola 1, 2, 3, 4, 5, and 6 would be consistent with the purpose of ESECA to provide for a means to assist in meeting the essential needs of the United States for fuels in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment.

III. *Coal and coal transportation facilities will be available to these MFBI's during the period until December 31, 1984.*

A. *Coal availability.* 1. *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the foreseeable future. U.S. Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1 percent or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability for the period ending December 31, 1984.

2. *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned national coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plants that extend that far into the future; however, the projected total planned national coal production for 1985 already meets 99 percent of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

a. *National coal production.* It is conservatively estimated that it will be practical to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, Coal Availability Report, April 1977 (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

b. *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

c. *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

3. *Characteristic coal production and demand,* FEA's "Availability Report" identifies coal of specific quality characteristics available for use at these MFBI's. The survey is based on data from 31 mining companies that supplied useful information on 96 mining units. Responses from these companies identified planned production of coal which is not now committed to a specific buyer. For those companies which did not respond to the survey, FEA estimated their uncommitted planned production based on their 1974 production.

a. *Characteristic coal requirements for these MFBI's.* FEA's "Availability Report" has determined that boilers of the type used at Pensacola 1, 2, 3, 4, 5 and 6 will be able to burn coal of the following characteristics and comply with all applicable air pollution control requirements.

Btu's/lb	[1] 10,000
Moisture (percent)	[2] 15
Ash (percent)	[2] 20
Volatile (percent)	[1] 15
Ash (percent)	[2] 20
Sulfur (percent) (approx.)	[2] 2.5

[1] Minimum.
[2] Maximum.

b. *Characteristic coal demand from these MFBI's.* The potential demand for coal, of the type described above, which would result from this NOI is estimated to be as follows:

Year:	*Demand (thousand tons)*
1983 and thereafter	248

c. *National planned production, characteristic coal.* FEA's "Availability Report" has determined that coal of the type described in paragraph A.3.a., above, is uncommitted to a specific buyer and will be potentially available to these MFBI's in a nationwide market as follows:

Year:	*Production (thousand tons)*
1978	124,300
1979	243,100
1980	293,300
1981	350,000
1982	369,900
1983	396,200
1984	475,500

d. *National ESECA prohibition order demand for coal, regardless of characteristics.* The national planned production of characteristic coal, as stated in paragraph A.3.c., above, exceeds potential demand for coal regardless of characteristic expected from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. National ESECA Prohibition Order demand as previously stated in paragraph A.2.c., above, is no more than the following ("Availability Report"):

Year:	*Demand (thousand tons)*
1978	11,032
1979	22,434
1980	32,483
1981	35,755
1982	57,362
1983	59,815
1984	59,815

e. *Regional planned production, characteristic coal.* Coal with the characteristics described in paragraph A.3.a., above, is uncommitted and will be potentially available to these MFBI's (in a probable regional supply/demand relationship related to the location of these MFBI's) from BOM Districts 7, 8 and 13 as follows ("Availability Report"):

Year:	*Production (thousand tons)*
1978	28,934
1979	52,077
1980	58,396
1981	67,882
1982	71,985
1983	77,668
1984	89,345

f. *Regional ESECA prohibition order demand for coal, regardless of characteristic.* The expected regional production of characteristic coal, as stated in paragraph A.3.e., exceeds the potential demand for coal regardless of characteristic from BOM Districts 7, 8 and 13 expected to result from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. This potential regional demand is estimated in FEA's "Availability Report" to be no more than the following:

Year:	*Demand (thousand tons)*
1978	3,268
1979	9,149
1980	16,321
1981	18,005
1982	23,682
1983	24,095
1984	24,095

g. *Regional ESECA prohibition order demand for coal by sulfur characteristic.* The potential regional demand for coal from BOM Districts 7, 8 and 13 with a 2.2–2.51 percent sulfur content (which includes the 2.5 percent maximum sulfur content described in paragraph A.3.a., above) resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is estimated in FEA's "Availability Report" to be no more than the following:

Year:	*Demand (thousand tons) percent sulfur 2.2 to 2.51*
1978	77
1979	1,330
1980	1,530
1981	1,531
1982	1,531
1983	1,531
1984	1,531

The regional planned production of coal stated in paragraph A.3.e., above, with the characteristics described in paragraph A.3.a., above, far exceeds this potential ESECA regional demand for coal by sulfur characteristic.

4. *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

5. *Conclusion.* FEA's "Availability Report" has identified nationally and in BOM Districts 7, 8, and 13 uncommitted coal production that meets the requirements of Pensacola 1, 2, 3, 4, 5, and 6 as described in paragraph A.3.a., above. FEA proposes to find that this uncommitted coal exists in amounts sufficient in any year to meet the estimated additional demand for coal, both nationally and from these Districts, resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date undeh authority of Section 2(a) of ESECA.

Coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location from BOM Districts 7, 8, and 13. FEA observes, however, that the MFBI's could purchase coal in other markets as such production becomes available. (The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond, School of Engineering, University of Pennsylvania, November 7, 1975.)

B. *Coal transportation.* 1. *Location of MFBI's and coal supply.* Based on an FEA study, Coal Transportation Availability Report, April 1977 (hereafter "Transportation Availability Report"), coal for Pensacola 1, 2, 3, 4, 5, and 6 would probably come from BOM District 8 as the primary supply area and from BOM District 13 as the alternate supply area. While these supply regions are among the nearest available sources able to supply complying coal to the plant, complying coal could be transferred by rail from other identified sources within the United States as well. The analysis of transportation availability is based on the most likely route as well as two alternate routes. These routes were chosen to demonstrate transportation availability.

2. *Route of coal shipment.* The primary route for coal delivery for Pensacola 1, 2, 3, 4, 5, and 6 is to originate coal in BOM District 8 in the Williamsburg, Kentucky area on the Louisville and Nashville (L&N) Railroad. The L&N would move it via Nashville, Tennessee, and Decatur, Birmingham, and Montgomery, Alabama, for delivery to Pensacola 1, 2, 3, 4, 5, and 6. The total rail distance is about 640 miles.

The alternate route from the primary supply area originates coal near Clinton, Tennessee, on the Southern Railway which will move it via Knoxville and Cleveland, Tennessee, and Rome, Georgia, to Kimbrough, Alabama, where the Frisco Line picks it up to deliver to Pensacola 1, 2, 3, 4, 5, and 6. The total rail distance is about 630 miles.

An alternate route from the alternate supply area would originate coal in BOM District 13 the Tuscaloosa, Alabama area where the coal would be barged by the Parker Towing Company down the Warrior River and via the Gulf Intercoastal Waterway for delivery to Pensacola 1, 2, 3, 4, 5, and 6. The total distance is about 500 miles.

3. *Originating trunk carrier.* The L&N Railroad, the originating carrier of coal for Pensacola 1, 2, 3, 4, 5, and 6, has over 34,000 hopper cars in service and has been increasing this number by about 2,000 cars per year. Using an average number of 20 deliveries per year per 75-ton car, the L&N may need as many as 165 additional cars to handle the increased demand from Pensacola 1, 2, 3, 4, 5, and 6. This estimate assumes that the railroad would neither have excess originating capacity nor obtain cars from other carriers in the originating vicinity.

FEA's "Transportation Availability Report" concluded that for all potential Prohibition Order candidates studies, there would be no major constraints in transporting coal. This study examined existing rail transportation car capacity, water transportation capacity, including unloading docks, where applicable, and took into account projections made by all carriers to meet the anticipated demand for all types of transportation facilities assuming all MFBI's studied were to receive orders under Section 2(a) of ESECA. The L&N indicated that transportation facilities at nine sites within BOM District 8 served by the L&N are in good condition and that loading facilities could handle the required coal volumes.

FEA has not found nor has it been informed of any apparent constraints to carrying coal for any alternate or intermediate carriers should they be used.

4. *Destination carrier and MFBI facilities.* Monsanto has indicated that no coal facilities are currently available. A study being conducted by Monsanto should be completed by mid-1977. It is expected that these installations can be accomplished prior to the effective date for coal burning.

There are no other obstacles to the delivery of coal to these MFBI's.

5. *Conclusion.* Coal transportation facilities will be available for the period a Prohibition Order is expected to be in effect since no major constraints to coal delivery over the primary route to Pensacola 1, 2, 3, 4, 5, and 6 presently exist, and alternate routes are available.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue a Prohibition Order

ESECA and the FEA regulations require FEA to make certain findings before issuing a Prohibition Order to a major fuel burning installation (MFBI). FEA's proposed findings are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit No.	Location
OCU-2612	Bowater Corp., Ltd., Bowater Southern Paper Corp.	Calhoun mill	1,2,3,4,5	Calhoun, Tenn.

These findings, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Prohibition Order.

Bowater Southern Paper Corporation, a wholly-owned subsidiary, through other subsidiaries, of Bowater Corporation, Ltd., London, England shall be referred to as the "owner" and as "Bowater Southern". Calhoun-Mill Units 1, 2, 3, 4, and 5 shall be referred to as the "MFBI's" and as "Calhoun 1, 2, 3, 4, and 5".

I. *Capability and necessary plant equipment to burn coal.*

FEA proposes to find that on June 22, 1974, Calhoun 1, 2, 3, 4, and 5 had the capability and necessary plant equipment to burn coal. This proposed finding is based on the facts and interpretations stated below:

A. Bowater Southern, in a Major Fuel Burning Installation Coal Conversion Report, Section II, Questions 6, and 12–14, (Form FEA C–602–S–0), filed on May 30, 1975, indicated that each MFBI had in place on June 22, 1974, a boiler that was capable of burning coal. The boilers had been designed and constructed or modified to burn coal as their primary energy source, notwithstanding the fact that on June 22, 1974, the MFBI's may not have been burning coal as their primary energy source.

B. Based on information Bowater Southern filed with FEA dated March 7, 1977, and other information available to FEA, the following plant equipment and facilities at Calhoun 1, 2, 3, 4, and 5 would have to be acquired or refurbished in order for these MFBI's to burn coal as their primary energy source:

1. Combustors; 2. Soot blowers; 3. Unloaders; 4. Conveyors; 5. Crushers; 6. Pulverizers; 7. Scales; 8. Feeders; 9. Air heaters; 10. Controls; 11. Ash handling equipment.

C. FEA proposes to find that on June 22, 1974, Calhoun 1, 2, 3, 4, and 5 had all other significant plant equipment and facilities associated with the burning of coal.

D. Within the meaning of ESECA and the regulations pursuant thereto, the equipment and facilities listed in paragraph B, above, do not individually or in combination constitute a lack of capability and necessary plant equipment to burn coal as of June 22, 1974.

II. *The burning of coal in lieu of natural gas or petroleum products is practicable and consistent with the purposes of ESECA.*

FEA proposes to find that the burning of coal in lieu of petroleum products or natural gas at Calhoun 1, 2, 3, 4, and 5 is practicable and consistent with the purposes of ESECA. This proposed finding is based upon an analysis by FEA of the fuel consumption of these boilers for the period 1974–1976, the remaining life of each boiler after conversion, the net operating cost differential that would result from compliance with a Prohibition Order, as well as the facts and interpretations referenced below:

A. *The burning of coal is practicable.* 1. *Anticipated fuel supplies—Curtailment of natural gas supply.* Based on information obtained from the Federal Power Commission the natural gas supplier, and in certain cases the owner, FEA presumes that these MFBI's will experience a substantial curtailment of their present supply of natural gas. This curtailment will result in increased reliance on alternate fuels in the future.

2. *Costs associated with burning coal.* a. *Capital investment costs.* The total estimated initial capital investment costs, including financing costs, that would result from the acquisition and refurbishment of equipment and facilities associated with the burning of coal at Calhoun 1, 2, 3, 4, and 5 have been determined.

This determination was based on existing FEA information and analysis as well as information filed with FEA by the owner. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

b. *Annual operating and maintenance costs.* The expected increase in operating and maintenance costs, exclusive of fuel costs, that would result from the burning of coal has been calculated based on information supplied by the owner or otherwise acquired by FEA.

c. *Fuel costs.* Based on an analysis of annual fuel consumption and fuel cost information supplied by the owner and/or, in appropriate circumstances, upon FEA's fuel cost estimates, FEA has determined that the burning of coal in lieu of natural gas or petroleum products at Calhoun 1, 2, 3, 4, and 5 will result in a decrease in annual fuel costs.

d. *Net operating cost differential.* Based on the factors stated in paragraphs A.1. a.–c., above, as well as the expected remaining useful life of the boilers after conversion, FEA has determined that the net anual operating cost differential, hereafter "NOCD", (which represents the difference between operating the boilers with coal and alternate fuel(s) as their primary energy source), resulting from the conversion of Calhoun 1, 2, 3, 4, and 5 will represent an annual cost increase of $621,033.

3. *Reasonableness of additional costs of burning coal.* The following analysis of the costs of conversion provides the basis for deciding that compliance with the proposed order is not unreasonable.

By converting from burning natural gas to burning coal as the primary energy source these MFBI's would experience a net annual operating cost increase, but would save a substantial amount of natural gas. This cost would only be incurred for a limited period because these MFBI's will eventually experience a substantial curtailment of their supply of natural gas. If the prohibition order were not issued to these MFBI's they could alternatively replace their current natural gas supply with either petroleum products or coal for the period following such substantial curtailment of their natural gas supply.

In the calculation of the NOCD, FEA has considered oil as a substitute fuel for curtailed natural gas. In calculating the NOCD, in those instances where the MFBI has experienced no curtailment of its natural gas supply, FEA considered the present fuel usage. The net annual operating cost increase for these MFBI's resulting from operating on coal as their primary energy source, instead of petroleum products (and/or natural gas where applicable), will be approximately $621,033.

Although the use of the coal alternative, instead of potential petroleum products, could be expected to result in a net annual operating cost increase, FEA has determined that the prohibition of burning natural gas or petroleum products as the primary energy source at Calhoun 1, 2, 3, 4, and 5 is not unreasonable.

Burning of coal by these MFBI's as their primary energy source instead of petroleum products would result in additional capital investment costs and annual operating and maintenance costs exclusive of fuel costs. Any additional conversion costs would, however, be mitigated by the savings in fuel costs inherent in burning coal. Notwithstanding the fact that these MFBI's could experience annual savings in their total fuel costs should they convert to coal instead of converting to petroleum products, there would be a net increase in the costs to these MFBI's.

Although conversion to the burning of coal instead of petroleum products would be expected to increase the costs incurred by Calhoun 1, 2, 3, 4, and 5 by $621,033 per year, FEA proposes to find that such increased cost, per barrel of oil saved is not unreasonable given the purposes of ESECA. This determination is based on consideration of the substantial potential oil savings that would result from conversion to coal. The determination that the costs of burning coal instead of petroleum products would not be unreasonable is further supported by consideration of such costs in relation to the expected remaining useful life of these MFBI's, the size and resources of the owner as examined in the following discussion of financial capability, and the nature of the expected operations of these MFBI's.

The additional costs that would be incurred if FEA were to prohibit the burning of natural gas or petroleum products as the primary energy source at Calhoun 1, 2, 3, 4, and 5 would only be incurred for a limited period of time. In view of the scarcity of national supplies of natural gas and the likelihood that Calhoun 1, 2, 3, 4, and 5 will experience a substantial curtailment of its present natural gas supply in the future, FEA has determined that the cost of burning coal in lieu of natural gas is not unreasonable. (Final Report Oil and Gas Resources, Reserves, and Productive Capacities Volumes I and II, Federal Energy Administration, October 1975.)

4. *Financial capability of the owner.* a. *Recovery of capital investment.* FEA proposes to find that compliance with a Prohibition Order by Calhoun 1, 2, 3, 4, and 5 would be economically feasible. FEA's analysis took into consideration the financial capibility of the owner and is based upon the owner's financial position as reported in the Dun and Bradstreet Reference Book (March 1977). Where necessary, FEA performed an independent analysis of the owner's financial capability, considering such factors as the owner's current financial statement and the additional capital investment required for the owner to comply with this NOI and all other NOI's which are currently under consideration, as well as additional capital investment costs related to all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to MFBI's owned by Bowater Southern.

FEA related these additional capital investment costs to the total capitalization of Bowater Southern and the remaining useful life after conversion of Calhoun 1, 2, 3, 4, and 5.

FEA does not consider the effect of the added capital investment costs to represent an unreasonable burden given the financial capabilities of the owner to assume such costs.

b. *Total annual costs associated with conversion.* The total estimated annual increase in costs (amortized increased capital investment costs and other costs, exclusive of fuel costs) associated with the burning of coal as opposed to oil and natural gas attributable to compliance with this NOI and all other NOI's which are currently under consideration has been determined. FEA also took into consideration total annual costs resulting from compliance with all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to Bowater Southern MFBI's.

Notwithstanding the potential offsetting value of fuel cost savings attributable to compliance with this NOI and all other NOI's currently under consideration, Bowater Southern's total annual costs after conversion will increase by $621,033.

B. *Consistency with the purposes of ESECA.* Because the issuance of a Prohibition Order to Calhoun 1, 2, 3, 4, and 5 will discourage the use of natural gas or petroleum products and encourage the increased use of coal, FEA proposes to conclude that this action would be consistent with the purpose of ESECA to provide a means to assist in meeting the essential needs of the United States for fuels.

On the basis of the environmental analysis which FEA is required to conduct prior to issuance of a Notice of Effectiveness of a Prohibition Order, as well as the necessity for these MFBI's to comply with the Clean Air Act and other applicable environmental protection requirements, FEA proposes to conclude that a Prohibition Order to Calhoun 1, 2, 3, 4, and 5 would be consistent with the purpose of ESECA to provide for a means to assist in meeting the essential needs of the United States for fuels in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment.

III. *Coal and coal transportation facilities*

will be available to these MFBI's during the period until December 31, 1984.

A. *Coal availability.* 1. *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the foreseeable future. U.S. Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (Demonstrated Coal Reserve Base of the United States by Sulfur Category, on January 1, 1974, Bureau of Mines (May 1975) (hereafter "BOM Survey")). Within these recoverable reserves approximately 200 billion tons contain .1% or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability for the period ending December 31, 1984.

2. *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned national coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

a. *National Coal Production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's Coal Mine Expansion Study (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, *Coal Availability Report,* April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	396.2
1984	475.5
1985	544.9

b. *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1977	698
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

c. *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

3. *Characteristic coal production and demand.* FEA's "Availability Report" identifies coal of specific quality characteristics available for use at these MFBI's. The survey is based on data from 31 mining companies that supplied useful information on 96 mining units. Responses from these companies identified planned production of coal which is not now committed to a specific buyer. For those companies which did not respond to the survey, FEA estimated their uncommitted planned production based on their 1974 production.

a. *Characteristic coal requirements for these MFBI's.* FEA's "Availability Report" has determined that boilers of the type used at Calhoun 1, 2, 3, 4 and 5 will be able to burn coal of the following characteristics and comply with all applicable air pollution control requirements.

Btu's/lb	[1] 10,000
Moisture (percent)	[2] 15
Ash (percent)	[2] 20
Volatile (percent)	[2] 15
Ash softening temp. (°F)	[1] 2,200
Sulfur (percent) (approximate)	[2] 4.0

[1] Mimimum.
[2] Maximum.

b. *Characteristic coal demand from these MFBI's.* The potential demand for coal, of the type described above, which would result from this NOI is estimated to be as follows:

	Demand (thousand tons)
1980 and thereafter	172

c. *National planned production, characteristic coal.* FEA's "Availability Report" has determined that coal of the type described in paragraph A.3.a., above, is uncommitted to a specific buyer and will be potentially available to these MFBI's in a nationwide market as follows:

Year:	*Production (thousand tons)*
1978	124,300
1979	243,100
1980	293,300
1981	350,000
1982	369,900
1983	396,200
1984	475,500

d. *National ESECA prohibition order demand for coal, regardless of characteristics.* The national planned production of characteristic coal, as stated in paragraph A.3.c., above, exceeds potential demand for coal regardless of characteristics expected from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. National ESECA Prohibition Order demand as previously stated in paragraph A.2.c., above, is no more than the following ("Availability Report"):

Year:	*Demand (thousand tons)*
1978	11,033
1979	22,434
1980	32,483
1981	35,755
1982	57,303
1983	59,815
1984	59,815

e. *Regional planned production, characteristic coal.* Coal with the characteristics described in paragraph A.3.a., above, is uncommitted and will be potentially available to these MFBI's (in a probable regional supply/demand relationship related to the location of these MFBI's) from BOM Districts 7, 8 and 13 as follows ("Availability Report"):

Year:	*Production (thousand tons)*
1978	28,934
1979	52,077
1980	58,396
1981	67,862
1982	71,985
1983	77,660
1984	89,345

f. *Regional ESECA prohibition order demand for coal, regardless of characteristic.* The expected regional production of characteristic coal, as stated in paragraph A.3.c., above, exceeds the potential demand for coal regardless of characteristic from BOM Districts 7, 8 and 13 expected to result from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. This potential regional demand is estimated in FEA's "Availability Report" to be no more than the following:

Year:	*Demand (thousand tons)*
1978	3,269
1979	9,149
1980	16,321
1981	18,005
1982	23,682
1983	24,095
1984	24,095

g. *Regional ESECA prohibition order demand for coal by sulfur characteristic.* The potential regional demand for coal from BOM Districts 7, 8 and 13 with a 2.21–4.01% sulfur content (which includes the 4.0% maximum sulfur content described in paragraph A.3.a., above) resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is estimated in FEA's "Availability Report" to be no more than the following:

Year:	*Demand (thousand tons) percent sulfur 2.21–4.01*
1978	77
1979	1,330
1980	1,530
1981	1,531
1982	1,531
1983	1,531
1984	1,531

The regional planned production of coal stated in paragraph A.3.e., above, with the characteristics described in paragraph A.3.a., above, far exceeds this potential ESECA regional demand for coal by sulfur characteristic.

4. *State or local laws.* FEA has found no state or local laws or policies limiting the extraction of utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

5. *Conclusion.* FEA's "Availability Report" has identified nationally and in BOM Districts 7, 8 and 13 uncommitted coal production that meets the requirements of Calhoun 1, 2, 3, 4 and 5 as described in paragraph A.3.a., above. FEA proposes to find that this uncommitted coal exists in amounts sufficient in any year to meet the estimated additional demand for coal, both nationally and from these Districts, resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders issued to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA.

Coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to these MFBI's location from BOM Districts 7, 8 and 13. FEA observes, however, that these MFBI's could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond,* School of Engineering, University of Pennsylvania, November 7, 1975.)

B. *Coal transportation.*—1. *Location of MFBI's and coal supply.* Based on an FEA study, *Coal Transportation Availability Report,* April 1977, (hereafter "Transportation Availability Report"), coal for Calhoun 1, 2, 3, 4 and 5 would probably come from BOM District 8 as both the primary and alternate source of supply. While this supply region is the nearest available source able to supply complying coal to the plant, complying coal could be transferred by rail from other identified sources within the United States as well. The analysis of transportation availability is based on the most likely route as well as one alternate route. These routes were chosen to demonstrate transportation availability.

2. *Route of coal shipment.* The primary route for coal delivery for Calhoun 1, 2, 3, 4 and 5 is to originate coal in BOM District 8 near Somerset, Kentucky on the Southern Railway. Southern would carry the coal via Knoxville, Tennessee and deliver it to Calhoun 1, 2, 3, 4 and 5. The total rail distance is about 233 miles.

The alternate route from the primary supply area originates coal in Corbin, Kentucky on the Louisville and Nashville Railroad (L&N) which moves it via Knoxville, Tennessee and Patty, Tennessee and delivers it to Calhoun 1, 2, 3, 4 and 5. The total rail distance is about 183 miles.

3. *Originating trunk carrier.* The Southern Railway, the originating carrier of coal for Calhoun 1, 2, 3, 4 and 5 has about 14,000 hopper cars in service. Using an average number of 20 deliveries per year per 88-ton car, the Southern may need as many as 132 additional cars to handle the increased demand from Calhoun 1, 2, 3, 4 and 5.

This estimate assumes that the railroad would neither have excess originating capacity nor obtain cars from other carriers in the originating vicinity.

FEA's "Transportation Availability Report concluded that for all potential Prohibition Order candidates studied, there would be no major constraints in transporting coal. This study examined existing rail transportation car capacity, water transportation capacity, including unloading docks, where applicable, and took into account projections made by all carriers to meet the anticipated demand for all types of transportation facilities assuming all MFBI's studied were to receive orders under Section 2(a) of ESECA.

FEA has not found nor has it been informed of any apparent constraints to carrying coal for any originating alternate or intermediate carriers should they be used.

4. *Destination carrier and MFBI facilities.* Bowater Southern has indicated that coal would be shipped to it by Southern and L&N.

There are no other obstacles to the delivery of coal to Calhoun 1, 2, 3, 4 and 5.

5. *Conclusion.* Coal transportation facilities will be available for the period a Prohibition Order is expected to be in effect since no major constraints to coal delivery over the primary route to Calhoun 1, 2, 3, 4, and 5 presently exist, and alternate routes are available.

Appendix—Proposed Findings and Rationale for Notice of Intention To Issue a Prohibition Order

ESECA and the FEA regulations require FEA to make certain findings before issuing a Prohibition Order to a major fuel burning installation (MFBI). FEA's proposed findings are set out below with respect to the MFBI's named below. Supporting rationale and conclusions are also set forth.

Docket No.	Owner	Installation	Unit No.	Location
OCU-3066	Westvaco Corp.	Charleston plant	4,5	Charleston, S.C.

These findings, which are now proposed by FEA, are based on the information that has been provided to and developed by FEA prior to the issuance of this Notice of Intention (NOI) to issue a Prohibition Order.

Westvaco Corporation shall be referred to as the "owner" and as "Westvaco". Charleston Plant Units 4 and 5 shall be referred to as the "MFBI's" and as "Charleston 4 and 5".

I. *Capability and necessary plant equipment to burn coal.*

FEA proposes to find that on June 22, 1974, Charleston 4 and 5 had the capability and necessary plant equipment burn coal. This proposed finding is based on the facts and interpretations stated below:

A. Westvaco, in a Major Fuel Burning Installation Coal Conversion Report, Section II, Questions 6, and 12–14, (Form FEA C-502-S-0) filed on June 30, 1975 indicated that each MFBI had in place on June 22, 1974, a boiler that was capable of burning coal. The boilers had been designed and constructed or modified to burn coal as their primary energy source, notwithstanding the fact that on June 22, 1974, the MFBI's may not have been burning coal as their primary energy source.

B. Based on information Westvaco filed with FEA dated July 22, 1976, and other information available to FEA, the following plant equipment and facilities at Charleston 4 and 5 would have to be acquired or refurbished in order for these MFBI's to burn coal as their primary energy source:

1. Unloaders.
2. Conveyors.
3. Scales and feeders.
4. Bunkers and silos.
5. Stack reclaimer.
6. Soot blowers.
7. Combustion controls.
8. Fans.
9. Feed ducts.
10. Ash handling and ponding equipment.
11. Pulverizers and crushers.
12. Burners.
13. Air heater.

C. FEA proposes to find that on June 22, 1974, Charleston 4 and 5 had all other significant plant equipment and facilities associated with the burning of coal.

D. Within the meaning of ESECA and the regulations promulgated pursuant thereto, the equipment and facilities listed in paragraph B, above, do not individually or in combination constitute a lack of capability and necessary plant equipment to burn coal as of June 22, 1974.

II. *The burning of coal in lieu of natural gas or petroleum products is practicable and consistent with the purposes of ESECA.*

FEA proposes to find that the burning of coal in lieu of petroleum products or natural gas at Charleston 4 and 5 is practicable and consistent with the purposes of ESECA. This proposed finding is based upon an analysis by FEA of the fuel consumption of these boilers for the period 1973–76, the remaining useful service life of the boilers after conversion, the net operating cost differential that would result from compliance with a Prohibition Order, as well as the facts and interpretations referenced below:

A. *The burning of coal is practicable.*—1. *Costs associated with burning coal.*—a. *Capital investment costs.* The total estimated initial capital investment costs, including financing costs, that would result from the acquisition and refurbishment of equipment and facilities associated with the burning of coal at Charleston 4 and 5 have been determined.

This determination was based on existing FEA information and analysis as well as information filed with FEA by the owner. Approximate costs to comply with applicable environmental protection requirements have also been considered, including the cost of compliance with the air pollution control requirements of the Clean Air Act.

b. *Annual operating and maintenance costs.* The expected increase in operating and maintenance costs, exclusive of fuel costs, that would result from the burning of coal has been calculated based on information supplied by the owner or otherwise acquired by FEA.

c. *Fuel costs.* Based on an analysis of annual fuel consumption and fuel cost information supplied by the owner and/or, in appropriate circumstances, upon FEA's fuel cost estimates, FEA has determined that the burning of coal in lieu of natural gas or petroleum products at Charleston 4 and 5 will result in a decrease in annual fuel costs.

d. *Net operating cost differential.* Based on the factors stated in paragraphs A.1.a.–c., above, as well as the expected remaining useful life of the boilers after conversion, FEA has determined that the net annual operating cost differential (which represents the difference between operating the boilers with coal and alternate fuel(s) as their primary energy source), resulting from the

conversion of Charelston 4 and 5 will represent an annual cost increase of $24,659.

2. *Reasonableness of costs of conversion.* The foregoing analysis of the costs of conversion provided the basis for deciding whether the conversion of Charleston 4 and 5 is reasonable.

As a result of conversion, Westvaco will incur additional capital investment costs, including financing costs, and additional annual operating and maintenance costs, exclusive of fuel costs, but will experience an annual savings in its total fuel costs for the expected remaining useful service life of the boilers after conversion.

Increased costs of conversion will be mitigated by the decrease in fuel costs. The net result, however, will be an increase in the annual cost of operating the boilers.

The use of coal at Charleston 4 and 5 will result in a substantial annual savings of barrels of oil that otherwise would be used as a boiler fuel.

Although conversion to the burning of coal would be expected to increase the cost of operating at Charleston 4 and 5, FEA proposes to find that such increased cost, per barrel of oil saved, is not unreasonable. This is based on consideration of the substantial savings of oil that will result from this conversion. The determination that the costs of converting are not unreasonable is further supported by consideration of such costs in relation to the expected remaining useful life of the boilers after conversion, the size and resources of Westvaco as examined in the following analysis of financial capability, the nature of the expected operation of these boilers and potential future increases in the fuel cost differential in favor of coal.

3. *Financial capability of the owner.*—a. *Recovery of capital investment.* FEA proposes to find that compliance with a Prohibition Order by Charleston 4 and 5 would be economically feasible. FEA's analysis took into consideration the financial capability of the owner and is based upon the owner's financial position as reported in the Dun and Bradstreet Reference Book (March 1977). Where necessary FEA performed an independent analysis of the owner's financial capability, considering such factors as the owner's current financial statement and the additional capital investment required for the owner to comply with this NOI and all other NOI's which are currently under consideration, as well as additional capital investment costs related to all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to MFBI's owned by Westvaco. FEA related these additional capital investment costs to the total capitalization of Westvaco and the remaining useful life after conversion of Charleston 4 and 5.

FEA does not consider the effect of the added capital investment costs to represent an unreasonable burden given the financial capabilities of Westvaco to assume such costs.

b. *Total annual costs associated with conversion.* The total estimated annual increase in costs (amortized increased capital investment costs and other costs, exclusive of fuel costs) associated with the burning of coal as opposed to oil attributable to compliance with this NOI and all other NOI's which are currently under consideration has been determined. FEA also took into consideration total annual costs resulting from compliance with all other Notices of Intention, to date, if any, to issue Prohibition or Construction Orders, and from all outstanding Prohibition or Construction Orders, if any, issued to date under authority of Section 2 (a) and (c) of ESECA to Westvaco MFBI's.

Notwithstanding the potential offsetting value of fuel cost savings, attributable to compliance with this NOI and all other NOI's currently under consideration, Westvaco's total annual costs after conversion will increase by $24,659.

B. *Consistency with the purposes of ESECA.* Because the issuance of a Prohibition Order to Charleston 4 and 5 will discourage the use of natural gas or petroleum products and encourage the increased use of coal, FEA proposes to conclude that this action would be consistent with the purpose of ESECA to provide a means to assist in meeting the essential needs of the United States for fuels.

On the basis of the environmental analysis which FEA is required to conduct prior to issuance of a Notice of Effectiveness of a Prohibition Order, as well as the necessity for these MFBI's to comply with the Clean Air Act and other applicable environmental protection requirements, FEA proposes to conclude that a Prohibition Order to Charleston 4 and 5 would be consistent with the purpose of ESECA to provide for a means to assist in meeting the essential needs of the United States for fuels in a manner which is consistent, to the fullest exent practicable, with existing national commitments to protect and improve the environment.

III. *Coal and coal transportation facilities will be available to these MFBI's during the period until December 31, 1984.*

A. *Coal availability.*—1. *National coal reserves.* United States coal reserves are more than sufficient to supply national needs for the foreseeable future. U.S. Department of the Interior, Bureau of Mines (BOM) data show a demonstrated coal reserve base of over 400 billion tons, over half of which is currently technically and economically recoverable (*Demonstrated Coal Reserve Base of the United States by Sulfur Category, on January 1, 1974,* Bureau of Mines (May 1975) [hereafter "BOM Survey"]). Within these recoverable reserves approximately 200 billion tons contain 1% or less sulfur by weight. To determine when certain quantities of these reserves are expected to be available, FEA has examined several studies referenced herein, which together provide the best current evidence as to coal availability for the period ending December 31, 1984.

2. *National coal production and demand.* The comparison, stated below, of estimated national coal production, national coal demand, and the total tonnage of uncommitted planned national coal production (derived from responses to a survey of coal producing companies) shows that there should be sufficient production of coal to meet the total national demand through 1980. Beyond 1980, plans for new production are not yet fully developed because few coal producers have firm expansion plans that extend that far into the future; however, the projected total planned national coal production for 1985 already meets 99% of the total U.S. demand expected in 1985. With time, more potential mine developments will become firm plans, thus increasing the planned production.

a. *National coal production.* It is conservatively estimated that it will be practicable to produce coal nationally in at least the following quantities:

Year:	*Production potential (million tons)*
1977	732.3
1978	791.6
1979	851.4
1980	911.7
1981	960.0
1982	994.3
1983	1,017.4
1984	1,028.7
1985	1,029.6

The figures shown above are derived from FEA's *Coal Mine Expansion Study* (May 1976). This study demonstrates that most coal producers did not have firm or accurate plans for new capacity additions beyond 1980. The 1985 projection, therefore, tends to underestimate actual production potential.

An FEA study, *Coal Availability Report,* April 1977, (hereafter "Availability Report"), indicates current plans for nationwide production of uncommitted coal as follows:

Year:	*Production (million tons)*
1978	124.3
1979	243.1
1980	293.3
1981	350.0
1982	369.9
1983	390.2
1984	475.5
1985	544.9

b. *National demand exclusive of ESECA prohibition order demand.* The estimated national demand, excluding any increased demand resulting from FEA action under the authority of Section 2(a) of ESECA, is as follows (FEA 1976 National Energy Outlook):

Year:	*Demand (million tons)*
1978	730
1979	764
1980	799
1981	842
1982	887
1983	935
1984	985
1985	1,040

c. *National ESECA prohibition order demand.* The estimated potential demand for coal resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA is no more than the following ("Availability Report"):

Year:	*Demand (million tons)*
1978	11.0
1979	22.4
1980	32.5
1981	35.8
1982	57.4
1983	59.8
1984	59.8

3. *Characteristic coal production and demand.* FEA's "Availability Report" identifies coal of specific quality characteristics available for use at these MFBI's. The survey is based on data from 31 mining companies that supplied useful information on 96 mining units. Responses from these companies identified planned production of coal which is not now committed to a specific buyer. For those companies which did not respond to the survey, FEA estimated their

uncommitted planned production based on their 1974 production.

a. *Characteristic coal requirements for these MFBI's.* FEA's "Availability Report" has determined that boilers of the type used at Charleston 4 and 5 will be able to burn coal of the following characteristics and comply with all applicable air pollution control requirements.

Btu's/lb	[1] 10,000
Moisture (percent)	[2] 15
Ash (percent)	[2] 20
Volatile (percent)	[1] 15
Ash softening temp. (°F)	[1] 2,200
Sulphur (percent, approximate)	[2] 1.5

[1] Minimum.
[2] Maximum.

b. *Characteristic coal demand from these MFBI's.* The potential demand for coal, of the type described above, which would result from this NOI is estimated to be as follows:

	Demand (thousand tons)
1980 and thereafter	187

c. *National planned production, characteristic coal.* FEA's "Availability Report" has determined that coal of the type described in paragraph A.3.a., above, is uncommitted to a specific buyer and will be potentially available to these MFBI's in a nationwide market as follows:

Year:	*Production (thousand tons)*
1978	67,937
1979	127,138
1980	158,932
1981	189,318
1982	200,259
1983	214,838
1984	253,700

d. *National ESECA prohibition order demand for coal, regardless of characteristics.* The national planned production of characteristic coal, as stated in paragraph A.3.c., above, exceeds potential demand for coal regardless of characteristic expected from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. National ESECA Prohibition Order demand as previously stated in paragraph A.2.c., above, is no more than the following ("Availability Report"):

Year:	*Demand (thousand tons)*
1978	11,032
1979	22,434
1980	32,483
1981	35,755
1982	57,362
1983	59,815
1984	59,815

e. *Regional planned production, characteristic coal.* Coal with the characteristics described in paragraph A.3.a., above, is uncommitted and will be potentially available to these MFBI's (in a probable regional supply/demand relationship related to the location of the MFBI's) from BOM Districts 7, 8 and 13 as follows ("Availability Report"):

Year:	*Production (thousand tons)*
1978	26,032
1979	47,383
1980	53,082
1981	61,661
1982	65,354
1983	70,552
1984	80,964

f. *Regional ESECA prohibition order demand for coal, regardless of characteristic.* The expected regional production of characteristic coal, as stated in paragraph A.3.c., above, exceeds the potential demand for coal regardless of characteristic from BOM Districts 7, 8 and 13 expected to result from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of Section 2(a) of ESECA. This potential regional demand is estimated in FEA's "Availability Report" to be no more than the following:

Year:	*Demand (thousand tons)*
1978	3,268
1979	9,149
1980	16,331
1981	18,005
1982	23,682
1983	24,095
1984	24,095

g. *Regional ESECA prohibition order demand for coal by sulfur characteristic.* The potential regional demand for coal from BOM Districts 7, 8 and 13 with a 1.41–1.8% sulfur content (which includes the 1.5% maximum sulfur content described in paragraph A.3.a., above) resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under the authority of Section 2(a) of ESECA is estimated in FEA's "Availability Report" to be no more than the following:

Year:	*Demand (thousand tons) percent sulfur, 1.41–1.8*
1978	226
1979	897
1980	1,773
1981	1,773
1982	1,773
1983	1,773
1984	1,773

The regional planned production of coal stated in paragraph A.3.c., above, with the characteristics described in paragraph A.3.a., above, far exceeds this potential ESECA regional demand for coal by sulfur characteristic.

4. *State or local laws.* FEA has found no state or local laws or policies limiting the extraction or utilization of coal that would adversely affect these production figures, and none have been brought to FEA's attention.

5. *Conclusion.* FEA's "Availability Report" has identified nationally and in BOM Districts 7, 8 and 13 uncommitted coal production that meets the requirements of Charleston 4 and 5 as described in paragraph A.3.a., above. FEA proposes to find that this uncommitted coal exists in amounts sufficient in any year to meet the estimated additional demand for coal, both nationally and from these Districts, resulting from this NOI, from all other Notices of Intention to issue Prohibition Orders to date and from all outstanding Prohibition Orders issued to date under authority of section 2(a) of ESECA.

Coal for these MFBI's will probably be bought from producers according to regional supply/demand relationships related to the MFBI's location from BOM Districts 7, 8 and 13. FEA observes, however, that the MFBI's could purchase coal in other markets as such production becomes available. (*The Feasibility of Considering Expanded Use of Western Coal by Midwestern and Eastern Utilities in the Period 1978 and Beyond*, School of Engineering, University of Pennsylvania, November 7, 1975.)

B. *Coal transportation.*—1. *Location of MFBI's and coal supply.* Based on an FEA study, *Coal Transportation Availability Report*, April 1977, (hereafter "Transportation Availability Report"), coal for Charleston 4 and 5 would probably come from BOM District 8 as the primary supply area and from BOM District 6 as the alternate supply area. While these supply regions are among the nearest available sources able to supply complying coal to the plant, complying coal could be transferred by rail from other identified sources within the United States as well. The analysis of transportation availability is based on the most likely route as well as two alternate routes. These routes were chosen to demonstrate transportation availability.

2. *Route of coal shipment.* The primary route for coal delivery to Charleston 4 and 5 would originate in BOM District 8 in the Somerset, Kentucky area on the Southern Railway Co. (Southern). The Southern would move it via Knoxville, Tennessee to Asheville, North Carolina, Spartanburg, Columbia and Orangeburg, South Carolina for delivery to Charleston 4 and 5. The total rail distance is approximately 585 miles.

The alternate route for coal delivery from the primary supply area originates coal in BOM District 8 in the Corbin, Kentucky area on the Louisville and Nashville (L&N) Railroad. The L&N would move it via Knoxville, Tennessee to Atlanta, Georgia where the Seaboard Coast Line (SCL) would then pick it up and carry it via Augusta Robbins and Yemassee, South Carolina for delivery to Charleston 4 and 5. The total rail distance is about 639 miles.

An alternate route from the alternate supply area would originate coal in BOM District 6 in the Bluefield, West Virginia area on the Norfolk and Western (N&W) which would move the coal via Roanoke, Virginia to Walnut Cove, North Carolina. Southern would then pick it up and move the coal via Greensboro and Charlotte, North Carolina to Columbia, South Carolina and deliver the coal to Charleston 4 and 5. The total rail distance is about 557 miles.

3. *Originating trunk carrier.* The Southern Railway, originating carrier of coal for Charleston 4 and 5 has about 14,000 hopper cars in service. Using an average number of deliveries of 20 per year per 88-ton car, the Southern may need as many as 197 additional cars to handle the increased demand from Charleston 4 and 5. This estimate assumes that the railroad would neither have excess originating capacity nor obtain cars from other carriers in the originating vicinity.

FEA's "Transportation Availability Report" concluded that for all potential Prohibition Order candidates studied, there would be no major constraints in transporting coal. This study examined existing rail transportation car capacity, water transportation capacity, including unloading docks, where applicable, and took into account projections made by all carriers to meet the anticipated demand for all types of transportation facilities assuming all MFBI's studied were to receive orders under Section 2(a) of ESECA.

FEA has not found nor has it been informed of any apparent constraints to carrying coal for any alternate or intermediate carriers should they be used.

4. *Destination carrier and MFBI facilities.* Westvaco has indicated that land is available for coal storage. Railroad companies can deliver coal to Charleston 4 and 5.

There are no other obstacles to the delivery of coal to Charleston 4 and 5.

5. *Conclusion.* Coal transportation facilities will be available for the period a Prohibition Order is expected to be in effect since no major constraints to coal delivery over the primary route to Charleston 4 and 5 presently exist, and alternate routes are available.

[FR Doc.77-13705 Filed 5-13-77;8:45 am]

Federal Register

MONDAY, MAY 16, 1977

PART V

ENVIRONMENTAL PROTECTION AGENCY

■

IDENTIFICATION OF REGIONS AND AGENCIES FOR SOLID WASTE MANAGEMENT

Interim Guidelines

Title 40—Protection of the Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

[FRL 715-1]

PART 255—IDENTIFICATION OF REGIONS AND AGENCIES FOR SOLID WASTE MANAGEMENT

Interim Guidelines

AGENCY: Environmental Protection Agency.

ACTION: Interim Guidelines.

SUMMARY: These guidelines present criteria and procedures to assist State and local governments in identifying (1) regions which have common solid waste management problems and which are appropriate units for planning regional solid waste management services, and (2) State and local agencies and their respective responsibilities for developing and implementing a State solid waste management plan. Such identification is a requirement for Federal assistance under Section 4007 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976.

DATES: Comments must be received by July 15, 1977. Effective date: June 15, 1977.

ADDRESS: Comments on these guidelines may be addressed to the Deputy Assistant Administrator for Solid Waste (AW-462). Environmental Protection Agency, Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT:

Burnell Vincent, (202) 755-9125.

SUPPLEMENTARY INFORMATION: The overall objectives of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (Pub. L. 94-580, 42 U.S.C. 6901 et seq. the Act), are to promote the protection of health and the environment and to conserve material and energy resources in part by establishing a cooperative effort toward improved solid waste management among the Federal, State, and local governments and private enterprise. The protection of health and the environment includes particularly the protection of the quality of ground and surface waters from leachates and runoff, protection of air quality, disease and vector control, safety, and esthetics associated with land disposal sites. The issuance of Federal guidelines for identifying regions that are appropriate units for solid waste management planning and for identifying agency responsibilities for planning and implementation is the first action under the Act in this cooperative effort.

These guidelines provide criteria and procedures to assist the formal identification of regions by Governors as described in section 4006(a) of the Act. In conjunction with that effort, State and local officials will jointly identify agencies to develop and implement a State solid waste management plan, specifying which agencies will be responsible for which functions (section 4006(b)). This is an important feature of the Act, since formal identification of responsibilities has not been routinely achieved in all areas of the country. The Act calls for region identification within 6 months of the date of these guidelines, and agency identification within 6 months after that.

Within 12 months of the publication date of the regional identification guidelines, EPA is required to issue guidelines on the development and implementation of the State solid waste management plans (section 4002(b)). The identification of regions and responsible agencies pursuant to section 4006 will be incorporated in the State plan, which to be eligible for Federal funds should at a minimum provide for prohibition of new open dumps, for remedial actions at existing open dumps, for other disposal, recovery and conservation measures necessary to meet the objectives of the Act, and for the distribution of Federal funds within the State (section 4003).

The formal identification of regional boundaries and responsible agencies and the approval of State plans are conditions for eligibility of States for Federal financial assistance (section 4007(b)). Grant regulations to be developed as Subpart B, Part 35, of this Chapter will provide that grants under section 4008 may only go to agencies identified pursuant to section 4006.

In carrying out the identification and planning processes, several features of the Act should be particularly noted. One is the broad definitions of solid waste, solid waste management, and disposal that are used. Complete coverage of all waste and waste management practices which have health or environmental impact is intended, consistent with other Federal laws, as specified in section 1006. Another feature is the flexibility for State and local discretion in the entire planning and implementation process. Finally, there is clear emphasis on opportunities for participation and involvement of the public, all affected agencies and parties, and the private sector in program planning.

Region and agency identifications should be based on a State strategy for solid waste management. This strategy should:

1. Establish goals and objectives for prevention of adverse effects on the environment resulting from improper solid waste disposal including protection of surface and ground water quality, air quality and the land.

2. Identify waste problems by type and volume (including residential and commercial solid waste, hazardous waste, industrial sludges and pretreatment residues, municipal sewage sludge, air pollution control residue, septage, mining and agricultural wastes and other wastes from industrial or municipal sources).

3. Identify disposal options (including impoundments, pits, ponds, lagoons, landfills, dumps, land spreading, and industrial disposal operations).

4. Identify resource recovery and conservation options and other options for conversion, treatment or processing of solid waste.

5. Review and analyze existing agencies with responsibilities for solid waste management and existing institutional and regulatory programs.

6. Involve an analysis of alternatives for identifying areas and agencies based on the information developed above.

This State strategy is an essential component of the State plan which will be developed and submitted pursuant to the guidelines on the development and implementation of State solid waste management plans (sections 4002(b) and 4007).

The goal of the identification process should be to establish complete coverage in each State for solid waste management functions (for which there is a need) in such a manner that resources are equitably distributed; that disposal capacity, both existing and proposed, is utilized in the manner most expeditious from a statewide perspective; that resource recovery and conservation is encouraged consistent with economic and energy conservation policies; that wastes are accumulated in sufficient quantity to achieve economical management; that transportation and logistical problems are resolved and assets are best utilized; and that the available means of interregional and interstate coordination are maximized. This does not imply that all functions or all waste types should have equal emphasis in all parts of the State. For example, while no area should be without access to acceptable solid waste disposal, there may be large areas which will not need concerted planning programs for several years and which may logically not be included in a resource recovery facility or a special hazardous or agricultural waste plan.

The criteria for region and agency identification presume some determination of goals and objectives in the State planning process to date, including those related to land, air and surface and ground water management policy. For some waste types and disposal or recovery options planning may not have proceeded to the point where the most appropriate region and agency identifications can be made. It may be desirable to set priorities and to phase region and agency identifications for various wastes and disposal and recovery options, based upon environmental and economic impacts, state-of-the-art of control technologies, and the current orientation and capabilities of State and local agencies. Temporary identifications are encouraged where they would be useful in achieving planning progress or in making decisions. Region and agency identification should be a continuing process under the State plan. Grant regulations to be issued pursuant to section 4007 and State planning guidelines to be issued pursuant to section 4002(b) may require continuing analyses of regional and agency designations and, as appropriate, redesignation of regions and agencies based on progress in developing the State strategy and plan.

The resulting system may be quite simple, or it may make distinctions according to purposes and functions. Where existing identifications of boundaries and agencies are effective in meeting the needs of the Act, they should naturally be utilized. Regions may be separately identified for each function, such as comprehensive planning and facility planning, or collection system and disposal site operation; they may be identified for types of wastes, such as hazardous, recoverable, or demolition debris; or they may be consolidated into established political boundaries. The identification of agency responsibility may similarly be established according to State needs for uniformity or diversity as determined jointly by State and local officials.

It is important to note that in accordance with the provisions of the Act, solid waste management includes practices such as utilization and disposal of municipal sewage treatment sludge and disposal of industrial wastes in surface impoundments. In some States, agencies responsible for such wastes may be distinct from agencies responsible for residential or commercial solid waste. Therefore, consideration should be given to designation of agencies which have demonstrated satisfactory ability to deal with these other types of solid wastes. Consideration should also be given to designation of more than one agency when a single agency does not have the appropriate experience and skills to perform all of the responsibilities which could be assigned under this Act. In such instances, it may be desirable to designate a separate agency for special functions such as sludge management or industrial impoundments particularly where existing agencies have demonstrated experience and abilities in a particular area.

Although the Act calls for separate actions to be taken in identifying regions and agencies, these actions are interrelated, and this fact should be well recognized in the identification processes. The criteria and procedures suggested in these guidelines should help to assure adequate consideration of the interrelationships. Identification of regional boundaries is the responsibility of the Governor after consultation with local elected officials. The identification of agencies is a joint responsibility of the State and local elected officials, requiring a more participatory local involvement. The Agency encourages States to provide for the participation of the legislative branch of the State Government in the identification of the regions and agencies. Such local and State involvement is needed to clearly determine whether the identified agencies have the authority and resources to carry out their responsibilities under the State plan and are accountable for doing so. The criteria for identifying agencies are no less applicable when the State plan calls for private industry to provide the recommended facilities and services, since a public agency must be held accountable for performance.

As noted, these identification processes are intended to build upon ongoing planning and management efforts including the efforts begun under the Solid Waste Disposal Act of 1965. Another important aspect is coordination with other programs, principally the areawide water quality management planning being conducted under section 208 of the Federal Water Pollution Control Act, 33 U.S.C. 1288. As part of that planning effort, State and areawide water quality management agencies are to identify a process to control the disposition of all residual (solid) waste in their areas which affect water quality of (section 208(b)(2)(J) of the FWPCA, 33 U.S.C. 1288(b)(2)(J)). Some of these water quality management agencies may have the capability and otherwise be qualified to conduct solid waste management planning for regions identified pursuant to these guidelines and such agencies should be considered as candidates for identification under the guidelines.

Attention is directed to the requirement of OMB Circular No. A-95, paragraph 2, Part IV of Attachment A, which provides for consideration of existing established substate planning districts and requires consultation with the appropriate Federal Regional Council.

The Act requires that guidelines for the identification of regions be published within 180 days of enactment (section 4002(a)). The Act does not require the publication of guidelines to assist States and local officials in the identification of agencies (section 4006(b)). However, under its general authority to publish necessary regulations (section 2002(a)(1)) and in response to requests for such guidance from States and local governments, EPA is including advisory criteria and procedures for identification of agencies as part of these guidelines.

To meet the Act's requirement for consultation with appropriate authorities, draft copies of the guidelines were sent to over 400 State, regional and local agencies, other Federal agencies, environmental groups and representatives of industry. In addition, a public meeting on the guidelines was held on March 30, 1977 with prior notice in the FEDERAL REGISTER. All comments were considered in the final drafting.

In order to allow the States, their Governors, and local authorities to begin work immediately on identification of regions and of agencies and their responsibilities as required by Section 4006, these guidelines are being published in interim form. Since the State and local governments need to refer to these guidelines in planning their action under the Act, it would be impracticable to first propose these guidelines prior to this publication. Similarly, it would be contrary to the public interest to delay the initiation of the State planning effort beyond the dates required by the Act. Accordingly, good cause is hereby found to publish these guidelines in the interim form without first proposing them for comment.

In addition to the extensive comments taken in the course of developing these interim guidelines, we invite further public comment. The review procedures established under OMB Circular A-85 will be conducted concurrently, and comments received from that process, from other Federal agencies, from State and local governments and from the public, together with the interim experience with these guidelines will be the bases for such changes as may be made prior to publication in final form. All comments received on or before July 15, 1977 will be considered prior to the promulgation of final guidelines.

Dated: May 9, 1977.

DOUGLAS M. COSTLE,
Administrator.

Chapter I, Title 40 of the Code of Federal Regulations is amended by adding a new Part 255, effective on June 15, 1977, as follows:

Subpart A—General Provisions

Sec.
255.1 Scope and purpose.
255.2 Definitions.

Subpart B—Criteria for Identifying Regions and Agencies

255.10 Criteria for identifying regions.
255.11 Criteria for identifying agencies.

Subpart C—Procedures for Identifying Regions and Agencies

255.20 Preliminary identification of regions.
255.21 Local consultation on boundaries.
255.22 Establishing regional boundaries.
255.23 Joint identification of agencies.
255.24 Procedures for identifying interstate regions.
255.25 Public participation.

Subpart D—Responsibilities of Identified Agencies and Relationship to Other Programs

255.30 Responsibilities established.
255.31 Integration with other Acts.
255.32 Coordination with other programs.
255.33 Inclusion of Federal Facilities and Native American Reservations.

Subpart E—Submission and Revision of Identifications

255.40 Notification of Status.
255.41 Procedures for Revision.

AUTHORITY: Sec. 2002(a)(1), Pub. L. 94-580, 90 Stat. 2795 (42 U.S.C. 6912(a)(1)). Also issued under sec. 4006(b), Pub. L. 94-580, 90 Stat. 2795 (42 U.S.C. 6946(b)), unless otherwise noted.

Subpart A—General Provisions

§ 255.1 Scope and purpose.

(a) These guidelines are applicable to policies, procedures, and criteria for the identification of those areas which have common solid waste management problems and which are appropriate units for planning regional solid waste management services pursuant to section 4002(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (the Act). The guidelines also define and guide the identification of which functions will be carried out by which agencies pursuant to section 4006 of the Act.

(b) The purposes of these guidelines are to (1) provide useful criteria for selecting the regions and agencies to be identified pursuant to section 4006 of the Act and (2) provide guidance for conducting the process which will result in formal identification of those regions and agencies.

(c) Identifications made pursuant to these guidelines should be consistent with State solid waste management plans and strategies. A State strategy establishes: goals for prevention of adverse effects on the environment resulting from improper solid waste disposal including protection of surface and ground water quality, air quality and the land; priorities among waste types; priorities among disposal practices; and the roles of existing agencies with responsibilities in solid waste management. The identification process should cover all waste types (residential and commercial solid waste, hazardous wastes, industrial sludges and pretreatment residues, municipal sewage sludge, air pollution control residue, septage, mining and agricultural waste, other industrial waste, and solid waste from community activities), all disposal practices (impoundments, pits, ponds, lagoons, landfills, dumps, land-spreading; and industrial leaching fields) and all technological approaches (conservation, recovery, incineration, disposal).

(Also Sec. 4002(a), Pub. L. 94-580, 90 Stat. 2795 (42 U.S.C. 6942)).

§ 255.2 Definitions.

The Act contains an extensive list of definitions in Section 1004 which are applicable here. There are further definitions of terms in OMB Circular A-95 Part IV of Attachment A which apply unless the context herein requires otherwise.

Subpart B—Criteria for Identifying Regions and Agencies

§ 255.10 Criteria for identifying regions.

The following criteria are to assist in identifying regions pursuant to section 4006(a) of the Act.

(a) Geographic areas which have a history of cooperating to solve problems in environmental or other related matters should be considered.

(1) Regions encompassing existing regional, including countywide, systems or institutions, including those of the private sector, should be evaluated. Changes in their boundaries may be needed for economic viability or other reasons in keeping with the State plan.

(2) Boundary selection which would require the creation of new agencies should be considered only where necessary. The relationship among established agencies should be considered. Where institutional gaps or inadequacies are found, regions should be identified keeping in mind which agencies would be able to fill those needs.

(b) The size and location of regions should permit resource recovery and conservation in accordance with the objectives in section 4001 of the Act.

(1) A region's size and configuration should be considered, weighing transportation costs against economies of scale.

(2) Left-over regions having inadequate resources or volumes of waste should be avoided.

(3) Location should be considered relative to available transportation and to markets for recovered resources.

(c) The volume of wastes within a region will influence the technology choices for recovery and disposal, determine economies of scale, and affect marketability of resources recovered. A region should include sufficient volume of waste to support the goals and objectives of the State plan, including materials or energy recovery as appropriate.

(d) Waste type should be considered since it also affects management options. Industrial or hazardous waste streams may warrant special consideration or special boundaries.

(e) The effect of geologic and hydrologic conditions, such as soil suitability, land availability, natural barriers (rivers and mountains), the quantity and availability of water resources, and the susceptibility of ground water to contamination should be considered. Aquifer protection in accordance with State water quality management plans and policies could influence boundary selection.

(f) Coordination with ongoing planning for other purposes may be an influence in selecting boundaries.

(1) The local and regional planning process should be integrated into the State planning process.

(2) Use of a common data base should be encouraged among transportation, land use, and other planning areas.

(3) To the extent practicable, coterminous planning regions should be encouraged, and larger regions should be multiples of whole smaller regions.

(4) Coordination should be provided with those agencies designated for water quality management planning under section 208 of the Federal Water Pollution Control Act, with underground injection control agencies designated in accordance with the Safe Drinking Water Act, and with air quality planning agencies designated under the Clean Air Act.

(Sec. 4002(a), Pub. L. 94-580, 90 Stat. 2795 (42 U.S.C. 6942).)

§ 255.11 Criteria for identifying agencies.

The following criteria are intended to assist in the process of agency selection pursuant to section 4006(b) of the Act. They may also be useful in pointing out needed improvements in the qualifications of the selected agencies.

(a) Existing agencies with demonstrated satisfactory ability to plan, manage, or operate solid waste management services should be considered for planning and implementation responsibilities. Agencies which have completed planning that resulted in successful implementation of solid waste management facilities or services should be given priority consideration for future planning responsibilities when they otherwise meet these criteria.

(b) An agency to be identified as responsible for conducting regional solid waste management planning should:

(1) Be a representative organization composed of, or whose membership is composed of, individuals at least a majority of whom are elected officials of local governments or their designees having jurisdiction in the planning region;

(2) Have planning jurisdiction in the entire planning region.

(3) Be capable of having the planning process fully underway within 1 year after identification.

(4) Have established procedures for adoption, review, and revision of plans and resolution of major issues, including procedures for public participation in the planning process.

(5) Have appropriate experience and skills to perform all of its assigned responsibilities, including expertise for the particular waste type, processing or disposal technology, and functional area. (Attention is directed to OMB Circular No. A-95, paragraph 1.e., Part IV of Attachment A which encourages the designation of established substate district comprehensive planning agencies as the agencies to carry out areawide planning assisted or required under any Federal program).

(c) In identifying agencies for solid waste management planning and implementation under section 4006 of the Act, the State should review the solid waste activities being conducted by water quality management planning agencies designated under section 208 of the Federal Water Pollution Control Act. Where feasible, identification of such agencies should be considered in the joint identification processes of Subpart C of this part. There should be a formal means of coordination established with the State water quality management agencies.

(d) Planning objectives will influence agency selection. Distinctions may be made between policy planning and facility planning and between planning a single solid waste management system and comprehensive planning which addresses trade-offs among various media.

(e) For coordinating planning and implementation under the State plan, as required in section 4003(1)(c), consideration should be given to identifying one agency for both functions. Where separate planning and implementation agencies are selected, there should be some means to ensure implementation, such as State legislation or an interagency agreement that all constituent jurisdictions will abide by the plan. Furthermore, strong coordination should be established between the planning agency and the implementing agency. During the planning period, the implementation agency should have continual access to plan development processes. There should be an administrative procedure to resolve conflicts between planners and implementers.

(f) The agency responsible for carrying out the regional plan should be constituted with authority to implement the plan in its constituent jurisdictions.

(g) The need for a reliable volume of waste to supply disposal or recovery facilities should be addressed. Agency pro-

viding such facilities whose member jurisdictions could choose whether or not to utilize the facility should analyze that need and consider methods such as franchising or public utility controls to assure an adequate supply.

Subpart C—Procedures for Identifying Regions and Agencies

The following procedures are provided to assist in establishing consultation and joint identification processes to be used for identifying regions and agencies pursuant to section 4006. Any process which meets the substantive intent of these guidelines may be submitted to the EPA Regional Administrator for purposes of determining grant eligibility under section 4007, especially if such process has been mandated or funded by State legislation.

§ 255.20 Preliminary identification of regions.

Preliminary identification of regions should be made by the Governor or his representative after consultation with the chief executives of all agencies designated pursuant to OMB Circular No. A-95, and with water quality and solid waste management planning agencies, cities, and counties and other appropriate units of general purpose local government. The Governor should notify the concerned agencies of his recommendations concerning boundaries. Where the regional identification has already been established by State legislation or other method in keeping with these guidelines, this notification need only request comments on the existing arrangement.

§ 255.21 Local consultation on boundaries.

Any chief executive of a general purpose government within the State may comment on the Governor's recommendation concerning the boundaries.

(a) The purposes of these comments are to assure that the experience of local agencies is used to fullest advantage in boundary decisions, that incompatible institutional arrangements are not forced, and that significant local considerations are not overlooked.

(b) When the objectives of the Act concerning local consultation can be met by an equivalent or existing process established under State administrative procedures acts or other State procedural guidance, the Governor may request that the EPA accept that process in fulfillment of the grant eligibility criteria under section 4007 of the Act.

§ 255.22 Establishing regional boundaries.

Under section 4006(a) of the Act the formal means for identifying regional boundaries are to be regulations promulgated by the Governor. Where the identification of areas has already been made by State legislation or other means which have legal stature equivalent to the required regulations, and where notification and consultation have occurred pursuant to § 255.20 and § 255.21 above, such legislation may be used in lieu of those regulations. Where substantial disagreement persists between the Governor and local officials, normal State administrative and judicial appeals procedures are available to resolve such conflict.

§ 255.23 Joint identification of agencies.

(a) The Governor should designate a lead agency to manage the identification process. That agency should review established notification procedures to determine that at least all general purpose local governments within the State, all units of regional governance, all existing solid waste and water quality management planning agencies, and all areawide A-95 clearinghouses will be notified. If necessary, a supplemental distribution list should be prepared. Consideration should be given to addressing individual offices within those agencies.

(b) The Governor should, by correspondence or State notification procedures, notify the agencies on the distribution list (paragraph (a) of this section) of the purpose and schedule of the joint identification process. This may be coincident with the notification in § 255.20.

(c) The Governor, an appropriate legislative committee, and appropriate local elected officials may submit nominations of agencies and functions to the lead agency appointed by the Governor. This lead agency should make such nominations public.

(d) Chief executives of agencies on the distribution list may comment by letter on the nominations.

(e) If a disagreement exists which cannot be settled by correspondence or a meeting with the Governor's representative, a public hearing should be held and all elected officials of local general purpose governments within the region should be invited. The purpose of this meeting will be for the local officials to reach a consensus regarding the agency(ies) to be formally identified.

(f) When a consensus is reached among local elected officials a formal agreement should be made in conformance with State administrative procedures. It should be binding until revised in accordance with this subpart.

(g) When the local consensus is in agreement with the State opinion, the State should confirm that agreed arrangement, formally establishing the duties and responsibilities of the identified agencies by legislative resolution or executive order.

(h) In the event that a consensus cannot be reached before 270 days after promulgation of regulations pursuant to § 255.22 the Governor should designate a State agency to develop and implement the plan for the concerned region.

§ 255.24 Procedure for identifying interstate regions.

If the Governor's recommendation, the local consensus, or a neighboring Governor's recommendation is that an interstate region be identified, the procedures described in this subpart should be extended to include notification and comment of all concerned officials in the entire recommended region.

(a) Section 4006(c) of the Act establishes specific procedures for the conduct of interstate identification processes.

(b) Recommendations, nominations, and comments resulting from processes described in §§ 255.20 and 255.21 that concern interstate regions should be brought to the attention of the appropriate EPA Regional Administrator.

(c) The Governor should evaluate the use of interstate metropolitan area (Standard Metropolitan Statistical Area) boundaries for planning and management purposes, and consider nominating such areas where appropriate.

(Also Sec. 4006(c), Pub. L. 94-580, 90 Stat. 2795 (42 U.S.C. 6946(c)).)

§ 255.25 Public participation.

Public participation in the process of identifying regions and agencies should be provided for, encouraged, and assisted by the State and local officials.

Subpart D—Responsibilities of Identified Agencies and Relationship to Other Programs

§ 255.30 Responsibilities established.

The following duties and responsibilities should be assigned for all appropriate areas pursuant to section 4006.

(a) Disposal of municipal solid waste should be an identified responsibility throughout the State. In the event that no local or regional agency is held responsible for disposal for a region, a State agency should be identified and held accountable.

(b) Where the State plan identifies municipal sewage sludge disposal, hazardous waste disposal or other functions needing attention in a region, an agency should be identified as being responsible for that function in that region.

(c) These responsibilities may be assigned with the intent that private industry be the actual purveyor of service.

§ 255.31 Integration with other acts.

The Governor shall integrate the provisions of these guidelines for purposes of administration and enforcement, and should avoid duplication to the maximum extent practicable, with the appropriate regional identification provisions of the Clean Air Act (42 U.S.C. 1857 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.) and other appropriate Acts of Congress.

(Sec. 1006(b), Pub. L. 94-580, 90 Stat. 2795 (42 U.S.C. 6905(b)).)

§ 255.32 Coordination with other programs.

The region and agency identification criteria (§ 255.11) specify review of solid waste activities being conducted by water

quality management planning agencies, underground injection control agencies, and air quality management agencies. There should be a formal means of coordination established between any agencies established under section 4006 which are not identical with these agencies. Coordination should be established so that permittees under the National Pollutant Discharge Elimination System of the Federal Water Pollution Control Act will be consulted concerning disposal of residual sludges.

§ 255.33 Inclusion of Federal facilities and native American reservations.

Major Federal facilities and Native American Reservations should be treated for the purposes of these guidelines as though they are incorporated muncipalities, and the facility director or administrator should be considered the same as a locally elected official.

(Sec. 6001, Pub. L. 94-580, 90 Stat. 2795 (42 U.S.C. 6961).)

Subpart E—Submission and Revision of Identifications

§ 255.40 Notification of status.

This subpart describes procedures which may ultimately be required by EPA when its publishes regulations governing application and eligibility for grants under section 4007. Under these regulations the appropriate EPA Regional Administrator will consider the identifications made under Section 4006 as one of the conditions of grant eligibility.

The Regional Administrator may accept, in State grant applications, notification of the status of these identifications to insure that premature decisions on State plan development will not be forced by the timing of the identifications specified in the Act. Procedures are outlined here to advise the States of what EPA expects to require in such notification.

(a) The notification should specify those regional boundaries and agencies which are uncontested at the time of submission, and specify a schedule of hearings and determinations of subsequent identification of regions and agencies as consensus is reached.

(b) The appropriate level of detail and the timing of the identifications to be made should be established for each planning region after agreement between the State and the appropriate EPA Regional Administrator. The timing should depend upon how well the State plan is developed, the environmental and economic decisions to be made, and the existing management approaches to their resolution.

(c) The notification should list the major known interested agencies and private operators within each planning region and describe how they will be included in the process. Where appropriate, it should include an expression of their interest and a definition of the extent and limits of their role in solid waste management planning.

(d) The notification should provide a schedule for phasing of plan development with the identification of agencies to carry out those plans, showing the projected maturation of management agencies and the milestones for those agencies in taking over the plan implementation process.

(e) This notification should include establishment of State agencies where regional planning and implementation agencies have not been identified within 270 days of the Governor's promulgation of regulations identifying regional boundaries.

(See section 4006(b)(2).)

§ 255.41 Procedure for revision.

The procedure for revising regional identifications or agency responsibilities should be specified by the notification.

(a) The State should review and, if appropriate, revise or modify the identification of regions and the responsibilities of local and regional agencies at intervals of less than 3 years. Review and modification should include, but not be limited to, the following areas:

(1) Whether new regions should be identified, or whether present boundaries should be modified.

(2) Whether responsibilities of an agency should be expanded or reduced due to changes in the needs for solid waste functions in the region.

(b) Revisions or adjustments to the State plan may require minor boundary or agency changes from time to time. The appropriate EPA Regional Administrator should be notified of such revisions by the State solid waste agency.

(c) Major revisions or adjustments in agencies or boundaries should be made in consultation with local officials and be subject to the same procedures used in the original identification process. Notification of such revisions should be submitted with State plan updates.

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Federal Register

MONDAY, MAY 16, 1977

PART VI

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Federal Insurance Administration

■

NATIONAL FLOOD INSURANCE PROGRAM

List of Communities

CHAPTER X—FEDERAL INSURANCE ADMINISTRATION, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

SUBCHAPTER B—NATIONAL FLOOD INSURANCE PROGRAM

[Docket No. FI-2883]

PART 1914—AREAS ELIGIBLE FOR THE SALE OF INSURANCE

Suspension of Community Eligibility

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: The purpose of this rule is to list communities where the sale of flood insurance as authorized under the National Flood Insurance Program will be suspended because of noncompliance with the program regulations.

DATES: The last date that appears in the fourth column is the effective date of the suspension of the sale of flood insurance.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755-5581 or Toll Free Line 800-424-8872, Room 5270, 451 Seventh Street, Southwest, Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: The Flood Disaster Protection Act of 1973 (Pub. L. 93-234) requires the purchase of flood insurance as a condition of receiving any form of Federal or Federally related financial assistance for acquisition or construction purposes in a flood plain area having special hazards within any community identified by the Secretary of Housing and Urban Development.

The requirement applies to all identified special flood hazard areas within the United States, and no such financial assistance can legally be provided for acquisition or construction in these areas unless the community has entered the program and insurance is purchased. Accordingly, for communities listed under this Part such restriction exists as of the effective date of suspension because insurance, which is required, cannot be purchased.

Section 1315 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4022) prohibits flood insurance coverage as authorized under the National Flood Insurance Program (42 U.S.C. 4001-4128) unless an appropriate public body shall have adopted adequate flood plain management measures with effective enforcement measures. The communities suspended in this notice no longer meet that statutory requirement for compliance with program regulations (24 CFR Part 1909 et seq.). Accordingly, the communities are suspended on the effective date in the list below.

The Federal Insurance Administrator finds that delayed effective dates would be contrary to the public interest. The Administrator also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

Section 1914.6 of Part 1914 of Subchapter B of Chapter X of Title 24 of the Code of Federal Regulations is amended by adding in alphabetical sequence new entries to the table. In each entry, a complete chronology of effective dates appears for each listed community.

The entry reads as follows:

§ 1914.6 List of eligible communities.

(24 CFR § 1914.6)

State ***	County ***	Location ***	Effective date of authorization of sale of flood Insurance for area ***		Hazard area Identified ***	Community Number ***
Michigan.	Menominee.	Stephenson, City of.	August 7, 1973. May 16, 1977. June 15, 1977.	Emerg. Reg. Susp.	5-17-74 & 5-28-76	260139-A
Minnesota.	St. Louis.	Cook, City of.	March 1, 1977. March 1, 1977. June 15, 1977.	Emerg. Reg. Susp.	3-29-74.	270420A
Do.	Anoka.	Coon Rapids, City of.	March 15, 1977. March 15, 1977. June 15, 1977.	Emerg. Reg. Susp.	6-1-73	270011A
Do.	Stearns.	St. Cloud, City of.	March 31, 1972. April 1, 1977. June 15, 1977.	Emerg. Reg. Susp.	12-17-73 & 9-26-75	270456A
New York.	Broome.	Conklin, Town of.	November 2, 1973. May 16, 1977. June 15, 1977.	Emerg. Reg. Susp.	4-5-74	360042A
Do.	Broome.	Dickinson, Town of.	July 22, 1975. April 15, 1977. June 15, 1977.	Emerg. Reg. Susp.	3-8-74 & 12-19-75	360044A
Do.	Oswego.	Oswego, City of.	April 30, 1973. May 16, 1977. June 15, 1977.	Emerg. Reg. Susp.	5-10-74	360656A

State ***	County ***	Location ***	Effective date of authorization of sale of flood Insurance for area ***		Hazard area Identified ***	Community Number ***
Do.	Broome.	Port Dickinson, Village of.	March 25, 1975. May 2, 1977. June 15, 1977.	Emerg. Reg. Susp.	2-1-74 & 11-28-75	360053A
Ohio.	Greene.	Bellbrook, City of.	July 28, 1972. June 1, 1977. June 15, 1977.	Emerg. Reg. Susp.	11-2-73 & 4-23-76	390194A
Do.	Licking.	Newark, City of.	August 25, 1972. April 15, 1977. June 15, 1977.	Emerg. Reg. Susp.	11-28-73 & 8-15-75	390335A
Do.	Wayne.	Wooster, City of.	February 2, 1977. February 15, 1977. June 15, 1977.	Emerg. Reg. Susp.	10-26-73	390579A
Oregon.	Douglas.	Roseburg, City of.	December 23, 1971. June 15, 1977. June 15, 1977.	Emerg. Reg. Susp.	6-7-74 & 4-23-76	410067A
Wisconsin.	Waupaca.	Fremont, Village of.	March 29, 1974. June 15, 1977. June 15, 1977.	Emerg. Reg. Susp.	11-30-73	550496A
Do.	Winnebago.	Oshkosh, City of.	November 12, 1971. May 16, 1977. June 15, 1977.	Emerg. Reg. Susp.	11-23-73	550511A
Do.	Ozaukee.	Unincorporated areas.	May 14, 1971. May 16, 1977. June 15, 1977.	Emerg. Reg. Susp.	5-16-77.	550310.

(24 CFR § 1914.6)

State	County	Location	Effective date of authorization of sale of flood Insurance for area		Hazard area Identified	Community Number
***	***	***	***		***	***
Pennsylvania.	Lebanon.	Annville, Township of.	March 16, 1973. April 15, 1977. July, 1, 1977.	Emerg. Reg. Susp.	11-9-73 & 9-3-76	420570A
Do.	Northampton.	Bangor, Borough of.	February 2, 1977. February 2, 1977. July 1, 1977.	Emerg. Reg. Susp.	2-1-74	420716A
Do.	Lebanon.	Cleona, Borough of.	March 9, 1973. April 1, 1977. July 1, 1977.	Emerg. Reg. Susp.	12-28-73	420571A
Do.	Chester.	Downingtown, Borough of.	December 3, 1971. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	2-9-73	420275
Do.	Chester.	East Bradford, Township of.	August 16, 1974. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	8-16-74 & 10-24-75	420276A
Do.	Luzerne.	Edwardsville, Borough of.	December 1, 1972. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	3-23-73	420604
Do.	Dauphin.	Highspire, Borough of.	November 10, 1972. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	3-23-73	420381
Do.	Wayne.	Honesdale, Borough of.	March 1, 1977. March 1, 1977. July 1, 1977.	Emerg. Reg. Susp.	11-30-73	420864A
Do.	Cambria.	Johnstown, City of.	August 4, 1972. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	1-16-74	420231A

State ***	County ***	Location ***	Effective date of authorization of sale of flood Insurance for area ***		Hazard area Identified ***	Community Number ***
Do.	Luzerne.	Larksville, Borough of.	March 23, 1973. April 1, 1977. July 1, 1977.	Emerg. Reg. Susp.	7-6-73	420614A
Do.	Dauphin.	Lower Swatara, Township of.	November 3, 1972. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	1-9-74 & 6-4-76	420385A
Do.	Luzerne.	Luzerne, Borough of.	March 2, 1973. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	11-23-73	420616
Do.	Montour.	Mahoning, Township of.	March 19, 1974. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	9-13-74 & 9-24-76	421234A
Do.	Luzerne.	Nanticoke, City of.	April 4, 1973. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	8-24-73 & 12-14-73	420617B
Do.	Lycoming.	Old Lycoming, Township of.	January 19, 1973. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	8-31-73 & 8-13-76	420652A
Do.	Clinton.	Pine Creek, Township of.	April 24, 1973. April 1, 1977. July 1, 1977.	Emerg. Reg. Susp.	4-1-77	420332
Do.	Luzerne.	Plymouth, Borough of.	October 27, 1972. April 1, 1977. July 1, 1977.	Emerg. Reg. Susp.	3-30-73 & 3-29-74	420622B
Do.	Do.	Plymouth, Township of.	February 2, 1973. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	2-8-74 & 7-2-76	420623A
Do.	Chester.	Pocopson, Township of.	January 21, 1972. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	4-15-77	420286
Do.	Northumberland.	Riverside, Borough of.	November 19, 1973. April 15, 1977. July 1, 1977	Emerg. Reg. Susp.	3-29-74 & 6-11-76	420740A

(24 CFR § 1914.6)

State ***	County ***	Location ***	Effective date of authorization of sale of flood Insurance for area ***		Hazard area Identified ***	Community Number ***
Do.	Delaware.	Rose Valley, Borough of.	February 2, 1977. February 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	5-25-73	420431C
Do.	Dauphin.	Royalton, Borough of.	March 16, 1973. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	6-15-73 & 9-10-76	420394A
Do.	Bradford.	Sayre, Borough of.	February 19, 1974. April 15, 1977. July 1, 1977..	Emerg. Reg. Susp.	5-17-74 & 6-4-76	420175A
Do.	Centre.	Spring, Township of.	October 13, 1972. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	6-21-74 & 6-25-76	420269A
Do.	Dauphin.	Steelton, Borough of.	January 7, 1972. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	8-31-73 & 12-26-75	420396A
Do.	Monroe.	Stroud, Township of.	May 9, 1973. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	1-17-75	420693
Do.	Schuylkill.	St. Clair, Borough of.	March 15, 1977. March 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	3-15-77	420786A
Do.	Chester.	Thornbury, Township of.	March 1, 1977. March 1, 1977. July 1, 1977.	Emerg. Reg. Susp.	8-2-74 & 8-13-76	425390A
Do.	Northumberland,	West Chillisquaque, Township of.	January 28, 1974. April 15, 1977. July 1, 1977.	Emerg. Reg. Susp.	5-10-74 & 6-4-76	421033A

(National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 FR 17804. Nov. 28, 1968), as amended (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, Feb. 27, 1969), as amended 39 FR 2787, Jan. 24, 1974.)

Issued: April 29, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13606 Filed 5-13-77;8:45 am]

[Docket No. FI-2884]

PART 1914—COMMUNITIES ELIGIBLE FOR THE SALE OF INSURANCE

Status of Participating Communities

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final Rule.

SUMMARY: The purpose of this rule is to list those communities where the sale of flood insurance is authorized under the National Flood Insurance Program.

Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurers Association servicing company for the state.

DATES: The date that appears in the fourth column of the table is the effective date of authorization for the sale of flood insurance.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755-5581 or Toll Free Line 800-424-8872, Room 5270, 451 Seventh Street, Southwest, Washington, DC 20410.

SUPPLEMENTARY INFORMATION: The Flood Disaster Protection Act of 1973 (Pub. L. 93-234) requires the purchase of flood insurance as a condition of receiving any form of Federal or Federally related financial assistance for acquisition or construction purposes in a flood plain area having special hazards within any community identified for at least one year by the Secretary of Housing and Urban Development. The requirement applies to all identified special flood hazard areas within the United States, and no such financial assistance can legally be provided for acquisition or construction except as authorized by setion 202(b) of the Act, as amended, unless the community has entered the program. Accordingly, for communities listed under this Part no such restriction exists, although insurance, if required, must be purchased.

The addresses of the National Flood Insurers Association servicing companies, where flood insurance policies can be obtained, are published at § 1912.5 (24 CFR Part 1912).

The Federal Insurance Administrator finds that delayed effective dates would be contrary to the public interest. The Administrator also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

Section 1914.6 of Part 1914 of Subchapter B of Chapter X of Title 24 of the Code of Federal Regulations is amended by adding in alphabetical sequence new entries to the table. In each entry, a complete chronology of effective dates appears for each listed community. The entry reads as follows:

§ 1914.6 List of eligible communities.

State	County	Location	Effective date of authorization of sale of flood Insurance for area	Hazard area Identified	Community Number
***	***	***	***	***	***
Colorado.	Boulder.	Nederland, Town of.	May 2, 1977. Emerg.	8-22-75	080255
California.	Marin.	Belvedere, City of.	April 28, 1972. Emerg. May 2, 1977. Reg.	6-7-74 & 4-23-76	060429-B
Colorado.	Montezuma.	Cortez, City of.	June 24, 1975. Emerg. April 1, 1977. Reg.	5-17-74 & 4-23-76	080121-B
Connecticut.	New London.	New London, City of.	March 24, 1972. Emerg. May 5, 1977. Reg.	6-28-74	090100A
Do.	Hartford.	Wethersfield, Town of.	April 14, 1972. Emerg. May 2, 1977. Reg.	5-11-73	090040A
Idaho.	Boundary.	Bonners Ferry, City of.	August 13, 1974. Emerg. April 22, 1977. Reg.	6-28-74	160031B
Do.	Valley.	Donnelly, City of.	September 10, 1975. Emerg. April 15, 1977. Reg.	9-6-74	160121B
Do	Power.	Rockland, City of.	December 11, 1975. Emerg. April 1, 1977. Reg.	12-27-74	160110A
Iowa.	Johnson.	Iowa City, City of.	February 4, 1972. Emerg. May 2, 1977. Reg.	5-2-77	190171
Kansas.	Harvey.	Burrton, City of.	September 3, 1976. Emerg. April 22, 1977. Reg.	3-15-74 & 10-24-75	200130B
Do.	Johnson.	Gardner, City of.	June 25, 1975. Emerg. April 15, 1977. Reg.	5-3-74 & 1-23-76	200164B
Do.	Elk.	Howard, City of.	September 16, 1976. Emerg. April 8, 1977. Reg.	8-8-75	200507A
Do.	Ellsworth.	Kanopolis, City of.	September 10, 1976. Emerg. April 8, 1977. Reg.	8-15-75	200511A

State ***	County ***	Location ***	Effective date of authorization of sale of flood Insurance for area ***		Hazard area Identified ***	Community Number ***
Louisiana.	West Feliciana Parish.	St. Francisville, Town of.	April 30, 1973. May 2, 1977.	Emerg. Reg.	5-17-74	220246B
Minnesota.	Sherburne.	Elk River, City of.	February 19, 1974. May 2, 1977.	Emerg. Reg.	3-8-74 & 6-11-76	270436B
Missouri.	Clark.	Alexandria, City of.	March 13, 1974. May 2, 1977.	Emerg. Reg.	10-25-74	290080A
Do.	Boone.	Centralia, City of.	January 31, 1975. April 15, 1977.	Emerg. Reg.	6-7-74 & 1-2-76	290035B
Do.	St. Louis.	Clarkson Valley, Village of.	May 27, 1975. April 8, 1977.	Emerg. Reg.	7-26-74 & 1-16-76	290340B
Do.	Cass.	Drexel, City of.	June 23, 1975. April 8, 1977.	Emerg. Reg.	3-29-74 & 10-31-75	290064B
Do.	Lincoln.	Elsberry, City of.	March 25, 1974. May 2, 1977.	Emerg. Reg.	5-10-74 & 11-21-75	290209B
Do.	Cass.	Garden City, City of.	July 15, 1975. April 15, 1977.	Emerg. Reg.	3-29-74 & 1-16-76	290067B
Do.	St. Louis.	St. John, City of.	May 9, 1975. April 15, 1977.	Emerg. Reg.	5-3-74 & 10-10-75	290384B
Nebraska.	Richardson.	Salem, Village of.	September 9, 1976. April 8, 1977.	Emerg. Reg.	11-8-74	310185A
New York.	Broome.	Port Dickinsdn, Village of.	March 25, 1975. May 2, 1977.	Emerg. Reg.	11-1-74 & 11-28-75	360053B
Pennsylvania.	Delaware.	Colwyn, Borough of.	September 15, 1977. May 2, 1977.	Emerg. Reg.	11-16-73	420409B
Do.	Montour.	Danville, Borough of.	September 5, 1971. May 2, 1977.	Emerg. Reg.	3-1-74	420714A

State	County	Location	Effective date of authorization of sale of flood Insurance for area		Hazard area Identified	Community Number
***	***	***	***		***	***
Do.	Schuylkill.	Gilberton, Borough of.	August 18, 1972. May 2, 1977.	Emerg. Reg.	12-28-73 & 9-24-76	421007A
Do.	Dauphin.	Harrisburg, City of.	April 21, 1972. May 2, 1977.	Emerg. Reg.	4-5-74	420380A
Do.	Berks.	Kutztown, Borough of.	June 30, 1972. May 2. 1977.	Emerg. Reg.	1-9-74	420136A
Do.	Luzerne.	Pringle, Borough of.	January 19, 1977. May 2, 1977.	Emerg. Reg.	7-13-73 & 8-6-76	420624B
Do.	Dauphin.	South Hanover, Township of.	March 30, 1973. May 2, 1977.	Emerg. Reg.	10-12-73	420395A
Do.	Northumberland.	Upper Augusta, Township of.	January 19, 1973. May 2, 1977.	Emerg. Reg.	1-16-74 & 6-11-76	420745A
Do.	Chester.	West Whiteland, Township of.	November 5, 1971. May 2, 1977.	Emerg. Reg.	7-26-74 & 6-18-76	420295-B
Rhode Island.	Newport.	Tiverton, Town of.	August 18, 1972. May 2, 1977.	Emerg. Reg.	5-24-74	440012A
South Carolina.	Beaufort.	Beaufort, City of.	November 27, 1970. May 2, 1977.	Emerg. Reg.	6-28-74 & 9-5-75	450026B
Texas.	Hidalgo.	Edinburg, City of.	October 13, 1972. May 2, 1977.	Emerg. Reg.	6-28-74 & 4-16-76	480338B
Virginia.	Fairfax.	Clifton, Town of.	December 5, 1973. May 2, 1977.	Emerg. Reg.	3-28-75	510186B

State	County	Location	Effective date of authorization of sale of flood Insurance for area	Hazard area Identified	Community Number
***	***	***	***	***	***
Pennsylvania.	Cambria.	White, Township of.	May 3, 1977. Emerg.	11-22-74	422258

(24 CFR § 1914.6)

State	County	Location	Effective date of authorization of sale of flood Insurance for area	Hazard area Identified	Community Number
***	***	***	***	***	***
North Carolina.	Graham, Chrokee, Jackson & Swain.	Eastern Band of Cherokee Indians.	May 4, 1977. Emerg.		370401-New
Pennsylvania.	Somerset.	Lower Turkeyfoot, Township of.	Do. Emerg.	1-24-75	422517
Do.	Cambria.	Southmont, Borough of.	Do. Emerg.	3-19-76	420239
Do.	Jefferson.	Timblin, Borough of.	Do. Emerg.	1-24-75	422448
West Virginia.	Preston.	Kingwood, City of.	Do. Emerg.	9-3-76	540254

State ***	County ***	Location ***	Effective date of authorization of sale of flood Insurance for area ***	Hazard area Identified ***	Community Number ***
Colorado.	Logan.	Crook, Town of.	May 6, 1977. Emerg.	11-8-74	080111
Iowa.	Buchanan.	Quasqueton, City of.	Do. Emerg.	11-5-76	190332
Maine.	Aroostook.	Orient, Town of.	Do. Emerg.		230029
Michigan.	Kalamazoo.	Cooper, Township of.	Do. Emerg.		260428
Nebraska.	Dakota.	Jackson, Village of.	Do. Emerg.	12-20-77	310292
Wisconsin.	Brown.	Green Bay, City of.	April 21, 1977. Suspension Withdrawn.	8-30-74 & 11-7-75	550022A
Do.	Winnebago.	Oshkosh, City of.	Do.	11-23-73	550511A

(National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended (42 U.S.C. 4001–4128); and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, Feb. 27, 1969), as amended 39 FR 2787, Jan. 24, 1974.)

Issued: April 28, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13605 Filed 5-13-77;8:45 am]

[Docket No. FI-2881]

PART 1915—IDENTIFICATION AND MAPPING OF SPECIAL HAZARD AREAS

List of Communities With Special Hazard Areas

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: The purpose of this rule is the identification of communities with areas of special flood or mudslide or erosion hazards as authorized by the National Flood Insurance Program. The identification of such areas is to provide guidance so that communities may mitigate hazards and reduce property losses by adopting appropriate flood plain management or other measures to minimize damage caused by floods or other hazards. It will enable communities to guide future construction, where practicable, away from locations which are threatened by flood or other hazards.

DATES: The effective date of identification is the date listed in the eighth column of the table or June 13, 1977, whichever is later.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, (202) 755-5581 or Toll Free Line 800-424-8872, Room 5270, 451 Seventh Street S.W., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: The Flood Disaster Protection Act of 1973 requires the purchase of flood insurance on and after March 2, 1974, as a condition of receiving any form of Federal or Federally related financial assistance for acquisition or construction purposes in an identified plain area having special flood hazards that is located within any community participating in the National Flood Insurance Program.

One year after the identification of the community as flood prone, the requirement applies to all identified special flood hazard areas within the United States, so that, after that date, no such financial assistance can legally be provided for acquisition and construction in these areas unless the community has entered the program. The prohibition, however, does not apply to loans by Federally regulated, insured, supervised or approved lending institutions (1) to finance the acquisition of a residential dwelling occupied as a residence prior to March 1, 1976, or one year following identification of the area within which such dwelling is located as an area containing special flood hazards, whichever is later, or made to extend, renew, or increase the financing or refinancing in connection with such a dwelling, (2) to finance the acquisition of a building or structure completed and occupied by a small business concern, as defined by the Secretary, prior to January 1, 1976, (3) any loan or loans, which in the aggregate do not exceed $5,000, to finance improvements to or rehabilitation of a building or structure occupied as a residence prior to January 1, 1976, or (4) any loan or loans, which in the aggregate do not exceed an amount prescribed by the Secretary, to finance nonresidential additions or improvements to be used solely for agricultural purposes on a farm.

This 30 day period does not supersede the statutory requirement that a community, whether or not participating in the program, be given the opportunity for a period of six months to establish that it is not seriously flood prone or that such flood hazards as may have existed have been corrected by floodworks or other flood control methods. The six months period shall be considered to begin June 13, 1977, or the effective date of the Flood Hazard Boundary Map, whichever is later. Similarly, the one year period a community has to enter the program under section 201(d) of the Flood Disaster Protection Act of 1973 shall be considered to begin June 13, 1977, or the effective date of the Flood Hazard Boundary Map, whichever is later.

This identification is made in accordance with Part 1915 of Title 24 of the Code of Federal Regulations as authorized by the National Flood Insurance Program (42 U.S.C. 4001-4128).

Accordingly, § 1915.3 is amended by adding in alphabetical sequence a new entry to the table, which entry reads as follows:

§ 1915.3 List of communities with special hazard areas (FHBMs in effect).

STATE	COUNTY	COMMUNITY NAME AND NO. OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM AND CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE (S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
AL	Jackson	City of Scottsboro 01-53	010112A	E - 5	I	F	June 10, 1977	June 10, 1977	John T. Reid, Mayor 916 Broad Street Scottsboro, AL 35768 Phone: 205-574-3100
FL	Orange	Orange County (Uninc. Areas) 01-62	120179A	E - 11,12, 14	I	F	Jan. 30, 1976	April 15, 1977	James L. Harris, Co. Adm. County Courthouse Orlando, FL 32802 Phone: 305-420-3618
GA	DeKalb	DeKalb County (Uninc. Areas) 01-20	130065A	E - 10,11, 12,14	I	F	June 5, 1970	April 15, 1977	Chairman, DeKalb County Bd. of Commissioners County Courthouse Decatur, GA 30030 Phone: 404-422-2320
GA	Miller	Miller County (Uninc. Areas) 01-20	130134A	N - 5	I	F	June 10, 1977	June 10, 1977	Marvin Wells, Chairman County Commissioners P.O. Box 155 Colquitt, GA 31737 Phone: 912-758-2271
IL	Clinton	Clinton County (Uninc. Areas) 01-33	170044A	N - 10,11, 12,14	I	F	Dec. 20, 1974	April 15, 1977	Robert Cohlmeyer, Chairman County Commissioners County Courthouse Carlyle, IL 62231 Phone: 618-594-2464

STATE	COUNTY	COMMUNITY NAME AND NO. OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM AND CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE (S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
IN	Lake	City of East Chicago 01-03	180130B	E - 9	I	F	April 12, 1974 April 9, 1976	April 15, 1977	Robert Pastrick, Mayor 4525 Indianapolis Blvd., East Chicago, IN 46312 Phone: 219-398-4200

STATE	COUNTY	COMMUNITY NAME AND NO. OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM AND CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE (S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
IN	Wayne	City of Fountain City 01	180282B	N - 9	H	F	May 10, 1974 April 16, 1976	April 15, 1977	John Keller, Pres. Town Board 312 W. Main Street Fountain City, IN 47341 Phone: 317-847-2412
IN	Lake	City of Gary 01-16	180132B	E - 9	H	F	June 28, 1974 June 4, 1976	April 15, 1977	Richard Gordon Hatcher, Mayo City Hall, 401 Broadway Gary, IN 46402 Phone: 219-944-6501
IN	Steuben	Town of Hamilton 01	180248B	E - 9	H	F	Sept. 6, 1974 Aug. 27, 1976	April 15, 1977	Brad Thomas, Pres. Town Board, 311 Bellefountain Hamilton, IN 46742 Phone: 219-488-2522
IN	Shelby	Shelby County (Uninc. Areas) 0001A-0006A	180235A	E - 11,12, 14	H	F	Nov. 29, 1974	April 15, 1977	Jim Williams, Pres. Bod. of Commissioners Courthouse, Rm. 107 Shelbyville, IN 46176 Phone: 317-398-8306
KY	Bullitt	City of Lebanon Junction 01	210304B	N - 9	H	F	March 15, 1974 June 18, 1976	April 15, 1977	Gerald Tamme, Mayor P.O. Box 61 Lebanon Junction, KY 40150 Phone: 502-833-4311

STATE	COUNTY	COMMUNITY NAME AND NO. OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM AND CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE (S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
MI	Genesee	Township of Flint 01-09	260395A	E - 5	I	F	June 10, 1977	June 10, 1977	Ray M. Flavin, Supr. 1490 South Dye Rd. Flint, MI 48504 Phone: 313-732-1350
MI	Houghton	City of Houghton 01	260568A	N - 5	I	F	June 10, 1977	June 10, 1977	Gerald S. Bond, Mayor 100 Portage St. Houghton, MI 49931 Phone: 906-482-1700
MI	Oakland	Township of Springfield 0001A-0004A	260478	N - 5	I	F	June 10, 1977	June 10, 1977	Donald W. Rogers, Twp. Supr. 650 Broadway Davisburg, MI 48019 Phone: 313-625-4802
MI	Delta	Township of Wells 0001A-0004A	260388	N - 5	I	F	June 10, 1977	June 10, 1977	Charles Sedenquist, Twp. Supr P.O. Box 188 Wells, MI 49894 Phone: 906-786-5235
MN	Lincoln	Lincoln County (Uninc. Areas) 01-36	270653A	E - 5	I	F	June 10, 1977	June 10, 1977	Carl Hauschild, Chairman County Board Minneota, MN. 56264 Phone: 507-694-1517

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MN	Big Stone	City of Correll 01	270025A	N - 9	I	F	Jan. 24, 1975	April 15, 1977	George Krostjens, Mayor City Hall Correll, MN 56227 Phone: None
MN	Dakota & Washington	City of Hastings 01-06	270105B	E - 8,11, 12,14	I	F	Nov. 16, 1973 June 11, 1976	April 15, 1977	Wallace Erickson, Clerk/Treas 100 Sibley Street Hastings, MN 55033 Phone: 612-437-4127
MS	Pike	Pike County (Uninc. Areas) 01-28	280278A	N - 5	I	F	June 10, 1977	June 10, 1977	Dole Forman, Chairman Board of Supervisors P.O. Box 309 Magnolia, MS 39652 Phone: 601-783-3362
MS	Pontotoc & Union	Town of Sherman 01	280296A	N - 5	I	F	June 10, 1977	June 10, 1977	James H. Bruce, Mayor P.O. Box 54 Sherman, MS 38869 Phone: 601-842-1919
NJ	Middlesex	Township of East Brunswick 01-08	340260A	E - 10,11, 12,14	I	F	Jan. 23, 1974	April 15, 1977	William F. Sox, Mayor Township Hall East Brunswick, NJ 08816 Phone: 201-254-4600
NY	Montgomery	Town of Amsterdam 01-05	360441B	E - 9	I	F	July 19, 1974 June 18, 1976	April 15, 1977	Leo Klobukowski, Supr. R.D. 5, Town Office Bldg. Amsterdam, NY 12010 Phone: 518-842-7961

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NY	Dutchess	Town of Beekman 01-04	361333B	E - 9	I	F	Oct. 18, 1974 Aug. 13, 1976	April 15, 1977	Raymond J. Sheridan Route 216, R.D. 1 Poughquag, NY 12570 Phone: 914-724-9991
NY	Oswego	Town of Granby 01-03	360650A	E - 8, 10, 11, 12 14	I	F	May 3, 1974	April 15, 1977	Paul Malone, Town Supr. R.D. 7 Fulton, NY 13069 Phone: 315-593-6920
NY	Steuben	Town of Hornellsville 01-12	360777A	E - 10, 11 12, 14	I	F	June 28, 1974	April 15, 1977	Howard Hurlbut, Town Supr. Box 1, Arkport, NY 14807 Phone: 607-295-7768
NY	Schenectady	Village of Scotia 01-02	360742B	E - 9	I	F	May 3, 1974 Oct. 22, 1976	April 15, 1977	John F. Ryan, Jr., Mayor 4 N. 10th Broeck Street Scotia, NY 12302 Phone: 518-374-1071
NY	Chenango	Town of Smithville 01-04	361040A	N - 15	I	F	June 10, 1977	June 10, 1977	Neal J. Root, Supr. Town Hall Smithville Flats, NY 13841 Phone: None

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NC	Buncombe	Buncombe County (Uninc. Areas) 0001A-0011A	370031A	E - 5	I	F	June 10, 1977	June 10, 1977	R. Curtis Radcliff, Chairman County Board, PO Box 7436 Asheville, NC 28807 Phone: 704-255-5533
NC	Catawba	Catawba County (Uninc. Areas) 01-33	370050A	E - 5	I	F	June 10, 1977	June 10, 1977	Jack Matthew, County Engr. P.O. Box 389 Newton, NC 28658 Phone: 704-464-7880
NC	Robeson	City of Lumberton 01-06	370203A	E - 10,11, 12,14	I	F	June 28, 1974	April 15, 1977	Clifford E. Bullard, Mayor P.O. Box 1388 Lumberton, NC 28358 Phone: 919-739-6031
OH	Henry	Village of Hamler 01	390264A	N - 9	I	F	April 12, 1974	April 15, 1977	Ralph Niese, Mayor Village Hall Hamler, OH 43524 Phone: 419-274-3671
OH	Jefferson	Jefferson County (Uninc. Areas) 01-30	390294A	N - 5	I	F	June 10, 1977	June 10, 1977	John T. McDivett, Co. Eng. 814 Adams St. Steubenville, OH 43952 Phone: 614-283-4111
OH	Washington	Village of Matamoras 01-02	390573A	E - 8,10, 11,12 14	I	F	April 5, 1974	April 15, 1977	Doris Amos, Village Clerk Village Hall New Matamoras, OH 45767 Phone: 614-865-3524

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OH	Medina	Medina County (Uninc. Areas) 01-27	390378A	N - 10,11, 12,14	I	F	Jan. 10, 1975	April 15, 1977	Charles C. Clark, Chairman County Commissioners 144 North Broadway Medina, OH 44256 Phone: 216-723-3641
PA	Bucks	Township of Bensalem 01-06	420181A	E - 10,11 12,14	I	F	April 5, 1974	April 15, 1977	Stephen Kelly, Chairman 3800 Hulmeville Rd. Cornwells Heights, PA 19020 Phone: 215-639-2500
PA	York	Township of Conewago 01-11	420918A	E - 10,11 12,14	I	F	Dec. 28, 1973	April 15, 1977	James W. Kennedy, Chairman Township Supervisors Coppenhaffer Rd., R.D. 4 York, PA 17404 Phone: 717-266-2122
PA	Bucks	Township of Hilltown 01-10	420189A	E - 10,11 12,14	I	F	Aug. 2, 1974	April 15, 1977	C. Dale Hartshorne, Chairman 113 State Street Blooming Glen, PA 18911 Phone: 215-249-3388
PA	Luzerne	Township of Jackson 01-14	420610A	E - 15	I	F	June 10, 1977	June 10, 1977	Frederick R. Fielding, Chairm Box 191, R.D. 5 Shavertown, PA 18708 Phone: 717-675-0479
PA	Cumberland	Township of Middlesex 01-12	420363A	E - 10,11, 12,14	I	F	Feb. 8, 1974	April 15, 1977	Mr. Charles Hampson, Chairm Twp. Planning Board, Box 121 Carlisle, PA 17013 Phone: 717-249-2742

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PA	Columbia	Township of Montour 01-04	421002A	E - 10	H	F	April 5, 1974	April 15, 1977	Albert Wirt, Chairman R.D. 2 Bloomsburg, PA 17815 Phone: 717-784-6559
VA	Frederick	Town of Middletown 01	510274A	E - 5	H	F	June 10, 1977	June 10, 1977	John W. Legge, Mayor P.O. Box 175 Middletown, VA 22645 Phone: 703-869-2226
VA		City of Roanoke 01-15	510130A	E - 8, 10, 11, 12, 14	H	F	May 3, 1974	April 15, 1977	Roy L. Webber, Mayor Municipal Bldg. Roanoke, VA 24011 Phone: 703-981-2000
VA	Isle of Wight	Town of Windsor 0001A	510295	N - 5	H	F	June 10, 1977	June 10, 1977	M.H. Robinson, Jr., Mayor Town Hall, Windsor, VA 23487 Phone: 804-242-4183
WI	Sheboygan	Village of Cascade 01	550425A	E - 10, 11 12, 14	H	F	May 3, 1974	April 15, 1977	Alvin Jaeckels, Mayor Clark Street Cascade, WI 53011 Phone: 414-528-8877

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WI	Waukesha	Village of Hartland 01	550481B	E - 8,10, 11,12, 14	I	F	Nov. 30, 1973 May 14, 1976	April 15, 1977	Kenneth Race, Village Pres. Village Hall Hartland, WI 53029 Phone: 414-367-2789

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AR	Uninc. Area	Conway County (01-44)	050426 A	N-5	I	F	10 JUN 77	10 JUN 77	Honorable Dave Traford- County Judge - Courthouse - Morrilton, AR 72110 (501) 354-2561
AR	St. Francis	City of Madison (01)	050189 B	E-8,12,14	I	F	22 MAR 76 27 AUG 76	15 APR 77	Honorable Willard Whitaker - Mayor - City Hall - Madison, AR 72359 (901) 633-3571
CA	Uninc. Area	San Mateo County (01-44)	060311 A	E-11,12,14	C	F	1 NOV 74	15 APR 77	Mr. Vick Sanders - County Engineering Dept. - County Government Center - Redwood City, CA 94063 (415) 364-5600
CO		City/Co. of Denver (01-44)	080046 A	E-11,12,14	I	F	26 DEC 75	15 APR 77	Mr. J. Zohn - P.E. Director - Department of Public Works - Wastewater Management Division 5055 Washington Street - Denver CO 80216 (303) 629-1451
CO	Uninc. Area	Gilpin County (01-13)	080075 A	N-5	I	F	10 JUN 77	10 JUN 77	Mr. Kenneth Green - Chairman - Gilpin Co. Commissioners Office Gilpin Co. Courthouse - P.O. Box 366 - Central City, CO 80427 (303) 582-5214
CT	New Haven	Town of Middlebury (01-07)	090080 A	E-10,11,12,14	I	F	6 SEP 74	15 APR 77	Mr. William Longa - Selectman Town Hall - Middlebury, CT 06762 (203) 758-2557
CT	Hartford	Town of Windsor (01-13	090041 A	N-10,11,12,14	I	F	5 OCT 73	15 APR 77	Mr. John R. Welch - Selectman 275 Broad Street - Windsor, CT 06095 (203) 688-3675

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ID	Uninc. Area	Clearwater County (01-80)	160046 A	E-10,11,12,14	I	F	20 DEC 74	15 APR 77	William T. Bud - Chairman, Board of County Commissioners - P.O. Box 586 - Orofino, ID 83544 (208) 476-3615
IA	Marion	City of Knoxville (01-03)	190603 A	E-11,12,14	I	F	29 AUG 75	15 APR 77	Mr. Dick Hierstein - City Manager 114 N. Third Street - Knoxville, IA 50138 (515) 842-3146
KS	Uninc. Area	Sumner County (01-70)	200348 A	E-5	I	F	10 JUN 77	10 JUN 77	Mr. Wallace Wolf - Chairman, Board of County Commissioners - Sumner County Courthouse - Wellington, KS 67152 (316) 326-3395
LA	Uninc. Area	Iberville Parish (01-51)	220083 A	E-10,11,12,14	I	F	18 OCT 74	15 APR 77	Mr. S.J. Cardinal - President, Police Jury - Iberville Parish - Samstown Road - White Castle, LA 70788 (504) 687-6819
MA	Middlesex	City of Waltham (01-06)	250222 A	E-10,11,12,14	I	F	28 JUN 74	15 APR 77	Mr. Henry Hoover, Jr. - Chairman 610 Main Street - Waltham, MA 02154 (617) 893-4040
MO	Dekalb	City of Maysville (01)	290686 A	N-11,12,14	I	F	25 JLY 75	15 APR 77	Robert B. Paden - Attorney - City Hall - Maysville, MO 64469 (816) 449-2656
MO	Howell	City of West Plains (01-03)	290166 A	E-10,11,12,14	I	F	15 FEB 74	15 APR 77	Honorable W.G. Roe - Mayor - City Hall - 401 Jefferson Avenue - West Plains, MO 65775 (417) 256-3531

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									(402) 426-3373
NH	Merrimack	Town of Hooksett (01-16)	330115 A	E-10,11,12,14	I	F	21 FEB 75	15 APR 77	Mr. Oscar A. Morin - Selectman - Hooksett, NH 03106 (603) 485-9534
NM	Otero	City of Alamogordo (01-06)	350045 A	E-10,11,12,14 15	I	F	19 JLY 74	15 APR 77	Honorable G.M. Glover - Mayor - City Hall - 511 Tenth Street - Alamogordo, NM 88310 (505) 437-7220
NM	Torrance	Village of Encino (01)	350102 A	N-12,14	I	F	2 JLY 76	15 APR 77	Virginia Garcia - Village Clerk Village Hall - P.O. Box 163 - Encino, NM 88321 (505) 845-2980
OR	Washington	City of Hillsboro (01-05)	410243 A	E-11,12,14	I	F	12 APRIL 74	15 APR 77	Mr. Timothy J. Erworth - Plannir Director - City Hall - 205 S.E. Second Avenue - City of Hillsbor (503) 648-0821
TX	Taylor	TOWN ~~City~~ of Impact (01)	481294 A	N-5	I	F	10 JUN 77	10 JUN 77	Honorable Dallas Perkins - P.O. Box 3116 - Abilene, TX 79604 (915) 672-9332
TX	Uninc. Area	Jim Wells County (01-63)	481258 A	E-5	I	F	10 JUN 77	10 JUN 77	Honorable T.L. Harville - County Judge - Courthouse - Alice, TX 78332 (512) 664-3032
TX	Parker	Town of Sanctuary (01)	481285 A	N-5	I	F	10 JUN 77	10 JUN 77	Honorable M.E. Moore - Mayor - West 317 Ash Creek - Azle, TX 76020 (817) 677-2252

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UT	Utah	Town of Goshen (01)	490155 A	N-11	1	F	7 FEB 75	15 APR 77	Honorable Joel White - Mayor - Town Hall - Goshen, UT 84633 (801) 274-3249
VT	Windham	Town of Newfane (01-12)	500133 A	E-8,11,12,14	I	F	28 JUN 74	15 APR 77	Mr. Stephen A. Morse - Chairman, Board of Selectmen - Office of Selectmen - Newfane, VT 05345 (802) 365-4255
VT	Windham	Town of Westminster (01-15)	500139 A	E-11,12,14	I	F	16 AUG 74	15 APR 77	Mr. G. Preston James - Selectman RFD #3 - Putney, VT 05346 (802) 722-4393

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AZ	Maricopa	City of Mesa (01-16)	040048 A	E-8,11,12,14	I	F	13 APR 73	22 APR 77	Peter Peterson - City Engineer - 55 North Center St. - Mesa, AZ - 85201 (602) 834-2011
AR	Uninc. Area	Boone County (01-40)	050016 A	N-5	I	F	17 JUN 77	17 JUN 77	Honorable Clifford Tomlinson - County Judge - Boone County Courthouse - Harrison, AR 72601 (501) 365-8423
AR	Uninc. Area	Crawford County (0002, 0004-0011)	050428 A	N-5	I	F	17 JUN 77	17 JUN 77	Honorable Walter Naylor - County Judge - Office of the County Judge - Crawford County Courthouse Van Buren, AR 72959 (501) 474-1312
AR	Uninc. Area	Dallas County (0001-0010)	050061 A	N-5	I	F	17 JUN 77	17 JUN 77	Honorable Troy Bradley - County Judge - Dallas County Courthouse - Fordyce, AR 71742 (501) 352-3371
CO	Gunnison	City of Marble (01)	080197 A	N-5	I	F	17 JUN 77	17 JUN 77	Honorable Lloyd G. Blue - Mayor - City Hall - P.O. Box 65A-Main St. Marble, CO 81623 (303) 963-3768

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ID	Bonneville	City of Irwin (01-02)	160143 A	E-11,12,14	I	F	29 AUG 75	22 APR 77	Honorable Robert Jones - Mayor - Irwin, ID 83428 (208) 483-2528
IA	Story	City of Ames (01-09)	190254 A	E-10,11,12,14	I	F	2 AUG 74	22 APR 77	Honorable William F. Pelz - Mayor - City Hall - Ames, IA 50010 (515) 232-6210
IA	Uninc. Area	Carroll County (0001-0004)	190039 A	E-5	I	F	17 JUN 77	17 JUN 77	Mr. Lewis H. Rich - Chairman - Board of Supervisors - Carroll County Courthouse - Carroll, IA 51401 (712) 792-4923
IA	Uninc. Area	Dubuque County (01-42)	190534 A	E-5	I	F	17 JUN 77	17 JUN 77	Mr. Wilford Bahl - Chairman - Board of County Commissioners - County Courthouse - Dubuque, IA 52001 (319) 583-3511
KS	Gray	City of Copeland (01)	200398 A	N E-5	I	F	17 JUN 77	17 JUN 77	Honorable Paul Hinderliter - Mayor - City Hall - Copeland, KS 67837 (316) 668-2791

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KS	Uninc. Area	Douglas County (01-31)	200087 A	E-5	I	F	17 JUN 77	17 JUN 77	Mr. Robert Nice - Chairman - Board of County Commissioners - Douglas County Courthouse - Lawrence, KS 66044 (913) 842-2377
KS	Seward	City of Liberal (01-02)	200330 B	E-11,12,14	I	F	1 MAR 74 26 DEC 75	22 APR 77	Robert Wherry - Administrative Assistant - 325 North Washington Avenue - Liberal, KS 67901 (316) 624-2568
LA	Uninc. Area	Grant Parish (01-42)	220076 A	E-5	I	F	17 JUN 77	17 JUN 77	Mr. Morgan L. Briggs - President Police Jury - Office of the Police Jury - Courthouse - Olfax, LA (318) 627-3675
LA	Uninc. Area	West Carroll Parish (01-31)	220243 A	E-5	I	F	17 JUN 77	17 JUN 77	Mr. Leelois Jones - President - Police Jury - Drawer 2-D - Oak Grove, LA 71263 (318) 428-3390
MT	Uninc. Area	Silver Bow County (01-54)	300076 A	N-5	I	F	17 JUN 77	17 JUN 77	Mr. John Sheehan - % Maureen Pasco - County Surveyor - County Courthouse - Butte, MT 59701 (406) 792-1427

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NB	Uninc. Area	Pierce County (0001-0006)	310466 A	E-5	I	F	17 JUN 77	17 JUN 77	Mr. Elmer Maas - Chairman - Board of County Commissioners - Pierce County Courthouse - Pierce, NB 68767 (402) 329-6335
NH	Hillsborough	Town of Bennington (01-06)	330084 B	E-12,14	I	F	8 MAR 74 24 SEP 76	22 APR 77	Erving A. LeCain - Chairman, Selectman - Board of Selectmen - Bennington, NH 03442 (603) 588-3311
OK	Tulsa & Osage	City of Sand Springs (01-25)	400211 A	E-10,11,12,14	I	F	26 JLY 74	22 APR 77	Honorable Don Sullivan - Mayor - City Hall - Broadway & McKinley, P.O. Box 607 - Sand Springs, OK 74063 (918) 245-8751
OK	LeFlore & Latimer	Town of Talihina (01)	400094 A	E-8,10,11,12, 14	I	F	5 APR 74	22 APR 77	Mr. Fred Crims - President - First Street - P.O. Box 457 - Talihina, OK 74571 (918) 567-2194
OR	Clackamus & Washington	City of RIVERGROVE (01)	410022 A	E-11,12,14	I	F	6 DEC 74	22 APR 77	Bob Wilkinson - Chief, Flood Plain Management Section - P.O. Box 1104 Rivergrove, OR 97034 (503) 639-4365

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SD	Uninc. Area	Lawrence County (01-48)	460094 A	E-5	I	F	17 JUN 77	17 JUN 77	Mr. Boyd Larson - Chairman - Lawrence County Board of County Commissioners - County Courthouse Deadwood, SD 57732 (605) 642-3105
TX	Uninc. Area	Burleson County (0001-0011)	481169 A	N-5	I	F	17 JUN 77	17 JUN 77	Honorable Mark Caperton - Judge - Burleson County - Caldwell, TX 77836 (713) 567-4326
TX	Uninc. Area	Grimes County (0001-0010)	481173 A	N-5	I	F	17 JUN 77	17 JUN 77	Honorable Ben F. Swank Jr. - Grimes County Courthouse - Office of the Judge - Anderson, TX 77830 (713) 873-2967
TX	Uninc. Area	McMullen County (01-72)	480463 A	E-10,11,12, 14	I	F	27 DEC 74	22 APR 77	Honorable Claude Franklin Jr. - County Judge - McMullen County Courthouse - P.O. Box 237 - Tilden, TX 78072 (512) 274-3341
VT	Lamoille	Village of Johnson (01)	500232 B	E-9	I	F	5 APR 74 26 NOV 76	22 APR 77	Mr. Peter Carbee - President - Village Office - Johnson, VT 05656. (802) 635-2611

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VT	Lamoille	Town of Morristown (01-20)	500064 A	E-10,11,12, 14	I	F	31 MAY 74	22 APR 77	Mr. Laurie Gray - Selectman - Town Hall - Morristown, VT 05661 (802) 888-3534
VT	Caledonia	Town of Newark (01-15)	500190 A	N-11,12	I	F	10 JAN 75	22 APR 77	Gerald Burke - Chairman - Selectman - Board of Selectmen - West Burke, VT 05871 (802) 467-3708
VT	Windham	Town of Rockingham (01-15)	500135 A	E-8,10,11,12 14	I	F	21 JUN 74	22 APR 77	Peter C. LaHaise - Town Manager - P.O. Box 370 - Bellows Falls, VT 05101 (802) 463-3964
VT	Orange	Town of Thetford (01-18)	500075 A	E-10,11,12, 14	I	F	16 AUG 74	22 APR 77	Ms. Virginia S. Babcock - Selectman - Town Hall - Thetford Center, VT 05074 (802) 785-2922
WA	King	City of Kent (01)	530080 A	E-10,11,12	I	F	7 JUN 74	22 APR 77	Honorable Isabel Hogan - Mayor - City Hall - Kent, Wa 98031 (206) 852-2412

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FL	Sumter	Sumter County (Uninc. Areas) 01-47	120296A	E - 5	I	F	June 17, 1977	June 17, 1977	Melvin E. Carlton, Chairman County Commissioners P.O. Box 8 Bushnell, FL 33513 Phone: 904-793-0211
GA	Grady	Grady County (Uninc. Areas) 01-32	130096A	N - 5	I	F	June 17, 1977	June 17, 1977	Elwyn Childs, Chairman County Commissioners P.O. Box 90 Cairo, GA Phone: 912-377-1512
GA	Gwinnett	Gwinnett County (Uninc. Areas) 01-31	~~130332A~~-130322A	E - 5	I	F	June 17, 1977	June 17, 1977	Bill Atkinson, Chairman County Commissioners 250 Oak Street Lawrenceville, GA 30245 Phone: 404-963-2071
IL	Johnson	Johnson County (Uninc. Areas) 01-24	170817A	E - 5	I	F	June 17, 1977	June 17, 1977	Carl Sharp, Chairman County Board County Courthouse Vienna, IL 62995 Phone: 618-658-3611

ATE	COUNTY	COMMUNITY NAME AND NO. OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM AND CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE (S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
MN	Waseca	Waseca County (Uninc. Areas) 01-28	270647A	E - 5	I	F	June 17, 1977	June 17, 1977	Jack Fitzimmons, Chairman Board of Supervisors Courthouse Waseca, MN 56093 Phone: 5-7-835-5885
MS	Scott	Scott County (Uninc. Areas) 01-38	280280A	N - 5	I	F	June 17, 1977	June 17, 1977	Charles Sanders, County Agent P.O. Box 509 Forest, MS 39074 Phone: 601-469-4241
NY	Erie	Town of Newstead 0001B-0003B	360251	E - 11,12, 14	I	F	April 12, 1974 August 20, 1976	April 22, 1977	J. Kelsey Webster, Supr. Corner of Church & John Stre Akron, NY 14001 Phone: 716-542-2323
NY	Dutchess	Town of Washington 0001B-0004B	361147	E - 11,12, 14	I	F	Nov. 1, 1974 July 9, 1976.	April 22,1977	H. Durtis Place, Town Supr. Washington Town Hall Milbrook, NY 12545 Phone: 914-677-3811
OH	Harrison	Harrison County (Uninc. Areas) 0001A-0004A	390255	E - 10,11, 12,14	I	F	Jan. 31, 1975	April 22, 1977	Duane Smith, Pres. County Commissioners County Courthouse Cadiz, OH 43907 Phone: 614-942-4619

STATE	COUNTY	COMMUNITY NAME AND NO. OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM AND CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE (S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
PA	Susquehanna	Borough of Friendsville 01	422579A	N - 5	I	F	June 17, 1977	June 17, 1977	Stanley Strohl, Pres. Borough Council Box 23 Friendsville, PA 18818 Phone: 717-553-3408
TN	Anderson	Anderson County (Uninc. Areas) 0001A-0008A	470217	E - 5	I	F	June 17, 1977	June 17, 1977	A.B. Slusher, C. Judge County Courthouse Clinton, TN 37716 Phone: 615-457-2544
TN	Cumberland	City of Crab Orchard 01-07	470038B	E - 12,14	I	F	June 14, 1974 Sept. 3, 1976	April 22, 1977	William Hammer, Mayor City Hall Crab Orchard, TN 37723 Phone: 615-484-7680
WI	Marinette	Marinette County (Uninc. Areas) 01-103	550259A	E - 10,11, 12,14	I	F	Aug. 26, 1974	April 22, 1977	Ed Collette, Chairman County Board, Co. Courthouse Marinette, WI 54143 Phone: 715-735-3371
WI	Waukesha	Waukesha County (Uninc. Areas) 01-48	550476A	E - 5	I	F	June 17, 1977	June 17, 1977	Lloyd Owens, Chairman Co. Commission, Courthouse Waukesha, WI 53186 Phone: 414-544-8227

STATE	COUNTY	COMMUNITY NAME & NUMBER OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM & CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE(S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
AK	Unorganized Borough	City of Akiak (01)	020101 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable John Jasper - Mayor - General Delivery - Akiak, AK 99552
AK	Unorganized Borough	City of Alakanuk (01-02)	020030 A	N-5	C	F	10 MAY 77	10 MAY 77	Honorable Paul M. Phillip - Mayor P.O. Box 51 - Alakanuk, AK 99554
AK	Unorganized Borough	City of Kotlik (01)	020058 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable Benedict Okitkum - Mayor - General Delivery - Kotlik, AK 99620
AK	Unorganized Borough	City of Napaskiak (01)	020066 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable Carl Motgin - Mayor - General Delivery - Napaskiak, AK 99559
AK	Unorganized Borough	City of *Russian Mission* (01)	020076 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable Peter Alexie - Mayor - General Delivery - Russion Mission AK 99657
AK	Unorganized Borough	City of Saint Mary's (01)	020077 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable Sebastian Cowboy - Mayor - P.O. Box 171 - Saint Mary's, AK 99658 (907) KXA-27
AK	Unorganized Borough	City of Savoonga (01)	020080 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable Edward Gologergen - Mayor - P.O. Box 149 - Savoonga, AK 99769

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AK	Unorganized Borough	City of Togiak (01)	020090 A	N-5	C	F	10 MAY 77	10 MAY 77	Honorable Moses Kritz, Sr. - Mayor - P.O. Box 99 - Togiak, AK 99678
AR	Uninc. Area	Grant County (01-47)	050434 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable Ves Easley - County Judge - Courthouse - Sheridan, AR 72150 942-2651
AR	Uninc. Area	Washington County (0001-0012)	050212 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable Vol B. Lester - County Judge - Courthouse - Fayetteville AR (501) 521-8400
CO	Uninc. Area	Delta County (04,08,10,13-18,21-28,30-53)	080041 A	N-5	I	F	10 MAY 77	10 MAY 77	Mr. Wayne A. Gore - Chairman - Board of County Commissioners - Courthouse - Delta, CO 81416 (303) 874-9752
CT	Hartford	Town of Enfield (01-11)	090028 A	E-10,11,12, 14	I	F	5 APR 74	10 MAY 77	Mr. Philip E. Clarkin - Clerk - 820 Enfield Street - Enfield, CT 06082 (203) 745-0371 Ext. 341
IA	Uninc. Area	Bremer County (0001-0004)	190847 A	N-5	I	F	10 MAY 77	10 MAY 77	Mr. Reinhard Buhr - Chairman - Board of Supervisors - Bremer County Courthouse - Waverly, IA 50677 (314) 352-1365
IA	Uninc. Area	Dickinson County (0001-0004)	190864 A	N-5	I	F	10 MAY 77	10 MAY 77	Mr. Alvin C. Myrick - Chairman - Dickinson County Courthouse - Board of County Supervisors - Spirit Lake, IA 51360 (712) 336-3356

STATE	COUNTY	COMMUNITY NAME & NUMBER OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM & CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE(S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
KS	Uninc. Area	Cherokee County (01-35)	200044 A	N-5	I	F	10 MAY 77	10 MAY 77	Mr. Lloyd Kitch, Sr. - Chairman - Board of County Commissioners - Courthouse - Columbus, KS 66725 (316) 429-3256
KS	Lyon	City of Emporia (01-04)	200203 A	E-5,15	I	F	10 MAY 77	10 MAY 77	Mrs. Reuben Hammer - Mayor - City Hall - 522 Mechanic - Emporia, KS 66801 (316) 342-5105
KS	Uninc. Area	Rice County (0001-0009)	200290 A	N-5	I	F	10 MAY 77	10 MAY 77	Mr. Cecil Johnson - Chairman - Rice County Courthouse - Board of County Commissioners - Lyon, KS 67554 (316) 257-2232
ME	Sagadahoc	City of Bath (01-08)	230118 A	E-10,11,12, 14	I	F	1 NOV 74	10 MAY 77	Mr. Charles F. MacDonald - Chairman - 1168 High Street - Bath, ME 04530 (207) 443-4783
ME	Penobscot	Town of Lincoln (01-02,04-20,22-24)	230109 A	E-10,11,12, 14	I	F	19 JLY 74	10 MAY 77	Mr. Albert Thomas - Chairman - Town Hall - Lincoln, ME 04457 (207) 794-6645
MA	Essex	Town of North Andover (01-08)	250098 A	E-10,11,12, 14	I	F	28 JUN 74	10 MAY 77	Mr. Joseph A. Guthrie - Selectman Town Hall - Main Street - North Andover, MA 01845 (617) 682-6483

STATE	COUNTY	COMMUNITY NAME & NUMBER OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM & CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE(S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
MA	Bristol	Town of Norton (0001-0004)	250060 A	E-10,11,12, 14	I	F	28 JUN 74	10 MAY 77	Mr. Raymond N. Patenaude - Selectman - Town Hall - 10 Taunton Avenue - Norton, MA 02766 (617) 285-4451
NB	Perkins	Village of Madrid (01)	310298 A	E-11,12,14	I	F	18 JLY 75	10 MAY 77	Rachel Dobscha - Director - Perkins County - 411 East 2nd St. Ogallala, NB 69153 (308) 284-6456
NB	Uninc. Area	Richardson County (01-40)	310470 A	E-5	I	F	10 MAY 77	10 MAY 77	Mr. Ralph Steinbrink - Chairman - Board of County Commissioners - Courthouse - Falls City, NB 68355 (402) 245-2911
NB	Uninc. Area	Webster County (01-40)	310232 A	E-5	I	F	10 MAY 77	10 MAY 77	Mr. Raleigh Vance - Chairman - Board of County Commissioners - Courthouse - Red Cloud, NB 68970 (402) 746-2716
NH	Cheshire	Town of Marlow (01-09)	330025 A	E-10,11,12, 14	I	F	13 SEP 74	10 MAY 77	Mr. Joseph N. Fever - Selectman - Town Hall - Marlow, NH 03456 (603) 446-7836
NM	Santa Fe	City of Santa Fe (01-16)	350070 A	E-5	I	F	10 MAY 77	10 MAY 77	Honorable Joseph E. Valdes - Mayor - City Hall - P.O. Box 909 Santa Fe, NM 87501 (505) 982-4471
SD	Uninc. Area	Union County (01-40)	460242 A	E-5	I	F	10 MAY 77	10 MAY 77	Mr. M. C. Bak - Chairman - Board of County Commissioners - Elk Point, SD 57025 (605) 356-2101

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TX	Nueces	City of Driscoll (01)	480507 A	E-8,10,11,12, 14	I	F	1 MAR 74	10 MAY 77	Honorable B. B. Meyers - Mayor - P.O. Box 244 - Driscoll, TX 78351 (512) 353-2679
TX	Uninc. Area	Gillespie County (0001-0002)	480696 A	E-5	I	F	10 MAY 77	10 MAY 77	Honorable Victor H. Sagebiel - County Judge - Courthouse - Fredericksburg, TX 78624. (512) 997-2854
TX	Tarrant & Johnson	City of Mansfield (01-02,04-12)	480606 A	E-8,10,11,12, 14	I	F	22 FEB 74	10 MAY 77	Honorable Loyd Seeton - Mayor - City Hall - Mansfield, TX 76063 (817) 477-3101
TX	Uninc. Area	Scurry County (0001-0012)	480564 A	N-5	I	F	10 MAY 77	10 MAY 77	Honorable C. Preston Wilson - County Judge - Courthouse - Snyder, TX 79549 (915) 573-8576
UT	Washington	Town of Springdale (0001)	490179 A	E-5	I	F	10 MAY 77	10 MAY 77	Mr. Howard J. Smith - Town President - Town Hall - Springdale, UT 84767 (801) 772-3284
VT	Windham	Village of Bellows Falls (01)	500125 A	E-10,11,12, 14	I	F	16 AUG 74	10 MAY 77	Mr. Peter Lahaige - Village Manager - Village Hall - Bellows Falls, VT 05101 (802) 463-3964
VT	Caledonia	Town of Groton (01-02,04-10,12-14,17-18)	500026 A	E-10,11,12, 14	I	F	9 AUG 74	10 MAY 77	Mr. Michael Blair - Selectman - Town Hall - Groton, VT 05046 (802) 584-3453

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VT	Windham	Town of Jamaica (0001-0004)	500131 A	E-10,11,12, 14	I	F	28 JUN 74	10 MAY 77	Mr. Authur Brooks, Jr. - Selectman - Town Hall - Jamaica, VT 05343 (802) 874-7431

STATE	COUNTY	COMMUNITY NAME AND NO. OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM AND CHANCE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE (S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
AL	Lawrence	Lawrence County (Uninc. Areas) 0001A-0003A	010324A	N - 5	I	F	May 13, 1977	May 13, 1977	Chairman, County Comm. County Courthouse Moulton, AL 35650 Phone: 205-974-0282
AL	Montgomery	City of Montgomery 01-19	010174B	E - 8,11, 12,14	I	F	June 28, 1974 Jan. 9, 1976	May 13, 1977	J. Aronstein, Jr., City P.O. Box 1111 Montgomery, AL 36102 Phone: 205-262-4411
FL	Polk Co.	Polk County (Uninc. Areas) 01-127	120261A	N - 5	I	F	May 13, 1977	May 13, 1977	Charles Whitten, Chair County Commissioners P.O. Box 1808 Bartow, FL 33830 Phone: 813-533-0174
IL	Henry	Village of Cleveland 01	170748A	N - 15	I	F	May 13, 1977	May 13, 1977	Joseph Merrill, Mayor Route 1, Box 165 Colona, IL 61241 Phone: 309-792-1330
IL	Dupage	Dupage County (Uninc. Areas) 01-22	170197A	E - 5	I	F	May 13, 1977	May 13, 1977	Gerald Weeks, Chairma County Board 421 N. County Farm Rd Wheaton, IL 60187 Phone: 312-682-7000

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IL	Rock Island	Village of Milan 01-04	170590B	E - 11,12, 14	I	F	May 10, 1974 Sept. 24, 1976	May 13, 1977	Richard H. Work, Mayor 321 W. Second Ave. Milan, IL 61264 Phone: 309-787-2662
IL	Morgan	Morgan County (Uninc. Areas) 01-40	170903A	N - 5	I	F	May 13, 1977	May 13, 1977	F. Byron Smith, Chairman County Board County Courthouse Jacksonville, IL 62650 Phone: 217-245-5304
KY	Meade	Meade County (Uninc. Areas) 0001A-0009A	210169A	N - 5	I	F	May 13, 1977	May 13, 1977	James E. Greer, County J County Courthouse Brandenburg, KY 40108 Phone: 502-422-3567
KY	Muhlenberg	Muhlenberg County (Uninc. Areas) 0001A-0003A	210293A	N - 5	I	F	May 13, 1977	May 13, 1977	Robert Draper, County Ju County Courthouse Box 137 Greenville, KY 42345 Phone: 502-338-2520
MI	Ingham	Township of Alaiedon 0001A-0004A	260670A	N- 5	I	F	May 13, 1977	May 13, 1977	Lewis E. Wilson, Twp. S Township Hall - 2021 We Holt Road Mason, MI 48854 Phone: 517-676-9812

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MI	Oakland	City of Berkley 0001A	260292A	E - 5	I	F	May 13, 1977	May 13, 1977	Robert Eck, Mayor 3338 Coolidge Hwy, Berkley, MI 48072 Phone: 313-545-1171
MI	Lapeer	Township of Deerfield 0001A-0004A	260434A	N - 5	I	F	May 13, 1977	May 13, 1977	Gordon H. Yowell, Twp. 2212 Foner Road North Branch, MI 48461 Phone: 313-688-3186
MI	Oakland	Township of Independence 0001A-0004A	260475A	N - 5	I	F	May 13, 1977	May 13, 1977	J. Edwin Glennie, Twp. S Twp. Hall - 90 N. Main S Clarkston, MI 48016 Phone: 313-625-5111
MI	Saginaw	Village of St. Charles 0001B	260593B	N - 8,11	I	F	Oct. 8, 1976 Nov. 19, 1976	May 13, 1977	Robert Burns, Village Cle 110 W. Spruce Street St. Charles, MI 48655 Phone: 517-865-9791
MI	Cass	Township of Silver Creek 01-10	260369A	N - 11,12 14	I	F	Nov. 26, 1976	May 13, 1977	Richard Grabemeyer, Zon R.R. 5, Dixon St. Dowagiac, MI 49147 Phone: 616-424-3325

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Onslow	City of Jacksonville 01-04	370178A	E - 10,11 12,14		F	May 10, 1974	May 13, 1977	W. Bruce Teachery, Jr., Mayor P.O. Box 128 Jacksonville, NC 28540 Phone: 919-347-5153

	COUNTY	COMMUNITY NAME AND NO. OF PANELS	COMMUNITY NUMBER & SUFFIX	PROGRAM AND CHANGE CODE	INLAND OR COASTAL	HAZARD F/M/E	IDENTIFICATION DATE (S)	EFFECTIVE DATE OF THIS MAP ACTION	LOCAL MAP REPOSITORY
VA	Loudoun	Town of Round Hill 01	510279A	N - 5	I	F	May 13, 1977	May 13, 1977	Frank Entwisle, Mayor Town Hall Round Hill, VA 22141 Phone: 703-338-7878

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AR	Uninc. Area	Baxter County (02-33,36)	050010 A	N-5	I	F	17 MAY 77	17 MAY 77	Honorable James Baker - Judge - Office of the County Judge - Courthouse - Mountain Home, AR 72653 (501) 425-2755
AR	Uninc. Area	Desha County (02-61)	050065 A	N-5	I	F	17 MAY 77	17 MAY 77	Honorable Bonnie Zook - County Judge - Office of the County Judge Courthouse - Arkansas City, AR (501) 877-2426
CT	Fairfield	Town of Darien (01-06)	090005 A	E-8,10,11, 12,14	C	F	26 JLY 74	17 MAY 77	Mr. William Patrick - Selectman - Town Hall - Darien, CT 06820 (203) 655-1170
CT	New Haven	Town of Hamden (01-15)	090078 A	N-8,11,12	I	F	16 JAN 74	17 MAY 77	Mr. Mayo Snyder - Town Planner - Memorial Town Hall - Hamden, CT 06518 (203) 288-5641
CT	Hartford	Town of Rocky Hill (02-05)	090142 A	E-10,11,12, 14	I	F	7 JUN 74	17 MAY 77	Mr. Miriam Lifshitz - Selectman - 699 Old Main Street - Hartford, CT 06067 (203) 563-1431
ID	Uninc. Area	Payette County (01-05,07-27)	160198 A	N-5	I	F	17 MAY 77	17 MAY 77	Mr. Jack Abshire - Chairman - Board of County Commissioners - Courthouse - Payette, ID 83661 (208) 642-4641

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IA	Uninc. Area	Des Moines County (0001-0006)	190113 A	N-5	I	F	17 MAY 77	17 MAY 77	Mr. Merle Kelly - Chairman - Board of Supervisors - Courthouse - Burlington, IA 52601 (319) 752-6318
IA	Uninc. Area	Emmett County (0001-0002)	190865 A	N-5	I	F	17 MAY 77	17 MAY 77	Mr. Gary Stribley - County Engineer - Courthouse - Estherville IA 51334 (712) 362-4251
IA	Uninc. Area	Palo Alto County (0001,0003,0005)	190898 A	N-5	I	F	17 MAY 77	17 MAY 77	Mr. Richard C. Thompson - Chairman Board of Supervisors - Palo Alto County Courthouse - P.O. Box 95 - Emmetsburg, IA 50536 (712) 852-2924
KS	Uninc. Area	Brown County (01-31,33-35)	200026 A	N-5	I	F	17 MAY 77	17 MAY 77	Mr. Glenn Plamann - Chairman - Board of County Commissioners - Courthouse - Hiawatha, KS 66434 (913) 742-2581
KS	Uninc. Area	Crawford County (01-35)	200564 A	E-5	I	F	17 MAY 77	17 MAY 77	Mr. D. A. Saia - Chairman - Board of County Commissioners - County Courthouse - Girard, KS 66743 (316) 724-8217

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LA	Uninc. Area	Jefferson Davis Parish (01-23,25-49)	220095A	E-10,11,12, 14	I	F	31 JAN 75	17 MAY 77	Mr. David E. Marcantel - Secretary Police Jury - Jennings, LA 70546 (318) 824-4792
ME	Lincoln	Town of Newcastle (0001-0002)	230218 A	N-11,12	I	F	21 FEB 75	17 MAY 77	Mr. Robert W. Baker - Selectman - Town Hall - Newcastle, ME 04553 (207) 563-3441
ME	York	Town of Parsonfield (01-09,11-17)	230154 A	E-10,11,12, 14	I	F	28 JUN 74	17 MAY 77	Mr. Joseph Watson - Selectman - Town Hall - Parsonfield, ME 04047 (207) 625-3931
MO	Montgomery	City of Bellflower (01-02)	290770 A	N-5	I	F	17 MAY 77	17 MAY 77	Honorable Jim Stokes - Mayor - City Hall - Bellflower, MO 63333 (314) 929-3506

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NH	Sullivan	Town of Charlestown (01-08,10-15,17)	330153 A	E-10,11,12, 14	C	F	31 MAY 74	17 MAY 77	Mr. Ted H. Putnam - Selectman - Town Hall - Charlestown, NH 03603 (603) 826-4400
NH	Cheshire	Town of Stoddard (03,05-06,08-11,13-20)	330195 A	N-11,12	I	F	17 JAN 75	17 MAY 77	Mr. Earle F. Wesson - Selectman-Clerk - Office of Selectman - Stoddard, NH 03464 (603) 446-7098
OK	Cleveland	City of Norman (01-10,12-25)	400046 A	E-10,11,12, 14	I	F	23 AUG 74	17 MAY 77	Honorable William S. Morgan - Mayor - City Hall - 111 North Peters - Norman, O. 73069 (405) 321-1600

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									Cedar Park, TX 78613 (512) 258-4121
TX	Uninc. Area	Floyd County (0001-0012)	480817 A	N-5	I	F	17 MAY 77	17 MAY 77	Honorable J. K. Holmes - County Judge - Courthouse - Floydada, TX 79235 (806) 983-2244
TX	Uninc. Area	Jasper County (01-03,06-08,12-15,17-70)	481080 A	N-5	I	F	17 MAY 77	17 MAY 77	Honorable T. Gilbert Adams - County Judge - Courthouse - Jasper, TX 75951 (713) 384-2612
TX	Uninc. Area	Johnson County (0001-0010)	480679 A	N-5	I	F	17 MAY 77	17 MAY 77	Honorable Charles C. Cooke - County Judge - Office of County Judge - Courthouse - Cleburne, TX 76031 (817) 645-7151
TX	Kaufman & Henderson	City of Mabank (01,03-04)	480414 A	N-5	I	F	17 MAY 77	17 MAY 77	Honorable E. L. Guinn - Mayor - City Hall - 129 East Market Street Mabank, TX 75147 (214) 887-3241
TX	Montgomery	Town of Magnolia (01-02)	481261 A	N-5	I	F	17 MAY 77	17 MAY 77	Ms. Jo Anne Presley - City Secretary - Town Hall - P.O. Box 395 - Magnolia, TX 77355 (713) 356-2266

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TX	Collin & Dallas	City of Richardson (01-09)	480184 A	E-10,11,12, 14	I	F	24 MAY 74	17 MAY 77	Honorable Raymond D. Noah - Mayor - City Hall - 219 E. Main Street - Richardson, TX 75080 (214) 235-8331
VT	Addison	Town of Ferrisburg (01-19)	500002 A	E-10,11,12, 14	I	F	6 SEP 74	17 MAY 77	Mr. Samuel Essex - Selectman - Town Hall - Ferrisburg, VT 05456 (802) 877-3429

1. Conversion to Regular Program with FIRM (elevations determined)

2. Conversion to Regular Program with FIRM (no elevations determined)

3. Conversion to Regular Program with no Special Flood Hazard Areas- no FIRM

4. Conversion to Regular Program with no Special Flood Hazard Areas - no FIRM; rescission of FHBM effective on same date as conversion

5. Initial FHBM

6. Revision - Change of elevation; revised FIRM

7. Revision - Change of zone designation; revised FIRM

8. Revision - Corporate limit changes

9. Revision - Drafting corrections; Printing errors

10. Revision - Curvilinear

11. Revision - Add Flood Hazard Area

12. Revision - Reduce Flood Hazard Area

13. Revision - Federal Register omission

14. Revision - Refunds possible

15. Attention! A previous map (or maps) has been rescinded or withdrawn for this community. This may have affected the sequence of suffixes.

R - REGULAR PROGRAM E - EMERGENCY PROGRAM N- NOT IN PROGRAM

(National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, Feb. 27, 1969).

Issued: May 3, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13608 Filed 5-13-77;8:45 am]

[Docket No. FI-2882]

PART 1915—IDENTIFICATION AND MAPPING OF SPECIAL HAZARD AREAS

List of Communities With Special Hazard Areas

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: The purpose of this rule is the identification of communities with areas of special flood or mudslide or erosion hazards as authorized by the National Flood Insurance Program. The identification of such areas is to provide guidance so that communities may mitigate hazards and reduce property losses by adopting appropriate flood plain management or other measures to minimize damage caused by floods or other hazards. It will enable communities to guide future construction, where practicable, away from locations which are threatened by flood or other hazards.

DATES: The effective date of identification is the date listed in the sixth column of the table or June 13, 1977, whichever is later.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator; Office of Flood Insurance, 202–755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street SW., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: The Flood Disaster Protection Act of 1973 requires the purchase of flood insurance on and after March 2, 1974, as a condition of receiving any form of Federal or Federally related financial assistance for acquisition or construction purposes in an identified plain area having special flood hazards that is located within any community participating in the National Food Insurance Program.

One year after the identification of the community as flood prone, the requirement applies to all identified special flood hazard areas within the United States, so that, after that date, no such financial assistance can legally be provided for acquisition and construction in these areas unless the community has entered the program. The prohibition, however, does not apply to loans by Federally regulated, insured, supervised or approved lending institutions (1) to finance the acquisition of a residential dwelling occupied as a residence prior to March 1, 1976, or one year following identification of the area within which such dwelling is located as an area containing special flood hazards, whichever is later, or made to extend, renew, or increase the financing or refinancing in connection with such a dwelling, (2) to finance the acquisition of a building or structure completed and occupied by a small business concern, as defined by the Secretary, prior to January 1, 1976, (3) any loan or loans, which in the aggregate do not exceed $5,000, to finance improvements to or rehabilitation of a building or structure occupied as a residence prior to January 1, 1976, or (4) any loan or loans, which in the aggregate do not exceed an amount prescribed by the Secretary, to finance nonresidential additions or improvements to be used solely for agricultural purposes on a farm.

This 30 day period does not supersede the statutory requirement that a community, whether or not participating in the program, be given the opportunity for a period of six months to establish that it is not seriously flood prone or that such flood hazards as may have existed have been corrected by floodworks or other flood control methods. The six months period shall be considered to begin June 13, 1977, or the effective date of the Flood Hazard Boundary Map, whichever is later. Similarly, the one year period a community has to enter the program under section 201(d) of the Flood Disaster Protection Act of 1973 shall be considered to begin June 13, 1977, or the effective date of the Flood Hazard Boundary Map, whichever is later.

This identification is made in accordance with Part 1915 of Title 24 of the Code of Federal Regulations as authorized by the National Flood Insurance Program (42 U.S.C. 4001–4128).

Accordingly, § 1915.3 is amended by adding in alphabetical sequence a new entry to the table, which entry reads as follows:

§ 1915.3 List of communities with special hazard areas (FHBMs in effect).

(24 CFR § 1915.3)

4.

State ***	County ***	Location ***	Map No. ***	Local Map Repository ***	Effective date of identification of areas which have special flood hazard ***
Alaska.	Unorganized Borough.	Valdez, City of.	H 020094A 01 through H 020094A 35.	Mayor, P.O. Box 506, Valdez, AK 00686.	November 1, 1974. April 8, 1977.
Arizona.	Gila.	Unincorporated Areas.	H 040028A 01 through H 040028A 12.	Chairman, Board of Supervisors, Courthouse, 1400 East Ash St., Globe, AZ 85501.	November 1, 1974. April 8, 1977.
Arkansas.	Lonoke.	Cabot, City of.	H 050309A 01 through H 050309A 08.	Mayor, City Hall, Cabot, AR 72023.	June 3, 1977.
Do.	Hempstead.	Unincorporated Areas.	H 050436A 01 through H 050436A 55.	County Judge, Office of the County Judge, Hempstead Co. Courthouse, Hope, AR 71801.	June 3, 1977.
Do.	Jackson.	Unincorporated Areas.	H 050096A 01 through H 050096A 47.	Judge, Courthouse, Office of the Judge, Newport, AR 72112.	June 3, 1977.
Do.	Lawrence.	Unincorporated Areas.	H 050443 0001A through H 050443 0009A.	County Judge, Lawrence County Courthouse, Walnut Ridge, AR 72476.	June 3, 1977.
Do.	Prairie.	Unincorporated Areas.	H 050459 0001A through H 050459 0011A.	County Judge, Courthouse, Office of the Judge, Des Arc, AR 72040.	June 3, 1977.
Do.	Nevada & Ouachita.	Reader, Town of.	H 050428A 01 through H 050428A 02.	Mayor, P.O. Reader Rural Branch, Chidester, AR 71726.	June 3, 1977.
Colorado.	Chaffee.	Unincorporated Areas.	H 080269A 01 through H 080269A 03.	Chairman, Board of Co. Commissioners, County Courthouse, Salida, CO 81201.	June 3, 1977.
Do.	La Plata.	Unincorporated Areas.	H 080097A 01 through H 080097A 27.	Chairman, Commissioners Office, Courthouse, 1060 Second Ave., Durango, CO 81301.	June 3, 1977.

(24 CFR § 1915.3)

5.

State ***	County ***	Location ***	Map No. ***	Local Map Repository ***	Effective date of identification of areas which have special flood hazard ***
Connecticut.	Hartford.	Berlin, Town of.	H 090022A 01 through H 090022A 11.	Clerk, Town Hall, New Britain, CT 06037.	August 16, 1974. April 8, 1977.
Do.	Litchfield.	Washington, Town of.	H 090057A 01 through H 090057A 15.	Selectman, Bryan Memorial Town Hall, Washington Depot, CT 06794.	March 8, 1974. April 8, 1977.
Florida.	Seminole.	Unincorporated Areas.	H 120289A 01 through H 120289A 28.	Chairman, Board of Commissioners, P.O. Drawer C. Sanford, FL 32777.	January 17, 1975. April 8, 1977.
Georgia.	Catoosa.	Unincorporated Areas.	H 130028 0001A through H 130028 0003A.	Commissioner, Roads & Revenue, County Courthouse, Ringgold, GA NO ZIP CODE.	June 3, 1977.
Do.		City of Macon and Bibb County.	H 130011A 01 through H 130011A 71.	City Engineer, P.O. Box 247, Macon GA 31201.	May 24, 1974. April 8, 1977.
Idaho.	Lemhi.	Leadore, City of.	H 160224A 01.	Mayor, Town Hall, Leadore, ID 83464.	June 3, 1977.
Do.	Madison.	Rexburg, City of.	H 160098B 01 through H 160098B 04.	Mayor, 12 North Center, Rexburg, ID 83440.	December 17, 1973. April 8, 1977.
Do.	-do-	Sugar City, City of.	H 160099A 01.	Mayor, P.O. Box 176, Sugar City, ID 83448.	June 3, 1977.
Illinois.	DeKalb.	Unincorporated Areas.	H 170808A 01 through H 170808A 44.	County Board, Courthouse Annex, Sycamore, IL 60178.	June 3, 1977.
Iowa.	Allamakee.	Unincorporated Areas.	H 190005A 01 through H 190005A 44.	County Engineer, Courthouse, Waukon, IA 52172.	June 3, 1977.

(24 CFR § 1915.3)

6.

State	County	Location	Map No.	Local Map Repository	Effective date of identification of areas which have special flood hazard
***	***	***	***	***	***
Do.	Floyd.	Unincorporated Areas.	H 190127A 01 through H 190127A 30.	Board of Supervisors, Floyd County Courthouse, Charles City, IA 50616.	June 3, 1977.
Do.	Jasper.	Unincopporated Areas.	H 190880 0001A througy H 190880 0004A.	Chairman, Board of Supervisors, Jasper County Courthouse, Newton, IA 50208.	June 3, 1977.
Do.	Linn.	Unincorporated Areas.	H 190829A 01 through H 190829A 44.	Chairman, Board of Supervisors, Linn County Courthouse, Cedar Rapids, IA 52401.	June 3, 1977.
Do.	Marshall.	Unincorporated Areas.	H 190890 0001A through H 190890 0002A.	Chairman, Board of Supervisors, 113 North First Avenue, Marshalltown, IA 50158.	June 3, 1977
Do.	Marion.	Pella, City of.	H 190837A 01 through H 190837A 06.	Mayor, City Hall, Pella, IA 50219.	June 3, 1977.
Do.	Webster.	Vincent, City of.	H 190819A 01 through H 190819A 02.	Mayor, City Hall, Vincent, IA 50594.	June 3, 1977.
Kansas.	Doniphan.	Unincorporated Areas.	H 200078A 01 through H 200078A 31.	Chairman, Board of County Comms., Courthouse, Troy, KS 66087.	June 3, 1977.
Louisiana.	Assumption Parish.	Unincorporated Areas.	H 220017A 01 through H 220017A 29.	President, Policy Jury, P.O. Box 518, Napoleonville, LA 70390.	January 24, 1975. April 8, 1977.
Do.	St. John the Baptist Parish.	Unincorporated Areas.	H 220164A 01 through H 220164A 28.	President, Courthouse, P.O. Box 25, Edgard, LA 70049.	August 9, 1974. April 8, 1977.
Do.	West Feliciana Parish.	Unincorporated Areas.	H 220245A 01 through H 220245A 36.	Pres., Policy Jury, P.O. Drawer N., St. Francisville, LA 70775.	December 20, 1974. April 8, 1977.
Massachusetts.	Norfolk.	Bellingham, Town of.	H 250232A 01 through H 250232A 10..	Selectman, Town Hall, Bellingham, MA 02019.	June 28, 1974. April 8, 1977.

(24 CFR § 1915.3)

7.

State ***	County ***	Location ***	Map No. ***	Local Map Repository ***	Effective date of identification of areas which have special flood hazard ***
Do.	Worcester.	Holden, Town of.	H 250309A 01 through H 250309A 15.	Selectman, 1196 Main Street, Holden, MA 01320.	September 6, 1974. April 8, 1977.
Do.	Hampden.	Holland, Town of.	H 250141A 01 through H 250141A 06.	Selectman, Town Hall, Southbridge, MA 01550.	June 7, 1974. April 8, 1977.
Do.	Essex.	Methuen, Town of.	H 250093A 01 through H 250093A 12.	Chairman, 90 Hampshire Street, Methuen, MA 01844.	August 30, 1974. April 8, 1977.
Do.	Worcester.	West Boylston, Town of.	H 250345A 01 through H 250345A 07.	Selectman, Town Hall 35 Worcester Street, West Boylston, MA 01583.	July 26, 1974. April 8, 1977.
Minnesota.	Cottonwood.	Unincorporated Areas.	H 270622A 01 through H 270622A 40.	County Auditor, County Courthouse, Windom, MN 56101.	June 3, 1977.
Do.	McLeod.	Unincorporated Areas.	H 270616A 01 through H 270616A 33.	Chairman, Board of Supervisors, County Courthouse, Glencoe, MN 55336.	June 3, 1977.
Do.	Washington.	Unincorporated Areas.	H 270499A 01 through H 270499A 33.	County Auditor, 14900 - 61st Street North, Stillwater, MN 55082.	June 3, 1977.
Mississippi.	Union.	Unincorporated Areas.	H 280237A 01 through H 280237A 30.	Chairman, Board of Supervisors, County Courthouse, New Albany, MS 38652.	December 13, 1974. April 8, 1977.
Missouri.	Shelby.	Clarence, City of.	H 290744A 01.	Mayor, Town Hall, Clarence, MO 63437.	June 3, 1977.
Do.	Franklin.	Oak Grove, Village of.	H 290554A 01 through H 290554A 02.	Chairman, Village Hall, Sullivan, MO 63080.	June 3, 1977.
Do.	Stoddard.	Penermon, City of.	H 290427A 01.	Chairman, Route #1, Essex, MO 63846.	June 3, 1977.

(24 CFR § 1915.3)

8.

State ***	County ***	Location ***	Map No. ***	Local Map Repository ***	Effective date of identification of areas which have special flood hazard ***
Do.	Jackson.	Unity, Village of.	H 290513A 01 through H 290513A 02.	Clerk, Village Hall, Unity Village, MO 64065.	June 3, 1977.
Nebraska.	Washington.	Unincorporated Areas.	H 310483A 01 through H 310483A 29.	Chairman, Board of Supervisors, Blair, NB 68008.	June 3, 1977.
New Hampshire.	Merrimack.	Warner, Town of.	H 330123A 01 through H 330123A 21.	Selectman, Town Hall, Warner, NH 03278.	August 9, 1977. April 8, 1977.
Do.	Grafton.	Wentworth, Town of.	H 330078A 01 through H 330078A 16.	Selectman, Town Hall, Wentworth, NH 03282.	August 16, 1974. April 8, 1977.
Do.	-do-	Woodstock, Town of.	H 330079A 01 through H 330079A 22.	Board of Selectmen, Office of the Selectmen, Woodstock, NH 03293.	June 28, 1974. April 8, 1977.
Ohio	Lorain.	Unincorporated Areas.	H 390346A 01 through H 390346A 34.	President, 226 Middle Ave., Middle Elyria, OH 44035.	June 3, 1977.
Oklahoma.	Oklahoma.	Midwest City, City of.	H 400405A 01 through H 400405A 13.	Mayor, City Hall, P.O. Box 10570, Midwest City, OK 10570.	June 3, 1977.
Oregon.	Benton.	Unincorporated Areas.	H 410008A 01 through H 410008A 47.	Chairman, Board of Commissioners, Benton Coounty Courthouse, Corvallis, OR 97330.	December 27, 1974.
Do.	Linn.	Lyons, City of.	H 410142A 01.	City Recorder, City Hall, Lyons, OR 97358.	March 8, 1974. November 21, 1975.
Pennsylvania.	York.	York, Township of.	H 421032A 01 through H 421032A 13.	Pres., 76 Revere Road, York, PA 17407.	June 3, 1977.
Rhode Island.	Providence.	Glocester, Town of.	H 440034A 01 through H 440034A 20.	Clerk, Town Hall, Chepachet, RI 02814.	October 18, 1974. April 8, 1977.

(24 CFR § 1915.3)

10.

State ***	County ***	Location ***	Map No. ***	Local Map Repository ***	Effective date of identification of areas which have special flood hazard ***
Do.	Angelina.	Homer, Town of.	H 481277A 01.	Mayor, Route 1, Box 237 E., Lufkin, TX 75901.	June 3, 1977.
Do.	Ft. Bend, Harris, & Montgomery.	Houston, City of.	H 480296A 01 through H 480296A 174.	Engineer, City Hall, 900 Brazos Street, Houston, TX 77002.	December 27, 1974. April 8, 1977.
Do.	Denton.	Justin, Town of.	H 480778A 01.	Mayor, Town Hall, P.O. Box 578, Justin, TX 76247.	June 3, 1977.
Do.	Robertson.	Unincorporated Areas.	H 480988 0001A through H 480988 0011A.	County Judge, Robertson County Courthouse, Franklin, TX 77856.	June 3, 1977.
Do.	Dallas.	Rowlett, City of.	H 480185 0001A through H 480185 0002A.	Mayor, City Hall, Rowlett, TX 75088.	July 19, 1974. April 8, 1977.
Do.	Titus.	Unincorporated Areas.	H 481023A 01 through H 481023A 32.	County Judge, Courthouse, Mt. Pleasant, TX 75455.	June 3, 1977.
Utah.	Millard.	Holden, Town of.	H 490201A 01.	Town President, Town Hall, Holden, UT 84636.	June 3, 1977.
Do.	Cache.	Logan, City of.	H 490019A 01 through H 490019A 04.	Mayor, City Hall, Logan, UT 74321.	January 16, 1974. April 8, 1977.
Do.	Weber.	Plain City, City of.	H 490217A 01 through H 490217A 04.	Mayor, P.O. Box 2017, Ogden, UT 84404.	June 3, 1977.
Do.	-do-	Roy, City of.	H 490223A 01 through H 490223A 04.	City Manager, 5715 South 2200 West, Roy, UT 84067.	February 7, 1975.

(24 CFR § 1915.3)

State ***	County ***	Location ***	Map No. ***	Local Map Repository ***	Effective date of identification of areas which have special flood hazard ***
Do.	Washington.	Hopkinton, Town of.	H 440028A 01 through H 440028A 14.	Clerk, Town Hall, Hopkinton, RI 02833.	May 31, 1974. April 8, 1977.
S. Dakota.	Day.	Bristol, City of.	H 460101A 01.	Mayor, Town Hall, Bristol, SD 57219.	June 3, 1977.
Do.	Hutchinson.	Unincorporated Areas.	H 460041 0001A through H 460041 0006A.	Chairman, Board of County Comm., Hutchinson County, Tripp, SD 57376.	June 3, 1977.
Tennessee.	Robertson & Sumner.	White House, City of.	H 470339A 01 through H 470339A 04.	Mayor, P.O. Drawer 69, White House, TN 37188.	May 17, 1974. April 8, 1977.
Texas.	Bell.	Unincorporated Areas.	H 480706A 01 through H 480706A 75.	County Judge, P.O. Box 336, Belton, TX 76513.	January 10, 1975. April 8, 1977.
Do.	Castro.	Unincorporated Areas.	H 480737A 01 through H 480737A 54.	County Judge, Castro County Courthouse, Judge's Office, Dimmitt, TX 79027.	June 3, 1977.
Do.	Bosque.	Clifton, City of.	H 480052A 01.	Mayor, City Hall, 403 West Thirdd Street, Clifton, TX 76634.	July 19, 1974. April 8, 1977.
Do.	Colorado.	Unincorporated Areas.	H 480144A 01 through H 480144A 74.	County Judge, Courthouse Building, Columbus, TX 78934.	October 25, 1974. April 8, 1977.
Do.	Montgomery.	Cut and Shoot, Town of.	H 481279A 01 through H 481279A 03.	Mayor, Town Hall, P.O. Box 440, Conroe, TX 77301.	June 3, 1977.
Do.	Duval.	Unincorporated Areas.	H 480202A 0001A through H 480202A 0018A.	County Clerk, County Courthouse, P.O. Box 248, San Diego, TX 78384.	June 3, 1977.
Do.	Williamson.	Georgetown, City of.	H 480668B 01 through H 480668B 08.	Mayor, P.O. Box 409, Georgetown, TX 78626.	March 8, 1974. May 28, 1976. April 8, 1977.

(24 CFR § 1915.3)

17.

State ***	County ***	Location ***	Map No. ***	Local Map Repository ***	Effective date of identification of areas which have special flood hazard ***
Vermont.	Rutland.	Pittsford, Town of.	H 500098A 01 through H 500098A 15.	Clerk, Town Hall, Pittsford, VT 05763,	June 3, 1977.
Washington.	Wahkiakum.	Unincorporated Areas.	H 530193 0001A through H 530193 0003A.	County Engineer, Wahkiakum County Commissioners Office, Wahkiakum County Courthouse, Cathlamet, WA 98612.	February 21, 1975. April 8, 1977.
Wisconsin.	Green.	Unincorporated Areas.	H 550157A 01 through H 550157A 35.	Chairman, County Board, Route 1, New Glarus, WI 53574.	December 6, 1974. April 8, 1977.

(National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, Feb. 27, 1969.)

Issued: May 3, 1977.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.77-13609 Filed 5-13-77;8:45 am]

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MONDAY, MAY 16, 1977

PART VII

DEPARTMENT OF JUSTICE

Antitrust Division

■

UNITED STATES v. NATIONAL BROADCASTING CO., INC.

Written Comments on Proposed Consent Judgment and Responses

DEPARTMENT OF JUSTICE

Antitrust Division

UNITED STATES v. NATIONAL BROADCASTING CO., INC.

Written Comments on Proposed Consent Judgment and Department of Justice Responses

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, the written comments on the proposed consent Judgment filed November 17, 1976, with the United States District Court in the Central District of California in Civil Action No. 74-3601-RJK, and the responses of the Department of Justice to such comments are published herewith. The Stipulation and Order modifying tne proposed Final Judgment, and the modified proposed Final Judgment are also reproduced.

CHARLES F. B. MCALEER,
Assistant Chief, Judgments and Judgment Enforcement Section, Antitrust Division.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., Defendant.	Civil No. 74-3601-RJK STIPULATION AND ORDER

The parties having filed a Stipulation dated November 17, 1976, regarding the filing and entry of a Final Judgment in the form attached thereto, and comments having been received and considered by plaintiff, it is hereby stipulated and agreed by and between the parties, by their respective attorneys and subject to the approval of the Court, that:

1. The proposed Final Judgment lodged with the Court on November 17, 1976, shall be modified as follows:

(a) Section VI(E)(iii)(c) shall be deleted (page 9, line 31 - page 10, line 14).

(b) On page 11, line 5, "June 1" shall be substituted for "July 1."

The above modifications are incorporated in the amended proposed Final Judgment attached hereto.

2. Recognizing that the proposed Final Judgment does not specifically deal with the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, the parties have nevertheless agreed that the entry of this Final Judgment shall not preclude plaintiff, upon a showing that defendant has used such exclusive rights to impede competition in the television entertainment programming field or to circumvent any provision of the Final Judgment, from applying to the Court for relief under the Judgment against such conduct, provided that such relief would not place NBC at a competitive disadvantage with respect to CBS or ABC.

3. This Stipulation and Order, the above modifications, and the original inclusion and subsequent deletion of Section VI(E)(iii)(c) from the proposed Final Judgment, shall not estop plaintiff or defendant, or any person, in this or any other action or proceeding, from asserting any issue of fact or law as to the subject matter of Section VI(E)(iii)(c) or as to the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, nor shall they constitute any evidence or admission as to any such issue.

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Dated: May 4, 1977

FOR THE PLAINTIFF:

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Assistant Attorney General

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Attorneys, Department of Justice

FOR THE DEFENDANT:

SCHNADER, HARRISON, SEGAL & LEWIS

By: BERNARD G. SEGAL

JEROME J. SHESTACK

PETER S. GREENBERG

ORDER

IT IS SO ORDERED this _____ day of _____, 1977.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., Defendant.	)	Civil Action No. 74-3601-RJK

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on December 10, 1974, and defendant, National Broadcasting Company, Inc., having filed its answer herein on December 30, 1974, by their respective attorneys, each having consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding;

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Form OBD-183
12-6-76 DOJ

NOW, THEREFORE, before any testimony has been taken, the Court being advised and having considered the matter, it is hereby:

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against defendant under the provisions of Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U.S.C. §§1, 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act.

II.

As used in this Final Judgment:

(A) "Person" means an individual, partnership, corporation or any other form of legal or business entity.

(B) "NBC" means the National Broadcasting Company, Inc. and its subsidiaries.

(C) A "person controlling NBC" means any person owning at least ten percent (10%) of, or a controlling share of, the outstanding voting stock of NBC.

(D) "NBC Television Network" means an NBC owned or operated business which provides television programs and related advertising messages to affiliated television broadcast stations.

(E) "Entertainment Program" means any program, including a feature film, exhibited or intended to be exhibited on

Form OBD-183
12-6-76 DOJ

television other than the following programs: news, public affairs, agricultural, religious, instructional, and sports (as those terms are defined in Appendix A to this Final Judgment). The inclusion of incidental or occasional entertainment or non-entertainment elements in a program or program series shall not be deemed to change the classification of the program or program series.

(F) "Independent Program Supplier" means a person who produces or offers one or more entertainment programs for network exhibition, other than NBC, a person controlling NBC, or a person in which NBC or a person controlling NBC has an ownership interest.

(G) "Network Exhibition" means the initial and repeat exhibitions of a television program on the NBC television network during the term of any agreement between NBC and an independent program supplier for such exhibition of such program.

(H) "Prime Time Hours" means the hours from 6:00 p.m. to 11:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 5:00 p.m. to 10:00 p.m. in the Central and Mountain Time Zones of the United States.

(I) "Daytime Hours" means the hours from 9:00 a.m. to 6:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 9:00 a.m. to 5:00 p.m. in the Central and Mountain Time Zones of the United States.

(J) "Fringe Hours" means the hours from 11:00 p.m. to 2:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Eastern and Pacific Time Zones of the United States, and the hours from

10:00 p.m. to 1:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Central and Mountain Time Zones of the United States.

(K) "Television Broadcast Station" means a station licensed as a television broadcast station by the Federal Communications Commission.

(L) "NBC Production Facilities" means studio facilities, including but not limited to, scenery, props and other production equipment, which are used for the production of entertainment programs exhibited or intended to be exhibited on television, and which are owned or leased by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

(M) "Stripping" means the broadcasting of more than one (1) episode per week of a television program series.

(N) "Broadcast Year" means the television broadcast year customarily commencing in September of one year and continuing until September of the following year.

III.

The provisions of this Final Judgment are applicable to NBC, to any person controlling NBC and to each of NBC's directors, officers, agents, employees, subsidiaries, successors, and assigns, and to all persons in active concert or participation with any of them, who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

NBC is enjoined and restrained from:

(A) Acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial

of any television program produced wholly or in part by an independent program supplier, other than the right to the Network Exhibition of the program except as provided in Sections VIII(A)-(D) of this Final Judgment, provided that an agreement granting NBC the right to Network Exhibition may include provisions concerning subject matters incident to the licensing and use of network programs, of which the following are examples: geographic scope and manner of transmission and delivery of network broadcasts; approval of creative elements and program content; technical quality and delivery requirements; union and Equal Employment Opportunity Act compliance; act of God, force majeure; preemptions; obligation to pay for, rather than plan, programs; number of episodes or programs ordered; assignability; warranties; indemnification; completion bonds; security agreements and financing statements; insurance; public morals; advertising conflicts; advertising, promotion and publicity of programs; audience testing and screening; cancellation; exclusivity for talent and creative personnel; exclusive exhibition rights (except as limited by Sections VI(E)(ii)-(iii) herein); pilots (except as limited by Section VI(F) herein); options (except as limited by Sections VI(E)(i), VI(F) and VI(G) herein); first negotiation and first refusal rights (except as limited by Sections VI(E)(i) and VI(G) herein); spinoffs (except as limited by Section VI(G) herein); repeats (except as limited by Section VI(H) herein); same day protection against once weekly syndication programs and theatrical feature films; title protection for the length of the applicable contract or contracts; format and continuing character protection; breach; and remedies, so long as any such provision does not violate the antitrust laws.

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(B) Selling, licensing, or distributing entertainment programs to television broadcast stations for non-network television exhibition (or otherwise engaging in the business commonly known as "syndication"), or to foreign television stations or networks, except as provided in Section VIII(D) of this Final Judgment.

V.

(A) NBC is enjoined and restrained for a period of ten (10) years from the effective date of this Section from offering for NBC network broadcast during Prime Time Hours, Daytime Hours or Fringe Hours, more than two and one-half (2-1/2) hours per week in Prime Time Hours, more than eight (8) hours per week in Daytime Hours, and more than eleven (11) hours per week in Fringe Hours, determined on the average per compliance period, of entertainment programs obtained from sources other than independent program suppliers, provided that during each compliance period NBC may add to the total number of allowable hours of entertainment programming from sources other than independent program suppliers, two (2) non-regularly scheduled special programs, and provided further that in any compliance period, NBC may, during Fringe Hours, increase the number of allowable hours of entertainment programming from sources other than independent program suppliers by reducing to the same extent the number

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of allowable hours of such programming in Prime Time Hours and/or Daytime Hours.

(B) For purposes of this Section V, compliance periods shall be consecutive semi-annual periods commencing at the start of each broadcast year. Compliance reports in the form set forth in Appendix B to this Final Judgment shall be submitted by NBC to plaintiff within thirty (30) days following the conclusion of each compliance period.

VI.

NBC is enjoined and restrained:

(A) From purchasing or offering to purchase from an independent program supplier the right to Network Exhibition of one or more entertainment programs upon the condition, express or implied, that NBC, or any person controlling NBC, will obtain any other right or interest from said supplier, except as to contractual provisions concerning subject matters incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(B) For a period of fifteen (15) years from the effective date of this Section, from purchasing or offering to purchase from an independent program supplier any right to the exhibition of a program, other than a live program, as an NBC television network entertainment program upon the condition, express or implied, that said supplier produce the program, in whole or in part, utilizing NBC production facilities.

(C) For a period of fifteen (15) years from the effective date of this Section from agreeing with an independent program supplier that said supplier use NBC production

facilities to produce a program, other than a live program, as an NBC television network entertainment program for a period in excess of the time required to produce episodes for one (1) broadcast year, provided that NBC and said supplier are not precluded each year from negotiating and contracting for additional periods not to exceed one (1) year each.

(D) For a period of ten (10) years from the effective date of this Section from purchasing or offering to purchase from CBS Inc. ("CBS") or American Broadcasting Companies, Inc. ("ABC") any right to Network Exhibition of any entertainment program upon the condition, express or implied, that CBS or ABC agrees to purchase or offers to purchase a right to network exhibition of any entertainment program produced or controlled by NBC.

(E) For a period of fifteen (15) years from the effective date of this Section from:

(i) Acquiring from an independent program supplier options for Network Exhibition of a prime time network entertainment program series exercisable for a period in excess of four (4) years from the date of first broadcast of an episode of such program as part of an NBC prime time television network entertainment program series, and the balance of any broadcast year in which such four (4) year period ends, provided that nothing herein shall prevent NBC, after the date of first broadcast, from negotiating new provisions which may include the purchase of an extension of the option period to five (5) years from the date of first

broadcast, and the balance of any broadcast year in which such five (5) year period ends, and, at the end or during the final year of any contract term, from negotiating for and entering into new agreements with said supplier so long as the options acquired under any such new agreements do not exceed a period of four (4) years from the date of first broadcast of an episode under such new agreements, and the balance of any broadcast year in which such four (4) year period ends, plus the right to negotiate for and acquire a fifth option year, and provided further that nothing herein shall prevent NBC from acquiring first negotiation and first refusal rights for new agreements with said supplier so long as any such first refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms, and provided further that nothing herein shall prevent NBC from entering into contractual provisions incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(ii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition, in excess of the following:

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(a) for prime time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition;

(b) for non-prime time stripping on television broadcast stations, four (4) years from the first prime time episode broadcast; and

(c) for all other broadcast uses, three (3) years from the first prime time episode broadcast,

provided that nothing herein shall prevent NBC from negotiating for and acquiring rights, including exclusive rights, for stripping and once weekly exhibition to be utilized after the periods of exclusivity set forth above, so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series, and provided further that nothing herein shall prevent NBC from acquiring exclusive exhibition rights to series episodes for the broadcast year for which such episodes are ordered.

(iii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for theatrical feature films for which NBC has a contractual right to Network Exhibition, against:

(a) theatrical and non-theatrical direct projection;

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(b) closed circuit TV in non-residential hotels, motels, bars, restaurants, hospitals and similar non-residential institutions;

(c) passenger-carrying vehicles;

(d) video discs, cartridges or cassettes or other such equipment.

(F) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier a first year pick-up option for exhibition of a prime time network entertainment program series based on a program designated by NBC and said supplier as a "pilot program" ("pilot") which is exercisable after the following times:

(i) where NBC has not advanced said supplier any part of the costs of pilot development, subsequent to the earliest date that the agreement contemplates that broadcast of the series may commence; and

(ii) where NBC has advanced said supplier any part of the costs of pilot development, more than one (1) year after delivery to NBC of the completed pilot, provided that as to those series which NBC does not include in the network schedule at the earliest date that the agreement contemplates that broadcast of the series may commence:

(a) for those pilots which have been delivered to NBC between October 2 of one year and April 1 of the following year, NBC must designate by June 1 of the latter year sixty-five percent (65%) of such pilots as to which

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NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots; and

(b) for those pilots which have been delivered to NBC between April 2 and October 1 of the same year, NBC must designate by January 1 of the following year sixty-five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots;

and provided further that NBC may purchase additional first year pick-up options for series which NBC has not designated for release and for series which NBC has designated for option release but which NBC wishes to retain, so long as such additional options are acquired, for pilots described in Section VI(F)(ii)(a), after June 1, or after the announcement of the NBC television network schedule for the next broadcast year, whichever is later, and, for pilots described in Section VI(F)(ii)(b), after December 1, and so long as such additional options do not exceed increments of six (6) months.

For purposes of this Section VI(F):

A pilot shall be deemed to have been delivered to NBC when NBC has received, in the case of a film pilot, an answer print, and, in

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the case of a tape pilot, a program complying with customary tape requirements.

In computing the number of pilots to be released under Sections VI(F)(ii)(a) and (b), any fraction of a pilot shall be rounded off to the next lower whole number.

Unrecouped costs shall be deemed to be the amount of money advanced by NBC to an independent program supplier for the development of a pilot, except that if the NBC television network broadcasts a pilot once, two-thirds (2/3) of NBC's costs shall be deemed to have been recouped, and if NBC broadcasts a pilot more than once, all of NBC's costs shall be deemed to have been recouped.

(G) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier rights in excess of first negotiation and first refusal rights for a spinoff involving a non-continuing character.

For purposes of this Section VI(G):

First refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to

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NBC without giving NBC the first opportunity to meet such terms.

A non-continuing character shall be deemed to mean one who appeared in no more than twenty-five percent (25%) of the original episodes of the program upon which such spinoff is based during the twelve (12) months prior to the time exhibition rights to such spinoff are offered for licensing by said supplier.

(H) For a period of ten (10) years from the effective date of this Section, from purchasing from an independent program supplier a right to first run Network Exhibition of any television entertainment program series which includes the right to exhibit repeats of episodes in years subsequent to the broadcast year of initial exhibition of such episodes, provided that repeat rights to three (3) initial episodes per broadcast year of each such program series may be purchased for exhibition in subsequent broadcast years as part of the right to Network Exhibition, and provided further that additional rights to repeats may be purchased for exhibition in subsequent broadcast years, so long as negotiation for and acquisition of such additional repeat rights takes place after NBC has agreed to order episodes of such program series for the first year of broadcast as an NBC television network entertainment program series, and provided further that the limitation as to the use of repeats contained in this Section VI(H) shall not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs.

VII.

The following Sections of this Final Judgment shall not take effect until similar injunctive relief is obtained in Final Orders, Judgments or Decrees entered against CBS in United States v. CBS Inc., Civil Action No. 74-3599-RJK (C.D. Cal), and against ABC in United States v. American Broadcasting Companies, Inc., Civil Action No. 74-3600-RJK (C.D. Cal.) which are not appealable or from which no timely appeal is taken: V, VI(C), VI(E)(i), and VI(F) through (H).

VIII.

Nothing contained in this Final Judgment shall be construed:

(A) To prohibit NBC from acquiring rights for non-network broadcast of programs by NBC owned and operated television broadcast stations where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(B) To prohibit NBC from seeking repayment, in whole or in part, of money or other consideration loaned, advanced or furnished by NBC in connection with the development or production of a television network program or of a project or activity that may result in a television network program, to the extent of the amount loaned, advanced or furnished, including interest.

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(C) To prohibit NBC from acquiring rights with respect to non-broadcast uses, including but not limited to publication of books or music, where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(D) To prohibit NBC from selling, licensing, or distributing outside the United States programs (i) produced in foreign countries and not included in NBC's television network schedule, where the acquisition of such distribution rights is not conditioned, directly or indirectly, upon the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program, or (ii) produced by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

IX.

If a Final Order, Judgment or Decree is entered with respect to CBS in United States v. CBS Inc., Civil Action No. 74-3599-RJK (C.D. Cal.), or with respect to ABC in United States v. American Broadcasting Companies, Inc., Civil Action No. 74-3600-RJK (C.D. Cal.), which is not appealable or from which no timely appeal is taken, which shall order or decree for either CBS or ABC injunctions different in terms or provisions than those required by this Final Judgment, or which shall result in the dismissal of

either or both of such actions, NBC may apply to the Court and shall be granted a modification of or relief from any terms set forth herein as may be necessary to prevent NBC from being placed at a competitive disadvantage with respect to CBS or ABC.

X.

(A) Within thirty (30) days after the entry of this Final Judgment, NBC shall furnish to its officers, directors, and appropriate employees and agents a copy of this Final Judgment, and each year for a period of ten (10) years thereafter NBC shall furnish a copy to all new officers, directors and appropriate employees and agents. NBC shall maintain a file listing all persons to whom it has furnished such copies.

(B) Within thirty (30) days after entry of this Final Judgment and once each year during the succeeding ten (10) calendar years following entry of this Final Judgment, NBC shall send a copy of this Final Judgment to the last known address of each independent program supplier known to have offered any entertainment program to NBC for inclusion in its schedule of NBC television network programs within the preceding five (5) years and to each person listed in the then current issue of Television Factbook as a provider of television production facilities.

XI.

(A) For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, upon written request of

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the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and on reasonable notice to NBC made to its principal office, shall be permitted, subject to any legally recognized privilege:

(1) access during the office hours of NBC to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of NBC relating to any matter contained in this Final Judgment; and

(2) subject to the reasonable convenience of NBC and without restraint or interference by it, the right to interview officers or employees of NBC, who may have counsel present, regarding any such matter.

(B) NBC, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided in this Section XI shall be divulged by any representative of plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XII.

Jurisdiction is retained by this Court for the purpose of enabling either party to this Final Judgment to apply to

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this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIII.

Entry of this Final Judgment is in the public interest.

Dated:

UNITED STATES DISTRICT JUDGE

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APPENDIX A*

(a) "Agricultural programs" include market reports, farming, or other information specifically addressed, or primarily of interest, to the agricultural population.

(b) "News programs" include reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis, and sports news.

(c) "Public affairs programs" include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs.

(d) "Religious programs" include sermons or devotionals; religious news; and music, drama, and other types of programs designed primarily for religious purposes.

(e) "Instructional programs" include programs (other than those classified under Agricultural, News, Public Affairs, Religious or Sports) involving the discussion of, or primarily designed to further an appreciation or understanding of, literature, music, fine arts, history, geography, and the natural and social sciences; and programs devoted to occupational and vocational instruction, instruction with respect to hobbies, and similar programs intended primarily to instruct.

* Taken from 47 C.F.R. §73.670, n.1 (1975).

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(f) "Sports programs" include play-by-play and pre- or post-game related activities and separate programs of sports instruction, news or information (e.g., fishing opportunities, golfing instructions, etc.).

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APPENDIX B

COMPLIANCE REPORT

NBC PRODUCED PROGRAMS

Compliance Period _____
No. weeks _____

Prime Time Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Daytime Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

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Fringe Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Appendix B

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Form CBD-183
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CINEMERICA
WE KNOW HOW TO MAKE YOUR FUTURE PAY

January 13, 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement Enforcement Section
Anti-Trust Division
U.S. Justice Department
Washington, D.C. 20530

Dear Mr. Hollander:

I am compelled to write to you today on a matter of the most serious urgency which threatens not only the existence of my small company, nor the development of the most exciting new communications medium to emerge in 25 years, but most importantly, a basic foundation of the American free enterprise system. I refer specifically to the unconscionable pay-television provisions of the proposed consent decree between the National Broadcasting Company and the U.S. Justice Department.

After reading and rereading all of the available documentation and media coverage of this situation, I still cannot believe that an anti-trust complaint against NBC in one area appears to be headed for settlement by permitting them new anti-competitive powers in another area. Our company, our industry, and indeed, our nation have all been founded on a single basic principle; the freedom of choice.

Pay-television is nothing more nor less than an option available to the American consumer. We offer the ability to view and enjoy the finest of current filmed entertainment in its pure unmutilated form. The subscribers we serve in 15 states have exercised their freedom of choice by voting with their dollars to bring this option into their homes. Am I now to believe that our government "of the people, by the people and for the people" is going to sanction one company's power to destroy this new found freedom? I pray not.

CINEMERICA, INC. 9477 Brighton Way, Beverly Hills, California 90210 (213) 550-1563

No one knowing the facts can fail to recognize the outcome if the pay-television provisions of the decree are adopted as presently written. If NBC can prevent motion pictures from reaching our subscribers they will prevent this. So too will ABC and CBS. Most simply, if NBC wins on this point it is the average American consumer who will suffer the greatest loss.

I urge you, please don't let this happen. You in your life goals, and I in mine, have both pledged ourselves to serving the public. I believe that in this instance this is best accomplished by not depriving them of the freedom of choice to which I refer.

Most sincerely,

Kenneth P. Silverman
President

KPS/lg
Encl.

Columbia University in the City of New York | New York, N.Y. 10027
SCHOOL OF THE ARTS
Office of the Dean
Dodge

13 January 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

I am writing in protest against the recent Consent Decree allowing NBC its special rights to theatrical movies against the interests of pay cable television.

My sole concern is that commercial motion pictures are the lifeblood of cable television at this particular time and if this avenue of revenue is snatched away cable television will not have the ghost of a chance of being able to develop viable public service programming in the Performing Arts.

I need hardly tell you that opera, ballet, symphonic music, chamber music, classical theatre and other areas of the arts have no real chance of regular television activity unless cable television becomes a strong programming force. Public television cannot do the job alone. The combination of cable and public television could create a real market for the arts with revenues that, in time, could become significant.

I urge you to reconsider what is in effect a cauterization of cable television's most obvious commerical avenues.

If you feel that further evidence on what I stated here is needed from me, please do not hesitate to tell me. I know whereof I speak: prior to coming to Columbia University I was General Manager of the Metropolitan Opera and before that actively involved in attempting to obtain television stages for various performing arts.

Sincerely yours,

Schuyler Chapin
Dean

SC/jb
cc: Mr. Bob Johnson

East Bay Skills Center
1100-47th STREET
OAKLAND, CALIFORNIA 94608
• TELEPHONE (415) 658-7356 •

January 19, 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement Enforcement
Section, Anti-Trust Division
Washington, D. C. 20530

Dear Mr. Hollander:

I have recently been made aware of a recent Consent Decree concerning NBC that is the result of a Justice Department anti-trust suit. A provision of this decree would permit NBC certain exclusivity rights on movies as a protection against pay cable for a period equal to the life of the contract plus 30 days.

It is my feeling that this decree creates a new stumbling block to the growth of the fledgling pay cable industry and its services to subscribers. Motion picture products are the life blood of the present pay cable service. If the pay cable industry is prohibited from offering this home entertainment service to its 900,000 subscribers, it will be unable to economically expand into other areas of home entertainment such as cultural, childrens and special interests.

As Director of a primarily federally funded manpower training program conducting special vocational training in the trade occupations of the cable industry, we have great concern about any action that tends to curtail the cable industry.

Our training program, as you may know, is designed to serve unemployed and economically disadvantaged youth of the Bay Area. Cable T.V. and its industry partner, pay cable, are at a very important crossroads in their industrial life; a crossroads that effects the future career opportunities of the young men and women who we train.

Pay cable offers a new injection of life blood into the Cable T.V. industry which means more jobs for graduates of our program. It is my hope that you will carefully review this decree and extend some relief to this new industry so that it will be given a chance to grow in the marketplace of this Country's economic system.

Sincerely,

William R. Dabney
Director

WRD:pmj cc: Mr. Bob Johnson and Mr. Spencer Kaitz

A COMMUNITY SERVICE OF THE PERALTA COLLEGES

nccl
National Citizens Communications Lobby

Rec'd 1/31/77 GFK

January 27, 1977

Bernard M. Hollander, Chief
Judgments & Judgment Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

On behalf of the National Citizens Communications Lobby, I am writing to express deep concern about the provision relating to pay cable television in the NBC/Justice Department Consent Decree.

This provision will cripple the young pay cable industry by denying it access to its product. At present, pay cable relies primarily on first-run motion pictures for its survival. The Consent Decree would enable NBC in acquiring rights to a film to obtain exclusivity protection against pay cable for two years with the allowance for yearly extensions; pay cable could conceivably wait years before it could purchase a film. It is disturbing that the Justice Department settled for substantially less than what it originally recognized to be effective relief. The Competitive Impact Statement noted that reasonable exclusivity protection should extend a maximum 90 days: 45 days prior to and following the film's exhibition date.

The provision is anti-competitive. NBC is not seeking exclusivity protection against the exhibition of movies at home, on video discs, or cassettes, nor the exhibition of movies in theatres, hotels, and airplanes. Only pay cable is singled out. Pay cable has 900,000 subscribers; the networks have access to 74 million viewing homes. Yet the networks continue to view this industry as a threat, and they seek to maintain their near-monopolistic control of television programming.

Consumers should have the right to choose whichever manner of television entertainment they please. Pay cable offers its subscribers the opportunity to watch unedited, uninterrupted movies. The consumer should not be deprived of this service.

The NCCL supports the notion of diversity and competition within the media. We encourage the growth of pay cable as an alternative to commercial broadcasting.

60-211-62

P.O.Box 19101 Washington, D.C. 20036 202-466-8290

Pay cable has great potential for expanding its services into cultural, educational, and children's programming. It would be a shame to see this potential go unrealized.

That this anti-trust suit brought about for the express purpose of opening competition in program production should result in crushing competition in program distribution would be a grim irony indeed.

We urge the Justice Department to reconsider this matter and either reinstate its earlier position calling for 90-day maximum exclusivity protection or delete the provision altogether.

Sincerely,

Melinda Halpert

Melinda Halpert
Executive Director, NCCL

Mr. Hollander 3706

The National Urban Coalition
1201 Connecticut Ave., N.W. • Washington, D.C. 20036 • 202/331-2400

February 10, 1977

Mr. Bernard M. Hollander
Chief
Judgements and Judge
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

On November 17, 1976, the U.S. Justice Department signed a Consent Decree with the National Broadcasting Company which may have profound and debilitating effects on the future growth and development of pay cable television.

As we see it, pay cable television provides the following services to our constituency - the poor, minorities, and working class city residents:

- Expanded job opportunities
- Increased opportunities for investment and business development for minority groups locked out of the established broadcast industry
- Additional avenues into local decision making through cable television coverage of such local activities as city council meetings
- The opportunity to view movies, sports events, and other entertainment for those who cannot afford to attend such functions
- New opportunities for cultural self-expression through increased variety of programs which appeal to the special interests of our constituents.

The provision in the agreement which relates to pay cable television would permit NBC, when acquiring rights to theatrical movies, to obtain exclusive protection against pay cable for a period equal to the life of the contract plus thirty days. The decree would, in effect, deny pay cable programmers access to motion picture product which is the lifeblood of the present pay cable service. The effect would cripple the cable television industry and prevent their expansion into other areas of home entertainment such as cultural, children's and other special interest programs.

Chairman Walter N. Rothschild, Jr. / President M. Carl Holman
Co-Chairpersons: Andrew Heiskell, Vernon E. Jordan, Jr., James M. Roche, Sol M. Linowitz, Joseph J. Bernal, Aileen C. Hernandez
Secretary: Clifford L. Alexander, Jr. / Treasurer Glenn E. Watts

We believe that every consumer should have the right to watch feature films in the form and manner they choose, without commercial interruptions. Further, the consent decree would seem to be contradictory to the principles of antitrust legislation which was enacted to prevent monopolistic practices that deny consumers freedom of choice and restrict the growth of competing industries.

Therefore, we urge you to consider the serious impact such a ruling would have upon our constituents and the millions of other television viewers who deserve an alternative to the present type of programming dictated by a few vested interests.

Thank you.

Sincerely,

M. Carl Holman

MCH:jg

AMERICAN CIVIL LIBERTIES UNION

22 East 40th Street New York, New York 10016 (212) 725-1222

February 10, 1977

Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Anti-Trust Division
Washington, DC 20530

Dear Mr. Hollander:

On November 17, 1976 the Justice Department signed a Consent Decree with the National Broadcasting Company in settlement of a four-and-a-half year old Justice Department suit aimed at curtailing the network's control over independent producers of entertainment programs. The Consent Decree contains a provision which would permit NBC to obtain "exclusivity protection" against pay cable television when acquiring the rights to theatrical movies for a period equal to the life of the contract plus thirty days.

The American Civil Liberties Union strongly opposes the exclusivity provision of the Consent Decree as harmful to the development of pay cable television, a new and important medium of communication which deserves the chance to compete with the established broadcasting structure.

The ACLU is committed to the principle that diversity of sources of expression in public communications systems will advance the exercise of freedom of speech and enhance the value of the guarantees of freedom of expression in the First Amendment. For this reason, the Union has long supported pay cable and subscription television as a means of expanding diversity of source of expression within the broadcast media.

To that end, the ACLU has objected to those rules promulgated by the Federal Communications Commission which place restrictions on the programs which can be televised via pay cablecasting. The Union sees such rules as an impermissible and unjustified government regulation of program content, molded for the protection of the established broadcast industry and disregarding the thrust of the First Amendment's purpose -- to encourage the dissemination to the public of a broad range of ideas and information.

Norman Dorsen, Chairperson, Board of Directors • Ramsey Clark, Chairperson, National Advisory Council
Aryeh Neier, Executive Director • Alan Reitman, Associate Director • Joel Gora, Acting Legal Director
Sharon Krager, Membership Director • John H. F. Shattuck, Director, Washington D.C. Office

Last February, the New York Times reported in a column by Les Brown that the Justice Department expressed agreement with the Union's assessment when it filed a brief in the U.S. District Court in Washington, D.C. challenging the rules governing pay-cable as anti-competitive, and charging that they were adopted by the FCC without regard for the public interest. Yet, the exclusivity provision in the Consent Decree is in clear derogation of diversity of source. By restricting the number of feature films available to cable subscribers, the Decree is cutting the lifeline of the present pay cable service at the request of, and for the sole benefit of, the established broadcast industry.

If the pay cable industry is prohibited from offering this home entertainment service, it will be economically unable to expand its developing special interest programming, such as cultural and children's presentations not often found on commercial television. The effect would be to blur the lines between pay cable and "free" TV to the detriment of the pay cable industry and the overall public interest.

Moreover, NBC's demand for protection against alternative television programming is clearly designed to preserve the network's monopoly over the TV viewing audience and the advertising revenues that are generated by commercial television. TV now reaches over 74 million homes and, according to their own estimates, network revenues should reach $13 billion by 1985. Pay Cable is currently viewed by 900,000 subscribers. The Consent Decree seems clearly to contradict the principles of antitrust legislation, which was enacted to prevent monopolistic practices that deny consumers freedom of choice and restrict the growth of competing industries. The Decree can, we believe, be labeled a blatant attempt by a network to strangle the infant pay cable industry.

It should be noted that the Justice Department itself originally recommended, in its Competitive Impact Statement, that a reasonable period of network exclusivity should be no more than 90 days: "only 45 days before and after the exhibition date of a feature film." Somewhere along the route to the Consent Decree agreement, this recommendation from the investigating attorneys

was discarded. Apparently, in its desire to get the broader settlement, the Justice Department sacrificed important rights of the pay cable industry and the American public.

The American Civil Liberties Union opposes this part of the Consent Decree as not being in the public interest. We strongly urge the Justice Department to delete the exclusivity provision from the Consent Decree with NBC in the interest of that diversity and competition in public communications which is essential to First Amendment freedoms.

Sincerely yours,

Aryeh Neier
Executive Director

Harriet Pilpel
Chairman, Communications
Media Committee

3706 M. Hollander

Legal Defense Fund
Allen Black, Jr., Director
DIVISION OF LEGAL INFORMATION AND COMMUNITY SERVICE
WESTERN REGIONAL OFFICE

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
12 Geary St., San Francisco, Calif. 94108 • (415) 788-8736
(National Office: 10 Columbus Circle, N.Y., N.Y. 10019 • 586-8397)

February 16, 1977

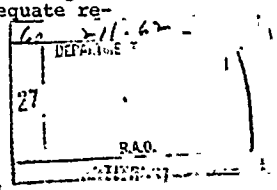
Mr. Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

This Division represents, assists and/or associates with over a dozen community groups in more than eight states which are working, through actions before the Federal Communications Commission and in Federal court, to assure adequate treatment from the media in the areas of ascertainment, programming and employment for minority communities. It is on behalf of these community groups that we oppose the proposed consent decree between the Department of Justice and the National Broadcasting Company.

At the same time, we are acutely aware of the attempts of minority groups to own and operate cable systems. According to N.C.T.A. there are presently 30 communities where franchises are principally owned by Black, Indian or Spanish surnamed persons. New systems controlled by Blacks are currently operating. The problems faced by any new franchise holder are great, for minorities they become even more formidable. If this fledgling group of minority entrepreneurs is to fulfill its promise they must not be hampered by additional burdens. We believe that the proposed consent decree will do irreparable harm to their efforts.

To be sure, the industry has not lived up to its potential to service the minority community. One reason may be that they lack the adequate re-



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sources to do so. A major source of income and one of their more attractive features is the ability to present first run movies, and other special events not otherwise available.

The proposed consent decree will take away from them this asset and at the same time it will allow NBC to freeze out its competition. The decree will also affect cable television's potential to provide diverse special interest programming, deny to consumers their right to watch feature films in the form and manner they choose, and perpetuate the networks monopoly of television entertainment.

We do not want anyone, cable, network or webs to have any excuse for its failure to adequately service the needs of the minority communities. The proposed consent decree provides such an excuse and we oppose it.

Very truly yours,

Allen Black Jr.

Allen Black, Jr.
Director
Division of Legal Information
& Community Service
Western Regional Office

ABJr/aph

ACTION FOR CHILDREN'S TELEVISION
46 AUSTIN STREET
NEWTONVILLE, MA. 02160 617-527-7870

3786 Mr Hollander

February 16, 1977

Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Re: Consent Order Between the United States Department of Justice and the National Broadcasting Company

Dear Mr. Hollander:

Action for Children's Television would like to express its views regarding the Consent Decree between the United States Department of Justice and the National Broadcasting Company signed November 17, 1976.

Action for Children's Television, Inc. (ACT) is a non-profit corporation organized under Massachusetts Law for the purpose of improving programming for children. It has local affiliates in principal cities in the United States and a national constituency including several thousand dues paying members.

ACT supports diversity in programming for children. We believe that the child audience should be provided with age-specific programming. Further, we believe this programming should include public affairs, news, educational presentations, and dramatic offerings that will expose the child to literature and theatre appropriate for young viewers. ACT supports programs that broaden the child's horizons and are free from racial, sexual, and age stereotypes.

ACT is concerned that the present Consent Decree between the Justice Department and NBC might operate to limit public access to diverse programming, including the potential for diverse programming for children. The section of the Consent Decree that relates to the exhibition of first run movies on television appears to promote "contract exclusivity" against pay cable and subscription television and consequently deny pay cable television a product critical to its growth. If this section of the Consent Decree will in fact inhibit the growth of cable television, the viewing public will be denied an important alternative to present programming. Such a result would run contrary to the underlying principle of the Consent Decree.

Pay cable has indicated its interest in programming for children. It would be unfortunate if as a result of the economic impact of the Consent Decree this programming was curtailed.

Sincerely,

Rachel Wolkin

Rachel Wolkin
General Counsel
on behalf of Action for Children's Television

RW:fb

27 P.O. TYPE

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3706 Ms. Hollander

MET

Metropolitan Opera Association, Lincoln Center, New York, New York 10023 (212) 799-3100

Michael Bronson, Technical Administrator

February 16, 1977

Bernard M. Hollander, Chief
Judgements and Judgement
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Gentlemen:

The Metropolitan Opera Association wishes to submit herein its comments on the Consent Decree signed by the Justice Department with N.B.C. in so far as this Consent Decree affects the Association's interests in pay cable television service.

In September 1974, Schuyler Chapin, then General Manager of the Metropolitan Opera Association, submitted comments to the F.C.C. concerning Docket Number 19554. In the two and a half years since that submission, the needs of the Association have increased substantially. The potential of pay cable television to substantially reduce our operating deficit and at the same time enable the Association to reach a wider audience is dependent on a healthy pay cable television industry.

This "Consent Decree" as signed, in our opinion, would restrict the pay cable television industry in a way that would limit its ability to deal with special interest programming such as might be provided by the Metropolitan Opera Association.

We hope you will read carefully Mr. Chapin's letter of September 10, 1974 and consider again the affect that the Consent Decree could have not only on pay cable television but on the important cultural institutions of America.

Sincerely,

Michael Bronson

MB:eg
Encl.

Cable Address: Metopera, New York

DEPARTMENT
27
P.A.O.
JUST

METROPOLITAN OPERA

METROPOLITAN OPERA ASSOCIATION, INC.
LINCOLN CENTER

SCHUYLER G. CHAPIN
GENERAL MANAGER

NEW YORK, N. Y. 10023

September 10, 1974

Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20554

Attention: Hon. Vincent J. Mullins, Secretary
Docket No. 19554

Gentlemen:

The Metropolitan Opera Association wishes to submit herein its comments in response to the FCC's Further Notice of Proposed Rule Making and Order for Oral Arguments released on August 12, 1974, in connection with the pay cable TV rules proceeding. Our chief aim in responding in writing now is to make the Commissioners aware of our concern that rule making in relation to pay cable TV should forthwith take into active account the minority interests of millions of Americans, those not now being adequately served by open airwaves TV. While our purpose in the narrow sense is to help make possible the video reception at home by Americans via pay cable TV of opera and other fine music programming, our aim is far wider.

This nation thinks of itself as enlightened and sophisticated, as it nears its 200th birthday. It has seen its way of life attract tens of millions to its shores and exported its culture and goods to hundreds of millions more. This nation also stands as the world exemplar of free enterprise, a setter of trends and keeper of traditions. It boasts the best informed, best educated yet most diverse, most individual citizenry in the world. It is, beyond all this, a nation dedicated to the principle that anyone within its shores may pursue the life of his choice, with law and custom.

Yet in one increasingly important sector of our national life, this principle of individual choice is not adequately respected. That sector is the field of mass communications (both radio and TV). Since our remarks here relate to FFC Docket No. 19554, which proposes to deal solely with rule making in pay cable TV, we shall not deal with the larger broadcast issue in America, save to note that good music is largely absent from TV, eroding from radio, and that our Saturday afternoon broadcasts from December to April, sponsored by Texaco on our own network, constitute the sole remaining example of good music "live" anywhere on the nation's airwaves.

ARIA COPY 211

The problem, as we all know, has to do with free enterprise when applied to a mass medium for the generation of profit. The decision to leave broadcasting in private hands in the U. S. was made nearly 50 years ago, at the birth of radio. The consequences are clear. Slowly over the ensuing years minority audience interests have been all but eliminated from the system, except in isolated independent low-cost pockets, as the service of those interests proved unable to generate revenues sufficient to satisfy stockholders. In this respect we are now unique among the major civilized broadcast nations of the world. We have permitted a majority of our people to become significantly disenfranchised, by deciding to serve only those of their interests which make money.

Paralleling this dilemma is that of the major cultural arts institutions of the nation, those who have always appealed to minorities and have never made money, among which the Metropolitan Opera is without peer. Each year the Metropolitan Opera Company presents in New York City and on tour an eleven-month season of major productions, drawing on the world's outstanding talents in the field, and on which it has always lost money. Faced as we are with rapidly rising costs, yet without any fresh sources of finance to meet the alarming deficit gap, the result, this year alone, has been to shorten the Metropolitan Opera season for the first time since 1934. In addition the Company dropped two planned new productions, among many other measures aimed at assuring at least a short term survival for the Company as we seek fresh solutions to the income problem.

Over the years many have asked why the Metropolitan Opera did not defray some of its costs by licensing telecasts of opera performances to one of the commercial networks. There was a brief honeymoon with the networks in the early 1950's, and even one closed circuit theatrical test. Since then it has been clear that our broadcast and financial future did not lie in this direction. Later there was talk of public television, but economic strictures in that field do not at present permit this to offer an alternative. Finally it is being suggested to us by some now that pay cable TV is the new technology that can break the impasse. The problem is that pay cable TV is still an infant industry, hardware-oriented and capital intensive. Neither we here at the Metropolitan Opera, nor any of our sister cultural institutions, theaters and museums, can ever hope to find part of our own long-term fiscal answer there unless the infant is encouraged to grow, as reasonably quickly, freely and unencumbered by excessive restrictions as possible.

In order to grow, pay cable TV must attract subscribers. To do this, it seeks to enter the general broadcast marketplace and compete for the right to control some part of the mass entertainment spectrum, most notably feature films and sports. The commercial networks object. Yet it is clear that without an increased pay cable TV audience base, which such popular programs would undoubtedly attract, institutions like ours will have to wait a long time before pay cable TV systems can generate sufficient revenues to license any cultural-events programs of consequence, even for a nominal fee.

Were pay cable TV to concentrate solely on movies and sports, both already supplied "free" by network TV (with commercials, whose cost and network time is built into the product price paid by the consumer), the anguish for the network stockholder would be understandable. But pay cable TV does have the opportunity to provide more diversity, and knows it must do so if it expects to be given the right to compete with network TV on any part of its own "traditional" home ground. The FCC has recognized this in previous rule making, such as the 90-10% rule, but those rules have tended to be restrictive rather than offering incentive for a job well done.

How can cable TV ever hope to do this "better job" of programming and make it adequately rewarding for all parties unless it is encouraged to do so at this critical point? Excessive restriction on competition can only hold it back. Now, some would have pay cable TV banished to doing only those jobs that don't pay or build mass audiences. A widely distributed network brochure recently stated:

> "There are only so many channels on the broadcast television dial. Broadcasters are charged with serving mass audiences; there is simply not enough time in the day to offer all the programs for which small, specialized audiences exist. Cable television offers an abundance of channels--24 or 40 in many places, with reports that the number may someday rise to 100. Thus, cable television can bring to the public a wide variety of services that broadcast television does not offer at this time, ranging from presently untelevised cultural events to new services like shopping by television."

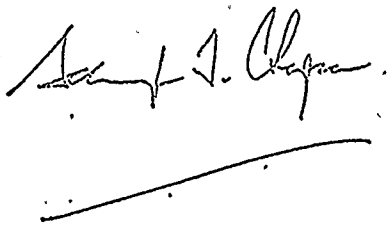
The example set by the program schedules of other major broadcast nations, (where free enterprise does not define the marketplace for program decision-making) gives the lie to this argument, which amounts to a plea that "we haven't been able to figure out how to make a profit out of programs except those that appeal to the largest public. So since we've thrown in the towel, why not give cable-TV a chance. Maybe they'll come up with a fresh answer." Another version of this argument is the time-worn American game of "Let's you and him fight."

Well, surprisingly enough, pay cable TV seems willing to give it a try. But pay cable TV today does not have an audience base capable of generating the thousands of dollars involved in mounting opera and other major cultural-event programming, not to mention countless other program types appealing to minority interests. We at the Metropolitan Opera have a vested interest in making certain that those 24-40-100 channels do ultimately offer the program diversity to which the American public is entitled. We would be less than candid if we did not acknowledge that eventual income from pay-TV sources is part of our active current planning. As we have said, the old sources of private finance are no longer sufficient to handle the Metropolitan Opera's deficit. We regard it as a major priority to find and develop new sources of income to meet our present and future needs. Pay cable TV is at the heart of our [illegible]nking.

The Metropolitan Opera urges the FCC to keep the debate on rule making in pay cable TV open to the consideration of the consequences of present or future rules to the ability and encouragement of the pay cable TV industry to undertake cultural and minority programming. In particular we would be pleased to address ourselves to the 90-10% rule on program content (the 90% being the maximum allowed for movies and sports). We are prepared to be present at your October oral hearings, if you choose to invite us, and will offer such further suggestions then, or at another time or in writing if you prefer, as we hope may be helpful to the debate.

The rules you adopt for pay cable TV now will set precedents and dominate the future of this industry for the next decade or two. The test for all of us is to determine whether private enterprise can at last provide a broadcast spectrum whose quality in diversity can become the equal of those elsewhere, while offering the consumer a pay-choice previously closed to him, because it had been decided for him by broadcasters' rules of "good business." We believe that TV customers who wish to satisfy a taste for opera, or any other minority program interest, will in most cases consider paying for the privilege. The Metropolitan Opera cannot reach those customers without the swift, healthy growth of the pay cable TV industry. That growth will be most encouraged by the least restriction combined with incentives. We believe pay cable TV is willing to shoulder its share of this opportunity, and can, if allowed, offer a service which perhaps only pay cable TV has any remaining hope of providing to a long-deprived American public. And in allowing this to happen, you will also provide an essential life-line to the cultural well-being of the nation for the remainder of the century and beyond.

Sincerely,



SGC

Nicholas Johnson

22 February 1977

Bernard M. Hollander, Chief
Judgements and Judgement Enforcement
Section
Anti-Trust Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Hollander:

I am writing to you to voice my reservations over the provisions of the NBC/Department of Justice consent decree which concern pay cable television. My concern focuses on section VI (E) (iii) of the proposed final judgement. This section would allow NBC to obtain exclusivity against pay cable and subscription television for a period beginning 30 days before the availability date for the feature film, and running up to 24 months after two runs of the movie, plus 12 months for every subsequent run.

While a member of the Federal Communications Commission (1966-1973), and since then as Chairperson of the National Citizens Committee for Broadcasting, my paramount concern has been the protection of the public's right to diversity, access, and information from its communications network. The public has a right to benefit from new technologies, and from, whenever possible, the benefits of free competition.

Pay cable offers the potential for a whole new era in home entertainment. The economic structures of such a system offers hope for greater availability of minority and special interest programming. Whole new areas of culture, entertainment, information, art, children's programming, theatre, and history could bloom under a system of pay-per-program television. I am not starry-eyed about the prospects; it will probably take a great deal of vigilance and attention from the public to guarantee that such services are provided But there can be no opportunity for such development if the pay cable industry is not allowed to grow out of its infancy.

The commercial, over-the-air broadcasters have been doing their darndest to prevent the fulfillment of this potential. While paying lipservice to the concept of free competition, and complaining about government regulation as attempts to interfere with their "freedom of speech," the broadcasting industry

DEPARTMENT OF JUSTICE
FEB 25 1977
RAO

P.O.Box 19101 Washington, D.C. 20036 202-466-8200

has used every device within reach to limit competition, and to stifle new communications services that it sees as threatening.

This is true of the practice of insisting on long exclusivity agreements on feature films, for which NBC is now trying to gain government sanction. Such agreements could smother pay cable before it gets off the ground, thereby denying the choice it offers to the public. These agreements immediately deny the public the freedom to choose the time, manner, and form in which they wish to view films-- and for no good reason. The networks are simply using their immense economic muscle unreasonably to block pay cable competition.

It is ironic that what began as an anti-trust action could end in government sanction of this anti-competitive practice.

NBC's intention is clear-- the crippling of the pay cable industry. Of all the other forums in which movies are shown-- at home, in theatres, hotels, and airplanes, or through distribution of video discs and cassettes-- only pay cable has been singled out for exclusionary treatment. Isn't that odd? Why do you suppose that is?

I suggest it is because NBC realizes the vast potential of this fledling industry, and knows of its dependance upon the first-run features for its substanance and growth in its present infant stage.

Even the Justice Department initially recognized the anti-competitive nature of these exclusivity agreements. DOJ attornies originally argued that a 90-day exclusivity period (45 days prior to and after the actual air date) was sufficient protection for the network. This position was apparently abandoned out of a desire to reach an overall settlement. That, however, does not change the important public interest and anti-trust considerations that led Justice to its original stand.

Let me hasten to add-- lest there be any suspicion that I have naively been won over by the equally rapacious pay cable entrepeneurs-- that I would and do oppose with equal force your giving them any anti-competitive exclusivity protection

The underlying purpose of the anti-trust laws is to prevent monopolistic practices that deny consumers freedom of choice and restrict the growth of of competing industries. It is particularly important in the communications industry that we make available to the public as many different sources of

information and entertainment as is possible without creating technological or economic chaos. This provision of the consent agreement flies in the face of those principles.

I hope you will seriously consider this question of the public's rights to as much diversity and competition as possible. I think the evidence shows that, considered solely on its own merits, this provision of the consent agreement is anti-competitive, anti-consumer, and an unnecessary boon to an already powerful corporation.

Sincerely,

Nicholas Johnson

3706 Mr. Hollander
Kaplan 3714
Film

AMERICAN TELEVISION & COMMUNICATIONS CORPORATION
360 SOUTH MONROE STREET • DENVER, COLORADO 80209 • PHONE (303) 321-2224

MONROE M. RIFKIN
President

January 14, 1977

Mr. Bernard M. Hollander
Chief, Judgments and Judgment
Enforcement Section
Anti-Trust Division
U. S. Department of Justice
Washington, D. C. 20530

Re: United States of America v. National Broadcasting Company, Inc. (Central District of California - Civil No. 74-3601-RJK)

Dear Mr. Hollander:

The proposed Final Judgment in the case of the United States of America v. National Broadcasting Company, Inc. would have a serious anti-competitive impact on the developing pay cable television and subscription television industry and would severely limit the public's opportunity to view commercial-free feature films in their own homes. Section VI(E)(iii)(e) of the proposed Final Judgment would allow NBC (and, by implication, ABC and CBS) to exercise their vastly superior economic bargaining position to require producers of movies to grant the networks, exclusive exhibition rights, against pay television, commencing 30 days prior to the date of availability for exhibition and ending on the last date of availability, so long as the period of availability does not exceed two years, plus one additional year for each exhibition in excess of two exhibitions for which a network acquires rights. The FCC rules confer territorial broadcast monopoly on the networks, so why should the Justice Department sanction their attempts to secure film exhibition exclusivity? The networks, by exercising their dominance and control over access to their broadcast time to force independent program suppliers to grant exclusive movie rights to the networks, would severely restrict the ability

of the pay television industry to obtain movies and thereby place the pay television industry at a severe competitive disadvantage.

The pay television industry is an infant industry which relies on movies as a critical source of programming. The industry cannot compete with the networks if it is denied the right to exhibit major, first-run movies shortly after the movies have completed their theatrical exhibition period, and it cannot spend the enormous amounts available to the networks to purchase films.

The proposed Final Judgment, in conjunction with the FCC pay television rules, would allow the networks to unreasonably exercise their extensive economic and other power to acquire exclusive rights to a film as soon as it clears the theatres, to hold the exhibition rights without exhibiting the film (i.e. "warehouse" the film) for a two-year and one-month period, exhibit the film on the last day of the warehousing period, and thereby prevent the exhibition of the film on pay television during the initial time that the FCC rules permit pay television exhibition -- the most competitively critical time. Then, for an ensuing seven-year period, the networks could prevent the exhibition of the film by simply declining to seek exhibition rights. At the expiration of the seven-year period, the networks could continue to prevent pay television exhibition by warehousing the film for additional periods as authorized by the proposed Final Judgment.

If the networks are allowed to deny movie exhibition rights to pay television, they will deprive hundreds of thousands of existing pay television subscribers, and a far greater number of potential pay television subscribers, of their right to watch quality motion pictures in their homes without constant commercial interruptions and at times convenient to them. The proposed Final Judgment would be an invaluable and invidious tool in the hands of networks to be used to drive commercial-free television from the marketplace and to force television viewers to watch commercial-laden movies which increase network profits in proportion to

the number and length of commercials which suit the pleasure of the networks.

I urge, therefore, that the Department of Justice delete the anti-competitive, anti-pay television provision from the proposed Final Judgment so that the infant pay television industry may have an opportunity to develop, free from artificial restraints of trade, to enable it to serve the television-viewing public in a manner that affords that public, basic freedom of choice in home entertainment.

Very truly yours,

Monroe M. Rifkin
President

MMR/vi

THURMAN ARNOLD (1891-1969)
PAUL A. PORTER (1904-1976)
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NORMAN DIAMOND
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M. JONATHAN MENKMAN

MARTIN RIGER
ROBERT PITOFSKY
OF COUNSEL

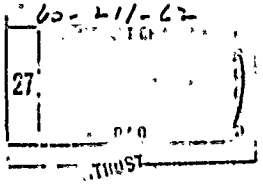
February 25, 1977

Bernard M. Hollander, Esquire
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: Comments of Twenty-Four Companies in the Pay Cable Industry on the Proposed Consent Judgment in United States v. National Broadcasting Company, Inc., Civil Action No. 74-3601-RJK, U.S.D.C., C.D. Cal.

Dear Mr. Hollander:

We represent twenty-four companies in the pay cable industry (identified in Attachment A to our accompanying comments) in connection with proceedings concerning the proposed consent decree filed in United States v. National Broadcasting Company, Inc., Civil Action No. 74-3601-RJK, on November 17, 1976, in the United States District Court



for the Central District of California. We submit the accompanying comments on behalf of our clients pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d).

We urge the Department of Justice to withdraw its consent to the proposed decree.

This case marks a sharp departure from the Department's usual practice of pursuing effective antitrust relief and ending predatory practices and barriers to entry created by oligopolistic firms like the defendant networks. We object to the decree because it not only would not halt, but would explicitly approve, the continuation of anticompetitive network practices which are calculated to stifle the pay cable industry in its infancy. In particular, the decree would specifically authorize NBC to obtain exclusivity against pay cable exhibition on feature films during the entire period films are available under contract for network exhibition. Further, in combination with the restrictive rules promulgated by the Federal Communications Commission, the decree would have the practical effects (i) of limiting pay cable, in the case of films released in theatres during the preceding three years to those cases where the films are no longer running in theatres and the networks have not contracted for them, and (ii) of denying pay cable any real opportunity to exhibit films of a greater age.

For reasons presented in our comments, the exclusivity approved by the proposed decree is unreasonable -- as indeed would be any exclusivity against pay cable. We, therefore, urge the Department to withdraw its consent and to negotiate adequate relief with NBC. Should a proposal be made to limit exclusivity to a period not in excess of 15 days prior to each network exhibition of a feature film (and not at all thereafter) as a compromise, our clients would not further object. If such relief is not obtained

through consent in the instant litigation, we urge the Department to continue litigation against the networks in order to end the networks' use of exclusivity as a means of throttling pay cable.

After you and your staff have had an opportunity to review our comments, we request the opportunity to confer with you concerning this matter. In addition, we would request the opportunity to meet with the Assistant Attorney General in charge of the Antitrust Division at any appropriate time before the Department reaches a final decision as to whether it will withdraw its consent to the proposed decree.

We look forward to further consultation with you.

Sincerely,

ARNOLD & PORTER

By Dennis G. Lyons

COMMENTS OF

AMERICAN TELEVISION & COMMUNICATIONS CORP.; CABLECOM-GENERAL, INC.; CABLE INFORMATION SYSTEMS, INC ; CENTRAL CALIFORNIA COMMUNICATIONS; COMMUNICATIONS PROPERTIES, INC.; CONTINENTAL CABLEVISION, INC.; COX CABLE COMMUNICATIONS; DANIELS PROPERTIES, INC.; GOOD-VUE CATV, INC.; HARRIS CABLE CORPORATION; HERITAGE COMMUNICATIONS, INC.; HOME BOX OFFICE, INC.; INERTIA, INC.; LIBERTY COMMUNICATIONS; MANHATTAN CABLE TELEVISION; MIDWEST VIDEO; SAMMONS COMMUNICATIONS, INC.; TELE-COMMUNICATIONS, INC.; TELESIS CORPORATION; TELEPROMPTER CORPORATION; THE TM COMMUNICATIONS COMPANY; UA COLUMBIA CABLEVISION, INC.; UNITED CABLE TELEVISION CORPORATION; VISION CABLE COMMUNICATIONS, INC.

IN OPPOSITION

TO THE

PROPOSED CONSENT JUDGMENT

FILED IN

UNITED STATES OF AMERICA v. NATIONAL BROADCASTING COMPANY, INC.

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 74-3601-RJK

Dennis G. Lyons
Leonard H. Becker
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1229 Nineteenth Street, N.W.
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Dated: February 25, 1977

COMMENTS OF TWENTY-FOUR COMPANIES IN THE PAY CABLE INDUSTRY IN OPPOSITION TO THE PROPOSED CONSENT JUDGMENT IN UNITED STATES V. NATIONAL BROADCASTING COMPANY, INC.

I. PRELIMINARY STATEMENT

The proposed consent decree in this case is an extraordinary document. The Department of Justice ("Department") filed this action and the companion suits to end the networks' repeated abuses of their dominant power as purchasers of television programs. The Complaint sought broad and effective relief. Yet, the Department has now agreed to a proposed decree which not only would not halt such abuses but would explicitly permit the continuation of the networks' current practices of obtaining unreasonable exclusivity to deny the pay cable industry access to feature films. The conduct approved, which is calculated to destroy the pay cable industry in its emergent stage, is in clear violation of the antitrust laws.

The Department is the last party we would expect to support the oligopolistic networks in their efforts to suppress potential competition. In putting its imprimatur upon the networks' improper activities, the Department not only abandons its commitment to obtain effective relief against the networks but neglects its task of promoting healthy competition and assuring that new entrants are not denied a fair opportunity to compete.

We urge the Department to reconsider its action, to withdraw its consent to the proposed decree, and

to pursue meaningful relief against the networks

II. BACKGROUND

Pay Cable is One of the Few Hopes of Breaking the Networks' Stranglehold on Television Viewing -- and It is For This Reason That The Networks Have Consistently Sought to Destroy This Emerging Industry.

The Department is familiar by reason of its participation in various FCC and court proceedings with the emerging pay cable industry and with the networks' efforts to thwart its development We will, therefore, confine our description of the pay cable industry and its relationship to the networks to the most essential elements

The Department is also familiar with the oligopolistic position of the three television networks -- defendants in this case and its companion cases The networks currently have a "stranglehold" 1/ on the selection of the program material that will be shown on home television. The pay cable industry is one of the few hopes for at least some relaxation of that stranglehold.

1/ National Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249, 251 (2d Cir. 1974).

Our clients are twenty-four of the leading companies in the industry (For identification, see Attachment A) They include both owners of cable systems and suppliers of pay cable programming Our cable operator clients provide service to the substantial majority of the approximately 1,000,000 pay cable subscribers in the nation The basic cable service consists primarily of transmitting over-the-air broadcast signals to the viewer Pay cable provides additional nonbroadcast programs to subscribers for a monthly fee in addition to the basic cable charge

Pay cable provides its subscribers the opportunity to view motion pictures, sporting events, and special-interest programs unedited and without commercial interruption Motion pictures currently are the principal program attraction and comprise a substantial majority of the hours of programming shown on most pay cable systems Films are presented on pay cable channels in original, unedited form, and uninterrupted by commercials Ordinarily, a pay cable system exhibits a film repeatedly over a few months to afford its subscribers the opportunity to view the film at their convenience Pay cable subscription charges generally range from $7 to $10 per month, and subscribing families, therefore, may view motion pictures, sports events, special attractions

and other events for only a fraction of the price of box office admission.

Pay cable's significant reliance on motion pictures makes the industry highly dependent on its ability to obtain access to quality feature films. The supply of such films, however, is quite limited because there has been a sharp decrease in the number of feature films produced. While at one time more than 400 new playable feature films were released annually by Hollywood, slightly over 100 are released currently each year.

Pay cable's difficulties in obtaining films are heightened by the restrictive rules issued by the Federal Communications Commission which the Department, like the pay cable industry and many public interest groups, has opposed as adverse to the public interest. These rules are discussed in further detail below. Their practical effect, however, in light of the networks' practices of obtaining exclusivity against pay cable, is to limit pay cable, in the case of films released in theatres during the preceding three years to those cases where the films are no longer running in theatres and the networks have not contracted for them, and to deny pay cable any real opportunity to exhibit films of a greater age.

Pay cable is vital to the development of the cable industry. Pay cable not only can provide needed revenues for the capital intensive cable industry but also can attract new subscribers for the basic cable service. Pay cable also has the potential to offer diverse types of programming which appeal to more specialized tastes. It bears emphasis here, however, that in order to achieve its potential, pay cable must depend on a base of programs of broad appeal such as motion pictures to provide it with a stable economic base and solid foundation for growth and development 2/

Dwarfing the pay cable industry, the three television networks reach nearly 80,000,000 homes. Studies have shown that each television home views network and other broadcast programming on the average of 46 hours per week. Pay cable subscribers, on the other hand, view 3-4 hours of pay cable programming weekly. Pay cable program hours, therefore, represent only about one-tenth of one percent of conventional television hours watched. Network net incomes in 1976 were an all-time record.

2/ As Henry Geller, former General Counsel of the Federal Communications Commission, testified during the Commission proceedings:

> "Third, and this is very important . . . the studies all show that the only way you are going to get in minority taste programs is on a successful pay TV system, and that means using sports and movies." FCC Docket No. 19554, Hearings, Tr. 127.

Network programming has been marked by its lack of diversity. Because broadcast television has a scarcity of spectrum space and must depend on advertisers for revenues, air time has been used for programs of mass appeal in order to attract the largest possible audiences "Unlike other media, television presently provides relatively uniform programs from a limited number of sources "[3/]

The networks -- the creatures of government-granted licenses and chain affiliations with other licensees -- have sought to preserve their dominant and "stranglehold" positions by stifling the pay cable industry. They have attempted to thwart pay cable's development in every conceivable forum. They have successfully argued for restrictive FCC rules limiting pay cable's access to feature films and sporting events and have lobbied against pay cable in Congress and before state agencies The networks' campaign continues, and the Department's proposed action here -- approving the networks' aggressive use of exclusivity to deprive pay cable of feature films -- can only give aid and comfort to the networks in their attempt to destroy the pay cable industry in its infancy. The networks' activities violate fundamental antitrust principles and threaten to deprive the public of the benefits of more diversified programming

3/ Final Report of the President's Task Force on Communication Policy, Ch. VII, at 4 (1968).

III EFFECT OF THE PROPOSED DECREE

Abandoning the Stated Purposes of the Complaint, the Proposed Decree Expressly Approves Exclusivity Against Pay Cable on Feature Films During the Entire Period of Availability to the Network.

The government instituted these actions against the networks to curtail abuses of the networks' dominant power as purchasers of television programs The complaints alleged that each network had "used its control over access to . [network] broadcasting time . . during prime evening hours" to deny program suppliers an opportunity to market programs on a competitive basis Complaint, ¶ 17 Thus, the complaints alleged that the networks had compelled program suppliers to grant the networks financial interests in their programs and had excluded programs in which the networks were granted no ownership interest Complaint, ¶ 17(a), (b).

In addition, the complaints charged that each network had used its dominant position as a purchaser of television programs

> "[t]o obtain a competitive advantage over other producers and distributors of television entertainment programs and of motion picture feature films." Complaint, ¶ 17(c).

In connection with the latter allegation, one of the specific prayers for relief against each network was

that it be prohibited from using its position as a dominant purchaser "to foreclose competition or obtain an unfair competitive advantage in any other field." Prayer, ¶ 6.

The Department claims that "[t]he proposed judgment provides relief similar and substantially equivalent to that requested in the complaint." Competitive Impact Statement, at 2-3. This assertion is inaccurate. The proposed decree not only fails to prohibit NBC's abuse of purchasing power "to foreclose competition," but indeed expressly approves NBC's practice of demanding unreasonable exclusivity against pay cable. Such exclusivity serves no purpose other than to cement the networks' entrenched position by depriving the pay cable industry of its most important product and impairing its ability to compete. The proposed decree, therefore, would put the Department's imprimatur on precisely the type of network abuse that this suit was intended to prevent. Thus, the position of the pay cable industry is worse if the consent decree is entered with the provisions in question in it than if the Department had never even filed the complaints in these cases. In addition, as described in Section IV C below, the decree would permit the very kind of restriction against pay cable that the Department has consistently opposed in the past as adverse to the public interest.

The approving impact of the proposed decree is clear. Section VI(E)(iii) contains five subsections with respect to network exclusivity on feature films. The first four subsections are flat prohibitions and would bar NBC from obtaining any exclusivity against

(a) theatrical and nontheatrical projection;

(b) closed circuit TV in nonresidential hotels, motels, bars, restaurants, hospitals, and similar nonresidential institutions;

(c) passenger-carrying vehicles;

(d) video discs, cartridges or cassettes or other such equipment.

Subsection (a), which deals with network exclusivity against pay cable, contains no such prohibition. Rather, the subsection expressly provides as against pay cable

> "that NBC may acquire exclusive rights to any such feature film commencing thirty (30) days prior to the first date and extending until the last date on which NBC may broadcast such feature film under the contract between NBC and such supplier, so long as this period of exclusivity between the first and last dates on which NBC may broadcast such feature film under such contract does not exceed twenty-four (24) months, and does not exceed twelve (12) additional months for each exhibition greater than two (2) to which NBC acquires the exhibition rights."

Section IV(A) of the proposed decree is also directly relevant. This provision limits the interests which NBC may obtain in television programs, but then presents a lengthy list (32 in number) of "examples" of "subject matters" which may properly be included

in any "agreement granting NBC the right to Network Exhibition " Among the explicitly authorized "examples" are "exclusive exhibition rights (except as limited by Sections VI(E)(ii)-(iii)) " Clearly, the effect of this language is affirmatively to approve, as permissible in every network license of a feature film, the broad exclusivity against pay cable authorized by Section VI(E)(iii)(e) 4/

NBC has previously advised both the Federal Communications Commission and the Congress that its current practice is to obtain exclusivity against pay cable commencing 60 days before availability and continuing throughout the availability period 5/

4/ We recognize that following the list of authorized "examples" Section IV(A) contains the concluding proviso, "so long as any such provision does not violate the antitrust laws." But the import of this proviso is unclear, and the Competitive Impact Statement nowhere explains its meaning, A court in a subsequent private antitrust action might adopt the view that the proviso applied only to those "examples" of contractual provisions which are not the subject of detailed regulation in other sections of the decree. Thus, as to subjects -- like exclusivity against pay cable -- which are addressed in detail in other sections, the court could reason that the Department had fully examined the particular subject and made a determination as to the relief appropriate in accord with the Department's view of the requirements of the antitrust laws

5/ See FCC Docket No 20402, Comments of National Broadcasting Company, Inc , at 2 (December, 1975); Testimony of Robert T Howard, President, NBC Television Network Hearings on the Pay Cable Television Industry Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary 94th Cong,, 1st Sess , at 222 (July 8, 1975)

Thus, the only change under the proposed decree would be that exclusivity prior to the availability period would be reduced from 60 days to 30 Added to a 24-month availability period, this means that 1/26th of the period of exclusivity (and even less on longer contracts) is removed!

In addition to approving explicitly NBC's current practices, the proposed decree permits NBC to obtain exclusivity on every film which it licenses and places no limitation on the length of the network's availability period The only prerequisite to obtaining exclusivity throughout an availability period longer than 24 months is that NBC acquire the right to exhibit the film twice during the initial 24-month period and once every 12 months thereafter

The broad exclusivity approved by the proposed decree may be illustrated by the following examples: If a film license providing exclusivity against pay cable granted NBC the right to telecast a film three times between January 1, 1977 and January 1, 1980, the entire pay cable industry would be barred from exhibiting the film at any time during the 37-month period commencing December 1, 1976 (thirty days before the network's availability date) and ending on January 1, 1980 (assuming NBC telecast the film for the third time

on that date).[6/]

In the example given, the prohibition on pay cable exhibition would become effective on December 1, 1976, even if NBC elected not to telecast the film for many months and did not telecast it for the first time until 1978.

Or, to take another example, exclusivity would bar pay cable exhibition at any time between network telecasts regardless of the number of months intervening between network showings. Thus, even if NBC held the film for 23 months between the first and second showings, pay cable exhibition would be barred during the entire lengthy period before the second showing.

The use of the artificial "availability" period -- which is based on tax, accounting and other considerations -- as the measure of exclusivity presents these irrational consequences because it is an irrational measure of exclusivity. This long and continuous blackout of pay cable throughout the network's availability period stands in marked contrast to the limited exclusivity based on exhibition dates originally proposed by the Department of Justice in its negotiations with NBC To take the foregoing example, the provisions of the decree permit more than 1,100 days of continuing exclusivity during which pay cable would be denied access to films licensed by NBC. Under an "exhibition date" approach, on the other hand, pay cable would be prevented from exhibiting films only during brief periods immediately proximate to network telecasts. As discussed below, limited 15-day exclusivity prior to network exhibition dates would not be opposed by our clients because the networks would then no longer be in a position to deny pay cable access to feature films for years at a time.

The restraint permitted by the decree cannot be justified. Such unduly long exclusivity is unsupported by any legitimate business need of the network and has been employed to deny pay cable access to feature films and thereby directly to obstruct pay cable's entry into competition. As demonstrated below, the exclusivity sanctioned by the proposed decree is an unreasonable restraintof trade violative of the antitrust laws.

6/ This is so whether or not the networks actually show the film at all. The language in Section VI(E)(iii)(c) does not require that NBC telecast films the specified number of times, but only that it acquire the right to do so. Thus, NBC will remain free to continue to deny pay cable access to feature films for long periods, without telecasting the films. The Department's assertion to the contrary in the Competitive Impact Statement is inaccurate. (Competitive Impact Statement, at 20). Where NBC telecasts the film licensed, we understand that the proposed decree is understood, at least by the Department, as meaning that the period of exclusivity terminates at the time of the network's final exhibition of the film under the license. Thus, if the third telecast by NBC in the example cited were to occur on December 1, 1979, the period of exclusivity would be 36 months rather than 37.

IV. ARGUMENT

A The Department of Justice Should Withdraw Its Consent Because the Exclusivity Approved by the Proposed Decree Constitutes an Unreasonable Restraint of Trade Violative of the Antitrust Laws.

1 Exclusivity stifles the pay cable industry, denies consumers programming choices, and deprives producers of access to pay cable purchasers.

The anticompetitive nature of network exclusivity requires little elaboration By denying pay cable access to feature films, the networks maintain their dominance over home television at the expense of the pay cable industry, the public, and producers of motion pictures

There can be no debate as to the impact of exclusivity upon the pay cable industry. The effect is clear, direct and immediate -- pay cable is denied films under network license during their entire period of availability to the network Since the entrenched networks can outbid pay cable for the finest feature films, exclusivity relegates pay cable to a secondary position as an entertainment medium Exclusivity, therefore, directly aids the networks in maintaining their oligopolistic hold on home television

The burdens imposed on the pay cable industry by such restrictions are already evident The industry has obtained only brief access to many films and no access at all to many others The result has been to make it more difficult for pay cable to attract new subscribers and to deny the cable industry the revenues it needs to develop as a major broadband medium

The adverse effect of exclusivity upon the public is also plain Throughout the network's availability period, the public is totally foreclosed from exercising its choice as to when and in what form it will view feature films on home television For those pay cable subscribers who find the network's exhibition date inconvenient or prefer to view a film in its original, unedited form and without commercial interruption, exclusivity is a complete denial of consumer choice The public is limited to viewing the film at the time and under the conditions dictated by the networks Thus, exclusivity binds the public to the networks and once again directly reinforces the networks' dominant position.

Exclusivity secured through abuse of network purchasing power similarly denies marketing choices to motion picture distributors In order to license films to the networks, distributors are required to grant exclusivity and to forego the opportunity of licensing to pay cable during the period of network availability Consequently, the policies of the antitrust laws are frustrated as distributors are forced to capitulate to the networks' unwarranted and anticompetitive demands

2. Exclusivity is a restraint of trade, subject to the "Rule of Reason."

As the courts have long recognized, an exclusive dealing contract is a restraint of trade which is subject to the "Rule of Reason." The leading case is United States v Paramount Pictures, Inc., 334 U.S. 131, 144-48 (1948)

The Paramount case involved, among other things, "clearances" granted to first-run theatres which provided that the licensor would not license films to second-run, lower-priced theatres within a given area for a period of weeks after the first-run exhibition had concluded. The District Court recognized that such provisions restrained trade, but refused to condemn all such clearances as per se violations of the antitrust laws. 66 F. Supp. 323, 341 (S.D.N.Y. 1946). Rather, the court held that the proper inquiry was whether under all the attendant circumstances the particular clearance was reasonable. Id. at 343. Applying this test, the court found many of the clearances granted could not be justified. 7/

The Supreme Court approved the District Court's analysis. 334 U.S. at 144-48. The Court emphasized that "many clearances had no relation to the competitive factors which alone could justify them" and "had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade " 334 U.S. at 146. Moreover the Court imposed the burden of justifying future clearances on the producers -- the parties "in the best position to evaluate their competitive effects." 334 U.S. at 148.

Under the "Rule of Reason," it is well-established that there must be a detailed analysis of the challenged restraint in light of all pertinent industry conditions The classic statement of the many factors to be considered is that of Justice Brandeis in Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918):

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

As demonstrated below, the broad exclusivity against pay cable approved by the proposed decree

7/ The court also found a conspiracy among the producers to grant unreasonable clearances. 66 F. Supp. at 343-46.

bears each of the indicia which have led courts to declare "exclusives" unreasonable Accordingly, the Department should withdraw its consent to the proposed decree

3. Neither the Department nor NBC has provided evidence supporting the reasonableness of the exclusivity approved by the decree.

Tellingly, neither the Department nor NBC refers to any evidence which would support the reasonableness of the exclusivity approved by the proposed decree To the contrary, according to the Competitive Impact Statement, the Department determined during pretrial discovery that network exclusivity against pay cable "should be curtailed" and initially proposed that "NBC be permitted such exclusivity for only 45 days before and after each network exhibition date of a feature film, . ." (Competitive Impact Statement, at 19) Presumably, this proposal reflected the Department's view of the limits on exclusivity which would serve the public interest.

It is clear that NBC rejected this proposal and pressed the Department for approval of the network's existing practices The proposed decree demonstrates that the Department yielded to NBC's demands.

The Department defends its concession by stating that the proposed decree merely establishes "outer limits" on exclusivity. (Competitive Impact Statement, at 20) But the decree expressly approves exclusivity up to such "outer limits," and the Department has provided no evidence to support the reasonableness of exclusivity up to those limits Indeed, the Department states that there were "no materials or documents which the Government considered determinative in formulating the proposed consent judgment " (Competitive Impact Statement, at 21) It appears, therefore, that the Department merely acceded to NBC's negotiating demands in the context of a broad-ranging case and has no basis upon which to conclude that the exclusivity approved is reasonable

The proposed decree purports to resolve an issue presented under the "Rule of Reason" in the absence of a record and indeed in the absence of any evidence indicating that the exclusivity approved is reasonable On this ground alone, the Department should withdraw its consent to the proposed decree

4 The exclusivity approved by the proposed decree is unreasonable on several independent grounds.

The exclusivity provided for here is unreasonable because (a) it is unnecessary to permit the networks to enjoy the rights conveyed by the license; (b) such exclusivity will become an industry-wide standard imposing a substantial barrier to entry by pay cable; (c) the networks are permitted to obtain exclusivity on every available film so as to foreclose pay cable from the market; and (d) it is prima facie unreasonable to suppose that the networks as a free medium

need exclusivity against a fee-charging medium like pay cable. We emphasize that exclusivity bearing any one of these characteristics would be subject to condemnation as unreasonable. In this case, all of these objectionable features are present, and the conclusion is inescapable that the exclusivity approved by the decree is itself a violation of the antitrust laws

(a) The exclusivity approved is unnecessary to permit the networks to enjoy the rights conveyed by the license.

In Paramount, supra, the Court indicated that one of the factors bearing on the reasonableness of exclusivity is whether the clearance is "reasonably necessary to protect the licensee in the run granted." 334 U.S. at 147. If such protection is unnecessary, the restraint of trade is unreasonable and in violation of the antitrust laws.

The networks have attempted to defend exclusivity against pay cable as necessary to protect network telecasts. They assert that pay cable exhibition must be prevented during the entire period of network availability to assure that network telecasts are not impaired by pay cable exhibitions.

The contention ignores reality. Pay cable subscribers number little more than 1% of the homes served by the networks. Plainly, the more than 75,000,000 homes without pay cable cannot be diverted to pay cable. Moreover, the networks have provided no evidence (and we know of none) to suggest that pay cable subscribers who have seen a popular film months previously will not enjoy the film again when it is shown on network television or will not encourage their relatives, friends, and associates to view the network showing. Significantly, the networks have not been reluctant to obtain licenses on films previously shown on pay cable. Indeed, in many instances, the network has telecast such films only a few months after the pay cable exhibition. There is no evidence that any of these telecasts was adversely affected by the prior pay cable showing.

Indeed, the available evidence is to the contrary. In June 1976, "Gone With The Wind" was shown on pay cable TV. Nearly eighty percent of all pay cable subscribers viewed the film. In November 1976, the film appeared on network television and obtained the highest Nielsen rating then ever recorded. While "Gone With The Wind" is a unique film, this is not an isolated example. In each of the instances shown in Attachment B covering a recent two-month period, pay cable exhibition had preceded the network telecast. Yet, the networks included these films in their programming, and there is no evidence that the network telecast was adversely affected by the prior pay cable showing.

The fact is that the networks seek to license films which have been most widely seen during their theatrical showings. Experience has shown that films viewed by the greatest number of persons in theatres typically in turn attract the largest television audiences. Similarly, prior pay cable exhibition promises

to increase network audiences by giving films additional exposure prior to network showing. As noted, the networks have adduced no evidence whatsoever that prior pay cable exhibitions adversely affect network telecasts 8/ One could construct a more convincing argument to the exact contrary

Exclusivity against pay cable serves no legitimate network purpose. The networks do not require exclusivity against pay cable to protect their interests in films licensed. Accordingly, without regard to the additional indicia of unreasonableness present here, the exclusivity approved by the decree is unreasonable and itself a violation of the Sherman Act

(b) The proposed decree unreasonably approves an industry-wide practice of exclusives on films licensed by the networks and thereby preserves a substantial barrier to entry by pay cable -

The exclusivity approved by the proposed decree is subject to further condemnation because it will become the industry-wide standard applicable to films licensed by each of the oligopolistic networks The other networks follow parallel practices to those of NBC, and the proposal of the Department is to enter into similar decrees with the other two networks which would approve those practices. Thus, under the decree, the networks would have the Department's acquiescence for the first time in their efforts to deny pay cable access to films and to destroy the pay cable industry. 9/

The Supreme Court has recognized that exclusives are particularly suspect when they reflect a pervasive industry practice which results in erecting substantial barriers to entry by smaller firms. In Standard Oil Co v. United States, 337 U.S 293 (1949), defendant Standard Oil entered contracts with independent dealers

8/ In a submission to the Federal Communications Commission on the issue of exclusivity, NBC has acknowledged that it has no evidence that the networks require the protection of exclusivity against pay cable:

> "It is difficult to measure with precision what the impact on the network would be if no exclusivity were obtained against competing pay cable uses of a film during the period that it is available for network use." FCC Docket No 20402, Comments of National Broadcasting Company, Inc., at 10 (December 1, 1975)

9/ The trade press has made an exact and realistic appreciation of what the proposed consent decree does in this respect An article in Variety dated November 24, 1976, entitled "NBC Discovers That Justice Is Blind, Gave Uncle Sam Its 11th Toe In Decree," recognizes that:

> "[t]he provision also establishes Governmental approval of exclusivity against pay cable both in concept and time, something that feevee entrepreneurs would prefer to avoid. The terms are comfortable enough for NBC -- Justice had initially proposed that exclusivity last only 45 days before and after each network exhibition of a film -- and approval of the agreement by L A District Court Judge Robert Kelleher could have the practical effect of etching them in stone in D C."

in petroleum products under which each dealer agreed to purchase all of its requirements in particular products from Standard Similar exclusive contracts were employed on a widespread basis by competing oil companies As a result of the contracts, new entrants were restrained in their ability to compete because there were few dealers whose needs were not satisfied by the established oil companies In holding the exclusives violative of Section 3 of the Clayton Act, the Court emphasized the barriers to entry by additional firms. According to the Court, the exclusive contracts "prevent a late arrival from wresting away more than an insignificant portion of the market." 337 U.S at 309.

In the instant case, the networks are employing their power as dominant purchasers to impede pay cable competition just as in Standard Oil the offending oil companies used their position as sellers of petroleum products to impose unreasonable restraints. The use of both types of economic power to erect barriers to entry, of course, is equally proscribed. Indeed, the Supreme Court has repeatedly held in cases involving the motion picture industry that the use of dominant purchasing power to exclude competition violates the Sherman Act. United States v. Griffith, 334 U.S. 100 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

Also instructive is the Supreme Court's decision in FTC v Motion Picture Advertising Service Co., 344 U.S. 392 (1953), where four distributors of advertising films had long-term exclusive contracts with 75% of the theatres in the United States displaying such films. The Federal Trade Commission found that the exclusive contracts unreasonably restrained the ability of other film suppliers to compete. The Supreme Court agreed, holding that "a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition.'" 344 U.S. at 395

By seeking to establish an industry-wide standard of exclusivity,[10/] the proposed decree preserves the substantial barriers to entry imposed by the networks against pay cable. We submit that there is no justification for the Department's willingness to aid the networks' efforts to cement their cartelization.

(c) The proposed decree would unreasonably permit NBC and the other networks to obtain exclusivity on all available feature films.

In addition to the industry-wide character of the proposed decree, the exclusivity approved is unreasonable

10/ If the government does not obtain a similar provision on exclusivity in its suits against CBS and ABC, NBC is entitled to apply to the Court under Section IX for such modification as is necessary to avoid NBC being placed at a competitive disadvantage.

for yet another reason -- because pay cable could be completely foreclosed from feature films consistent with the terms of the decree As noted previously, the decree approves NBC's obtaining exclusivity against pay cable on each and every motion picture The other networks presumably would receive similar license Thus, the decree would permit the networks to obtain exclusivity on all available feature films. In analogous circumstances, the use of exclusive contracts by dominant firms to foreclose potential competition has been condemned as unlawful Cf United States v Pullman Co., 50 F Supp 123 (E D. Pa 1943), 64 F. Supp 108 (E.D. Pa 1946), aff'd, 330 U S 806 (1947)

(d) It is prima facie unreasonable to suppose that the networks as a free medium need exclusivity against pay-cable.

As noted previously, many of the "clearances" involved in Paramount were held unlawful because they were unduly broad and unnecessary to protect the first-run theatres Reasonable, limited clearances of a few days or weeks, however, were upheld because the Court recognized that the public might refrain from patronizing the first-run theatres and await the second-run, lower-priced exhibitions

That facet of the Paramount decision is inapplicable here In the instant case, the positions of the parties are reversed -- the lower-priced exhibitors (the networks) seek protection not for days or weeks but for years against the higher-priced exhibitors (pay cable) The exclusivity approved by the decree, therefore, is patently unreasonable

5. The exclusivity approved against pay cable is irrational and discriminatory when compared to the flat prohibitions in the decree on exclusivity against other forms of exhibition.

In contrast to their preoccupation with denying films to pay cable, the networks seek no exclusivity against in-flight exhibitions, hotel and other non-residential exhibition, theatrical and nontheatrical projection, and video discs, cartridges, and cassettes. The proposed decree preserves these distinctions by prohibiting any exclusivity as the latter forms of exhibition while expressly approving exclusivity against pay cable

There is no basis other than predation for the networks' decision to single out pay cable. To take one of the other industries, the video disc-cartridge-cassette industry is quite similar to pay cable Each is in an early stage of development; each serves only a minute portion of the public; and each permits home viewing of feature films in unedited form and without

commercial interruption [11/] Indeed, in contrast to pay cable exhibitions which are of short duration, video discs, cartridges, and cassettes provide the public with a continuing and permanent opportunity to view feature films shown on network television. If the networks do not require exclusivity against the emerging video disc industry, they surely have no legitimate need for exclusivity against similarly emerging pay cable.

The networks also concede that they do not require exclusivity against theatrical projection, in-flight exhibition, and hotel and other nonresidential closed-circuit television. However, if seeing a feature film on pay cable TV will destroy a consumer as a potential viewer of the film and its accompanying commercials on network TV, it is hard to grasp why seeing it in a theatre or a 747 will not.

The proposed decree would approve NBC's invidious, anticompetitive discrimination against pay cable. The distinctions drawn are completely indefensible. They are eloquent in disclosing the pay cable TV industry as the target of NBC Accordingly, the Department should withdraw its consent to the proposed decree.

6 Unwarranted network demands for exclusivity violate free market principles.

The networks have asserted in the past that the granting or withholding of exclusivity should remain subject to negotiation with producers. The suggestion made is that producers should retain the freedom to bargain with the networks and to sell exclusivity if they so desire in accord with their appraisal of market conditions

This argument has validity only where the market power of buyer and seller is relatively equal. For only then can true marketplace bargaining occur. Such a market will generally be found where there are a large number of competing buyers and competing sellers. Here, however, the dominant position of the three networks is incontrovertible. Indeed, the instant government suits proceed from the premise that the networks possess dominant purchasing power to which program suppliers have been forced to submit. Thus, it is plain that the networks are in a position to demand unreasonable exclusivity against pay cable from producers of feature

11/ Of course, NBC has an additional reason not to seek exclusivity against discs or cartridges. As is well-known, its parent company has substantial economic interests in those products. We understand that CBS also has invested in those products.

films, and the evidence shows that they do so.[12/]

Moreover, the willingness of the networks to pay large sums to obtain unwarranted exclusivity against pay cable, and the complementary desire of producers to earn large license fees from the networks, does not excuse the restraint The networks and the motion picture producers are entitled under the antitrust laws to bargain only for reasonable exclusivity. In short, the fact that the networks may make it profitable for producers to grant unreasonable exclusivity provides no defense for the networks' anticompetitive conduct That an unreasonable restraint of trade is viewed by the parties as being in their economic interest does not excuse it Unless the product of physical coercion, every contract in restraint of trade, reasonable or unreasonable, has a consensual basis

B The FCC Rules Restricting Pay Cable's Access to Feature Films and the Diminished Supply of Quality Films Aggravate the Impact of Exclusivity and Further Demonstrate the Evils of the Proposed Decree.

In the past, the networks have sought to justify exclusivity against pay cable by asserting that films other than those under network contract are available for pay cable exhibition. Even were this true, it would provide the networks no defense for their conduct The networks are not entitled to obtain unnecessary and unreasonable exclusivity whether or not other films are available to pay cable Neither should the pay cable TV industry be forced to glean the fields after the networks' harvest in order to find appropriate fare to present to its subscribers

Moreover, the alleged availability of other films cannot justify the proposed decree. As noted, the proposed decree is not limited to any particular number of feature films It expressly approves NBC's obtaining an exclusive on as many feature films as it can get. The chance that NBC (and the other networks when their turns come) may not exercise its privileges under the decree to their utmost hardly justifies the provision.

Further, the pay cable industry faces significant limitations on its access to films As noted previously, there is a sharply diminished supply of new films. In addition, as the Department is aware, the Federal Communications Commission has imposed stringent restrictions on pay cable's access to feature films.[13/]

12/ See, e.g., Testimony of Herbert Stern, Vice President of Universal Studios-MCA, Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong , 1st Sess , at 97 (May 22, 1975) ("There are only three networks to sell to If you don't sell to one of them you have no place to go ")

13/ The FCC rules are under challenge in the United States Court of Appeals for the District of Columbia

[Footnote continued on following page]

The FCC rules divide films into three categories according to the number of years following general theatrical release Under the rules, pay cable may exhibit films during the first three years following release. 47 C.F.R. § 76.225(a)(1)(i). But many of the most popular films in this period are denied to pay cable completely or made available only for a brief period because of long theatrical runs and network exclusivity.

Theatrical runs limit the period in which pay cable may be able to obtain feature films, because film suppliers do not offer films to pay cable until theatrical exhibition is complete. For most films, theatrical exhibitions run between 12 and 18 months In the case of more successful films, the period of theatrical showing may be 24 months. And, in some instances, the true "blockbuster" may be in theatrical showing for more than three years. Thus, the more successful a film's theatrical showing, the shorter the period of pay cable's possible access during the first three years

Moreover, pay cable is by no means assured of access to films which have completed theatrical exhibition in less than three years The networks are free to license such films, and they have increasingly done so.[14/] And such licenses invariably provide for exclusivity against pay cable As a result, the period that such films have been available to pay cable has been sharply limited. Indeed, in many instances, pay cable has been denied access completely.

Attachment C lists 24 examples of films which have been denied to pay cable because of network exclusivity during the initial three-year period in which pay cable is permitted by the FCC rules to bid for feature films. As the chart reflects, most of these films were denied to pay cable more than 12 months before the end of the three-year period; others were denied to pay cable for more than six months during the three-year period.

[Footnote continued from previous page]

Circuit. They are, however, currently in effect and, for purposes of evaluating the impact of the proposed decree, it must be assumed that they will remain in effect. We, of course, believe that the rules are totally invalid for the reasons set forth in the briefs filed by the pay cable industry, the Department of Justice, the motion picture industry, and various public interest organizations in Home Box Office, Inc. v. Federal Communications Commission, No. 75-1280 et al.

14/ NBC's brief before the District of Columbia Circuit cites testimony before the FCC allegedly establishing that half of the films telecast by NBC during the 1972-73 season were under three years old. Home Box Office, Inc. v. Federal Communications Commission, No. 75-1280 et al., Brief of Petitioner National Broadcasting Company, Inc., November 3, 1975, at 25.

Network exclusivity is highly disruptive of pay cable operations as to films in the first three years after theatrical release. In many instances, pay cable companies have scheduled the exhibition of particular films only to be notified by the producer shortly before cablecast date of the license's termination. Whenever this occurs, promotional marketing must be recalled, schedules must be rearranged, and explanations must be made to unhappy subscribers.

Films suddenly withdrawn from pay cable as a result of network exclusivity will not become available to pay cable thereafter. Once the initial three-year period has expired, the films are available to pay cable under the FCC's 3-10 year rule under only one condition -- that the film be under contract and available for exhibition to a network or television station in the market. 47 C.F.R. § 76.225(a)(1)(ii). Because of exclusivity, however, this rule is meaningless and affords pay cable no access to feature films. The rule is a classic Catch-22: films which are not under contract and available to conventional television are forbidden to pay cable under the FCC rule; films which are under contract and available to conventional television are rendered unavailable to pay cable by contractual exclusivity.[15/] The proposed decree would complete the circle by sanctioning that exclusivity!

The end of the ten-year period does not do the pay cable industry much good. Exclusivity continues to bar access to the desirable films, and films not under contract to networks or their affiliates are available to pay cable only if they have not been exhibited on conventional television in the market for three consecutive years. 47 C F.R § 76.225(a)(1)(iii) The FCC recognized in its First Report and Order that this provision would generally limit pay cable to films which are "undesirable," 52 F.C C.2d 1, 54 (1975).

Our basic position is that network exclusivity against pay cable constitutes an unreasonable restraint of trade apart from the FCC restrictions The situation is bad enough without the FCC restrictions, and clearly, as demonstrated in Sections IV(A)(4) and (5) above, the decree approves an unreasonable restraint of trade even if the FCC rules did not exist But when the FCC restrictions are also considered, the destructive impact upon pay cable of the networks' practices becomes even

15/ CBS President Arthur R Taylor acknowledged in testimony before a Congressional subcommittee that the FCC's 3-10 year period is "meaningless" because of exclusivity against pay cable Hearings on the Pay Cable Industry before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. at 160-61 (July 8, 1975).

more apparent. While we recognize that this is not the appropriate forum in which to complain of the FCC rules, the existence of those rules further demonstrates the need for the Department to withdraw its consent to the proposed decree

C. The Department Has Consistently Opposed Unwarranted and Protectionist Restrictions on Pay Cable as Adverse to the Public Interest; the Proposed Decree Is an Inexplicable and Unwarranted Departure From This Position.

The proposed decree marks a sharp and inexplicable departure from the Department's past support of the pay cable industry as an emerging medium and the Department's consistent opposition to unwarranted restrictions upon pay cable programming.

Throughout the five-year long proceedings before the Federal Communications Commission leading to the foregoing rules, the Department repeatedly urged the Commission to refrain from imposing unnecessary restrictions on pay cable and to avoid policies which "cripple a new industry . . . because of speculative fears as to possible effects upon established firms."[16/] The Department counselled the Commission that it "should not defer to existing interests or impose excessive burdens on new entrants "[17/] The Department emphasized that "imaginative speculation"[18/] by broadcast interests was wholly insufficient to warrant restrictions on pay cable's access to feature films and other programs.

Notwithstanding the arguments of the Department, the pay cable industry, the motion picture industry, and numerous public interest organizations, the Commission followed a protectionist path in its April 1975 First Report and Order[19/] and sharply limited pay cable's access to feature films. The pay cable industry and various public interest groups have challenged those rules in the United States Court of Appeals for the District of Columbia Circuit. Home Box Office, Inc. v. Federal Communications Commission, No. 75-1280, et al. The case is still pending.

The Department has filed a brief in the Court of Appeals fully supporting pay cable's position and urging that all of the FCC restrictions be invalidated The Department reasserted with vigor its earlier

16/ Comments of the Department of Justice, FCC Docket No. 19554, November 1, 1972, at 11. (Emphasis in original.)

17/ Id. at 41.

18/ Reply Comments of the United States Department of Justice, FCC Docket No. 19554, October 4, 1974, at 3.

19/ 52 F.C.C.2d 1 (1975).

arguments that the imposition of unnecessary restrictions upon pay cable is not in the public interest. The Department noted that the Commission was without authority "to favor one form of interstate communications over another"[20] and observed, in language equally pertinent here, that decisions concerning the development of new technology, like pay cable TV, "are too important to be based upon surmise, conjecture or concern for the profit margins of those that provide the existing service "[21] The Department noted that the FCC and the courts had recognized the "oligopolistic"[22] nature of the networks The Department's view was that the networks had failed to establish any need for restrictions on pay cable programming

The proposed consent decree cannot be squared with the Department's long-standing position[23] The exclusivity approved by the decree, like the FCC rules, is not supported by any legitimate need of the networks or the public; rather such exclusivity rests upon the "speculative fears" of established interests and "surmise, conjecture or concern for the [networks'] profit margins." Moreover, exclusivity threatens to "cripple a new industry" by "impos[ing] excessive burdens" on pay cable entrants

The Department should withdraw its consent to the unwarranted restrictions in the proposed decree To stand by the present provisions would make the Department a party to precisely the kind of protectionism that it has consistently opposed in the past

CONCLUSION

The Department Should Withdraw Its Consent to the Proposed Decree and Negotiate Adequate Relief With NBC. A Provision Limiting Exclusivity Against Pay Cable to a Period Not in Excess of 15 Days Before Network Telecasts Would Not Be Subject to Further Objection By Our Clients If NBC Is Unwilling To Consent to Such a Provision, the Department Should Continue Litigation Against NBC and the Other Networks in Order to Enjoin the Networks' Predatory Use of Exclusivity Against the Pay Cable Industry.

20/ Home Box Office, Inc. v FCC, No 75-1280 et al., Brief for Respondent United States of America, at 29 (February 1976)

21/ Id at 35

22/ Id at 13 n 8

23/ The Department has not explained its dramatic change of position. Thus, the Department has failed to heed the well-established rule recognized by the courts:

> "An agency's view of what is in the public interest may change, either with or without a change in circumstances But an agency changing its course must supply a reasoned

[Footnote continued on next page]

[Footnote continued from previous page]

> analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute " Greater Boston Television Corp. v. FCC, 444 F 2d 841, 852 (D C Cir 1970), cert. denied, 403 U.S 923 (1971).

See also National Association of Food Chains, Inc. v. ICC, 535 F.2d 1308, 1314 (D C. Cir 1976).

For the reasons stated, we believe that no network exclusivity against pay cable exhibition has been or can be justified and that the exclusivity approved by the proposed decree constitutes an unreasonable restraint of trade. The Department, therefore, should withdraw its consent to the proposed decree.

We understand, however, that it may be said that there is a public interest to be served in the settlement of protracted litigation and in obtaining relief against other types of anticompetitive activity by the networks.[24/] Accordingly, the Department might wish to accept a provision permitting a more limited exclusivity in the context of an overall settlement of this litigation.

If it were proposed, we would not object to inclusion in the proposed decree of a provision limiting exclusivity against pay cable to the 15-day period preceding each network exhibition of a feature film (and providing none after such exhibition). Such an approach would be vastly superior to that in the proposed decree and would afford substantial relief against the networks' present anticompetitive practices. Under an "exhibition date" approach, films would no longer be denied to pay cable for years at a time. Instead, the general rule would provide for the availability of films to pay cable. Thus, the networks would no longer be in a position to use exclusivity as a means of suppressing pay cable competition. Conversely, a 15-day provision would more than adequately protect the networks

We believe that, short of the total prohibition of exclusivity against pay cable which we trust litigation would bring, exclusivity for a limited (i.e. 15 day) period prior to each exhibition date is the only proper basis for a negotiated settlement if the Department is unwilling to press for a total prohibition on exclusivity The approach recommended is feasible because the networks would remain free to negotiate the availability periods they desire for planning and other purposes and could schedule telecasts of feature films 15 days in advance during such availability periods without sacrificing flexibility. While pay cable would not be treated on a par with video discs, in-flight exhibitions, hotel showings, and the other industries fully protected by the decree, the approach would promote the public interest by eliminating the most aggravated network abuses of the past. Accordingly, we believe this proposal might be a viable resolution tempering the imperative of

24/ We take no position on the adequacy of other provisions in the proposed decree.

obtaining adequate antitrust relief to some extent with the interests in effectively utilizing resources and terminating protracted litigation.

We urge, moreover, that if appropriate relief is not obtained through consent in the instant litigation, the Department should continue litigation against NBC and the other networks to enjoin their continued use of exclusivity as a means of suppressing pay cable competition. The violation of law is flagrant; the impact upon the struggling pay cable industry is clear; and the continued dedication of Antitrust Division resources in pursuit of meaningful relief is fully warranted

As to the Division's resources, we note that neither FCC nor Congressional action with respect to exclusivity can be assured. The FCC's Notice of Inquiry into network exclusivity, FCC Docket No 20402, has remained dormant at the Commission for nearly two years without any indication that the Commission intends to issue a Notice of Rulemaking [25/] In addition, although hearings have been held by subcommittees in both the Senate [26/] and House of Representatives [27/] concerning network exclusivity, no proposed legislation has been introduced. Accordingly, there can be no assurance of government relief unless the Department of Justice performs its function Moreover, if the Department adheres to the proposed decree and puts its imprimatur on the networks' practices, the likelihood of Congressional or agency action will be virtually non-existent.

The issues posed by the proposed decree are far-reaching and raise important considerations concerning the public interest Sensitive First Amendment considerations are implicated, and the future of a new and developing technology with vast potential for promoting consumer choice is at stake In addition, there is presented a classic abuse of economic power by oligopolists to suppress competition and stifle diversity The Department must carefully weigh all of these factors in reaching its decision

To sum up the position of our clients: We believe it is clear that no network exclusivity against pay cable on feature films is warranted and that exclusivity has been employed by the networks to suppress potential competition by a new entrant and

25/ In comments to the FCC, NBC has questioned the authority of the Commission to impose restrictions on network exclusivity against pay cable. FCC Docket No 20402, Comments of National Broadcasting Company, Inc , at 6-7 (December 1, 1975).

26/ Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., May 21, May 22, July 8, and July 15, 1975

27/ Hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives, 94th Cong , 2d Sess , July 27, 1976

to deprive viewers of freedom of choice. The proposed decree would expressly approve the continuation of such abuses and must, therefore, be rejected as inconsistent with the public interest. We submit that as a matter of antitrust law, no exclusivity against pay cable can be justified under the rule of reason. However, as a settlement of this litigation, a limitation on exclusivity solely to a period of 15 days before each network exhibition would not be objected to by our clients. If such a limit cannot be made the basis of a stipulated judgment, the Department should continue litigation against NBC and the other networks to obtain meaningful relief against the networks' unlawful use of exclusivity to suppress pay cable competition.

Respectfully submitted,

By _____

Dennis G Lyons
Leonard H. Becker
Steven P. Lockman
Albert H. Kramer

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Dated: February 25, 1977

PAY CABLE COMPANIES PARTICIPATING IN
THE ACCOMPANYING JOINT COMMENTS

American Television & Communications
Corp
360 South Monroe Street
Denver, Colorado 80209

Cablecom-General, Inc
4705 East Kingston Street
Denver, Colorado 80239

Cable Information Systems, Inc.
230 Park Avenue
New York, New York 20017

Central California Communications
Post Office Box 1651
238 John Street
Salinas, California 93901

Communications Properties, Inc
910 City National Bank Building
Austin, Texas 78701

Continental Cablevision, Inc
54 Lewis Wharf
Boston, Massachusetts 02110

Cox Cable Communications
53 Perimeter Center East
Atlanta, Georgia 30346

Daniels Properties, Inc
2930 East 3rd Avenue
Denver, Colorado 80206

Good-Vue CATV, Inc.
210 West Nyack Road
West Nyack, New York 10994

Harris Cable Corporation
10889 Wilshire Boulevard
Los Angeles, California 90024

Heritage Communications, Inc.
2205 Ingersoll Street
Des Moines, Iowa 50312

Home Box Office, Inc.
Time & Life Building
Rockefeller Center
New York, New York 10020

Inertia, Inc
3961 MacArthur Boulevard
Newport Beach, California 92660

Liberty Communications
225 Coburg Road
Eugene, Oregon 97401

Manhattan Cable Television
120 E 23rd Street
New York, New York 10010

Midwest Video
1255 Tower Building
Little Rock, Arkansas 72201

Sammons Communications, Inc.
Box 5728
Dallas, Texas 75222

Tele-Communications, Inc
54 Denver Technological Center
Denver, Colorado 80210

Telesis Corporation
2605 Yeager Road
Post Office Box 18
Lafayette, Indiana 47902

Teleprompter Corporation
50 West 44th Street
New York, New York 10036

The TM Communications Company
3303 Harbor Boulevard
Post Office Box 2320
Costa Mesa, California 92626

UA Columbia Cablevision, Inc.
49 Riverside Avenue
Westport, Connecticut 06880

United Cable Television Corporation
522 S. Boston Avenue
Post Office Box 3423
Tulsa, Oklahoma 74101

Vision Cable Communications, Inc.
501 Madison Avenue
New York, New York 10036

Attachment C

EXAMPLES OF FEATURE FILMS DENIED TO PAY CABLE
DURING 3 YEAR PERIOD FOLLOWING THEATRICAL RELEASE

Title	Conclusion of 3 Year Period Following Theatrical Release	Date Denied to Pay Cable	Time Lost to Pay Cable During 3 Year Period Following Theatrical Release
Lost Horizon	3/76	2/75	13 months
Thunderbolt & Lightfoot	5/77	8/31/75	20 months
Thieves Like Us	2/77	9/1/75	17 months
Neptune Factor (Neptune Disaster)	5/76	2/28/75	14 months
Legend of Hell House	6/76	2/28/75	15 months
Paper Chase	10/76	2/28/75	19 months
Scarecrow	4/76	10/31/75	5 months
The Sting	12/76	9/75	15 months
40 Carats	7/76	9/1/75	11 months
Newman's Law	5/77	10/75	19 months
Effect of Gamma Rays on Man in the Moon Marigolds	1/76	2/28/75	11 months
Paper Moon	5/76	2/16/76	2 months
The Spike's Gang	4/77	9/1/75	19 months
The Long Goodbye	3/76	9/1/75	7 months
The Last of Shiela	6/76	8/75	10 months
Last American Hero (Hard Driver)	7/76	2/28/75	16 months
Emperor of the North	6/76	6/30/75	11 months
Conrack	3/77	4/30/75	23 months
Lovin' Molly	3/77	7/31/75	20 months
California Split	8/77	7/31/75	25 months
Tom Sawyer	6/76	3/31/75	14 months
Claudine	4/77	2/29/76	14 months
The Seven Ups	12/76	6/30/75	18 months
Billy Two Hats	3/77	2/29/76	13 months

Attachment B

EXAMPLES OF RECENT NETWORK TELECASTS
OF FEATURE FILMS PREVIOUSLY SHOWN ON PAY CABLE

		Network Telecast Date
Airport 1975	NBC	9/20/76
Magnum Force	CBS	9/24/76
Earthquake (Part 1)	NBC	9/26/76
Paper Moon	CBS	10/1/76
Breakout	NBC	10/2/76
The Way We Were	ABC	10/3/76
Never Give An Inch (Sometimes a Great Notion)	NBC	10/4/76
Brannigan	CBS	10/8/76
Jesus Christ Superstar	NBC	10/11/76
The Stepford Wives	ABC	10/24/76
Badlands	CBS	10/29/76
McQ	NBC	10/30/76
Live and Let Die	ABC	10/31/76
Juggernaut	CBS	11/3/76
Play It Again, Sam	CBS	11/5/76
The Day of the Dolphin	NBC	11/6/75
Gone With the Wind (Part 1)	NBC	11/7/76
Gone With the Wind (Part 2)	NBC	11/8/76
The Great Waldo Pepper	NBC	11/10/76
Death Wish	CBS	11/10/76
Macon County Line	NBC	11/13/76
Chinatown	CBS	11/17/76

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Mr. Jones - 3109
Mr. Hallander - 3706
Mr. Kaplan
Mr. Sullivan
Mr. Selby
Mr. Crosby
Mr. Lewis

United States Senate
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
(PURSUANT TO SEC. 4 S. RES. 372 94TH CONGRESS)
WASHINGTON, D.C. 20510

February 25, 1977

RECEIVED
MAR 2 1977
O.L.A.

Donald I. Baker, Esquire
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Baker:

I am writing this letter and enclosing a memorandum from the staff of the Antitrust and Monopoly Subcommittee pursuant to the Antitrust Procedures and Penalties Act as comments relating to the proposed consent judgment entered against National Broadcasting Company, Inc. in United States v. National Broadcasting Company, (Civil Action No. 74-3601-RJK (C.D.Cal.).

The provision which concerns me is subsection VI(E)(iii)(e), which sanctions NBC's acquisition of exclusive exhibition rights to feature films against pay cable television for a 24-month period for two exhibitions, and for 12 additional months for each additional exhibition. In addition, NBC would be entitled to demand exclusivity for 30 days prior to this 24-month period. I have reviewed the staff memorandum, which incorporates the extensive hearings held on this issue by the subcommittee, and I am convinced that the department should give serious consideration to deleting this provision in the decree.

While there may indeed be situations, now or in the future, in which exclusivity provisions would be justified as reasonably necessary to a broadcasting network, I do not think it necessary or wise, at this time, virtually to insulate an unlimited number of two-year exclusivity provisions from the operation of the antitrust laws. FCC rules that already restrict access to movies

OFFICE OF LEGISLATIVE AFFAIRS
ANTITRUST

Donald I. Baker
February 25, 1977
Page 2.

by the pay cable industry are, of course, still in existence. The combination of these restrictive rules, which in the past the department has attacked in testimony before this subcommittee, and the decree's approval of lengthy exclusivity provisions, could enable networks contractually to exclude pay cable from meaningful access to feature movies. It seems to me wholly inappropriate for a major policy decision of this potential impact to be decided without a complete record and in the context of a non-litigated consent decree with one network

Sincerely,

Edward M. Kennedy
Acting Chairman

enclosure

MEMORANDUM

TO: Edward M Kennedy

FROM: Majority Staff, Senate Antitrust and Monopoly Subcommittee

SUBJECT: Subsection VI(E)(iii)(e) of the NBC Consent Decree

On December 10, 1974, the United States filed identical complaints against the three networks alleging that the networks had each combined with their affiliated stations to use their control over access to network air time to restrain and monopolize prime time TV entertainment programming in violation of sections 1 and 2 of the Sherman Act. The complaints charged that each network used their control over access: to exclude from network broadcast those entertainment programs in which the networks had no financial interest; to compel independent program suppliers to grant to the networks financial interest in TV programs which they accepted for broadcast; to refuse to sell air time to advertisers and other independent program suppliers seeking to have their own programs shown on the networks; to control the prices paid by the networks for TV exhibition rights to motion picture films; and to obtain competitive advantages over other producers and distributors of TV and entertainment programs and of motion picture feature films. The government sought to enjoin the networks from the following practices: obtaining any interest, except for the right of network exhibition, in independently produced programs; producing entertainment programs themselves; and using their control over access to the networks to foreclose competition or obtaining an unfair competitive advantage in any other field.

On November 17, 1976, the Department of Justice and NBC filed a proposed consent decree to terminate this litigation. Most of the terms of the decree are contingent upon settlement on similar terms with CBS and ABC. While there are many troublesome aspects of the decree, one provision is markedly both adverse to the antitrust laws and the public interest. The provision in question, Subsection VI(E)(iii)(e), concerns the amount of exclusivity against pay cable NBC would be allowed to obtain when purchasing the rights to televise motion pictures.

The consent decree would permit NBC to contract with movie producers for exclusivity against pay cable for 24 months if NBC broadcast a movie twice, and an additional 12 months for each additional time NBC broadcast the film. In addition, NBC would be allowed to demand a provision banning the license of the film to pay cable for a period of 30 days prior to the time NBC could telecast the film.

To fully understand the effect of the exclusivity allowed by the consent decree, one must take into account certain FCC Rules. Feature films are first marketed through theaters, usually through a distribution system owned by the movie producer. The FCC Rules allow pay cable to bid for these films for a period of three years after their first release. Many films, however, especially the more successful films, are marketed through theaters for up to two years after their release and movie producers are unwilling to license a film to pay cable in this period. The FCC Rules, however, do not prohibit networks from obtaining exclusivity rights within this three-year period, and the networks usually obtain exclusivity well within this period. 1/ From the end of the third year until the end of the tenth year after release, the FCC Rules prohibit pay cable access to the film unless the film is under contract and currently available to a network or TV station in the particular pay cable market in question If it is under contract to a TV station or network, however, many times there are exclusivity provisions in effect preventing pay cable from licensing the film. 2/ At the end of ten years, pay cable can have access to a film in a given market area only if the movie has not been shown by a TV station in the last three years. The purpose of these rules was to prevent pay cable from "siphoning" a film from the "free" TV market. The rules are solely for the benefit of "free" TV. Thus, if a film were released on February 1, 1977 and marketed through theaters for two years until February 1979, as a practical matter, pay cable could bid to show it sometime within a period between February 1, 1979 to February 1, 1980. But, a network could contract at any time after release date for three exhibitions of the film starting on March 1, 1979 and as a condition of the contract and expressly allowed by the decree, it could demand exclusivity against pay cable starting on February 1,

1/ E.G., see hearings on Pay Cable Television Industry before the Subcommittee on Antitrust and Monopoly, 94th Cong., 1st Sess. at pp. 401-404 (1975).

2/ See testimony of CBS President Arthur R Taylor, who acknowledged that this company obtained exclusivity within the 3-10 year period. Hearings on the Pay Cable Television Industry before the Senate Subcommittee on Antitrust and Monopoly, 94th Cong., 1st Sess. at 160-161 (July 8, 1975).

1979 until March 1, 1982. If the film was then not contracted for by a TV station in the particular pay cable operators market, it could not be licensed to that pay cable operator until February 1, 1987. If the film was contracted for by a TV station, the great majority of these contracts also contain exclusivity provisions barring pay cable exhibition. In this type of situation, assuming that the exclusivity runs until February 1987, pay cable could show the film after February 1, 1987 only if the film had not been shown in the last three years

Current industry practice has been to demand exclusivity during the availability period which has usually been 24 months for two showings. The networks have also usually obtained exclusivity for sixty days prior to the availability period. 3/ Thus, the consent decree provision is very similar to the current industry practice, differing only by thirty days.

Subsection VI(E)(iii)(e) does represent quite a departure from the previous position of the Department of Justice which has been expressed in submissions to the FCC, testimony before this Subcommittee, and amicus briefs at the Court of Appeals level. On November 1, 1972 and on October 4, 1974, the Justice Department filed comments in FCC Docket 19554 which concerned these pay cable rules. In its 1972 comments, the Department concluded that:

> ". . . (1) there was insufficient evidence to support a finding that programming restrictions on pay cable were in the public interest as defined in the Communications Act of 1934, (2) the imposition of onerous programming restrictions upon pay cable would preclude it from developing into a medium capable of increasing the diversity of this nation's communications system and (3) the Commission should free pay cable from the various programming restrictions then imposed upon it in order to avail itself of an opportunity to obtain empirical evidence as to whether any type of programming restrictions were, in fact, necessary to protect the public interest."

3/ See testimony of Robert Howard, President, NBC Television Network. Hearings on the Pay Cable Television Industry, 94th Cong., 1st Sess., at pp. 219-230 (July 8, 1975) before the Subcommittee on Antitrust and Monopoly.

In its updated 1974 comments the Department stated:

> ". . . subsequent events have only reaffirmed our conviction that Commission attempts to protect the broadcasting industry from competitors in order to guard the public against unspecified dangers will have the dual effect of retarding the development of pay cable as a means of diversifying our communications system and embroiling the Commission in a continuous effort to develop increasingly intricate rules based upon speculation rather than experience."

On July 15, 1975, Deputy Assistant Attorney General Donald Baker, now head of the Antitrust Division, testified before the Antitrust Subcommittee stating that --

> ". . . the FCC has proceeded, more or less on an ad hoc basis to erect barriers to cable services, largely on the basis of speculative fears of the broadcast television industry." (Hearings before the Antitrust and Monopoly Subcomittee, Pay Cable, July 15, 1975, p. 234)

He also specifically mentioned the exclusivity issue, declaring that --

> "The so-called pay-cable rules, of course, are logical extensions of these earlier illogical exercises of regulatory power. The 2-year period after general release during which a cable operator could bid for a film was indeed increased to 3 years. In oversight testimony, the Chairman of the Commission described this as a major expansion in film availability, without, however, explaining why the restriction was ever justified to begin with." (Hearings p. 234)

In addition, as late as February 1976, the Department of Justice again reiterated its views -- this time in an amicus brief supporting the removal of the FCC restrictions on pay cable. The Department observed that decisions concerning the development of new technology "are too important to be based upon surmise, conjecture, or concern for the profit margins

of those that provide the existing service." (Home Box Office, Inc. v. FCC, No. 75-1280 et al. Brief for Respondent U S A. at 35)

In furtherance of their oft-stated critical view of schemes that deny competitive opportunity, the Department's Competitive Impact Statement asserts that the Antitrust Division "first proposed that NBC be permitted such exclusivity for only 45 days before and after each network exhibition date of a feature film." The provision eventually accepted by both parties was, as mentioned before, a maximum of 24 months exclusivity for two telecasts with 12 months for each additional telecast and 30 days exclusivity allowable prior to the first date NBC could telecast the film It is important to note that the 45 days first proposed was 45 days before actual exhibition, whereas the thirty days in the decree is 30 days before there is a right to telecast the film. Thus, the decree would allow NBC to contract for exclusivity for up to 25 months before actually broadcasting a movie, whereas under the Department's original proposal, it would have been a maximum of 45 days. 4/

Since actual industry practice consists of 24 months of exclusivity within the availability period for two telecasts with 60 days of exclusivity before the availability period, the decree does limit the exclusivity slightly A contract for two exhibitions used to have an exclusivity provision foreclosing cable's access to the movie for 26 months, now it would be limited to 25 months. As a practical matter, as long as exclusivity can be obtained from the date the movie could first be marketed to cable until the FCC Rules take effect, which can be achieved in either 25 or 26 months, there is only one difference between industry practice and the practice specified in the decree. This crucial difference is that now this practice appears to have the full approval of the Department of Justice and is subject to a judicial imprimatur if this provision in the consent decree is upheld by the court.

There are important public policy and antitrust reasons against having these types of exclusivity provisions in a contract between movie producers and networks. The combined effect of these provisions could easily prevent consumers from exercising their choice as to how they want to be entertained. Even though the producers profit from their dealings with the

4/ Actually the provision as accepted does not seem to even require NBC to actually broadcast the film -- it speaks solely in terms of broadcast rights.

networks and thus often readily accede to their demands, the producers have testified that with exclusivity obtained by the sheer market power of the networks they are often foreclosed from a market they would like to service. 5/ Also, since pay cable apparently provides the financial base for other more experimental and educational cable services, provisions which unnecessarily retard pay cable's growth may totally stymie the entire cable industry. The presence of these contractual provisions was constantly subject to legal questions and possible private antitrust actions prior to the proposal of the consent decree. The Department's imprimatur upon this practice makes it virtually certain that this practice will greatly increase in magnitude in the future. As noted by many antitrust experts, the combination of restraints -- the number of movies tied up by exclusivity provisions -- is a very important factor when judging the legality of these provisions. Before the Department approves this practice, there remains the possibility that this combined effect would reach a point where it would be judged illegal. With the Department's approval of the practice without limits on the number of movies, the flexibility of the antitrust laws is needlessly lost.

On antitrust grounds alone, and these are ordinarily an accurate reflection of public policy considerations, there is an overwhelming body of law stating that exclusivity provisions are restraints of trade which must be justified as reasonable or fall within the prohibitions of the Sherman Act. In the Paramount case, which is one of the leading cases in this area, one of the issues involved was the reasonableness of exclusivity provisions in contracts between a producer and exhibitor which prevented the producer from licensing the same film to other exhibitors. The rationale behind these exclusivity provisions, which are called clearances in movie industry terminology, was that a given theater would be more likely to pay more for a movie if it knew it was not going to have its competitors showing the same picture and perhaps undercutting its admission price The Supreme Court ruled that all the circumstances of each clearance had to be examined to see if that particular clearance was reasonable, and that a key factor in this examination was whether the exclusivity provision is "reasonably necessary to protect the licensee in the run granted." (United

5/ See generally the testimony of movie producers at hearings on the Pay Cable Televisions Industry before the Sub committee on Antitrust and Monopoly, 94th Cong , 1st Sess. at pp. 90-118 (May 21, 1975).

States v. Paramount Pictures, 334 U.S. 131, at p. 147). The District Court ruled and the Supreme Court affirmed that "many clearances had no relation to the competitive factors which alone could justify them." (334 U.S. at 146) The requirement that there be some connection between the exclusivity provision or "clearance" and the competitive factors involved in each situation would quite clearly not be met by the provisions in this consent decree, because this decree virtually gives a blank check of approval to the industry's usual practice of obtaining more than two years of exclusivity against pay cable. The consent decree's acquiescence in these lengthy exclusivity provisions will greatly encourage what has already been acknowledged as an industry practice but which is not now used with all films. This unwarranted insulation from the antitrust laws will readily result in a uniformity and inflexibility much worse than that condemned in Paramount.

> ". . . The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade." (334 U.S. at 146)

In Standard Oil Co. v. United States, 337 U.S. 293 (1949), the fact that exclusivity provions had become an industry-wide practice made them particularly vulnerable to antitrust attack, because they were used to "prevent a late arrival from wresting away anymore than an insignificant portion of the market" (337 U.S. at 309). In Lorain Journal Co. v. United States, 342 U.S. 143 (1951), a newspaper, which had monopolistic power as a seller of advertising space, conditioned its sales upon a clause preventing the entity from buying advertising from a new radio station. The newspaper's abuse of its dominant purchasing power to discourage a new entrant was found to violate the Sherman Act. The networks' practice of obtaining lengthy exclusivity against pay cable is also an abuse of dominant purchasing power. The decree contains no limit on the number of films on which NBC could obtain exclusivity nor would there be a limit on the films the other networks could obtain. The Department's lawsuits recognized -- indeed were premised upon -- the possession and abuse of dominant purchasing power by the networks; yet, subsection VI(E)(iii)(c) would preserve and protect one of these abuses.

Without the consent decree provision, the key question with NBC would be whether or not, taking into account the FCC

Rules, the length and/or the existence of the exclusivity provisions is reasonably necessary for the protection of NBC. In Paramount the court emphasized that the burden of proof falls on the "party in the best position to evaluate their competitive effects," meaning the party demanding the protection. Thus, NBC should bear this burden. Yet, neither in testimony before the Antitrust Subcommittee nor apparently in the negotiations with the Justice Department, has NBC presented evidence that it needs long clearances in order to commercially survive. In fact, it is so difficult to even obtain advertising space on network air time, there has been serious talk about the formation of a fourth network. It must be remembered that in Paramount, clearances of a few weeks duration were declared unreasonable, whereas here we are talking about several years. Additionally, the Paramount clearances were designed to protect against lower priced competitors whereas here NBC is claiming it needs protection against competitors that only reach 1% of NBC's viewers, charge a much higher price and in fact offer a different product.

NBC does contend that pay cable systems have really not been hurt -- that there are plenty of movies available to them. The data used to support this contention has been challenged by the pay cable industry and has not been subjected to a full fact-finding process necessary to make such a determination. In any event, the answer is two-fold. One, the exclusivity provisions must be affirmatively justified by NBC as necessary to their own existence, rendering secondary the issue of whether or not pay cable has some movies available to it. Two, even if pay cable is not now being denied all films, through the consent decree the Government is now taking the safety off the loaded pistol the networks have pressed against cable's Achilles' heel. All the networks have to do is to use it by contracting for more movies and using the maximum exclusivity provisions with each one.

The Department has also not presented any evidence to justify approving these exclusivity provisions. The competitive impact statement required with the consent decree is woefully weak in this area, stating that:

> ". . . Section VI(E)(iii) will not, of course, prevent certain theatrical feature film distributors from continuing to deny NBC any exclusive rights as they have done in the past; it merely establishes outer limits on the exclusive rights NBC may require." (Competitive Impact Statement, p. 20)

The Department also stated that:

> "There are no materials or documents which the Government considered determinative in formulating the proposed consent judgment Therefore, none is being filed with this competitive impact statement." (Competitive Impact Statement, p 21)

It would be difficult under the circumstances of today's TV market and the presence of the FCC's 3-10 year Rule, to justify as reasonable even one of these contracts containing an exclusivity clause The pertinent antitrust cases say that these exclusivity provisions must each be looked at in all their attendant circumstances. Yet, the Justice Department, without the benefit of a record, and in the context of a non-litigated consent decree with one network, would establish the legality of the provisions whose upper limits would undoubtedly become an industry-wide standard. The public interest would better be served by not immunizing these exclusivity provisions at the present time For instance, if at a later date, this industry practice became even more pervasive, and lengthy exclusivity applied to all feature movies, then there would still be an available remedy under antitrust law On the other hand, by saying that lengthy exclusivity provisions should not be immunized at this time, we are not suggesting that some sort of exclusivity could never be justified There may in fact be appropriate situations, now or in the future, justifying limited exclusivity. Our point is simply that these provisions should not be frozen into existence at this time. Of course, if and when exclusivity is questioned on antitrust grounds, the networks could still sustain them as reasonable if they can marshall the appropriate evidence

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.
1865 BROADWAY (AT 61 STREET) NEW YORK, N Y 10023 (212) 765-5100
CABLE LINCENARTS

February 25, 1977

Mr. Bernard M. Hollander
Judgments and Judgment Enforcement
Section Anti-Trust Division
Washington, D.C. 20530

Dear Mr Hollander:

While Lincoln Center for the Performing Arts, Inc , has no direct involvement in the NBC/Justice Department Consent Decree per se, we wish to go on record in opposition to legislation which restricts the development of the pay cable television industry. We contend that minority and special interest programming depends on the conduit which cable provides to an increasing number of viewer homes across the nation. We view the growth of the pay cable industry as a means of expanding that universe We oppose the Consent Decree on the following grounds:

The Consent Decree will severely restrict pay cable television's potential to provide the feature films and sports which are the backbone of pay cable programming. It is this basic programming which is needed today in order to build access to the larger audience required for the expansion of special interest programming such as Lincoln Center's.

Furthermore, the Consent Decree will deny consumers their right to a choice of format in which to receive sports and feature films Since programming on pay cable television is presented unedited and without commercial interruption, the consumer should have the opportunity to decide whether or not he wishes to pay for this advantage We are particularly concerned with developing new means of paying for television programming. Our future as arts institutions may depend on reaching a paying television audience with our performances.

Because we feel that the growth of pay cable television is vital to the continuing development of the cable communications industry, we vigorously oppose all regulations which inhibit that growth, and specifically the NBC/Justice Department Consent Decree.

Sincerely,

John Goberman

JG/sm

John Goberman
Director of Media Development

COMMUNITY COALITION FOR MEDIA CHANGE (CCMC)

1728 Curtis Street #A Berkeley, Ca 94703 415 526-8801
Marcus Garvey Wilcher, Chairman
Edwin J. Terry, V. Chairman
626-6720

26 February 1977

Bernard M. Hollander, Chief
Judgements and Judgement
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander,

The Community Coalition for Media Change wishes to express its concern and disagreement with the NBC and U.S. Department of Justice concent decree.

We believe that this agreement is an example of bowing to the powerful radio/television corporations at the expense of millions of Americans who assume that their interest, the public interest, comes first.

For these additional reasons we oppose the decree:

1) Disregard for the public right to watch recent films as they so choose.
2) The decree stifles entertainment variety and gives much too much control to network monoplies.
3) Exclusivity control should no extend beyond 2 or 3 months.

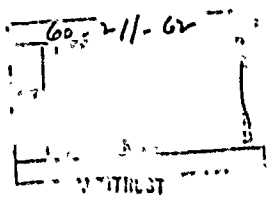
It is clear to citizens of this country that many persons on the public payroll, such as you are, do not represent us, but represent the non-moral corporations whose greed for excessive profits seems to be growing.

However, we still hope you will reconsider your action and void this unfair consent decree.

Sincerely,

Marcus Garvey Wilcher
Chairman

cc: Bob Johnson,
NCTA



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Attorneys for Optical Systems Corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., Defendant.	Civil No. 74-3601-RJK COMMENTS OF OPTICAL SYSTEMS CORPORATION TO STIPULATION AND FINAL JUDGMENT

The following are comments of Optical Systems Corporation regarding the proposed consent decree contained in the document entitled Final Judgment which is attached to the Stipulation filed November 17, 1976 in this action. These comments are filed pursuant to 15 U.S.C. § 16(b).

Optical Systems Corporation [hereinafter OSC], provides a channel of home television programming in return for a fee payable on a monthly basis. * Its headquarters is at 433 Airport Boulevard in Burlingame, California and it does business in many cities and regions in California as well as the states of Hawaii, Texas, Ohio, Michigan and Pennsylvania, providing subscription television programming to more than 50,000 subscribers.

Virtually all of the program material OSC provides consists of feature length motion pictures which were initially released for theatre exhibition. OSC has discovered that there is a distinct and significant demand for in-home movies presented in their original form, uninterrupted by commercial breaks, and that the subscription television business is a distinct new medium of entertainment which fulfills a heretofore unsatisfied need. At the same time, there are regulations of the Federal Communications Commission which severely limit the number of films which are available for exhibition by subscription television operators, and of course, the number and quality of films available directly affects OSC's ability to attract and retain subscribers.

OSC and NBC are in direct competition for feature length motion pictures which remain available under the FCC regulations and they obtain those films from the same producer and distributor supply sources. However, when NBC obtains the rights to exhibit films, it typically includes in the contract a provision which prohibits the supplier from providing the film or films to OSC for various periods of time. The time periods to which these provisions apply are exceedingly long and extend to several years or more in most instances. During this time period, NBC will typically

* This service shall be referred to hereinafter as subscription television programming.

have the right under the contract to exhibit the film between one and three times. Thus, for more than ninety-nine percent of the days during which the films are subject to these contracts and hence forbidden to OSC, they are simply held by the networks and not exhibited.*

At any one time a substantial number of films of quality suitable for exhibition by OSC are unavailable because of these contract provisions, and OSC could increase significantly the number of quality films it exhibits per month in their absence. The provisions create an artificial shortage of films for subscription television and have no legitimate purpose. Since the affected films are in interstate commerce, these contracts directly violate Section 1 of the Sherman Antitrust Act by restraining trade in the market for the films. The arrangement contained in the proposed consent decree does not alter the practices described herein

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* In the late spring of 1975 the Antitrust Subcommittee of the Senate Judiciary Committee held hearings on the contracts described in this paper and a large number of the contract provisions in question were produced. Copies of those which appeared in the report of those hearings are attached to this paper as an exhibit. (See Hearings on Pay Cable Television Industry Before the Subcommittee on Judiciary, 94th Cong., 1st Sess. (1975).)

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in any significant way * and consequently also violates the antitrust laws in that respect. Any final consent decree in this litigation should be conditioned on the defendant's agreement that it will rescind all existing contract provisions which restrict in any way the number of motion pictures available to subscription television operators and that it will not enter contracts in the future which contain similar provisions.

Dated: February 25, 1977.

RICHARD J. ARCHER
JOHN F. DWYER
SULLIVAN JONES & ARCHER

By _____
John F. Dwyer
Attorneys for Optical Systems Corporation

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* The proposed Final Judgment would allow NBC to contract for films with exclusive rights over subscription television for a twenty-five month period and for additional twelve month periods for each additional single exhibition of the film or films greater than two. (Final Judgment at 9-10.) The Competitive Impact Statement filed in conjunction with the Stipulation and Final Judgment comments that this feature eliminates NBC's ability to obtain "exclusivity for several years from the date of the contract until the conclusion of the network run" and the "possibility that NBC can 'warehouse' feature films for a number of years before exhibiting them on network television". (Competitive Impact Statement at 20.) This statement is incomprehensible. The subject provision allows by its very terms precisely what the Competitive Impact Statement says it does not allow.

EXCLUSIVITY PROVISIONS OF 1974 THEATRICAL FILM CONTRACTS FOR ABC

January 14, 1974—American International Television, Inc.

3. *Exclusivity*—Licensor shall have the right to exhibit and exploit the Film during the period beginning on January 14 1974 and continuing through the end of the Broadcast Period; provided however, that Licensee will not authorize the broadcast or transmission of all or any portion of the Film (or of any remake of or sequel to the Film or of any television pilot, television program, or television program series based on the Film or based on any of the human or nonhuman characters in the Film or on the literary property underlying the Film) through air waves, cable, or any other manner or means to television receivers, monitors or screens in the Broadcast Area or in Windsor, Ontario, Canada or Tijuana, Mexico (other than pursuant to the rights granted to ABC hereunder) during the period beginning on January 14 1974 and ending upon the expiration of the Broadcast Period (or ending as many as sixty (60) days after such expiration, if after such expiration any delayed broadcast or delayed broadcasts shall be made as part of any Network Broadcast hereunder of the Film), except: (i) pay television in nonresidential hotels, motels, hospitals, bars, restaurants, and other nonresidential institutions; and (ii) exhibition in passenger-carrying vehicles

March 8, 1974—Columbia Pictures Industries

(c) *Exclusivity.*—Licensor warrants that during the period beginning March 8, 1974 and continuing through the end of the Authorized Broadcast Period, the Film will not be exhibited by Licensor or pursuant to Licensor's authorization, in any medium in the Broadcast Area or Windsor Ontario except by ABC pursuant to this Agreement, other than in the following media ("Licensor's Permissible Media"): (i) theatrical and non theatrical direct projection; (ii) sale, lease or other physical distribution of video cassets; (iii) closed circuit television in hotels, motels and similar institutions, and hospitals, so long as none of the foregoing are primarily reasonably permanent residences (except as permitted under subparagraph (vi) below); (iv) exhibition on passenger carrying vehicles; (v) in the Spanish language (in addition to the media specified in subdivisions (i) through (iv), as to which there is no restriction) all other media, to commence after the completion of the first Network Broadcast of the Film; and (vi) toll, pay and subscription television via cable or any other means where a "per program" or "per channel" charge is made for viewing until one month prior to the Authorized Broadcast Period

April 5, 1974—United Artists Corp

3 *Exclusivity*—(a) Licensor shall have the right to exhibit and exploit the Film without limitation during the period beginning April 5, 1974 and continuing through the end of the Broadcast Period provided that licensor will not authorize the Film to be transmitted through air waves, cable, or any other manner or means to television sets in the Broadcast Area or Windsor, Ontario (other than pursuant to the rights granted to ABC hereunder), except: (i) sale or rental of video cassets, cartridges or similar devices; (ii) cable or pay television in nonresidential hotels motels, hospitals bars restaurants, and other nonresidential institutions; and (iii) passenger carrier exhibition

(b) In addition to the rights granted to Licensor to exhibit and exploit the Film pursuant to subdivisions 3(a)(i), (ii), and (iii) hereof Licensor shall have the right to exhibit and exploit the Film through CATV by any manner or means, and toll pay and subscription television until June 30, 1975 Licensor warrants that thereafter, except for the uses permitted in subdivisions 3(a)(i) (ii), and (iii) hereof Licensor shall not authorize any such exhibition or exploitation of the Film through CATV by any manner or means, or toll, pay or subscription television until after the end of the Broadcast Period

Exhibit A

(c) To the extent that Licensor controls remake rights in the Film, Licensor agrees that it will not authorize the broadcast of such remake in the Broadcast Area during the Broadcast Period.

(d) If Licensor notifies ABC in advance of any re release of the Film for theatrical direct projection during the Broadcast Period in the Broadcast Areas, then ABC will consult and cooperate with Licensor by considering any request by Licensor that ABC refrain from making any Network Broadcast of the Film during such re release period, but in case of disagreement ABC's determination shall prevail

May 3, 1974—Independent Television Corp

3. *Exclusivity*—Licensor shall have the right to exhibit and exploit the Film during the period beginning on May 3, 1974 and continuing through the end of the Broadcast Period; provided, however, that Licensor will not authorize the broadcast or transmission of all or any portion of the Film (or any remake of or sequel to the Film) through air waves, cable or any other manner or means to television receivers, monitors, or screens in the Broadcast Area or in Windsor, Ontario, Canada or Tijuana, Mexico (English language only) (other than pursuant to the rights granted to ABC hereunder) during the period beginning on May 3, 1974 and ending upon the expiration of the Broadcast Period

May 6, 1974—Bing Crosby Productions, Inc

3. *Exclusivity: First negotiation/first refusal*—(a) Licensor shall have the right to continue to exhibit and exploit the Film during the period beginning on May 6, 1974 and continuing through the end of the Broadcast Period: provided, however, that Licensor will not authorize the broadcast or transmission of all or any portion of the Film (or of any remake of or sequel to the Film or of any television pilot, television program, or television program series based on the Film or based on any of the principal human characters in the Film or on the literary property underlying the Film or on the life of Buford Pusser) through air waves, cable, or any other manner or means to television receivers, monitors, or screens in the Broadcast Area or in Windsor, Ontario, Canada (other than pursuant to the rights granted to ABC hereunder) during the period beginning on May 6, 1974 and ending on and including (A) with respect to each such television pilot, television program, and television series and each portion thereof, the date which is two (2) years after the beginning of the Broadcast Period or the date of completion of second network broadcast hereunder of the Film (including, without limitation, the completion of any and all delayed broadcasts made as part of said second network broadcast), whichever date occurs earlier (such date being called in subparagraph 3(b) hereof the "End Date") and (B) with respect to the Film and each portion thereof and each such remake and sequel and each portion thereof, the date of expiration of the Broadcast Period except: (i) pay television in nonresidential hotels motels, hospitals, bars, restaurants, and other nonresidential institutions; and (ii) exhibition in passenger-carrying vehicles

August 12, 1974—United Artists Corp

3 *Exclusivity*—(a) Licensor shall have the right to exhibit and exploit the Film without limitation during the period beginning August 12, 1974 and continuing through the end of the Broadcast Period, provided that Licensor will not authorize the Film to be transmitted through air waves, cable, or any other manner or means to television sets in the Broadcast Area or Windsor, Ontario (other than pursuant to the rights granted to ABC hereunder), except: (i) sale or rental of video cassettes, cartridges or similar devices; (ii) cable or pay television in nonresidential hotels, motels, hospitals, bars, restaurants, and other nonresidential institutions; and (iii) passenger carrier exhibition

(b) To the extent that Licensor controls remake rights in the Film Licensor agrees that it will not authorize the broadcast of such remake in the Broadcast Area during the Broadcast Period

(c) In addition to the rights reserved by Licensor to exhibit and exploit the Film pursuant to subdivisions 3(a)(i), (ii), and (iii) hereof, Licensor shall have the right to exhibit and exploit the Film through CATV by any manner or means, and toll, pay, and subscription television for two (2) years from June 8,

1974, Licensor's general theatrical release date, or until the start of the Broadcast Period, whichever is earlier. Licensor warrants that thereafter, except for the uses permitted in subdivisions 3(a) (i), (ii), and (iii) hereof, Licensor shall not authorize any such exhibition or exploitation of the Film through CATV by any manner or means, or toll, pay, or subscription television until after the end of the Broadcast Period.

November 15, 1974—Bing Crosby Productions, Inc.

8. *Exclusivity*—Licensor shall have the right to continue to exhibit and exploit the Film during the period beginning on November 15, 1974 and continuing through end of the Broadcast Period; provided, however, that Licensor will not authorize the broadcast or transmission of all or any portion of the Film (or of any remake of or sequel to the Film or of any television pilot, television program, or television program series based on the Film or based on any of the principal human characters in the Film or on the literary property underlying the Film) through air waves, cable, or any other manner or means to television receivers, monitors, or screens in the Broadcast Area or in Windsor, Ontario, Canada (other than pursuant to the rights granted to ABC hereunder) during the period beginning on November 1, 1974, and ending on and including (A) with respect to each such television pilot, television program, and television program series and each portion thereof, the date which is two (2) years after the beginning of the Broadcast Period or the date of completion of the second Network Broadcast hereunder of the Film (including, without limitation, the completion of any and all delayed broadcasts made as part of said second Network Broadcast), whichever date occurs earlier, (B) with respect to the Film and each portion thereof and each such remake and each portion thereof, the date of expiration of the Broadcast Period, and (C) with respect to each such sequel and each portion thereof, the date of completion of the second Network Broadcast hereunder of the Film (including, without limitation, the completion of any and all delayed Broadcasts made as part of such second Network Broadcast) or date of expiration of the Broadcast Period, whichever date occurs earlier, except: (i) pay television in nonresidential hotels, motels, hospitals, bars, restaurants, and other nonresidential institutions; (ii) residential pay television, but in no event after the date which is six (6) months prior to the beginning of the Broadcast Period; and (iii) exhibition in passenger carrying vehicles.

November 10, 1974—Columbia Pictures Television

(c) *Exclusivity.*—Licensor warrants that during *the period beginning November 10, 1974 and continuing through the end of*[1] the Authorized Broadcast Period, the Film will not be exhibited by Licensor, or pursuant to Licensor's authorization, in any medium in the Broadcast Area or Windsor, Ontario, except by ABC pursuant to this Agreement, other than in the following media ("Licensor's Permissible Media"): (i) theatrical and non-theatrical direct projection; (ii) sale, lease, or other physical distribution of video cassettes; (iii) closed circuit television in hotels, motels, and similar institutions, and hospitals, so long as none of the foregoing are primarily reasonably permanent residences; (iv) exhibition on passenger-carrying vehicles; (v) in the Spanish language (in addition to the media specified in subdivisions (i) through (iv), as to which there is no restriction) all other media, to commence after the completion of the first Network Broadcast of the Film; and (vi) toll, pay and subscription television via cable or any other means, where a "per program" or "per channel" charge is made for viewing until one month prior to the Authorized Broadcast Period.

December 30, 1974—Twentieth Century-Fox Film Corp.

5. *Exclusivity*—(a) Licensor shall have the right, without limitation, to exhibit and exploit the Film via cable or pay television in nonresidential institutions, including, but not limited to, hotels, motels, hospitals, bars and restaurants ("institutional cable television") during the period commencing with the date

[1] Patron's Note.—The same provision was also included in licensing agreement with the italicized words deleted.

first written above and continuing through September 30, 1975 (Exploitation Period (a)"); and Licensor warrants that immediately subsequent thereto and throughout the Broadcast Period it will not authorize or permit the exhibition or exploitation of the Film by any of the means set forth above in this subparagraph 5(a); provided, however, that in the event that Licensee shall elect to schedule the Network Broadcast of the Film within the first thirty (30) days of the Broadcast Period, Licensee shall notify Licensor to such effect no later than thirty (30) days prior to the date of such scheduled Network Broadcast, and in such event Exploitation Period (a) shall expire (30) days prior to the date of such scheduled Network Broadcast.

(b) Licensor shall have the right, without limitation, to exhibit and exploit the Film through any means of "pay television" not provided for in subparagraph 5(a) immediately above, during the period beginning with the date first written above and continuing until six (6) months prior to the scheduled Network Broadcast, or until March 31, 1975, whichever is later ("Exploitation Period (b)"); and Licensor warrants that for the period commencing immediately subsequent to Exploitation Period (b) and continuing through the date upon which the Broadcast Period expires it will not authorize or permit the exhibition of the Film by any of the means set forth above in this subparagraph 5(b). As used herein, the term "pay television" refers to all means of television exhibition, other than those set forth in subparagraph (a) above, for which a per program charge is imposed, including but not limited to "toll," "subscription" and "cable" services.

December 27, 1974—Twentieth Century Fox Film Corp.

Exclusivity—(a) Licensor shall have the right, without limitation, to exhibit and exploit the Film via cable or pay television in non-residential institutions, including but not limited to hotels, motels, hospitals, bars and restaurants ("institutional cable television") during the period commencing with the date first written above and continuing until commencement of the Broadcast Period ("Exploitation Period (a)"); and Licensor warrants that immediately subsequent thereto and throughout the Broadcast Period it will not authorize or permit the exhibition or exploitation of the Film by any of the means set forth above in this subparagraph 5(a); provided, however, that in the event that Licensee shall elect to schedule the Network Broadcast of the Film within the first thirty (30) days of the Broadcast Period, Licensee shall notify Licensor to such effect no later than thirty (30) days prior to the date of such scheduled Network Broadcast, and in such event Exploitation Period (a) shall expire thirty (30) days prior to the date of such scheduled Network Broadcast.

(b) Licensor shall have the right, without limitation, to exhibit and exploit the Film through any means of "pay television" not provided for in subparagraph 5(a) immediately above, during the period beginning with the date first written above and continuing six (6) months prior to the commencement of the Broadcast Period ("Exploitation Period (b)"); and for the period commencing immediately subsequent to Exploitation Period (b) and continuing through the Broadcast Period, Licensor warrants that it will not authorize or permit the exhibition of the Film by any of the means set forth above in this subparagraph 5(b). As used herein, the term "pay television" refers to all means of television exhibition, other than those set forth in subparagraph (a) above, for which a per program charge is imposed, including but not limited to "toll," "subscription" and "cable" services.

EXCLUSIVITY PROVISIONS OF 1974 THEATRICAL FILM CONTRACTS FOR CBS

March 27, 1974—Medallion TV Enterprises

12. *Exclusivity.*—(a) Licensor warrants that the motion pictures will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the

applicable motion picture (including any delayed broadcasts) whichever date first occurs (such period being herein called the 'Exclusive Period") Licensor warrants further that Licensor will not broadcast or transmit the motion pictures, and will not authorize any other person, firm or corporation to broadcast or transmit the motion pictures during the Exclusive Period by wire, cable, community antenna television system or any other means, including toll pay or subscription" television within the Broadcast Area (or in Windsor, Ontario).

April 10, 1974 as amended, September 30, 1974—Warner Brothers

10 *Exclusivity.*—(a) Licensor warrants that the motion pictures will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area except pursuant hereto during the period commencing on the date first above written and ending upon the expiration of the Broadcast Period applicable to such motion picture or the day after the last permitted network broadcast (including delayed broadcasts) of such motion picture whichever date is earlier, such period in regard to such three (3) motion pictures being herein called the 'Exclusive Period." Licensor further warrants that the motion pictures will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area except pursuant hereto during the period commencing on the date first above written and ending upon expiration of the Broadcast Period applicable to such motion picture or after the last permitted network broadcast (including delayed broadcasts) of such motion picture whichever date is earlier, except that it is understood that the motion picture has heretofore been licensed by Licensor to the ABC Television Network for three (3) network broadcasts and the motion pictures each have been heretofore licensed to the NBC Television Network for three (3) network broadcasts. It is therefore, understood that network broadcasts of the motion pictue on the ABC Television Network and network broadcasts of the motion pictures on the NBC Television Network (each limited to not more than three (3) network broadcasts), shall not be deemed in breach of the foregoing provided that the network broadcasts on the ABC Television Network of the motion picture occur prior to November 1, 1976; that the network broadcasts on the NBC Television Network of the motion picture occur prior to December 1, 1976; and that the network broadcasts on the NBC Television Network of the motion picture occur prior to November 1, 1977.

Subject to these exceptions and notwithstanding such exceptions, the period commencing with the date hereof and ending upon the expiration of the Broadcast Period applicable to such three (3) motion pictures, or ending upon the day after the last permitted broadcast (including delayed broadcasts) of the applicable motion picture whichever date is earlier shall herein be called the "Exclusive Period." Licensor also warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located in Windsor, Ontario except on the basis of authorizations granted by Licensor prior to the date of this Agreement and that Licensor will not hereafter grant any new licenses for such broadcasts and transmissions during the term of this Agreement Licensor warrants further that Licensor will not transmit any motion picture and will not authorize any other person firm or corporation to transmit any motion picture during the Exclusive Period by wire cable or any other means, including "toll pay or subscription' television, to television receivers located within the Broadcast Area

April 16, 1974 as amended, October 29, 1974, November 11, 1974—Ben Barry and Associates

April 16, 1974—Ben Barry and Associates

April 19, 1974—Monroe Rapaport

July 9, 1974—Rosamond Productions

13 *Exclusivity.*—(a) Licensor warrants that the motion picture will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto during the period commencing on the day and

year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the motion picture hereunder (including any broadcasts pursuant to exercise by CBS of its option pursuant to paragraph 17(b) hereof), whichever date first occurs (such period being herein called the 'Exclusive Period") Licensor warrants further that Licensor will not broadcast or transmit the motion picture and will not authorize any other person, firm or corporation to broadcast or transmit the motion picture during the Exclusive Period by wire, cable, community antenna television system or any other means including "toll, pay or subscription" television within the Broadcast Area (or in Windsor, Ontario)

April 26, 1974—Cinema 5, Ltd

12 *Exclusivity*—(a) Licensor warrants that the motion pictures will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area, except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the applicable motion picture (including any delayed broadcasts), whichever date first occurs (such period being herein called the "Exclusive Period"), Licensor warrants further that Licensor will not broadcast or transmit the motion pictures and will not authorize any other person firm or corporation to broadcast or transmit the motion pictures during the Exclusive Period by wire, cable community antenna television system or any other means, including "toll, pay or subscription" television within the Broadcast Area

July 2, 1974 as amended, July 2, 1974, September 27, 1974—United Artists

July 2, 1974 as amended, July 2, 1974, September 27, 1974 (7 pictures)—United Artists

12. *Exclusivity*—(a) Licensor warrants that the motion picture will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days (for the purpose of delayed broadcasts in each delayed broadcast market) after the second 'network broadcast" of the motion picture whichever date first occurs (such period being herein called the 'Exclusive Period") Licensor warrants further that Licensor will not broadcast or transmit the motion picture and will not authorize any other person, firm or corporation to broadcast or transmit the motion picture during the Exclusive Period by wire cable, community antenna television system or any other means including 'toll, pay or subscription" television within the Broadcast Area (or in Windsor, Ontario)

SEPTEMBER 27, 1974

UNITED ARTISTS CORPORATION
729 Seventh Avenue, New York, N Y.

GENTLEMEN: Reference is made to the following documents:

(a) Film License Agreement dated as of July 2, 1974 whereby you licensed to us the motion picture for television broadcast.

(b) Film License Agreement dated as of July 2, 1974 whereby you licensed to us seven (7) motion pictures for television broadcast.

(c) Amendatory letter dated July 2, 1974 whereby you licensed to us three (3) network broadcasts to be selected from the motion pictures licensed to us pursuant to the Film License Agreements specified in subsections (a) and (b) hereinabove, as well as from the motion picture

In connection with the foregoing Film License Agreements, you have advised us that you have made arrangements for the exhibition of the motion pictures over "community antenna television systems." We therefore agree that notwithstanding anything contained in paragraphs 8 (LICENSE) and 12(a) (EXCLUSIVITY) of the respective Film License Agreements, you shall have the right to broadcast or transmit, or license the broadcast or transmission by wire, cable,

community antenna television systems (including "toll, pay or subscription" television), but not by any means of broadcast and/or transmission over the air, the picture in the Broadcast Area at any time but only prior to December 31, 1974, and that the motion picture may be broadcast or transmitted (or licensed for broadcast or transmission), in the same manner and subject to the same limitations, in the Broadcast Area at any time but only prior to September 1, 1975

We further agree that notwithstanding anything contained in the documents specified hereinabove, you may license the motion picture the seven (7) motion pictures licensed to us pursuant to the Film License Agreement specified in subsection (b) above, as well as the motion picture for exhibition in the Broadcast Area over closed circuit television solely in hotels and motels and solely on the condition that the occupant of each separate hotel or motel room is required to pay a separate and distinct charge based on the number of programs supplied or a standard charge based on the hours of service provided or that the particular hotel or motel pays a separate and distinct per room per day charge for each room of the applicable hotel or motel in connection with the service provided

Very truly yours,

CBS TELEVISION NETWORK,
A DIVISION OF CBS INC.

July 9, 1974 as amended, October 31, 1974—Teleworld Inc.

13 *Exclusivity.*—(a) Licensor warrants that the motion picture will not be broadcast or transmitted pursuant to any authorization of Licensor over any television station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing January 1, 1976 and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the motion picture hereunder (including any broadcasts pursuant to exercise by CBS of its option pursuant to paragraph 4(b) hereof), whichever date first occurs (such period being herein called the "Exclusive Period"). Licensor warrants further that Licensor will not broadcast or transmit the motion picture and will not authorize any other person, firm or corporation to broadcast or transmit the motion picture during the Exclusive Period by wire, cable, community antenna television system or any other means, including "toll, pay or subscription" television within the Broadcast Area (or in Windsor, Ontario). Nothing contained in this paragraph 13(a) shall be deemed to prohibit Licensor from authorizing the Licensing or the performance of the motion picture on ships or aircraft.

July 18, 1974 (14 pictures)—Warner Brothers

10. *Exclusivity.*—(a) Licensor warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area except pursuant hereto during the period commencing on the date first above written and ending upon the expiration of the Broadcast Period applicable to such motion picture or the day after the last permitted network broadcast (including delayed broadcasts) of such motion picture, whichever date is earlier, such period being herein called the "Exclusive Period." Licensor also warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located in Windsor, Ontario except on the basis of authorizations granted by Licensor prior to the date of this Agreement and that Licensor will not hereafter grant any new licenses for such broadcasts and transmissions during the term of this Agreement. Licensor further warrants that Licensor will not transmit any motion picture hereunder, and will not authorize any other person, firm or corporation to transmit any such motion picture, during the Exclusive Period by wire, cable or other means, including "toll, pay or subscription" television to television receivers located within the Broadcast Area; provided, however, that Licensor shall have the right, with respect to each motion picture hereunder, to authorize the transmission thereof over the facilities of any toll, pay or subscription television system transmitting programs by means of wire or cable to television receivers located in the Broadcast Area to subscribing members of the public who pay a per program or per channel charge for the

right to receive program material originated by such system, provided that any such transmission shall only occur prior to the following applicable dates in regard to each of the motion pictures hereunder:

The motion picture prior to January 1, 1976
The motion picture prior to June 1, 1976
The motion picture prior to July 1, 1975.
The motion picture prior to April 1, 1975
The motion picture prior to December 1, 1975
The motion picture prior to July 1, 1975.
The motion picture prior to August 1, 1976.
The motion picture prior to November 1, 1975
The motion picture prior to May 1 1975.
The motion picture prior to July 1, 1972
The motion picture prior to June 1, 1973
The motion picture prior to July 1, 1974
The motion picture prior to _____

Notwithstanding anything contained in the preceding portion of this subparagraph (a) to the contrary, Licensor shall have the right to license the motion pictures hereunder during the Exclusive Period in the Broadcast Area over any closed circuit television system operating solely within hotels and motels *and hospitals* on condition that under the terms of such licensing the occupant of each separate hotel or motel room is required to pay a separate identifiable charge based upon the number of programs supplied or the number of hours of service provided or that the particular hotel or motels pays a separate and identifiable per room per day charge for each room therein for the service provided

July 18, 1974 (6 pictures)—Warner Brothers

10 *Exclusivity*—(a) Licensor warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area except pursuant hereto during the period commencing on the date first above written and ending upon the expiration of the Broadcast Period applicable to such motion picture or the day after the last permitted network broadcast (including delayed broadcasts) of such motion picture, whichever date is earlier, such period being herein called the "Exclusive Period." Licensor also warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located in Windsor, Ontario except on the basis of authorizations granted by Licensor prior to the date of this Agreement and that Licensor will not hereafter grant any new licenses for such broadcasts and transmissions during the term of this Agreement. Licensor further warrants that Licensor will not transmit any motion picture hereunder, and will not authorize any other person, firm or corporation to transmit any such motion picture, during the Exclusive Period by wire, cable or other means, including "toll, pay or subscription" television to television receivers located within the Broadcast Area; provided, however, that Licensor shall have the right, with respect to each motion picture hereunder, to authorize the transmission thereof over the facilities of any toll, pay or subscription television system transmitting programs by means of wire or cable to television receivers located in the Broadcast Area to subscribing members of the public who pay a per-program or per-channel charge for the right to receive program material originated by such system, provided that any such transmission shall only occur prior to the following applicable dates in regard to each of the motion pictures hereunder:

The motion picture prior to January 1, 1975
The motion picture prior to January 1, 1975
The motion picture prior to January 1, 1975.
The motion picture prior to July 1, 1970.
The motion picture prior to July 18, 1974.
The motion picture prior to June 1, 1973.

Notwithstanding anything contained in the preceding portion of this subparagraph (a) to the contrary, Licensor shall have the right to license the motion pictures hereunder during the Exclusive Period in the Broadcast Area over any closed circuit television system operating solely within hotels and motels on

condition that under the terms of such licensing the occupant of each separate hotel or motel room is required to pay a separate identifiable charge based upon number of programs supplied or the number of hours of service provided or that the particular hotel or motel pays a separate and identifiable per room per day charge for each room therein for the service provided

August 7, 1974—Twentieth Century Fox

13 *Exclusivity*—(a) Licensor warrants that the motion picture will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the motion picture hereunder, whichever date first occurs (such period being herein called the "Exclusive Period") Licensor warrants further that Licensor will not broadcast or transmit the motion picture and will not authorize any other person firm or corporation to broadcast or transmit the motion picture during the Exclusive Period by wire, cable community antenna television system or any other means, including 'toll pay or subscription" television within the Broadcast Area (or in Windsor, Ontario)

July 30, 1974 as amended, December 17, 1974—Metro Goldwyn Mayer

October 21, 1974—Metro Goldwyn Mayer

12. (a) MGM warrants that the Picture will not be telecast or transmitted pursuant to any authorization of MGM over any station whose transmitter is located in the Licensed Territory or in Windsor, Ontario (such areas together being herein called the "Exclusive Territory") except pursuant hereto during the period commencing on the date hereof and ending on the expiration of the Telecast Period (such period being herein called the 'Exclusive Period'): provided however, that the Exclusive Period for the Picture shall end sixty (60) days after the last permitted telecast thereof and MGM shall be free to license the Picture for telecast by others after the Exclusive Period MGM further warrants that MGM will not authorize any other person firm or corporation to transmit the Picture during the Exclusive Period by wire cable or any other means including toll, pay or subscription television to television receivers of the type commonly used in private homes located within the Licensed Territory

August 22, 1974 as amended, October 15, 1974—Columbia Pictures

16. *Exclusivity*—(a) Licensor warrants that no film, or any part thereof or outtakes therefrom, which outtakes are under Licensor's control and are identifiable with the film will be authorized for broadcast or transmission over any station whose transmitter is located within the Broadcast Area (or Windsor, Ontario), during the Exclusive Period"

(i) The Exclusive Period' of the films listed in Section I of Exhibit A hereto commences on the date hereof and ends on the earlier of the following dates: A date thirty (30) days after the expiration of the applicable Broadcast Period or a date sixty (60) days after the last broadcast of the individual film hereunder

(ii) The "Exclusive Period' of the films listed in Section II of Exhibit A hereto shall commence upon the commencement date of the Broadcast Period of the individual film (as specified in such Section II), and shall end at the earlier of the following dates: A date thirty (30) days after the expiration of the applicable Broadcast Period or a date sixty (60) days after the last broadcast of the individual film hereunder.

However, in regard to the thirty (30) day period after the Broadcast Period referred to in subsections (i) and (ii) of the preceding part of this paragraph 16(a), and sixty (60) day period after the last broadcast of the applicable film (referred to in the same subsections) the Exclusive Period shall be limited to those markets in which CBS makes or authorizes delayed broadcasts of the applicable film or films; in other markets Licensor shall have the right to authorize the applicable film for broadcast or transmission For the purpose of the foregoing, CBS agrees to advise Licensor, at Licensor's request, of those markets in which delayed broadcasts will or may occur with reasonable promptness after CBS has ascertained the facts in each case Licensor warrants further that none of the films will be authorized for transmission commencing with the date hereof and continuing thereafter until expiration of the Exclusive Period by wire, cable or any other means to television receivers located within the Broadcast Area

December 2, 1974 as amended, December 2, 1974—American International Television, Inc

16 *Exclusivity*—(a) Licensor warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor, over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast period applicable to such motion picture or on the day following the last permitted network broadcast (including delayed broadcasts) of such motion picture, whichever date occurs earlier (such period being herein called the "Exclusive Period') Licensor warrants further that Licensor will not transmit any motion picture hereunder and will not authorize any other person, firm or corporation to transmit any motion picture hereunder during the Exclusive Period by wire, cable, or any other means, including 'toll pay or subscription" television, to television receivers located within the Broadcast Area or Windsor, Ontario

Notwithstanding anything contained in the preceding portion of this subparagraph (a) to the contrary, Licensor shall have the right to license the motion pictures hereunder during the Exclusive Period in the respective Broadcast Areas over any closed circuit television system operating solely within hotels and motels on condition that under the terms of such licensing the occupant of each separate hotel or motel room is required to pay a separate identifiable charge based upon the number of programs supplied or the number of hours of service provided or that the particular hotel or motel pays a separate and identifiable per room per day charge for each room therein for the service provided

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EXCLUSIVITY PROVISIONS OF 1974 THEATRICAL FILM CONTRACTS FOR NBC

May 22, 1974—United Artists Corp, Clauses 3, 4

3 (a) The term of this agreement shall commence on the date of this agreement and shall continue with respect to each picture until expiration of the Telecast Term specified in the attached schedule plus a maximum of 60 days thereafter if required solely for purposes of so called "delayed telecast" by affiliated NBC television stations However, none of the films shall be telecast by NBC earlier than the commencement date of the Telecast Term specified in the attached schedule for such film.

(b) During the term each of the films shall be exclusive to NBC in the licensed territory in free and pay television, cable and CATV, except for uses expressly permitted pursuant to paragraph 4 of this agreement NBC's exclusive right to each film will expire upon the expiration of the Telecast Term with respect to such film as provided in the attached schedule

4 Notwithstanding the exclusivity granted to NBC or restrictions imposed pursuant to paragraph 3 of this agreement UA may license the film:

(i) at any time during the term for closed circuit television exhibition solely in hotels and high rise residential apartment complexes under common ownership or control or high rise residential condominiums (it being understood that a "complex' is two or more adjoining units originally developed or publicly regarded as a single entity or residential community) and solely on condition that the occupant of each separate hotel room, apartment or abode is required to pay a separate and distinct charge for viewing the film (as distinguished from a blanket charge based on the number of programs supplied or a standard charge based on the hours of service provided); and

(ii) until the earlier of (a) two years prior to the return date for each film or (b) the expiration of the period (presently two years from the initial theatrical

release of the film) specified in Section 76.225(a)(1) of the FCC rules, as such section may be hereafter amended, UA may transmit or authorize the transmission of the film by wire, cable or any other means, where a "per program" or "per channel" charge is made for viewing the film

May 22, 1971—Warner Bros., Inc ; Clause 4

4. From the date hereof until the expiration of NBC's rights in a picture, said picture will be exclusive to NBC on free television (including cable television, but not exclusive in cable television for which the viewer pays a per program or per channel charge) and during the Play Off Period, on over the air pay television (in addition to free television) in the licensed territory.

February 5, 1971—United Artists Corp, Clauses 1(c) and 2

(c) During the term each of the films shall be exclusive to NBC in the licensed territory, except for uses expressly permitted pursuant to paragraph 2 of this agreement. NBC's exclusive right to each film will expire upon the expiration of the Telecast Term with respect to such film as provided in the attached schedule.

2. Notwithstanding the exclusivity granted to NBC or restrictions imposed pursuant to paragraph 1 of this agreement, UA may license the film: (i) at any time during the term for closed circuit television exhibition solely in hotels and high rise residential apartment complexes under common ownership or control, or high rise residential condominiums (it being understood that a "complex" is two or more adjoining units, originally developed or publicly regarded as a single entity or residential community), and solely on condition that the occupant of each separate hotel room, apartment, or abode is required to pay a separate and distinct charge for viewing the film (as distinguished from a blanket charge based on the number of programs supplied or a standard charge based on the hours of service provided); and (ii) until the earlier of (a) two years prior to the return date for each film or (b) the expiration of the period (presently two years from the initial theatrical release of the film) specified in Section 76.225(a)(1) of the FCC rules, as such section may be hereafter amended, UA may transmit or authorize the transmission of the film by wire, cable or any other means, where a "per program" or "per channel" charge is made for viewing the film.

Nothing contained in this agreement is intended to imply that a CATV system owned by UA shall have any lesser right to carry NBC's broadcast of the film than such system would have had if owned by a third party. The granting by UA to any airline, train or ship of the right to perform or exhibit any of the films hereunder, whether electronically or by means of direct projection, on any flight or trip in the licensed territory to those persons aboard the plane, train or ship shall not be a breach of this agreement.

June 1, 1971—Metro Goldwyn Mayer, Clause 1(c)

(c) During the term the pictures shall be exclusive to NBC in free and pay and subscription television in the licensed territory except for the following: Licensor may license each picture for exhibition in the licensed territory by pay television (i.e. where a per program charge is made for viewing the picture or the subscriber pays a separate per channel charge for the channel where the picture is being shown), provided no such pay television exhibition occurs during the period commencing 60 days prior to the availability date of the picture specified in the attached schedule and ending with the expiration of the telecast term of such picture.

January 10, 1971—Metro Goldwyn Mayer, Clause 1(c)

(c) During the term the pictures shall be exclusive to NBC in free and pay and subscription television in the licensed territory except for the following: Licensor may license each picture for exhibition in the licensed territory by pay television (i.e. where a per program charge is made for viewing the picture), provided no such pay television exhibition occurs during the period commencing 60 days prior to the availability date of the picture specified in the attached schedule and ending with the expiration of the telecast term of such picture.

February 8, 1974—American International Television, Inc, Clause 1(a)

1. (a) Licensor does hereby grant to NBC during the term hereof the sole and exclusive license to telecast on free television (including community antenna systems, but not pay television) on a national network basis the motion pictures specified in the schedule attached hereto (hereinafter called "the pictures", which term shall refer to one picture if only one picture is designated in the schedule) within the United States, its territories and possessions including Puerto Rico (herein called the "licensed territory") for the number of runs specified in the attached schedule During the term the pictures shall be exclusive to NBC in free and pay television in the licensed territory, and in Windsor, Ontario, and as to English language broadcast in Tijuana, Mexico, (and the pictures shall not be broadcast from any transmitter located elsewhere in Canada or Mexico (in English language only) which is capable of placing a signal in any portion of Detroit, Michigan, or San Diego California, sufficient to provide at least "Grade B service" as that term is defined and calculated in the Rules and Regulations of the Federal Communications Commission), except that licensor reserves the right to license the film for hotel, condominium and high rise apartment exhibition on paid television systems that require a per channel or per program charge for reception of the film The term hereof shall commence on the date hereof and shall continue as to each picture until the expiration of the telecast term specified in the attached schedule or the last authorized telecast of the picture (including 60 days delayed telecast), whichever is earlier: provided, however, that no picture shall be telecast hereunder earlier than the commencement date of the telecast term therefor specified in the attached schedule.

November 25, 1974—Cinema Center Films, Part of Clause 1(a)

During the term, the picture shall be exclusive to NBC in free television in the licensed territory and in Windsor, Ontario and for English language broadcasts in Tijuana, Mexico The picture was theatrically released more than two (2) years prior to the commencement of the term hereof and, therefore, Licensor has elected not to make the picture available for exhibition in pay television during the term.

November 21, 1974—Emerson Film Enterprises, Inc., Clause 1(a)

Each picture shall be exclusive to NBC in free and pay television (including wireless, cable and CATV transmission), as hereinafter specified. During the period from the date of this agreement until the expiration of NBC's rights in a picture, the picture will be exclusive to NBC in free and pay television in the licensed territory except that with respect solely to pay television where a "per-program" or "per-channel" charge is made for viewing the picture, Licensor may license the picture for broadcast before the earlier of either (i) sixty (60) days prior to the commencement of the telecast term specified in the attached schedule or (ii) the expiration of the period specified in Sec. 76.225(a)(1) of the FCC rules, (i.e. currently 2 years from initial theatrical release of the picture).

December 2, 1971—Viacom International, Inc., Clause 1(a)

Each picture shall be exclusive to NBC in free and pay television (including wireless, cable and CATV transmission), as hereinafter specified. During the period from the date of this agreement until the expiration of NBC's rights in a picture, the picture will be exclusive to NBC in free and pay television in the licensed territory, except that with respect solely to pay television where a "per-program" or "per-channel" charge is made for viewing the picture, Licensor may license the picture for broadcast before the earlier of either (i) sixty (60) days prior to the commencement of the telecast term specified in the attached schedule or (ii) the expiration of the period specified in Sec. 76.225(a)(1) of the FCC rules, (i.e. currently 2 years from initial theatrical release of the picture).

CONSUMERS UNION / A NONPROFIT ORGANIZATION / PUBLISHER OF CONSUMER REPORTS

February 28, 1977

Mr Bernard M Hollander, Chief
Judgements and Judgement Enforcement Section
Antitrust Division
U S Department of Justice
Washington, D C 20530

Dear Mr Hollander:

Consumers Union (CU) and Consumer Federation of America (CFA) wish to express our concern over, and opposition to, the provision in the proposed NBC/Justice Department Consent Decree that would grant NBC the right to obtain contractual exclusivity on motion pictures for an unreasonably long period

Our understanding is that this provision would allow NBC to obtain exclusive rights to a motion picture for a period of 30 days before the picture's availability date and for 24 additional months covering the first two runs of the picture plus 12 months for each contracted subsequent run. This arrangement -- which is not related to the actual exhibition date -- essentially forecloses the availability of a picture to other forms of television, i e , pay cable and subscription We find such foreclosure to be anticompetitive and not in the best interest of the consumer and a free marketplace economy

We believe that the Justice Department's endorsement of this restraint of trade is inappropriate, given the stated intention of the House of Representative's Communications Subcommittee to examine and reevaluate the entire Communications Act of 1934. Justice Department action risks weakening the possibility of obtaining redress against exclusivity practices of this kind in other forums such as the Congress, the FCC and in the courts.

Our interest in the Justice Department's action is contained in CFA's Communications Policy Resolutions, approved by its membership (over 200 national, state and local non-profit organizations) on February 12, 1977. It states in part:

> "CFA recognizes that consumers have a major stake in the technologies and issues .both because the public has the right to choose from and have access to a variety of high quality communications services at reasonable costs and because the public is dependent upon telecommunications for accurate treatment and fair reporting of the many diverse and complex issues in today's society.

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We believe that cable television has, in the main, fallen short in fostering diversity in programming. For instance, we are unaware of any significant cable or pay TV program designed to serve the information needs of consumers Cable television's failure to develop a strong public service component to its programming would appear to us to be further hindered by sanctioning broadcast industry practices that potentially deprive cable of developing a viable economic base Our concern, therefore, is that the government not inhibit the cable industry from developing the economic base to deliver the full public service potential promised but thus far not delivered.

We, therefore, believe that a Consent Decree provision with the potential of inhibiting the growth of cable or pay TV in this country is contrary to the best interests of all Americans We urge the Justice Department to withdraw its Consent to this Decree and seek one that promotes and safeguards competition in our broadcast/cable industries,

CU and CFA have not focused on the other provisions of the Consent Decree and are offering no comment on them at this time

Very truly yours,

Warren Braren

Warren Braren
Associate Director
and
Chairperson, CFA
Communications Policy Committee

WB/lk

cc Rhoda H Karpatkin
Executive Director, CU

Kathleen O'Reilly
Executive Director, CFA

TELEPHONE: 293 7330
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Executive Director
JOHN J GUNTHER

February 28, 1977

Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Antitrust Division
Washington, D. C. 20530

Re: United States v. NBC

Dear Mr. Hollander:

The U.S. Conference of Mayors, an organization representing the nation's 750 cities over 30,000 population, is writing in opposition to the provisions in the proposed NBC/Justice Department Consent Decree permitting NBC to continue its practice of obtaining contractual exclusivity against pay cable television on feature films.

Pay cable television is a new home entertainment service which is being made available to more than a million cable subscribers in approximately 410 towns and cities throughout the nation. According to cable developers, it is the added revenue base generated by pay cable television programming that can provide the economic stimulus for the expansion of cable telecommunications into our major urban communities.

The proposed Consent Decree granting NBC the right to withhold motion picture products from the pay cable industry would deprive the pay cable industry of essential programming it must have in order to attract urban customers. The cost of building urban cable systems can go as high as $10,000 per mile. Without access to movies upon which to build a stable economic base, cable operators and investors are reluctant to venture into urban markets. Cable television with the economic incentive provided by pay cable subscribers can bring to all city residents the many advantages offered by a broadband communications service.

Furthermore, without motion picture product to attract large audiences, the cable industry would be denied the opportunity to broaden its programming horizons into the areas of cultural, children's, and minority interest programming that is often lacking on commercial television and regrettably inaccessible to many elderly and disadvantaged citizens in our urban centers.

The U.S. Conference of Mayors has long championed free competition in the marketplace of ideas as well as in the economic marketplace. The pay cable industry is an emerging home entertainment service that is struggling to compete with the major networks that have access today to over 74 million TV homes. It is blatantly anti-competitive to deny the pay cable industry its right to compete with an oligopolistic broadcast industry that generates over a billion dollars in revenues while enjoying free use of the public airwaves.

The U.S. Conference of Mayors is aware that our commercial TV system is the finest in the world. Yet, we also recognize that free competition is a fundamental principle of our society that should be nourished rather than stifled. In testimony before the Federal Communications Commission, we have stated that pay cable television will not supplant our commercial system, but will supplement it by offering greater diversity and freedom of choice.

It is indeed ironic that a Consent Decree which was brought to open the doors of competition in the program producing industry would slam these doors shut on the pay cable industry. It is fair to ask why NBC chooses to seek contractual exclusivity only against pay cable television and not against other means of motion picture distribution including in-flight exhibition, hotel exhibition, theatrical exhibition, and cassettes and video-discs. Surely, these modes of exhibition generate audiences larger than the pay cable industry. Yet, the decree would endorse NBC's discriminatory practices. We believe the Justice Department should carefully examine whether it has become a party to NBC's efforts to foreclose competition in the home entertainment industry. The need for a thorough examination becomes even more apparent when it is pointed out that NBC's parent company, RCA, is investing in the development of video-disc home movies against which NBC does not feel compelled to obtain contractual exclusivity.

The major concern of the U.S. Conference of Mayors is identifying what is in the public interest in this case. Our concerns include those citizens who are cable subscribers as well as those who are not. We have testified before the FCC that the unrestricted growth and development of pay cable television will not injure the rights of those citizens who enjoy commercial television. We firmly believe that it is the consumer who should have the ultimate right to choose the form and the manner in which he receives and views entertainment in his home.

TV sets are paid for by the individual. They are not the property of the Networks, the advertisers, nor the pay cable industry Therefore, the role of the government should be to protect and preserve the right of the individual to exercise his basic freedoms. The Consent Decree, as it is written, makes the government a party to an unreasonable and unwarranted infringement on the right of all citizens to freely exercise their preferences in deciding how and in what form they shall view movies.

The Justice Department initially proposed a formula that would have limited network exclusivity to no more than 45 days prior and 45 days after a network telecast. Clearly, that solution would have better safeguarded the public interest and fostered greater competition. Unfortunately, the Department acceded to NBC's demands for far broader exclusivity. There is the distressing prospect -- presently unanswered -- that the Justice Department sacrificed the interests of the pay cable industry in order to obtain an overall agreement with NBC.

The U.S. Conference of Mayors believes that the Decree is not in the public interest and is contrary to the mandate of our antitrust laws. We urge the Justice Department either to withdraw the provision in the decree affecting pay cable television or negotiate relief that will serve the public interest and preserve our free market society.

Sincerely,

John J. Gunther
Executive Director

MEDIA ACCESS PROJECT

February 28, 1977

Bernard M. Hollander, Chief
Judgments and Judgment Enforcement Section
Anti-Trust Division, Department of Justice
Washington, D.C. 20530

Dear Mr. Hollander:

This letter is being written on behalf of the Committee for Open Media (COM) (San Jose, California), the Mexican-American Legal Defense Fund (MALDF) (Washington, D.C.) and the National Newspaper Publishers Association (NNPA) (Washington, D.C.) in connection with the Justice Department's proposed consent decree with the National Broadcasting Company. COM, MALDF, and NNPA are concerned with the aspect of the settlement which relates to certain protections afforded the National Broadcasting Company's scheduling of motion pictures on television.

If one were consciously to attempt to undermine the viability of subscription and pay cable television today, one would not be likely to find an easier or more effective method than by enforcing the exclusivity provision in the proposed consent decree between the National Broadcasting Company (NBC) and the Department of Justice.

Still in a nascent and highly vulnerable stage of development, the cable television industry relies heavily upon its power to attract and to retain new subscribers. 1/ While cable television has achieved its greatest success in rural areas, which might typically be served by only one or two distant stations, its attempts to attract support in the major cities has often been frustrated by the plethora of traditional-type programs offered by the more familiar networks.

As most cable operators agree, however, this barrier is not insurmountable. Indeed, perhaps the most promising development in this new and exciting area of broadcasting is pay cable service, which allows a cable subscriber to enjoy, for a few extra dollars each month, first-run movies and sporting events. Such programs are presented on special channels, unedited and without commercial interruption.

1/ "Future of Cable TV: The Future Brightens", New York Times, February 21, 1976.

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The monies so received, in turn, make possible the variety of cultural and special interest programming that currently distinguishes cable from major network television, the former employing a type of programming that has almost infinite ramifications for those seeking to advance the interests of hitherto underrepresented minorities in this country.

Under the terms of the consent decree's proposed exclusivity provision, a well-established station, such as NBC, could conceivably condition its purchase of a first-run movie upon the producer's promise not to distribute that particular film to cable television during the month preceding and the two years following the film's designated availability date.

We urge that the contractual exclusivity provision be eliminated. Its gross unfairness to cable television and undue protectiveness towards major network interests are clearly inconsistent with, if not totally antithetical to, the concept of cultural diversity in television programming.

That the proposed contractual exclusivity clause-- , and a fortiori, the option to renew--would firmly reinforce major networks' clear dominance over cable TV in still one more area of programming, i.e., films, is self-evident. 1/ Less obvious, but at least equally disturbing, are the implications of exclusivity for the possibility of providing meaningful access to the media in the foreseeable future for the less visible, often less powerful, minority peoples of this country.

A complete list of the ways in which cable television could advance minority interests is obviously impossible to generate at this time. However, we believe that cable television represents one of the most promising and feasible methods by which important needs of the minority community are being and can continue, in increasing measure, to be met. 2/

1/ The networks currently have access to 74 million TV homes. According to their own estimates, network revenues are expected to reach $13 billion by 1985. These figures are in sharp contrast to the 12.5 million subscribers of cable television today.

2/ According to Alex Mendaris, Director of the Office of Minority Business enterprise, who testified in the recent FCC hearings to relax restrictions on cable television, there were four minority cable systems on the air, with another one under construction at the time of the hearings. A total of 23 minority firms held franchises, and a substantial number of other minority corporate groups were then forming to seek additional franchises.

Over 11 million minorities are currently concentrated in the 25 major markets of this country In light of the frequently high costs of attending cinematic, dramatic, educational, musical, or other cultural events in larger cities today, pay cablecasting offers the opportunity for such groups to share some of the events that are unique to urban life, but which would nevertheless remain largely unavailable to them otherwise. Payment of the typical cable charge of less than $8.00 per month, which is less than the cost of a single family trip to the movies, would broaden the cultural options open to poor immeasurably. Cablecasting represents one way in which the broadcast media might allow the indigent to avoid the prohibitive costs of travel and admission, but still benefit from the advantages of living in a major city. In a very real sense, cable television would permit poor and minority peoples to escape the immediacy of their circumstances and to partake in some of the best forms of cultural enrichment that American society can offer.

Cable television's relatively limited audience size, a serious weakness insofar as subsidization is concerned, could be turned to significant advantage by maximizing upon the greater amounts of flexibility and special interest programming that it allows.

More minority participation at top-levels of decision-making as well as additional minority-operated stations would go a long way towards augmenting broadcaster sensitivity to local needs. A greater receptivity to local talent would provide an important outlet for the self-expression of heretofore unrecognized filmmakers, producers, and artists, thereby contributing to greater minority employment as well. The familiar problems of inadequate local news coverage too could be alleviated. Even the needs of small communities where a foreign language is predominant could be met through cablecasting.

The possibilities in this area are limitless. But before such innovative and important programs can be realized, cable television must be afforded the opportunity to achieve a small measure of economic security. The presentation of high quality feature films as part of pay cable service plays a key role in generating support for the continuation of cable television.

Legitimization of NBC's proposed exclusivity clause would not only perpetuate the monopoly of television entertainment enjoyed by the major networks today, but would dash the hopes for soon achieveing the cultural diversity that is so sorely needed in this industry. This opportunity for bold innovation should not be lost. The proposal of contractual exclusivity should be eliminated.

Yours truly,

Harvey J. Shulman
Media Access Project
1912 N Street, N.W.
Washington, D.C. 20036
(202) 785-2613

Counsel for COM, MALDF, NNPA

Of Counsel:

Edward Leong
Law Student Intern
University of Pennsylvania Law School

Cable Television

March 1, 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement
Enforcement Section
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Dear Mr. Hollander:

The undersigned, certain members of the staff of the Cable Television Information Center of The Urban Institute, hereby submit comments on the proposed consent decree in the case of United States v. National Broadcasting Company, Inc., Civil No. 74-3601-RJK, which was filed November 17, 1976 in the United States District Court for the Central District of California.

These comments reflect the views of the undersigned. They are not the views of the Cable Television Information Center of The Urban Institute, nor of the sources of its financial support.

Under section VI (E) (iii) (c) of the proposed consent decree, the Department of Justice would give its approval to NBC's acquisition of exclusive exhibition rights to first run motion pictures as against subscription and pay cable television. The period of exclusivity allowed under the proposed decree may extend up to 24 months for two broadcast showings and an additional 12 months for each exhibition greater than two. Thus, NBC may acquire the exclusive right to exhibit a film three times and thus preclude the showing of that film on subscription or pay cable television for three years. This period of exclusivity, combined with the Federal Communications Commission's current rules regarding the exhibition of feature films on pay cable, 47 C.F.R. § 76.225 (a), could effectively foreclose pay cable from exhibiting certain movies for at least ten years and possibly longer.

This provision of the consent decree is not in the public interest. The American people should be given an increased - as opposed to decreased - range of choices as to how they may view entertainment programming. The effect of the consent decree may be to totally preempt one of those choices -- pay cable. Such an effect is anticompetitive and should not be sanctioned by the Department of Justice.

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It is instructive to recall the Department's own statements regarding the need for competition between broadcast and cable interests:

> The public has vital interests which are not necessarily coextensive with those of the broadcasters or CATV operators....The public's interest includes securing a broad diversity of information, viewpoints and entertainment. We look to competition to provide this type of diversity....Where private agreement resolves the parties' differences by sacrificing actual or potential competition the public interest in competition may be fatally compromised. Comments of the United States Department of Justice in FCC Docket 18397 at pages 3-4 Sept. 8, 1969).

Thus, what the Justice Department condemned by private action it now condones in the proposed consent decree

Apparently, part of the reasoning behind sanctioning such exclusive contracts is that it limits NBC to the type of contractual arrangements which are currently being negotiated. That may be so, but we believe it is unwise and unnecessary for the Justice Department to sanction such practices. The Department has already observed that if the broadcasters agreed among themselves not to purchase movies from sellers who did not agree to exclusive contracts, a per se violation of the antitrust laws would be involved. (Brief for United States of America in Home Box Office v. Federal Communications Commission, p. 19, Nos. 75-1280, et al., (D.C. Cir.).) Yet, if the proposed consent decree becomes effective, that type of practice would be difficult to challenge because of express Justice Department approval. As such, remedial action by the courts or by legislation may be effectively precluded.

The Justice Department states in its Competitive Impact Statement that the proposed provision should "eliminate any possibility that NBC can 'warehouse' feature films for a number of years before exhibiting them on network television..." p. 20. However, by allowing the exclusivity period to run from the date of the program's first availability, the Department has sanctioned a procedure which in fact invites warehousing. For example, NBC and a program supplier could agree to a contract whereby NBC would exhibit a motion picture three times over a three year period. According to the consent decree provision, NBC could get 36 months of exclusivity protection for that motion picture. Assume that the supplier and NBC agree to an availability date of January 1, 1977. NBC will have to exhibit the film twice by December 31, 1978, and once again by the end of 1979. NBC could effectively warehouse the film for a year and a half by not broadcasting it until July 1, 1978 and re-running it December 31, 1978.

If, on the other hand, the exclusivity date were based upon the date of exhibition the network would receive exclusivity protection only at those times directly before and after the broadcast. The warehousing problem would be foreclosed. Thus, the key to any exclusivity provision should be the date of exhibition, not the date of availability.

Another matter which we believe to be incorrectly decided is the period of time for which exclusivity may be obtained A two year period, regardless of the date from which it is calculated, is simply too long a time to foreclose a film's access to pay television. More importantly, it is too long a time to prevent the public from viewing entertainment programming via the medium of their choice. Furthermore, there appears to be no evidence to suggest that a broadcast exhibition of a film has ever been adversely affected by a prior pay cable exhibition. Indeed, it is difficult to imagine how a contemporaneous showing could adversely affect the networks when only 1,000,000 homes receive pay cable programming compared to the 80,000,000 homes which view over the air programming.

We believe the Department should return to its initial thinking on this matter. Forty-five days of exclusivity on either side of network exhibition affords ample protection to NBC. This was the Justice Department's initial determination, and it should be adhered to. A 90 day period of exclusivity would afford pay cable subscribers greater opportunity to choose freely the method of viewing which they prefer.

In our opinion, the provision currently proposed is an unreasonable intrusion on competition and the public's freedom of choice. A provision should be adopted which sufficiently limits the duration of allowable exclusivity protection and which computes the exclusivity period from the date of network exhibition. If such a provision cannot be agreed to, it would be better to have no provision at all. No provision is much more acceptable than an unjust provision

Initially, exclusivity as against pay cable, the subject matter of Section VI (E) (iii) (e), was peripheral to the thrust of the Justice Department's complaint against NBC This provision is relevant in only the very broadest sense to the purpose of the lawsuit. There is, therefore, no compelling reason to treat the subject in the decree. Its inclusion will have the effect of condoning anticompetitive practices, not halting them In other words, the net result will be a lessening of competition not an increase thereof; as compared with the situation that prevailed before the complaint was filed with respect to pay cable, network dominance will be furthered, not slowed.

The provision contained in the proposed decree, when considered in conjunction with the FCC's pay cable rules, may operate to exclude a feature film's availability from pay cable for a period of ten years or more. The FCC's cable

rules allow pay cable operators to exhibit feature films during the first three years of their release. After this three year period, films are not available to pay cable from the third through the tenth year of their release unless the film is under contract and available for exhibition by a network or television station in the market in which the pay cable operator wishes to show it. 47 C.F R § 76 225 (a) (1) (ii) This rule, combined with the Justice Department's stamp of approval on exclusive contracts, may act to foreclose completely a film's availability to pay cable Films not under contract and available for exhibition in a particular market may not be shown over pay cable due to the operation of FCC regulations. Films which are available in a local market will be rendered unavailable to pay cable by virtue of the contractual exclusivity permitted by the consent decree.

While this is obviously not the proper forum to argue the merits of the FCC's cable rules, they must be considered by the Justice Department because the combined effects of the rules and the consent decree are so blatantly inequitable. Considered together, the FCC's rules and the consent decree effectively preempt the right of choice of 1,000,000 pay cable subscribers to the benefit of no one.

In summary, we urge the Justice Department to withdraw its approval from the current pay cable exclusivity provision embodied in the NBC consent decree. Instead, we support the inclusion of a provision similar to the one initially proposed by the Department which allows 45 day exclusivity on either side of the exhibition date. If such a provision cannot reasonably be included in the consent decree, the subject of exclusivity as against pay cable should not be included in the decree.

Respectfully submitted,

Henry del Castillo

Stanley Gerendasy

Susan C. Greene

Harold E. Horn

Sheila Mahony

Michael A. McGregor

COMMENTS WITH RESPECT TO PROPOSED FINAL JUDGMENT IN UNITED STATES OF AMERICA v. NATIONAL BROADCASTING COMPANY, INC., CIVIL NO. 74-3601-RJK, U.S.D.C., C.D. Cal.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
COUNSELORS AT LAW
40 WEST 57TH STREET
NEW YORK, N Y 10019

COMMENTS OF UNITED ARTISTS CORPORATION AND METRO-GOLDWYN-MAYER INC. WITH RESPECT TO PROPOSED FINAL JUDGMENT IN UNITED STATES OF AMERICA V. NATIONAL BROADCASTING COMPANY, INC., CIVIL NO. 74-3601-RJK, U.S.D.C., C.D. Cal.

These comments are submitted to the Department of Justice pursuant to the provisions of Sections 2(b) - (h) of the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §16(b) - (h), by United Artists Corporation ("United Artists") and Metro-Goldwyn-Mayer Inc. ("MGM"). United Artists is a distributor of theatrical feature films.* MGM is a producer and distributor of theatrical feature films. Both companies distribute theatrical feature films for television exhibition.

The Proposed Decree Contains No Restrictions On NBC's Production Of Theatrical Feature Films

The proposed consent decree contains no restrictions on NBC's power to produce theatrical feature films. The Competitive Impact Statement confirms that NBC uses its control over access to its network "to control the prices paid by NBC for television exhibition rights to motion picture feature films; and to obtain competitive advantages over other [illegible] and distributors of ... motion picture feature fil[illegible]."* Despite the government's recognition of the problem, the proposed decree does nothing to prevent NBC from producing theatrical feature films whenever it chooses.

The decree's "hours limitation" permits almost unlimited production by NBC of theatrical features. For instance, since the proposed decree permits NBC to exhibit a full 2 1/2 hours of NBC produced entertainment programming in prime time each week, NBC could theoretically produce 52 feature films each year and, subsequent to their theatrical exhibition, play them off one week at a time in prime time on the network.

The motion picture industry depends greatly on revenues from television exhibition of theatrical features. The fact that there are only three buyers for the first run television exhibition of theatrical feature films -- the three networks -- gives the networks unfair leverage in purchasing. The Department of Justice has recognized that such network power becomes patently anticompetitive when "... the network,

* Motion pictures which are initially exhibited in theatres and only subsequently exhibited on television.

* Competitive Impact Statement, p. 2.

through its production of entertainment programs, is in competition with outside suppliers for exhibition on its own network and that [the network] could, at any time, by unilateral decision, pre-empt all the available time on its network."*

The government, having made this accurate observation, should not now be willing to settle for a decree which gives NBC the unrestricted power to make theatrical feature films. Under the decree, NBC could fill one entire evening of prime time per week with an NBC theatrical feature film. Since the number of theatrical features shown on television has decreased, this one motion picture per week could effectively pre-empt independent producers of motion pictures from having their product shown in prime time on the NBC network.

In addition, unless its ability to make theatrical feature films is restricted, NBC will continue to use the threat of internal production to keep the prices it pays outside suppliers at an artificially low level. When ABC and CBS entered into the production of theatrical feature films in the late 1960's, all three networks were able to suppress the price they paid other producers and distributors of motion pictures. Further, the leverage of "if you won't take our price, we'll produce it ourselves" allowed the networks to maintain the price at a level wholly unrelated to soaring costs or the natural laws of a competitive marketplace. All three networks offered the almost identical low price for the exhibition of a non-network produced motion picture. This price remained the same for several years. The producers and distributors of motion pictures had no alternative if they wanted to exhibit their films on television. They were compelled to take what the networks offered.

Allowing NBC to produce its own theatrical feature films injures competition in a variety of other ways. NBC could produce low quality theatrical feature films, expecting that any losses in theatrical exhibition would be recouped by exhibition on its own network. Also, NBC could spend vast amounts of money on a film because its prime time exhibition on NBC is guaranteed. Such expenditures would artificially force up the costs of production to outside suppliers.

* Page 8 of Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims filed January 19, 1976 in United States v. National Broadcasting Company, Inc., 74-3601-RJK, U.S.D.C., C.D., Cal.

The failure of the proposed decree to place any restrictions on NBC's internal production of theatrical feature films demonstrates the ineffectiveness of the so-called "hours limitation" on NBC produced programming. It also reveals that the decree provides no meaningful relief with respect to "long form" programming. For this reason also the proposed judgment should be withdrawn.

The Provisions Of The Proposed Decree With Respect To Network Exclusivity Over Pay Cable Provide No Meaningful Relief

Section VI(E)(iii)(e) of the proposed decree provides that for 15 years, for theatrical feature films which NBC has licensed to show on the NBC network, NBC cannot acquire exclusive exhibition rights against

> "pay or subscription television, via cable or any other means, where a per-program or per-channel charge is made to the viewer, except that NBC may acquire exclusive rights to any such feature film commencing thirty (30) days prior to the first date and extending until the last date on which NBC may broadcast such feature film under the contract between NBC and such supplier, so long as this period of exclusivity between the first and last dates on which NBC may broadcast such feature film under such contract does not exceed twenty-four (24) months, and does not exceed twelve (12) additional months for each exhibition greater than two (2) to which NBC acquires the exhibition rights" (emphasis supplied).

This provision merely codifies NBC's present contract exclusivity rights, which prevent the exhibition on pay cable of theatrical feature films licensed to NBC. The government's Competitive Impact Statement recognized the injustice of this practice by noting that the action against NBC was initiated because

"despite the FCC financial interest and syndication rules, NBC and the other networks continued to exact from producers such rights as ... exclusive use of [theatrical feature films] by NBC as against other communications markets."* Accordingly, NBC should not be permitted to acquire any exclusive rights with regard to pay or subscription television.

Under the proposed decree, NBC's exclusivity over pay cable may begin thirty (30) days prior to the date on which the license agreement permits NBC to broadcast the film. At the very least, any such exclusivity should be limited to begin no earlier than thirty (30) days prior to the scheduled showing of the film.

The decree gives NBC two years of exclusivity over pay cable. Any exclusive rights should terminate thirty (30) days after the film has been shown on the network.

The proposed decree would merely put the court's stamp of approval on NBC's present trade practices in connection with exclusivity over pay cable. This is a further reason for withdrawal of the proposed decree.

---

* Competitive Impact Statement, p.5.

Dated: New York, New York
March 1, 1977

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN,
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United States Senate

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON SEPARATION OF POWERS
(PURSUANT TO S. RES. 72, SEC. 10, 94TH CONGRESS)
WASHINGTON, D.C. 20510

Mr Dodd

March 1, 1977

RECEIVED
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C.L.A.

Donald I. Baker
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Dear Mr. Baker:

My purpose in writing is to file comments pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act on the proposed consent decree in U.S. v. NBC, Civil Action No. 74-3601-RJK, which is pending in the U.S. District Court for the Central District of California.

This proposed consent decree would in part permit NBC to acquire exclusive exhibition rights to feature films against pay cable TV for a 24-month period for two exhibitions, and for twelve additional months for each additional exhibition. NBC would also be entitled to demand exclusivity for 30 days prior to the 24-month period. My comments assume that the department would be willing to settle the companion suits against CBS and ABC on similar terms, at least insofar as exclusivity against pay cable is concerned.

In my judgment, the Department of Justice is making a grave error in granting its imprimatur to the network practice of obtaining exclusivity against pay cable television for the exhibition of feature films. I believe that the position taken by the Antitrust Division in the proposed consent decree is inconsistent with, and contrary to, the department's comments filed with the Federal Communications Commission and the entire thrust of your own testimony before the Senate Antitrust and Monopoly Subcommittee in July of 1975.

In this proposed consent decree, the Department of Justice has completely ignored the existence of the Federal Communications Commission's rules as set forth in the Commission's first Report and Order, Docket No. 19554, adopted March 20, 1975. Those rules may be summarized as follows: a pay cable operator may have access to a feature film for three years after its

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ANTITRUST

theatrical release date. Afther the third year, pay cable may have access only if a network or a boradcaster holds a present contractual right to exhibit the film. 'A pay cable operator may have access to films which are more than 10 years old only if the film has not been exhibited in his market by a broadcaster during the preceeding three-year period. The department seems to have forgotten that it opposed the adoption of these rules in Docket No. 19554. In its original comments the department concluded as follows:

> "... (1) there were insufficient evidence to support a finding that programming restrictions on pay cable were in the public intrest as defined in the Communications Act of 1934, (2) the imposition of onerous programming restrictions upon cable would preclude it from developing into a medium capable of increasing the diversity of this nation's communications system and (3) that the Commission should free pay cable from the various programming restrictions then imposed upon it in order to avail itself of an opportunity to obtain empirical evidence as to whether any type of programming restrictions were, in fact, necessary to protect the public interest."

The subcommittee hearings on the exclusivity provisions of the contracts between the networks and motion picture producers established the following points to my satisfaction: first, to induce sonsumers to subscribe and to become economically viable, cable television needs some programming with mass appeal. Thus, if cable is ever going to compete with the networks and broadcasters, feature films and sports are crucial to its development. Second, the combination of the FCC rules and the contractual arrangements between motion picture producers and the networks has the effect of denying pay cable any reasonable access to feature films until they are at least 10 years old. Practically speaking, pay cable can only license those feature films not available for telecast by the networks, for the limited period between the end of their run in the theaters and before the third year. Third, it is the networks, not the motion picture producers, who insist upon exclusivity during the contract negotiations. During the hearings, the motion picture producers testified they would prefer to license the exhibition of feature films sequentially to all three mediums: first, the theaters, then pay cable, and finally, commercial television. Fourth, the networks are able to insist upon exclusivity because of the same monopoly power in the prime-time television market of which the department complains. Indeed, paragraph 16 of the Justice Department complaint against NBC alleges that the defendant "has

monopolized the trade and commerce in the television entertainment programs exhibited on the NBC television network during prime-time evening hours." In effect, the networks use their monopoly power in advertiser-subscribed, over-the-air television to suppress the development of a competing technology, namely pay cable. The Department of Justice chastised the FCC on precisely these grounds in Docket No. 19554.

> ... Rather than protecting one form of communication against another, the proper role of the Commission is to allow each method of communications an opportunity to develop in a manner which will meet diversified needs of the American public.

Now, the Department proposes to become a formal party to a dual set of restraints.

The terms of the proposed consent decree will permit NBC to super-impose the private restraints complained of during the hearings on top of those already mandated by the FCC. NBC will be able to bar pay cable from showing any feature film for 10 years simply by purchasing the rights to exhibit it for the three-year period after the date of theatrical release. After the first three years, the FCC rule comes into play and pay cable will be precluded from licensing that film for the next seven. In a similar fashion pay cable will be banned from exhibiting all films which are between three and 10 years old. Those films will be denied to pay cable either by the FCC rule or by private contract. The Department of Justice by this consent decree, proposes to sanctify an arrangement whereby NBC and presumably the other networks can completely stifle the potential development of a competing medium.

The proposed consent decree should contain language expressly prohibiting NBC from purchasing the rights to exhibit feature films on terms which exclude pay cable as long as the FCC rules are in effect. The networks and the broadcasters should not be able to supplement the FCC's public restraints with private restraints of their own. It is clear the FCC did not envision these private, contractual restraints being imposed when it promulgated its rules for films between three and 10 years old:

> "The second situation in which a feature film will be available for subscription use is when the film is available for telecast by a conventional broadcast station located in the market of the subscription station or cable system. When a film becomes available for conventional television exhibition the issue of program siphoning disappears, as does the need for anti-siphoning restrictions. In such a situation, the public interest

> in receiving a film over conventional television has been realized and there is no longer any justification for restricting the exhibition of the film by subscription television. Since the public is able to view the film over conventional television at no charge, those who choose to pay a special fee to view the film over subscription television should not be prevented from doing so by our rules."

Even if there were no FCC rules, the exclusivity proposed in the proposed consent decree is unduly restrictive. In the absence of any rules, exclusivity for a period of 90 days prior to the play date would be sufficient to protect the value of the exhibition right which the network has purchased. In order to give NBC scheduling flexibility, language could be included permitting the network to extend the exclusivity period for an additional 90 days if the play date had to be changed. These provisions would be reasonable if there were no FCC rules. However, since we have the rules, and since NBC and the other networks benefit by their existence, they should have to live with them. In sum, no private exclusivity should be permitted. In the event NBC and other networks will not agree to these terms, the cases should be litigated to their conclusion.

Respectfully submitted,

James Abourezk
United States Senator

to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which that defendant is not a party.

IX

[Retention of Jurisdiction]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification of any of the provisions thereof and for the enforcement of compliance therewith and for the punishment of any violation thereof

X

Entry of this Final Judgment is in the public interest

Proposed Consent Decree

[¶ 50,292]

United States v National Broadcasting Co , Inc

U. S District Court, Central District of California. Civil Action No 74-3601-RJK. Filed, but not entered, November 17, 1976

Case No 2424, Antitrust Division, Department of Justice.

For plaintiff: Donald I Baker, Asst Atty Gen , William E. Swope, Charles F. B McAleer, Bernard M Hollander, Barry J. Kaplan, Bernard J O'Reilly, George W. Selby, Kevin R. Sullivan, and Polly L Frenkel, Attys., Dept of Justice For defendant: Bernard G Segal, Jerome J Shestack, and Peter S Greenberg, of Schnader, Harrison, Segal & Lewis, Corydon B Dunham, Vice Pres , National Broadcasting Co , Inc

Proposed Final Judgment

[Proposed final judgment] : Plaintiff, United States of America, having filed its complaint herein on December 10, 1974, and defendant, National Broadcasting Company, Inc , having filed its answer herein on December 30, 1974, by their respective attorneys, each having consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding;

Now, Therefore, before any testimony has been taken, the Court being advised and having considered the matter, it is hereby:

Ordered, Adjudged and Decreed as follows:

I

[Jurisdiction]

This Court has jurisdiction of the subject matter of this action and of the parties hereto The complaint states a claim upon which relief may be granted against defendant under the provisions of Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U. S C. §§ 1 2, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act.

II

[Definitions]

As used in this Final Judgment:

(A) "Person" means an individual, partnership, corporation or any other form of legal or business entity

(B) "NBC" means the National Broadcasting Company, Inc and its subsidiaries

(C) A "person controlling NBC" means any person owning at least ten percent (10%) of, or a controlling share of, the outstanding voting stock of NBC.

(D) "NBC Television Network" means an NBC owned or operated business which provides television programs and related advertising messages to affiliated television broadcast stations

(E) 'Entertainment Program" means any program, including a feature film, exhibited or intended to be exhibited on television other than the following programs: news, public affairs, agricultural, religious, instructional, and sports (as those terms are defined in Appendix A to this Final Judgment). The inclusion of incidental or occasional entertainment or non-entertainment elements in a program or program series shall not be deemed to change the classification of the program or program series.

(F) "Independent Program Supplier" means a person who produces or offers one or more entertainment programs for network exhibition, other than NBC, a person controlling NBC, or a person in which NBC or a person controlling NBC has an ownership interest

(G) "Network Exhibition" means the initial and repeat exhibitions of a television program on the NBC television network during the term of any agreement between NBC and an independent program supplier for such exhibition of such program

(H) "Prime Time Hours" means the hours from 6:00 p. m. to 11:00 p. m. in the Eastern and Pacific Time Zones of the United States, and the hours from 5:00 p. m. to 10:00 p. m in the Central and Mountain Time Zones of the United States

(I) "Daytime Hours" means the hours from 9:00 a. m. to 6:00 p. m in the Eastern and Pacific Time Zones of the United States, and the hours from 9:00 a. m to 5:00 p m. in the Central and Mountain Time Zones of the United States

(J) "Fringe Hours" means the hours from 11:00 p m. to 2:00 a. m and 6:00 a. m. to 9:00 a. m in the Eastern and Pacific Time Zones of the United States, and the hours from 10:00 p m to 1:00 a. m. and 6:00 a. m to 9:00 a m. in the Central and Mountain Time Zones of the United States

(K) "Television Broadcast Station" means a station licensed as a television broadcast station by the Federal Communications Commission

(L) "NBC Production Facilities" means studio facilities, including but not limited to, scenery, props and other production equipment, which are used for the production of entertainment programs exhibited or intended to be exhibited on television, and which are owned or leased by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

(M) "Stripping" means the broadcasting of more than one (1) episode per week of a television program series

(N) "Broadcast Year" means the television broadcast year customarily commencing in September of one year and continuing until September of the following year.

III

[Applicability]

The provisions of this Final Judgment are applicable to NBC, to any person controlling NBC and to each of NBC's directors, officers, agents, employees, subsidiaries, successors, and assigns, and to all persons in active concert or participation with any of them, who receive actual notice of this Final Judgment by personal service or otherwise

IV

[Independent Productions]

NBC is enjoined and restrained from:

(A) Acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by an independent program supplier, other than the right to the Network Exhibition of the program, except as provided in Sections VIII(A)-(D) of this Final Judgment, *provided that* an agreement granting NBC the right to Network Exhibition may include provisions concerning subject matters incident to the licensing and use of network programs, of which the following are examples: geographic scope and manner of transmission and delivery of network broadcasts; approval of creative elements and program content; technical quality and delivery requirements; union and Equal Employment Opportunity Act compliance; act of God; force majeure; preemptions; obligation to pay for, rather than play, programs; number of episodes or programs ordered; assignability; warranties; indemnification; completion bonds; security agreements and financing statements; insurance; public morals; advertising conflicts; advertising, promotion and publicity of programs; audience testing and screening; cancellation; exclusivity for talent and creative personnel; exclusive exhibition rights (except as limited by Sections VI(E)(ii)-(iii) herein); pilots (except as limited by Section VI(F) herein); options (except as limited by Sections VI(E)(i); VI(F) and VI(G) herein); first negotiation and first refusal rights (except as limited by Sections VI(E)(i) and VI(G) herein); spin-offs (except as limited by Section VI(G) herein); repeats (except as limited by Section VI(H) herein); same day protection against once weekly syndication programs and theatrical feature films; title protection for the length of the applicable contract or conracts; format and continuing character protection; breach; and remedies, so long as any such provision does not violate the antitrust laws

(B) Selling, licensing, or distributing entertainment programs to television broadcast stations for non-network television exhibition (or otherwise engaging in the business

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commonly known as "syndication"), or to foreign television stations or networks, except as provided in Section VIII(D) of this Final Judgment

V

[*Network Productions*]

(A) NBC is enjoined and restrained for a period of ten (10) years from the effective date of this Section from offering for NBC network broadcast during Prime Time Hours, Daytime Hours or Fringe Hours, more than two and one half (2½) hours per week in Prime Time Hours, more than eight (8) hours per week in Daytime Hours, and more than eleven (11) hours per week in Fringe Hours, determined on the average per compliance period, of entertainment programs obtained from sources other than independent program suppliers, *provided that* during each compliance period NBC may add to the total number of allowable hours of entertainment programming from sources other than independent program suppliers, two (2) non regularly scheduled special programs, and *provided further that* in any compliance period, NBC may, during Fringe Hours, increase the number of allowable hours of entertainment programming from sources other than independent program suppliers by reducing to the same extent the number of allowable hours of such programming in Prime Time Hours and/or Daytime Hours

(B) For purposes of this Section V, compliance periods shall be consecutive semi annual periods commencing at the start of each broadcast year. Compliance reports in the form set forth in Appendix B to this Final Judgment shall be submitted by NBC to plaintiff within thirty (30) days following the conclusion of each compliance period.

VI

[*Conditions; Acquisitions*]

NBC is enjoined and restrained:

(A) From purchasing or offering to purchase from an independent program supplier the right to Network Exhibition of one or more entertainment programs upon the condition, express or implied, that NBC, or any person controlling NBC, will obtain any other right or interest from said supplier, except as to contractual provisions concerning subject matters incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(B) For a period of fifteen (15) years from the effective date of this Section, from purchasing or offering to purchase from an independent program supplier any right to the exhibition of a program, other than a live program, as an NBC television network entertainment program upon the condition, express or implied, that said supplier produce the program, in whole or in part, utilizing NBC production facilities

(C) For a period of fifteen (15) years from the effective date of this Section, from agreeing with an independent program supplier that said supplier use NBC production facilities to produce a program, other than a live program, as an NBC television network entertainment program for a period in excess of the time required to produce episodes for one (1) broadcast year, *provided that* NBC and said supplier are not precluded each year from negotiating and contracting for additional periods not to exceed one (1) year each

(D) For a period of ten (10) years from the effective date of this Section, from purchasing or offering to purchase from CBS Inc. ("CBS") or American Broadcasting Companies, Inc. ("ABC") any right to Network Exhibition of any entertainment program upon the condition, express or implied, that CBS or ABC agrees to purchase or offers to purchase a right to network exhibition of any entertainment program produced or controlled by NBC.

(E) For a period of fifteen (15) years from the effective date of this Section, from:

(i) Acquiring from an independent program supplier options for Network Exhibition of a prime time network entertainment program series exercisable for a period in excess of four (4) years from the date of first broadcast of an episode of such program as part of an NBC prime time television network entertainment program series, and the balance of any broadcast year in which such four (4) year period ends, *provided that* nothing herein shall prevent NBC, after the date of first broadcast, from negotiating new provisions which may include the purchase of an extension of the option period to five (5) years from the date of first broadcast, and the balance of any broadcast year in which such five (5) year period ends, and, at the end or during the final year of any contract term, from negotiating for and entering into new agreements with said supplier so long as the options acquired under any such new agreements do not exceed a period of four (4) years from the date of first broadcast of an episode under such new agreements, and the balance of any broadcast year in which such four (4) year period ends, plus the right to negotiate for and acquire a fifth option year, and *provided further that* nothing herein shall prevent NBC from acquiring first negotiation and first refusal rights for new agreements with said supplier so long as any such first refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms, and *provided further that* nothing herein shall prevent NBC from entering into contractual provisions incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment

(ii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition, in excess of the following:

(a) for prime time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition;

(b) for non prime time stripping on television broadcast stations, four (4) years from the first prime time episode broadcast; and

(c) for all other broadcast uses, three (3) years from the first prime time episode broadcast,

provided that nothing herein shall prevent NBC from negotiating for and acquiring rights, including exclusive rights, for stripping and once weekly exhibition to be utilized after the periods of exclusivity set forth above, so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series, and *provided further that* nothing herein shall prevent NBC from acquiring exclusive exhibition rights to series episodes for the broadcast year for which such episodes are ordered.

(iii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for theatrical feature films for which NBC has a contractual right to Network Exhibition, against:

(a) theatrical and non theatrical direct projection,

(b) closed circuit TV in non residential hotels, motels, bars, restaurants, hospitals and similar non residential institutions;

(c) passenger carrying vehicles;

(d) video discs, cartridges or cassettes or other such equipment;

(e) pay or subscription television, via cable or any other means, where a per program or per channel charge is made to the viewer, except that NBC may acquire exclusive rights to any such feature film commencing thirty (30) days prior to the first date and extending until the last date on which NBC may broadcast such feature film under the contract between NBC and such supplier, so long as this period of exclusivity between the first and last dates on which NBC may broadcast such feature film under such contract does not exceed twenty four (24) months, and does not exceed twelve (12) additional months for each exhibition greater than two (2) to which NBC acquires the exhibition rights

(F) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier a first year pick up option for exhibition of a prime time network entertainment program series based on a program designated by NBC and said supplier as a "pilot program" ("pilot") which is exercisable after the following times:

(i) where NBC has not advanced said supplier any part of the costs of pilot development, subsequent to the earliest date that the agreement contemplates that broadcast of the series may commence; and

(ii) where NBC has advanced said supplier any part of the costs of pilot development, more than one (1) year after delivery to NBC of the completed pilot, *provided that* as to those series which NBC does not include in the network schedule at the earliest date that the agreement contemplates that broadcast of the series may commence:

(a) for those pilots which have been delivered to NBC between October 2 of one year and April 1 of the following year, NBC must designate by July 1 of the latter year sixty five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots; and

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(b) for those pilots which have been delivered to NBC between April 2 and October 1 of the same year, NBC must designate by January 1 of the following year sixty five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots;

and *provided further that* NBC may purchase additional first year pick-up options for series which NBC has not designated for release and for series which NBC has designated for option release but which NBC wishes to retain, so long as such additional options are acquired, for pilots described in Section VI(F)(ii)(a), after June 1, or after the announcement of the NBC television network schedule for the next broadcast year, whichever is later, and, for pilots described in Section VI(F)(ii)(b), after December 1, and so long as such additional options do not exceed increments of six (6) months

For purposes of this Section (VI)F:

A pilot shall be deemed to have been delivered to NBC when NBC has received, in the case of a film pilot, an answer print, and, in the case of a tape pilot, a program complying with customary tape requirements

In computing the number of pilots to be released under Sections VI(F)(ii)(a) and (b), any fraction of a pilot shall be rounded off to the next lower whole number

Unrecouped costs shall be deemed to be the amount of money advanced by NBC to an independent program supplier for the development of a pilot, except that if the NBC television network broadcasts a pilot once, two-thirds (⅔) of NBC's costs shall be deemed to have been recouped, and if NBC broadcasts a pilot more than once, all of NBC's costs shall be deemed to have been recouped

(G) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier rights in excess of first negotiation and first refusal rights for a spinoff involving a non-continuing character.

For purposes of this Section VI(G):

First refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms.

A non continuing character shall be deemed to mean one who appeared in no more than twenty-five percent (25%) of the original episodes of the program upon which such spinoff is based during the twelve (12) months prior to the time exhibition rights to such spinoff are offered for licensing by said supplier.

(H) For a period of ten (10) years from the effective date of this Section, from purchasing from an independent program supplier a right to first run Network Exhibition of any television entertainment program series which includes the right to exhibit repeats of episodes in years subsequent to the broadcast year of initial exhibition of such episodes, *provided that* repeat rights to three (3) initial episodes per broadcast year of each such program series may be purchased for exhibition in subsequent broadcast years as part of the right to Network Exhibition, and *provided further that* additional rights to repeats may be purchased for exhibition in subsequent broadcast years, so long as negotiation for and acquisition of such additional repeat rights takes place after NBC has agreed to order episodes of such program series for the first year of broadcast as an NBC television network entertainment program series, and *provided further that* the limitation as to the use of repeats contained in this Section VI(H) shall not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs

VII

[*Other Networks*]

The following Sections of this Final Judgment shall not take effect until similar injunctive relief is obtained in Final Orders, Judgments or Decrees entered against CBS in *United States v. CBS Inc.*, Civil Action No. 74-3599-RJK (C D Cal), and against ABC in *United States v. American Broadcasting Companies, Inc.*, Civil Action No 74-3600-RJK (C D. Cal) which are not appealable or from which no timely appeal is taken: V, VI(C), VI(E)(i), and VI(F) through (H)

VIII

[*Permitted Transactions*]

Nothing contained in this Final Judgment shall be construed:

(A) To prohibit NBC from acquiring rights for non-network broadcast of programs by NBC owned and operated television broadcast stations where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights including renewal rights, for the exhibition, distribution or use of any

program as an NBC television network program

(B) To prohibit NBC from seeking repayment, in whole or in part, of money or other consideration loaned, advanced or furnished by NBC in connection with the development or production of a television network program or of a project or activity that may result in a television network program, to the extent of the amount loaned, advanced or furnished, including interest

(C) To prohibit NBC from acquiring rights with respect to non-broadcast uses, including but not limited to publication of books or music, where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program

(D) To prohibit NBC from selling, licensing, or distributing outside the United States programs (i) produced in foreign countries and not included in NBC's television network schedule, where the acquisition of such distribution rights is not conditioned, directly or indirectly, upon the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program, or (ii) produced by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

IX

[*Modification*]

If a Final Order, Judgment or Decree is entered with respect to CBS in *United States v. CBS Inc.*, Civil Action No. 74-3599 RJK (C D. Cal), or with respect to ABC in *United States v. American Broadcasting Companies, Inc.*, Civil Action No 74-3600-RJK (C D Cal), which is not appealable or from which no timely appeal is taken, which shall order or decree for either CBS or ABC injunctions different in terms or provisions than those required by this Final Judgment, or which shall result in the dismissal of either or both of such actions, NBC may apply to the Court and shall be granted a modification of or relief from any terms set forth herein as may be necessary to prevent NBC from being placed at a competitive disadvantage with respect to CBS or ABC.

X.

[*Notice*]

(A) Within thirty (30) days after the entry of this Final Judgment, NBC shall furnish to its officers, directors, and appropriate employees and agents a copy of this Final Judgment, and each year for a period of ten (10) years thereafter NBC shall furnish a copy to all new officers, directors and appropriate employees and agents NBC shall maintain a file listing all persons to whom it has furnished such copies.

(B) Within thirty (30) days after entry of this Final Judgment and once each year during the succeeding ten (10) calendar years following entry of this Final Judgment, NBC shall send a copy of this Final Judgment to the last known address of each independent program supplier known to have offered any entertainment program to NBC for inclusion in its schedule of NBC television network programs within the preceding five (5) years and to each person listed in the then current issue of Television Factbook as a provider of television production facilities

XI

[*Inspection*]

(A) For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and on reasonable notice to NBC made to its principal office, shall be permitted, subject to any legally recognized privilege:

(1) access during the office hours of NBC to all books ledgers accounts, correspondence, memoranda, and other records and documents in the possession or under the control of NBC relating to any matter contained in this Final Judgment; and

(2) subject to the reasonable convenience of NBC and without restraint or interference by it, the right to interview officers or employees of NBC, who may have counsel present, regarding any such matter

(B) NBC, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided in this Section XI shall be divulged by any representative of plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal

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proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment or as otherwise required by law

XII.

[Retention of Jurisdiction]

Jurisdiction is retained by this Court for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIII

[Public Interest]

Entry of this Final Judgment is in the public interest

Antitrust Immunity—State Action

[¶ 50,293]

The "practical message" of four recent U. S Supreme Court decisions in the area of "state action" antitrust immunity was outlined recently by Donald I. Baker, chief of the Antitrust Division He discussed *Cantor, Goldfarb, Virginia Pharmacy* (not reported in TRADE REGULATION REPORTS) *Gibson v Berryhill*, 411 U S 564 (1973). According to Mr. Baker:

[Partial Text (Footnotes omitted)]

"First, the *command* of the *state as sovereign* provides an antitrust exemption for those private activities which have been commanded

"Secondly, *formal approval* of private conduct by the state as sovereign may or may not be tantamount to a state command. However, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' This is essentially a fact question depending on the state's role in bringing about the restraint, its interest in it and the nature of its action, or, as the Court said in *Cantor*, whether 'the State's participation in a decision is *so dominant* that it would be unfair to hold a private party responsible for his conduct in implementing it.'

"Third, what qualifies as the 'state as sovereign' is also a fact question Clearly the Legislature, the Judiciary or the Executive exercising these functions entrusted to them by the state constitution are the 'state as sovereign' On the other hand 'a state agency for some limited purposes,' to borrow a phrase from *Goldfarb*, may not be the sovereign state for other purposes, either because it is acting beyond its necessary duty or because its decisionmakers have a private pecuniary interest in the outcome Where a private group is 'masquerading under the banner of state action' no antitrust exemption will be available for anyone.

"Fourth, state *delegation* of power to a private person or group, i e, a nonsovereign, does not itself provide such a defendant with an antitrust exemption when that power is used to restrain competition Such delegation not only raises antitrust problems, it may also be subject to the due process infirmities of the delegation struck down in *Gibson v. Berryhill*

"Finally, informal state encouragement of a private restraint does not provide an antitrust exemption That goes all the way back to *United States v. Socony Vacuum Oil Co* 'Virtual volunteers' may not be given the power to take 'state action' However, while all this seems to me to be reasonably clear, it does not answer some really hard fact questions in individual cases.

"Two types of situations that are likely to occur in some normal business arrangements particularly need discussion One involves classic public utility regulation in which action typically is proposed by a private party and is approved, perhaps with modification, by the state utility commission. As the Supreme Court indicated in *Cantor*, this is truly 'a blend of private and public decisionmaking' The second situation involves self regulation by a professional or trade body delegated some authority by the state. Pharmacy boards and real estate licensing boards are well known examples of this category. Lesser known examples include self regulatory boards for barbers, cleaners, contractors, cosmetologists, employment agencies, furniture and bedding manufacturers, structural pest control operators and funeral directors.

"The two situations have similarities and differences. A state utility commission is normally what I would call an *independent state regulator* It is made up of salaried, full time officials, normally appointed by the Governor Such officials are barred from having any outside interests To the extent that such an independent regulatory board is acting within its mandate in promulgating regulations necessary to make a regulatory statute work, it normally qualifies as 'the state as sovereign' and its officers are thus immune from antitrust suit The basic questions in these cases include whether the state has been so much the moving or dominant force in bringing about the challenged restraint, and whether the restraint is central to the state's mission in the area

"The second situation involves what is essentially a *self regulator*. Here the organizational board is normally appointed from members of the industry or profession being regulated or is even elected by them. Their compensation is often nominal at best, and they generally continue to practice in the regulated field while serving on the board Sometimes their decisions require ratification by a vote of the very group being regulated Typical examples of such self regulatory groups would be the Alabama Optometry Board in *Gibson v. Berryhill* and the Agricultural Prorate Commission in *Parker v Brown*

"The most difficult cases will frequently involve *approvals* by independent regulatory commissions and *commands* by self-regulatory bodies These situations present the most opportunity for private initiative and action which is not in fact within the scope of what is necessary to the regulatory scheme as legislated by the state as *sovereign*. An agency's rubber-stamp approval of restrictive activities proposed and executed by private persons or companies does not relieve the private entities of responsibility for the consequences of their activities. Nor may an 'interested' self regulatory group assume that it has a roving mandate to command its members to engage in activities which profit the profession to the detriment of consumers, competitors, and the economy The tremendous inherent—and often invisible—opportunity to use a self regulatory mechanism to serve the members' interests at the expense of the public may well mean that no self regulatory group can be sufficiently unbiased to satisfy the requirements of both *Cantor* and *Gibson v. Berryhill* where it chooses to restrain competition.

"We must look at these issues in a broader perspective. Our economy is one which is based primarily on individual effort and entrepreneurial risk taking It is characterized by a mixture of private and public decisionmaking in which antitrust and direct regulation serve related *public interest* goals The Supreme Court made this quite clear in *Philadelphia National Bank* where it emphasized that the fact that an industry, such as banking, was highly regulated 'makes the play of competition not less important but more so.' It has long been recognized that the basic goal of regulation and the basic goal of the antitrust laws is the same—'to achieve the most efficient allocation of resources possible,' and that '[i]ndustries have been more progressive when the agencies have endeavored to confine regulation to a necessary minimum and have otherwise fostered competition.' *Cantor* and earlier cases indicate that the courts are going to be concerned about the application of antitrust principles to regulated sectors of the economy—which can be unpalatable to those regulated because antitrust mandated markets do interfere with the highly paternalistic *private interest* arrangements often fostered under the cover of regulation *Cantor* makes clear that courts are going to look behind the catchwords 'state action' to see whether the sovereign state is truly there or whether private interests are there attempting to cloak themselves in the state's sovereignty. This is good. It gives me hope that the third century of the Republic will see more economic liberty—more 'public interest competition'—and less protective 'special interest regulation.'"

Mr. Baker's remarks were prepared for delivery before the Council of American Bar Association Public Utility Law Section in White Sulphur Springs, West Virginia, on October 28, 1976. See ¶ 62042.

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NATIONAL CABLE TELEVISION ASSOCIATION

Office of The General Counsel

March 1, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D. C. 20530

Re: Comments of the National Cable Television Association, Inc., on the Proposed Consent Decree in United States v. National Broadcasting Co., Inc., Civil Action No. 74-3601-RJK, U.S.D.C., C.D. Cal.

Dear Mr. Hollander:

The attached comments are filed on behalf of the National Cable Television Association, Inc., the principal national trade association for the cable television industry. They are filed in connection with the proposed Consent Decree in the above-referenced litigation and pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act. NCTA urges the Department of Justice to withdraw its consent to the proposed decree.

NCTA's objection to the decree is directed to that portion which relates to the amount of contractual exclusivity which NBC is permitted to obtain against pay cable. As spelled out in our comments, this provision does no more than approve existing practices which are demonstrably anti-competitive in intent, and when taken together with the FCC's anti-siphoning rules, are certainly anti-competitive in effect. In addition, the distinction made between pay cable and other methods of exhibiting pay programming is not logical and is potentially harmful.

continued. . . . . .

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NCTA continues to feel that no exclusivity is warranted and that the Department of Justice should continue to pursue this litigation unless a sharply circumscribed agreement can be reached with NBC. The network simply cannot justify more than a short pre-telecast date period of protection.

We would be glad to provide further information and/or meet with you at any time prior to the final decision in this matter.

Sincerely,

Stuart Feldstein

Stuart F. Feldstein
Vice President/General Counsel

SFF/ag
Enclosure

Before the

DEPARTMENT OF JUSTICE

Washington, D.C.

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION TO THE PROPOSED CONSENT DECREE IN UNITED STATES v. NATIONAL BROADCASTING CO.

These comments are submitted by the National Cable Television Association, Inc., (NCTA), in connection with the proposed Consent Decree filed in United States v. National Broadcasting Company, Inc., Civil Action No. 74-3601-RJK, on November 17, 1976 in the U. S. District Court for the Central District of California. These comments are filed pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16(d).

NCTA is the principal national trade association for the cable television industry. It represents cable television operators, purveyors of programming, manufacturers and suppliers of equipment and others providing services to the industry. As such, our interest in the proposed Consent Decree is immediate and direct. NCTA strongly urges the

Department of Justice to withdraw its consent to the proposed Decree.

Our specific objection to the Decree arises from the provision dealing with pay cable television which is incorporated in Section VI (E) (iii) (e). In short, this provision does not alter present anti-competitive practices by NBC; it places an imprimatur on existing practices; and, taken together with the surrounding provisions, it discriminates against pay programming via cable vis-a-vis other delivery methods.

I. BACKGROUND

At the present time there are approximately 3,500 CATV systems serving in excess of 12,000,000 television homes. These systems are located in every state of the union. The 12,000,000 subscribing homes represent about 15% of the nation's 72,000,000 television homes. Of this number there are presently about 1,000,000 cable subscribers who also have opted to receive a supplementary pay service. Pay cable is a supplementary service available to subscribers to the basic CATV service for an additional monthly or per program fee. It consists of feature films, sports events and other special programming presented in a format

uninterrupted by commercials. The non-live programming is usually repeated a number of times so as to afford subscribers more than one opportunity to view the program. Feature films are the bread and butter of this service. The quality and quantity of this product made available on a timely basis is absolutely crucial to the viability of pay cable. 1/

Feature films are shown first in movie theaters. It is there that their critical reputation is established and thus their commercial value is set. It is immediately after the theatrical run that this product has the most value to pay cable. Virtually all English-language product except for X-rated films are then purchased for later network display. Thus, the logical time sequence is theater-pay cable-network for new films. Older films may be recycled through some or all of these phases in no particular order. The networks have tried to intrude on this process, however. Although feature films play a declining role in the networks' programming, 2/ they have perceived it to be in their interest to attempt to deny films to pay cable.

1/ Only about 100 films are released annually by the American movie industry. Many other films are made by and for the networks themselves (perhaps 50% of the films shown). These films, of course, rarely run in the theaters and are never sold to pay cable.

2/ Illustrative of the networks' lessening reliance on feature films is a Variety story of May 7, 1975, reporting that " all three [networks] slice movie nights."

This has been done in two principal ways, contractual exclusivity provisions and successful lobbying for restrictive FCC regulations. Taken together, the effect of these actions has made it extremely difficult for the pay cable industry to obtain what limited product is available on a timely basis.

II. THE NETWORKS HAVE AN EFFECTIVE STRANGLEHOLD ON PAY CABLE

The networks have effectively created and maintained controls over the growth of pay cable in two distinct but interrelated developments. The first method was to lobby for the establishment and maintainance of the FCC's "anti-siphoning" rules. These rules were first instituted in 1971 and were revisited by the Commission in 1975. 3/ All three major networks engaged in significant attempts to have the most restrictive rules possible imposed on pay cable. This was made obvious in a number of ways in addition to the filing of strong comments. 4/ Without any question the networks have looked upon the FCC's rulemaking processes as a forum for the accomplishment of their anti-competitive goals.

3/ See First Report and Order in Docket 19554, 52 F.C.C. 2d 1 (1975).

4/ See, e.g., Television Digest, March 4, 1974, pp. 1-2, where it was reported that then-Chairman Dean Burch was subjected to Senatorial pressure "prompted by Hill visit by [ABC executives] whose only goal was to put halter on relaxation of pay cable rules."

The present FCC rules as they apply to feature films on pay cable testify to the success which the networks have enjoyed at the FCC. 5/ Films which are less than three years old can be purchased for exhibition on pay cable (but, of course, only if a network has not succeeded in obtaining exclusivity). Films between the age of three to ten years old are also available to pay cable but only if the film is under contract and available for exhibition to a network or a television station in the particular market. (Again, exclusivity makes this provision meaningless.) Films which are older than ten years can also be shown on pay cable under the same circumstances as the three to ten year old films or if the film has not been shown on commercial television in the market for three years. Foreign language films are excluded from these restrictions.

The networks have compounded the restrictive effect of these rules by purchasing substantial contractual exclusivity against pay cable. Film suppliers do not make films available to anyone until the theatrical run is complete. The better product runs in the theaters for between 12 and 24 months and "blockbuster" films run in the theaters for periods

5/ 47 CFR 76.225. These rules are presently under challenge in the United States Court of Appeals for the District of Columbia, Home Box Office, Inc. v. F.C.C., No. 75-1280 et al.

sometimes exceeding three years. This makes the time for pay cable exhibition of a film in the zero to three year period a very narrow time frame. Networks often come in immediately after the theatrical run and purchase the rights to exhibit films at a later date. The exclusivity which is obtained may begin on the date of the contract signing, thus barring any pay cable exhibition. The effect of this practice is to preclude any pay cable access to these feature films far in advance of the first telecast of the film. The duration of such exclusivity is generally extended through the expiration of a lengthy broadcast period which may be two to four years or more. Depending upon the length of the theatrical run, a pay cable entrepreneur may find himself faced with no access period during the first three years because a network has contracted for exclusive rights to a film, or if pay cable exhibition rights had already been obtained, films can be pulled back by suppliers because of the signing of a subsequent network contract. To recapitulate, network exclusivity sometimes has the effect of cutting pay cable access to a film during the first three years of its life to either a very limited time period or no time at all.

And, of course, once a film is three years old, the

Commission's rules, together with exclusivity practices, create a "Catch-22" situation. In order for a film to be permitted to be shown on pay cable it must be under contract to a television station in the market, and the existence of contractual exclusivity completely closes off this possibility. Indeed, to our knowledge, there has not been one film made available to pay cable under this provision of the FCC's rules, so thoroughly does the practice of exclusivity permeate the market place. Likewise, in the post-ten year period, all of the most attractive films are tied up by exclusive contracts.

Thus network exclusivity obtained against pay cable is itself an anti-competitive practice which unreasonably restricts trade. Taken together with the FCC's rules, exclusivity completes an all but impenetrable web around the pay cable industry.

III. PRESENT LEVELS OF CONTRACTUAL EXCLUSIVITY ARE CLEARLY UNREASONABLE

The contractual exclusivity which networks obtain against pay cable is patently unreasonable. It is not needed by either the networks or the film suppliers, thus the intent is anti-competitive.

The initial question to be asked is whether the network practices restrict the presentation of alternative programming.

Pay cable is obviously such an alternative mode of delivery. It presents the opportunity to view feature films in the home for a fee in their unedited version, uninterrupted by commercials and at a time convenient to the subscriber. The only thing pay cable has in common with network exhibition is the use of the home television set. Exclusivity imposed against such exhibition by an industry which presents its programming in a commercial format free of direct charge is unreasonable. Exclusivity is obtained against pay cable despite the fact that no real competition is presently possible. Thus exclusivity is obtained by the networks solely for predatory reasons and, as demonstrated above, exclusivity against pay cable works with the FCC's rules to practically preclude even the minimal access to feature films permitted by those rules.

Furthermore, in our opinion, the networks' exclusivity practices are in violation of the antitrust laws. Restraints ancillary to the transfer of property rights are legal only if they are reasonably necessary to protect the purchaser of the property in the enjoyment of the purchase. 6/ This antitrust doctrine was extended to the licensing of feature

6/ United States v. Addyston Pipe and Steel, 85 Fed. 271, 282 (6th Cir. 1898), affd. 175 U.S. 211 (1899).

films in United States v. Paramount Pictures.7/ It has also been applied to television program contracts.8/

The applicable test for determining the reasonableness of the anti-pay cable exclusivity provisions is set forth in the Paramount opinion. This case was the culmination of several antitrust cases which examined the several methods used to suppress theater competition.9/ The sum and substance of these decisions was a finding that film licensing provisions were illegal when geared to the anti-competitive requirements of exhibitors instead of the revenue requirements of distributors. The Court in Paramount, for example, held that clearances are reasonable only "when not unduly extended in area or duration" and conversely are unreasonable if "in excess of what is reasonably necessary to protect the license in the run granted".10/

These cases establish two propositions that have

7/ 66 F. Supp. 323, 70 F. Supp. 53 (S.D.N.Y. 1946), reversed and remanded in part, 334 U.S. 131 (1948); 85 F. Supp. 881 (S.D.N.Y. 1949), affirmed, 339 U.S. 974 (1950).
8/ United States v. Loew's, Inc., 371 U.S. 11 (1962).
9/ Interstate Circuit v. United States, 306 U.S. 208 (1939); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Schine Theatres v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948).
10/ 334 U.S. 131, 145, 147.

specific applicability to the contractual exclusivity at issue in this litigation. First, protection cannot be obtained by a network licensee against another entity not in substantial competition with the network. Second, any exclusivity provisions must reflect the revenue needs of the copyright owners, not the anti-competitive designs of the networks. Application of these "rule of reason" tests against the various exclusivity provisions used by NBC and the other networks to restrict pay cable exhibition must result in a conclusion that they are unreasonable.

A. Pay Cable is Not in Substantial Competition with Network Television

Applying the first Paramount test, pay cable and the networks are not in substantial competition so as to justify the contractual exclusivity obtained by the networks. In the commercial television marketplace program costs (and profits) are paid by advertisers. Networks compete among themselves for this revenue. Pay cable does not compete with the networks for these dollars, rather it seeks its revenue directly from the subscribing consumer. Networks sell programs to advertisers based on the potential of reaching over 70 million television homes. Attractive feature films help make this mass circulation of the advertiser's message possible. Pay cable presently reaches

about 1,000,000 homes. No advertising is permitted and the commercial value of the service is obviously not based on a mass appeal to a large audience. Pay cable thus represents about 1% of a network's potential audience. Even the rapid growth of pay cable will not detract from the value of a feature film to a network. Indeed, the absolute growth in television households has been greater than the growth of pay cable subscribers.11/

It is inconceivable that pay cable exhibition will result in any loss of revenue to the networks in the foreseeable future. Any adverse affect must be presumed to flow from a decline in viewing levels caused by pay cable exhibition. But there is no evidence of this happening. Even assuming some small relative decline in viewing audience, this has been more than offset by higher prices being paid by advertisers and the growth of television homes.

Furthermore, the networks' theory, that if pay cable subscribers view a film on pay cable that film will be less

11/ According to American Research Bureau statistics, television households have been increasing by more than 1,000,000 per year for the past several years. Thus, there were 68,770,000 as of January 1, 1975, 70,550,000 as of January 1, 1976, and an estimated 72,000,000 as of January 1, 1977.

attractive to the networks, is simply untenable. It is at least equally likely that pay cable exhibition will have a positive impact on network viewing of feature films. Just as a long and successful theatrical run enhances the popularity of a film when it is shown on a network, pay cable exhibition may well add to viewer interest in a film.12/ This will likely be true at least until pay cable can command audiences comparable in numbers to the networks. The networks pay millions of dollars to obtain the rights to show films which have been seen by over 25,000,000 people in the theaters, but they seek no exclusivity against the theaters in advance of network exhibition. There is no difference between this situation and pay cable.

A person who has seen a movie in a theater often watches it again on the network just as viewers watch reruns in the second half of the network season and, indeed, in subsequent seasons. Why would a pay cable subscriber not view a film on the network some time after he had seen it on pay cable? NCTA submits that pay cable is simply an extension of the theater, except that the pay cable audience is much

12/ "Gone with the Wind" played to an estimated 25,000,000 paying customers in a multi-year theatrical run. In November, 1976, its premiere network exhibition achieved record ratings. Indeed, it had even been shown on pay cable only five months earlier. This is not an atypical result.

smaller.

The networks say they must have exclusivity far in advance of network showing in order to prevent pay cable exhibition too close to the time when the network will exhibit the film. In light of the networks' oft-repeated message as to the merits of "free" television versus pay television, it is inconceivable that a pay cable showing shortly in advance of a heavily advertised network exhibition is going to have any meaningful effect on a network's audience. As a matter of fact, the courts have assumed that a prior exhibition to a paying audience does not materially reduce the audience for a less expensive or free exhibition of a film. 13/

As to the availability of a film to a network, there is simply no question but that the networks can obtain any film they want to purchase. Pay cable exhibition does not alter the economic facts of life. Movie distributors will sell any and all of their product to the networks.

Thus, there is no basis for the networks to demand contractual exclusivity since pay cable presents no

13/ Interstate Circuit v. United States, 306 U.S. 208, 228-230 (1939).

substantial competition to the networks. Exclusivity is not "reasonably necessary to protect the [network licensee] in the run granted," thus it is unreasonable.

B. Network Exclusivity is Not Designed to Maximize Copyright Rewards

Under the second Paramount test, exclusivity must reflect the revenue requirements of the copyright owner and not the needs of the network licensee. It is clear that the copyright owner obtains the largest possible commercial reward from maximum circulation of his product. On the other hand, the networks have an obvious interest in repressing another mode of exhibiting the product to the home viewer. Networks thus use their substantial economic leverage to obtain unreasonable exclusivity from the copyright owner.

Testimony at hearings held during the 94th Congress amply demonstrates that the movie distributors look upon the development of pay cable as a promising way to enlarge their revenue potential. 14/ It is not difficult to conclude that it is the monopoly position of the networks which results in exclusivity against pay cable, not the need for this exclusivity by the film suppliers. Networks have many

14/ Hearings on the Pay Cable Television Industry Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975).

films produced exclusively for television and have further economic leverage resulting from their placement of television series production. This network dominance of relatively large numbers of film suppliers is further supported by the huge profits which the networks enjoy from their preeminent access to the public spectrum,15/

The film suppliers do not wish to see their product tied up by one buyer for an extended period of time.16/ Films could be sold to several buyers thus receiving larger circulation and revenue. Repetition over a period of time will result in greater audience viewing and thus greater revenue.

It is obviously very difficult for an individual film supplier to resist the demands of a huge oligopoly customer for extensive exclusivity against pay cable. The exclusivity

15/ According to the most recent figures available from the FCC, the three commercial networks enjoyed pre-tax profits of over $200,000,000 in 1975. Newspaper accounts point to even higher levels in 1976. By comparison, the pay cable industry presently grosses about half this amount, and this is split among some ten different pay cable companies.

16/ In Hearings on Cable Television Regulation before the House Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, 94th Cong., 2nd Sess. (1976), Jack Valenti, President, Motion Picture Association of America, confirmed this by stating,

> "[K]eep the exhibition sequence in mind for it is the linchpin of movie distribution strategy. First, to theatres, the primary market for movies; then to pay cable, then to networks; and on to individual station syndication. Even if there is the power to outbid, the sequential marketing logic will not be disturbed. The movie industry sees pay cable as an additional market, between theatrical and network exhibition." (p. 649)

demanded by the networks against pay cable is obtained because it is the only way the networks will deal. These contractual restrictions do not reflect the needs or desires of the copyright owners.

IV. THE TERMS OF THE PROPOSED CONSENT DECREE ARE HARMFUL TO PAY CABLE

Even if it is felt that some form of contractual exclusivity should be permitted, the limitations proposed in the Consent Decree are illusory and do not in any real way limit NBC's ability to utilize exclusivity in an anti-competitive fashion.17/ Not only are the terms so liberal as to be almost meaningless, but the failure to include the network owned and operated television stations is an inconsistent omission. Furthermore, the Consent Decree forbids NBC to obtain exclusivity against all modes of pay programming delivery except for pay television (cable and over the air). This discrimination has no rational basis.

A. The Proposed Front-end Limitation is Meaningless

NBC is to be permitted to obtain exclusivity against pay cable commencing 30 days prior to the date on which the film will be available for broadcast. This "availability date" concept is simply irrelevant. It is set for the

17/ The "limitation" in the proposed decree is really very little less exclusivity than NBC has been obtaining. Their practice has been to obtain exclusivity against pay cable starting 60 days prior to the availability date and running through the availability period. See Senate hearings, p. 222; FCC Docket 20402, Comments of National Broadcasting Co., p. 2.

tax purposes of the film suppliers and/or for the anti-competitive purposes of the networks. It bears no relationship to when the networks plan to actually telecast the film.

Availability date is a date which is often months or even years in advance of the first "telecast" date of a particular film. Available information submitted during the Senate hearings demonstrates this fact. For example, of the 113 different films listed by NBC as having been shown in an 18 month period, 53 were not shown until at least 6 months had elapsed after the availability date.18/ Many did not appear until a year or more had gone by. The same is true of the other two networks. Thus, the use of availability date as an exclusivity benchmark permits the networks, with certain exceptions, to obtain a minimum of six to nine months pre-clearance on a feature film before its actual date of first telecast.

Obviously the availability date is not established with film telecast dates in mind. Instead the date is often most meaningful to the motion picture companies as the date when income from a particular film sale is appropriately entered on the company's books.19/ The time

18/ Senate hearings, pp. 227-229.
19/ See Accounting for Motion Picture Films, prepared by the Committee on Entertainment Industries of the American Institute of Certified Public Accountants, pp. 6-8.

of income is critical to motion picture companies whose economic fortunes fluctuate greatly from year to year. Thus, the availability date can be artificially established well in advance of any intended telecast date with no economic relationship to the networks' need for exclusivity.

No other rationale exists for the choice of availability date rather than telecast date except that, from the networks' point of view, it can substantially extend the real period of exclusivity. Certainly in most cases the telecast date can be determined well in advance. In testimony during the Senate hearings Everett Erlick of ABC indicated that the networks needed six months in order to provide time to plan a sales campaign for a movie telecast date.20/ This testimony shows two things: (1) there is no nexus between exclusivity needs and availability date, and (2) the networks do not lack the ability to establish dates for telecast of films well in advance.

Telecast date is a far more logical point of departure for any discussion of permissible exclusivity. Some people have expressed the concern that if the telecast date were used, a network could announce its telecast date right in

20/ Senate hearings, p. 193.

the middle of a pay cable run, thus requiring the pulling of product from pay cable. However, pay cable is more than willing to take this risk since under the availability date approach, pay cable does not get the product at all. Since it is known that a telecast date can be fixed quite far in advance, we can see no reason why any front-end exclusivity should not be tied to that date. This would actually serve to lessen the possibility of product being pulled from pay cable since plans are made for pay cable exhibition far enough in advance to arrange an orderly schedule on both networks and pay cable.

If NBC is permitted exclusivity 30 days in advance of availability date, instead of a short period before telecast date, pay cable will continue to be squeezed in its three year FCC window between the theatrical run and this unjustifiable network exclusivity.

B. The Duration of Exclusivity is Far More Lengthy Than Needed

The proposed Consent Decree goes on to permit NBC to obtain two years of exclusivity against pay cable after availability date and an additional 12 months for each exhibition beyond the first two showings. Taken together with the availability date provision and the FCC rules,

this term of exclusivity just about completely eliminates any chance for pay cable to obtain good product until it is quite old, if ever. The networks simply have no need for that much exclusivity. The unreasonableness of such a provision stands out like a sore thumb.

The Consent Decree does not require NBC to telecast a film at any time during the first two years of exclusivity which it may purchase. Thus NBC can purchase and warehouse a film with the result that a long period of time may pass when no one is showing the film. Furthermore, one run a year can permit NBC to tie up the film for an indefinite period of time. The Department of Justice was heading in the right direction as indicated on pages 19 and 20 of the Competitive Impact Statement when it suggested that exclusivity be permitted for 45 days before and after each network exhibition. What has instead been proposed is a quantum jump in the wrong direction.

Use of availability date and a minimum of two years of exclusivity becomes even more restrictive when the FCC rules are factored in. Thus a film may be in its theatrical run

for 12 to 18 months and then NBC is permitted to obtain at least two years of exclusivity against pay cable from an early and fictional availability date. In most situations this takes a film past the three year old mark. Certainly the one year renewal rights accorded to NBC would bring the film beyond this age and as demonstrated above, once a film is over three years old, the FCC rules make it impossible for pay cable to purchase the film.

Just as the date of first telecast is an obvious and reasonable front-end exclusivity benchmark, so, too, should exclusivity not be permitted to extend beyond each telecast. It has been alleged that the networks will not purchase films if they can't get extensive pre- and post-exhibition exclusivity against pay cable. In light of the lack of actual competition between the two modes of delivery and in light of the great economic value that feature films have for the networks, it is absolutely inconceivable that the networks will not buy films when they are made available.

Thus the proposed provision is really of very little value to the networks, and it certainly is not needed, but it does have the effect of stifling pay cable by severely interrupting the flow of film product.

C. The Failure to Include NBC Owned and Operated Television Stations is Inexplicable

The Consent Decree should by all rights apply to NBC owned and operated stations. However, NBC has managed to obtain a specific exemption of these stations from any restrictions. It is amazing that such an exemption would be agreed to in light of the network's control not only over its own stations but over its affiliates, as well.

As the Department of Justice is well aware, the FCC is just beginning a wide-ranging inquiry into television network practices. 21/ This inquiry was initiated largely as a result of a rulemaking petition filed by the Westinghouse Broadcasting Company. The Department of Justice supported this petition although it attempted to separate its support for the inquiry from the issues being litigated in its suits against the three networks. The FCC, however, in launching the inquiry, relied not only on the Westinghouse petition and the Department of Justice comments, but also on the allegations contained in the suits against the networks. One of the major issues in the inquiry is the relationship between network owned and operated stations and the program suppliers. 22/ The allegations in the antitrust suits and the issues raised in the FCC inquiry make the exemption of the network owned and operated stations in the proposed

21/ Notice of Inquiry in Docket 21049, FCC 77-53, released January 14, 1977.
22/ Ibid., paragraph 28.

Consent Decree quite inconsistent. NCTA submits that this exemption is unwarranted and untimely.

D. The Discrimination Between Methods of Pay Program Delivery is Not Sustainable

NBC would be permitted under the Consent Decree to obtain the extensive exclusivity against pay cable discussed above but incongruously they are totally precluded from obtaining exclusivity against other modes of paid program delivery, such as video discs, airplanes, hotel pay TV and others. There is simply no rationale for such a distinction.

Some of these modes of delivery reach more people than pay cable. Others, such as video discs, may soon develop into a far more extensive and competitive method of film exhibition. There is no explanation in the Competitive Impact Statement as to why the distinction was made. The only possible explanation NCTA can even imagine is that pay television is the only one of these delivery modes which comes under the jurisdiction of the FCC. If this is the reason, or even part of it, we reject it as totally invalid. The FCC regulates pay television because it can be reached under the provisions of the Communications Act of 1934.23/ The other services cannot be so reached. Surely the jurisdictional parameters of the Communications Act bear no relationship to the applicability of the antitrust laws

23/ The FCC's jurisdiction is one of the issues being litigated in Home Box Office, Inc. v. FCC, supra.

in this case. Indeed, if this were so, the Consent Decree should be written the other way around since NBC should have more to fear from those delivery methods which the FCC cannot regulate rather than those it can.

The Department of Justice has long held the position that it favors competition and innovative alternatives, not the promotion of one or another competitor. The distinction made in the Consent Decree is in conflict with this philosophy. Every method of delivering pay programming is relieved from the burden of network exclusivity except for pay television. Thus the networks are free to exact substantial and unnecessary exclusivity against pay cable.

Put another way, if we examine all of the means of distribution of feature films, such as networks, theaters, pay cable, network owned and operated stations, affiliates, video discs, cassettes, hotel pay service, in-flight movies and bars, pay television (cable and over-the-air) is the only one which can be precluded from showing a film because of a contract provision obtained by another medium. This discrimination has been proposed in the Consent Decree with absolutely no rationale provided. NCTA suggests that the distinction is not defensible.

V. NETWORK EXCLUSIVITY PRACTICES HAVE BEEN UNDER REVIEW IN CONGRESS AND AT THE FCC FOR TOO LONG

The terms of the proposed Consent Decree are unfortunate in that the very exclusivity practices dealt with have been under review both in Congress and at the FCC and nothing has yet come of this activity. Effective action by the Department of Justice is therefore necessary.

The Senate Subcommitte on Antitrust and Monopoly of the Committee on the Judiciary held extensive hearings in 1975 on the precise subject under discussion here. In 1976 the House Subcommittee on Communications of the Interstate and Foreign Commerce Committee held a set of hearings on the broad subject of CATV regulation, and one of the major topics was pay cable. However, nothing concrete is yet on the horizon from this source.

Proceedings at the FCC are more numerous and equally unproductive. The long-pending rulemaking in Docket 18179 explores the duration of time exclusivity found in television contracts.24/ On August 12, 1974, the Commission issued a Further Notice of Proposed Rule Making in Docket 19554,25/ in which they sought comment on the alleged unreasonable

24/ See Second Further Notice of Proposed Rule Making in Docket 18179, 37 Fed. Reg. 7531 (1972).
25/ 48 FCC 2d 453 (1974).

exclusivity obtained by the networks against pay cable. No action was ever taken. Then the Commission seemed to back off still farther by issuing a general Notice of Inquiry in Docket 20402 in 1975. 26/ This proceeding was explained by the Commission as follows:

> The inquiry which we have initiated by this Notice will deal with many of the same issues taken up in earlier proceedings, but will focus on the effects of exclusive contracts upon subscription television vis-a-vis conventional television, and particularly on how these effects relate to our anti-siphoning rules. The basic issue posed in this proceeding is whether the degree of exclusivity now generally contracted for is necessary for the well being of conventional broadcasters, and whether this degree of exclusivity, when viewed in conjunction with the Commission's anti-siphoning regulations, will markedly inhibit the development of subscription television services. (emphasis added) 27/

However, once again, nothing has transpired.

In sum, the FCC has had several proceedings underway for some time now dealing with many of the issues dealt with in the Consent Decree. But none of these proceedings show signs of being concluded in any satisfactory fashion. Thus the Department of Justice is the logical entity to turn to

26/ 52 FCC 2d 87 (1975).
27/ Notice of Inquiry in Docket 20402, para. 6.

for resolution of this issue. In addition, approval by the Department of Justice of unreasonable exclusivity against pay cable will unavoidably place an imprimatur on existing network practices and thereby tend to prejudge or influence the outcome of the issue elsewhere.28/ This risk can only be avoided if the Department of Justice withdraws its consent to the proposed decree.

VI. THE DEPARTMENT OF JUSTICE SHOULD WITHDRAW ITS CONSENT TO THE PROPOSED DECREE

The proposed Consent Decree does not do more than codify existing network exclusivity practices. Approval of these practices seems patently inconsistent with the Department's past attitudes and pronouncements favoring free competition for pay cable. If satisfactory terms cannot be agreed on with NBC, then the Department should continue with its litigation.

The Department has consistently sided with the pay cable industry in its battle against restrictive FCC rules and network practices. Thus, in the lengthy FCC rulemaking in Docket 19554 which resulted in the present restrictions the

28/ This could even be the case in any subsequent private antitrust action. Although Section IV (A) of the Consent Decree contains a caveat about not approving violations of the antitrust laws, the meaning of this proviso is vague. It can reasonably be interpreted, taken in context, that the Department of Justice views those practices specifically enumerated in the Consent Decree as within the boundaries of the antitrust laws.

Department filed two sets of comments which took the position that the FCC should not stifle pay cable because of some hypothetical injury which might befall the broadcasters.29/ After the FCC's unsatisfactory action, the Department filed a brief in support of the pay cable industry in the court appeal.30/ And, in the 1975 Senate hearings, Donald Baker, Assistant Attorney General, Antitrust Division, observed that "the only problem [with the FCC rules] was that most of the affected films were under exclusive contracts."31/ Finally, the entire tenor of the Department's 1976 comments in support of the Westinghouse petition for a network inquiry is one of seeking to preserve a competitive environment. The approval of existing anti-competitive network exclusivity practices simply runs counter to all of this past conduct.

If, for various public policy reasons, the Department still feels that some provision dealing with exclusivity should be included in an overall settlement of the litigation, NCTA suggests that all that is needed by NBC is a short period of time prior to each telecast date. A period of 45

29/ See Department of Justice comments in Docket 19554, filed November 1, 1972, and October 4, 1974.
30/ Home Box Office, Inc. v. FCC, No. 75-1280 et al., Brief for Respondent United States of America.
31/ Senate hearings, p. 234.

days prior to each exhibition was suggested by the Department, 32/ but we feel that 15 days is more than sufficient. While a legitimate argument can be made for some pre-exhibition exclusivity, there is no reason for any post-telecast protection. How could a pay exhibition to a relatively small audience harm a prior "free" exhibition to a nationwide audience? This type of approach would give the networks all the protection they really need, while at the same time giving pay cable the access to the product which it must have to survive.

If NBC would not accept such a provision, the Department should continue to pursue the litigation. NCTA believes that the Department should take the position that no network exclusivity against pay cable is appropriate at this time, but at a minimum the Department should certainly not consent to a continuance of existing practices.

VII. CONCLUSION

NCTA submits that the contractual exclusivity obtained by NBC and the other networks against the pay cable industry is an unneeded practice which is anti-competitive in intent,

32/ Competitive Impact Statement, pp. 19-20.

and when taken together with the FCC's rules, is certainly anti-competitive in result. The proposed Consent Decree not only virtually approves existing practices, but it also creates a discriminatory framework between alternative methods of delivering pay programming. The Department of Justice should take a position in opposition to NBC's exclusivity practices, or at least seek an acceptable provision along the lines discussed above. If this cannot be accomplished, NCTA urges the Department to continue this litigation. In any event, the Department should withdraw its consent to the decree as it is now written.

Respectfully submitted,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.

By Stuart F. Feldstein
Stuart F. Feldstein

By
Frederick W. Finn

By Arthur H. Harding
Arthur H. Harding

Its Attorneys

918 16th Street, N. W.
Washington, D. C. 20006
202/457-6700

March 1, 1977

CONTINENTAL CABLEVISION, INC
54 LEWIS WHARF
BOSTON MASSACHUSETTS 02110
(617) 742-8265

H I GROUSBECK
PRESIDENT

April 20, 1977

Mr. Bernard Hollander, Chief
Judgements and Judgement Enforcement
Section
Anti-Trust Division
U S. Department of Justice
Washington, D.C. 20530

Dear Mr. Hollander:

I urge you to withdraw the support of the Department of Justice for the proposed Consent Decree in the NBC matter. I also urge you, if necessary, to take anti-trust action to prohibit unreasonable contractual exclusivity against pay cable.

Network licenses of films invariably provide for exclusivity against pay cable. This practice sharply limits or denies completely pay cable's access to films. For example, a film may be purchased by a network for only one or two showings, but its contract may provide for exclusivity against pay cable for a period of up to five years.

It is my view that it would be in the public interest for the Department of Justice to move to curtail this highly inequitable and anti-competitive practice.

Very truly yours,

H I Grousbeck

:em

UA-COLUMBIA CABLEVISION, Inc 49 Riverside Avenue • Westport Conn 06880 • 203 227 9581

Robert M Rosencrans
President

April 15, 1977

Mr. Bernard Hollander
Chief, Judgements &
Judgement Enforcement Section
Anti-Trust Division
U. S Department of Justice
Washington, D. C 20530

Dear Mr. Hollander:

I would like to add my voice to those who recommend withdrawal of your support to the proposed consent decree with NBC in connection with exclusivity against pay cable.

We believe that the effect of the consent decree would be to reenforce their economic power against our industry and effectively subvert the basic intent of the Justice Department.

We appreciate your concern with this matter and we trust you will give thorough consideration to the views that oppose the consent decree.

Sincerely yours,

RMR:1

TELESIS CORPORATION
2605 YEAGER ROAD P O BOX 18
LAFAYETTE INDIANA 47902

RICHARD F. SHIVELY
PRESIDENT

TELEPHONE
317 463 7508

April 13, 1977

Mr. Bernard Hollander, Chief
Judgements and Judgement Enforcement Section
Anti-Trust Division
U. S. Department of Justice
Washington, D.C. 20530

Dear Mr Hollander:

As an officer and director of Telesis Corporation, operator of Cable TV Systems in nine states, I wish to urge the Department of Justice to withdraw its support of the proposed Consent Decree with the National Broadcasting Company, Inc. in the matter of Pay Cable programming.

Our company has made substantial investments in order to make Pay Cable service available to many of our subscribers. The early acceptance of this service by subscribers has been heartening; however, the future is clouded by the possibility of the lack of availability of programming.

In view of the fact that the U.S. Court of Appeals vacated Federal Communications Commission Pay Cable rules, it appears likely that broadcast interests will make even greater use of their substantial financial advantage in order to obtain as much exclusivity as possible from the moment feature films are released for exhibit. A grant of up to 36 months' exclusivity, as permitted in the proposed Consent Decree, would have the practical effect of completely denying product to Pay Cable until after it is available via commercial television.

This certainly is anti-competitive. It not only restricts, it eliminates a market place. Moreover, it denies the public a right to view, in home, unedited and uninterrupted feature films. It also destroys a new market for feature films.

In the interests of the public, as well as in the interests of fair play, you are beseeched to reconsider your Department's decision and withdraw support from the proposed Consent Decree.

Sincerely,

Richard F. Shively

RFS/rap
cc: Bob Johnson

PROGRESS INTELLIGENTLY PLANNED AND DIRECTED

FOR RESPONSIVE MEDIA:
CITIZENS COMMUNICATIONS CENTER
1914 SUNDERLAND PL., N.W., WASHINGTON, D.C. 20036 (202) 296-423

March 1, 1977

Mr. Bernard M. Hollander
Chief
Judgment and Judgment Enforcement
Section
Antitrust Division
Department of Justice
Washington, D. C. 20538

Re: Proposed Consent Decree in
U.S. v. NBC, Com. Act, No.
74-3601 RJK, U.S. D.C. Cent.
Div Calif.

Dear Mr. Hollander:

The National Citizens Committee for Broadcasting objects to the proposed consent decree in United States v. National Broadcasting Company, Inc., Civil Action 74-3601-RJK, filed on November 17, 1976 in the United States District Court for the Central District of California.

Our principal concern lies in the proposed exclusive rights permitted NBC to theatrical feature films against their exhibition on pay cable television. [VI(E)(iii)(e)]. This clause unduly burdens the growing pay cable industry by denying it rapid access to feature films that can be brought to consumers without commercial interruption. This clause is inconsistent with the spirit of both the Communications Act and the Federal antitrust laws. Moreover it is contrary to the purpose of the entire antitrust action originally initiated by the Justice Department.

I. BACKGROUND

National Citizens Committee for Broadcasting (NCCB) is a non-profit organization representing consumers of media services. We believe that it is the paramount responsibility of both the Justice Department and the Federal Communications Commission to promote diversity and competition within the communications industry to increase consumer choice. Accordingly NCCB has participated in various F.C.C. rule-makings concerning Pay Cable (Docket Nos. 18893 and 19554). Like the Justice Department's Antitrust Division, we unsuccessfully urged the Commission in those rulemakings to remove the unnecessary and illegal restrictions on the pay cable industry. The artifical constraints (i.e. exclusive contracts) now used by the broadcast industry to deny pay cable access to feature films should, NCCB argued, be entirely abandoned.

Broadcasters, who present their product to the public at no direct charge, through an advertising-based system, are able through their dominant economic position in the communications industry to deny cable television, which would present such product on a paid, but uninterrupted and unedited basis, access to feature films. The FCC failed to deal adequately with this problem in one five year proceeding culminating in Subscription Television Program

Rules, 52 FCC 2d 1, reconsid. denied, 54 FCC 2d 797 (1975).

The Commission rejected the arguments made by NCCB and similar groups, essentially compromising among the contending industries and "gloss[ing] over the more fundamental public interests." NAITPD v. FCC, 502 F.2d 249, 258 (2d Cir. 1974). A new "inquiry" has been initiated into the practice, Docket No. 20402; 40 Fed. Reg. 15576 (1975). But before the Commission can make a final resolution of the problem it must first issue a formal notice of rulemaking.

This action (or rather inaction), along with other Commission restrictions placed on the pay cable industry, is on review by the United States Court of Appeals for the District of Columbia Circuit. The case was argued last spring and is now awaiting decision. Home Box Office v. FCC, D.C. Cir. No. 75-1280. Both Justice and NCCB supported the petitioning cable entities in their own briefs and arguments in this case. NCCB's principal arguments were that the restrictive cable rules as well as present practices of the broadcast industry vis-a-vis pay cable undermine the public's paramount First Amendment interest in access to diverse sources of information and entertainment, as well as national antitrust policies embodied in the Communications Act. We believe strongly that the Court will reverse and remand this case to the Commission to reconsider these important issues.

II. THE PAY CABLE EXCLUSIVITY PROVISION IN THE CONSENT DECREE:

Section VI(E)(iii)(a)-(d) of the decree prohibits NBC from entering into exclusive contracts with motion picture producers that deny feature films during the run-of-the-contract to theaters, closed circuit television in hotels, airline showings, and video discs. But VI(E)(iii)(e) specifically exempts from this restriction exclusive contracts which deny pay cable access to feature films. This provision in effect formalizes past industry practice by allowing NBC to obtain exclusivity against pay cable. Allowable exclusivity commences 30 days prior to the first network availability date and extends until the termination of the agreement or 24 months, whichever occurs first. Moreover, 12 additional months of protection is granted for each additional exhibition beyond two obtained by the network.

The Antitrust Division has itself recognized the potentially adverse effects of this current industry practice, and originally sought to limit it sharply (CIS at 19-20). In the Consent Decree however the Department abandoned its original proposal of limiting exclusivity to 45 days before and after each network exhibition date (90 day exclusivity) and acceded to NBC's demand to institutionalize the present exclusive contract against pay cable as an "upper limit" (Id. at 12). The provision could, however,

have the effect of denying pay cable access to specific feature films for an indefinite number of years. For as Variety recently noted, acceptance of this provision by the Court "could have the practical effect of etching them in stone in D.C." (November 24, 1976 issue)

This provision unduly restricts competition between different forms of communications media. It provides the networks with a mechanism to insure that their dominant position in the communications industry is not disturbed, and thus disserves the public interest. For the following reasons NCCB urges the Justice Department to either re-negotiate real relief (the 90-day exclusivity limit) or, if that is not possible, entirely eliminate this provision from the consent decree:

1. The proposed provision simply codifies the present network practice in obtaining exclusivity protection. It does not constitute a true compromise since the former practice of obtaining exclusivity from the date of contract has been entirely abandoned. Moreover, in light of anticipated adverse reaction in Congress and the FCC, led by the cable industry and public interest groups, it is unlikely that date of contract exclusivity will be reinstated in the near future. Any compromise in this important area should provide substantial or significant relief to the pay cable industry. An equitable solution would be the acceptance of a provision much more along the lines of the original Justice

Department proposal of granting exclusivity protection 45 days before and after each network exhibition of a feature film (e.g., 60 days before and after).[1/]

2. If the Antitrust Division cannot negotiate a genuine restriction on exclusive contracts -- and we believe that it has failed in its efforts to do so -- then the provision in the consent agreement should be entirely eliminated. It would be legally, psyschologically and tactically wrong for the Justice Department to acquiesce to the present network exclusivity practice which limits the availability of films to pay cable. Ultimately, the Department's acceptance of this unduly permissive standard could influence whatever action the Congress, the FCC or some future court in a private antitrust suit might be disposed to take.

3. This brings us to our final request -- namely, that the division should make clear in the decree itself that any provision, even the proposed limited 45-day restriction, should not in any way determine or influence Congressional or FCC consideration of the exclusivity matter.

1/ The FCC rules now provide that feature films more than three years old can be made available for pay cable use only when a conventional television station in the market or a network has a "present contractual right to exhibit the film." Therefore, "a film under contract but which is not available for exhibition until some future date, will not be considered as available for telecast." In our view and that of the Department in light of its position in the Home Box Office v. FCC appeal, this rule is of dubious legality, and therefore should not influence or affect the outcome of this antitrust suit.

The Division's action is simply a compromise resolution of an antitrust suit. Congressional and FCC action involves the much broader consideration of what course best promotes the public interest. We of course recognize that this is true whether or not it is specifically acknowledged in the CIS or decree process. It is important, however, that the process reflect this critical consideration. The Competitive Impact Statement (at 12) goes to great pains to point out that the exclusivity provision "should not affect those situtations where NBC does not now obtain such exclusivity for feature films". It should be similarly explicit as to its immateriality towards Congressional or FCC consideration of exclusive contracts.

III. Other Decree Provisions

While the foregoing constitutes our most serious objections, there are other features of the proposed decree which warrant comment and possible reconsideration by the Antitrust Division. The government states (CIS at 15) that "the agreed relief would be substantially equivalent to that sought in the complaint....". We question whether the relief granted meets this high standard. But more seriously, there is a substantial question whether the relief constitutes a genuine compromise at all in the following respects:

A. Internal Network Program Production.

In recognition of the networks' dominant position, coupled with the obvious incentive for the networks to prefer their own productions over independent offerings, the Division originally sought to prohibit all internal production of entertainment programs. Internal production cuts down on opportunities available for outside producers, and equally important, gives the networks additional leverage in dealing with independent production companies. Any compromise that left leeway for internal network production would not be effective in eliminating the leverage aspect. But it could make a significant contribution in increasing opportunity for independent producers. However, the Division's proposed decree fails to achieve even this goal, because it permits internal production figures greater than that now undertaken by NBC.

This provision is thus again not a genuine compromise but rather an institutionalization of the present network levels (generally using the high water marks of each network in particular time segments as the bellweather).

B. Yearly Option Renewal Provisions To Program Series

Similarly, there is a serious question as to the public interest basis for the option provisions of the decree [VI(E)(i)]. These limit exclusive yearly options in a contract for a network series to no more than four years, plus a single year's extension if the contract is to be renegotiated.

As noted in the Competitive Impact Statement (at 11) NBC can now obtain, and has obtained, " exclusive rights to a program for as long as seven years on terms and conditions set before the program has ever been developed." But generally the networks today obtain only five years of options for a prime time series . A provision much more in the Government's favor would be two years (as the Justice Department initally proposed -- CIS at 17). A genuine compromise would be three years, with a single year's extension upon renegotiation of the original contract.

C. Exclusivity In Program Series

A final example involves the exclusivity provision in VI(E)(ii), limiting NBC's right to prohibit the use of a particular prime time program (not a theatrical movie) to no more than three years. NBC may, however, obtain four years of exclusivity as against non-prime time stripping of a particular series, and unlimited prime time exclusivity during

the life of NBC's right to network exhibition of the program. Again we recognize that this is a significant cut-back. But it should be considered in light of two important considerations: First, there is clear evidence that non-prime time presentation of older episodes has no effect on the ratings of the new episodes in the networks' continuing prime time showings. Secondly, the struggling UHF independent has a great need for access to such off-network series if it is to succeed. Indeed, the public interest strongly militates against any exclusivity barring non-prime time presentation by UHF independent stations.

Here, as in the exclusivity as against feature films, we recognize that these provisions were "the subject of intense negotiations between the parties", (CIS at 17). It can be argued that we simply are insisting on different judgements concerning the outcome of the negotiations -- that, like Oliver Twist, "we want more". However, we do not regard the Government's trial position as weak in light of the network's record of dominance of the broadcasting industry. We strongly believe that any consent decree should reflect genuine compromise -- not just provisions that are really only ceilings retaining present industry custom.

Again, we stress that the decree process should clearly reflect that there is no intent to affect in any way future FCC or Congressional consideration of the areas covered by the compromise. In each specific matter covered by the decree, the FCC has clearly been delegated jurisdiction to regulate. The FCC is not only mandated to regulate to alleviate undue anti-competitive restraints. It must also promote "the larger and more effective use" of television in the public interest. 47 U S.C. §303(g); NBC v. United States, 319 U.S. 190 (1943). We urge that the consent decree be adjusted consistently with the above points, so as to maximize the public's access to diverse information sources, and not limit, directly or indirectly, the ability for other governmental entities to do the same.

Respectfully submitted,

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DONALD BAKER, ATTN ANTI TRUST DIVISION CHIEF
JUSTICE DEPT
WASHINGTON DC 20530

DUPLICATE AND CORRECTED COPY, 04-26, 0245P EST

WHY WAS A CONSENT DECREE PROPOSED AS SETTLEMENT AGAINST NBC NETWORK IN JUSTICE DEPARTMENT NETWORK ANTI TRUST SUIT PERMITTING NETWORK TO ACQUIRE RIGHTS FOR TWO SHOWINGS OF MOVIES WITH TWO YEAR EXCLUSIVITY, AGAINST PAY CABLE-ADDITION YEAR OF EXCLUSIVITY FOR EVERY ADDITIONAL EXHIBITION, THIS SHOULD BE DELETED FROM FINAL AGREEMENT ALSO WHY DOESN'T AND WHEN WILL JUSTICE DEPARTMENT TAKE FULL AND FORCEFUL ACTION AGAINST NBC, CBS, AND ABC BROADCASTING NETWORKS, AND TO PARTICIPATE IN THIS ACTION WITH THE FTC. CORDIALLY
CC: REP FRANK ANNUNZIO WASHINGTON DC
PRESIDENT JIMMY CARTER WHITE HOUSE WASHINGTON, DC
OAK INDUSTRIES, 100 S. MAIN ST, CRYSTAL LAKE IL. 60014
ATTN: PRES OF C.A.T.U. DIV. MR WERNER KOESTER

BURTON BERGER
6213 NORTH FAIRFIELD ST CHICAGO IL 60659

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6. 211-62

Response to the Comments Submitted by Congressional, Public Interest and Pay Cable Television Entities Opposing Section VI(E)(iii)(e) of the Proposed Judgment. 1/

Paragraph VI(E)(iii)(e) has been deleted from the proposed Judgment by agreement of the parties. It would have limited NBC's network program exclusivity for theatrical feature films as against pay cable television, and received, by far, the largest number of comments filed on the proposed Judgment

1/ The following entities filed comments on Paragraph VI(E)(iii)(e): Cinemerica, Inc.; Schuyler Chapin, Dean, School of Arts, Columbia University in the City of New York; East Bay Skills Center; NCCL; The National Urban Coalition; American Civil Liberties Union; NAACP Legal Defense and Educational Fund, Inc.; Action for Children's Television; Metropolitan Opera Association; Nicholas Johnson; American Television & Communications Corp.; Cablecom-General, Inc.; Cable Information Systems, Inc.; Central California Communications; Communications Properties, Inc.; Continental Cablevision, Inc.; Cox Cable Communications; Daniels Properties, Inc.; Good-Vue CATV, Inc.; Harris Cable Corporation; Heritage Communications, Inc.; Home Box Office, Inc.; Inertia, Inc.; Liberty Communications; Manhattan Cable Television; Midwest Video; Sammons Communications, Inc.; Tele-Communications, Inc.; Telesis Corporation; Teleprompter Corporation; The TM Communications Company; UA Columbia Cablevision, Inc.; United Cable Television Corporation; Vision Cable Communications, Inc.; Honorable Edward M Kennedy, Acting Chairman, Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, United States Senate; Lincoln Center for the Performing Arts, Inc.; Community Coalition for Media Change; Optical Systems Corporation; Communications Policy Committee, Consumers Union; United States Conference of Mayors; Media Access Project; Cable Television Information Center of The Urban Institute; United Artists Corp and Metro-Goldwyn-Mayer Inc.; Honorable James Abourezk, United States Senate; National Cable Television Association, Inc.; Citizens Communications Center; and Burton Berger.

Form CBD-183 12-3-76 DOJ

The relief proposed in this provision was simply intended to establish an upper limit on the exclusivity terms that NBC could obtain, at a level lower than current practice, rather than a determination of what period of network exclusivity would be reasonable under the Sherman Act. Despite this intent, and the fact that the Judgment does not constitute an "adjudication of fact or law," the commentors almost uniformly protested that this provision would establish an industry standard which they believed to be detrimental. Thus, for example, one comment stated:

> The proposed decree . . . expressly approves NBC's practice of demanding unreasonable exclusivity against pay cable . [and] would put the Department's imprimatur on precisely the type of network abuse that this suit was brought to prevent 2/

2/ See Comments of Twenty-Four Companies in the Pay Cable Industry at 8.

This view of the effect of the proposed Judgment was shared by a number of other commentors. 3/ In addition, some of these commentors presented analyses to the effect that the present exclusivity terms in network contracts constituted an unreasonable restraint of trade and reflected an unreasonable exercise of network purchasing power to foreclose competition. 4/

The commentors, while unanimously agreeing that Paragraph VI(E)(iii)(e), as written, was detrimental to the developing pay cable industry 5/, did not fully agree on the solution. While some would have the Government obtain a complete ban on such exclusivity, or at most permit it to run only for 15 days in advance of the feature's playdate and permit no exclusivity

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3/ See, e.g., Comments of Senator Edward M. Kennedy at 1; Comments of United Artists Corp. and Metro-Goldwyn-Mayer, Inc. at 7; Comments of the National Cable Television Association, Inc. at 27; Comments of Nicholas Johnson at 2; Comments of Citizens Communications Center at 5.

4/ Comments of Twenty-Four Companies in the Pay Cable Industry at 8, 23-24; Comments of the National Cable Television Association, Inc. at 7-16.

5/ It should be noted that CBS Inc. and American Broadcasting Companies, Inc. oppose entry of the entire Judgment and entry of this provision. Their comments are treated separately.

Form CRD-183
12-76 DOJ

after playdate 6/, others recommended that the provision be deleted from the Judgment entirely, since no factual record on what constituted reasonable exclusivity had as yet been developed in this case. 7/

As a result of the numerous assertions that this provision would establish a standard adversely affecting the pay cable industry, the Government became convinced that it would not provide meaningful relief. And, since no agreement on a more limited period for this type of exclusivity could be reached with NBC, the Government seriously considered withdrawing its consent to entry of the Judgment However, in a recent decision the District of Columbia Court of Appeals, citing "antitrust questions," has ordered the FCC to consider and resolve this problem within 180 days. 8/ Consequently, it

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6/ See, e.g., Comments of Twenty-Four Companies in the Pay Cable Industry at 44; Comments of the National Cable Television Association, Inc. at 29; Comments of Senator James Abourezk at 4.

7/ Comments of Senator Edward M. Kennedy at 1; Memorandum of Majority Staff, Senate Antitrust and Monopoly Subcommittee at 9; see Comments of the National Citizens Communications Lobby at 2; Comments of the American Civil Liberties Union at 3; Comments of American Television & Communications Corporation at 3; Comments of Cable Television Information Center at 4.

8/ Home Box Office, Inc. v. FCC, No. 75-1280 (D.C. Cir. March 25, 1977).

Form CRD-183
12-76 DOJ

was decided that outright removal of this provision would be appropriate and desirable as well, because its deletion would permit entry of the remainder of the Judgment. The parties have stipulated that removal of this provision does not estop any possible future action in this area against NBC by any person, and does not constitute any evidence or admission respecting any issue of fact or law 9/

9/ The Stipulation, in pertinent part, provides:

. . the original inclusion and subsequent deletion of Section VI(E)(iii)(e) from the proposed Final Judgment, shall not estop plaintiff or defendant, or any person, in this or any other action or proceeding, from asserting any issue of fact or law as to the subject matter of Section VI(E)(iii)(e) or as to the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, nor shall they constitute any evidence or admission as to any such issue

Bernard M Hollander

Attorney for the United States

Form CBD-183
12-8-76 DOJ

Kaplan - 3714

• THE CAUCUS •
FOR PRODUCERS, WRITERS & DIRECTORS

January 11, 1977

Bernard Hollender, Esq.
Chief of Judgment & Judgment
Enforcement Section - Antitrust Division
U.S. Department of Justice
10 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Re: USA v. NBC - Civil Action #74-3601 R.J.K.

Dear Mr. Hollender:

The Caucus of Producers, Writers and Directors is a non-profit organization, organized four years ago, and dedicated to constructive progress and improvement in the television and theatrical fields; and to protect the high standards and integrity of Creative Artists. Its membership includes the most important and prestigious segment of the Creative Community. A copy of volume 1 of Caucus Comments, just issued, which embodies the aims and objectives, and the current membership list of the Caucus is enclosed.

The Caucus has studied the proposed Judgment in connection with the above matter, and vigorously opposes said Judgment. Enclosed is a memorandum which the Caucus requested its attorneys (Simon & Sheridan) to prepare for submission to you. You will note that the Caucus recommends that the Anti-trust Division withdraw its consent to said proposed Judgment.

If there is any additional information you wish to obtain from the Caucus, please contact us, or our attorneys, Simon & Sheridan (2404 Wilshire Boulevard, Los Angeles, California 90057).

Respectfully submitted,

Charles W. Fries

CF:g
enc.

Steering Committee
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WILLIAM FROUG
LEONARD STERN
Co-Chairmen
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Certified copy of 5/6/77

Re: United States of America v. National Broadcasting Company,
Civil Action No 74-3601 RJK
The Proposed Final Judgment

One of the principal aims and objectives of the Caucus of Producers, Writers and Directors is that the Networks completely cease all production and syndication activities of entertainment programs

The Steering Committee and the Executive Committee of the Caucus had reviewed the complaint issued by the Justice Department against NBC and the proposed Judgment. Like so many other substantial representatives of Independent Television Program Suppliers, the Caucus vigorously opposes the Judgment which is proposed by the parties to settle the Government's antitrust action against NBC.

The complaint alleged that NBC, its O & O's, affiliates, and others, entered into contracts and unreasonable restraint of trade and commerce in connection with television entertainment programs exhibited during prime-time hours; that NBC was monopolistic; and that complaint sought to prohibit NBC from exhibiting programs (and feature films) produced by NBC or other networks, from obtaining any interest (except for the first-run exhibition rights) in television entertainment programs produced by others, to prohibit NBC from engaging in any syndication, to prohibit NBC from using its control to foreclose competition or obtain an unfair advantage in any other field; and the Government sought divorcement, divestiture, reorganization and injunction with respect to the business and properties of NBC. The Government complained that NBC's offenses included ownership and control of TV entertainment programs during prime-time hours, that competition with respect to production, distribution and sale of such programs was unreasonably restrained, and the viewing public has been deprived of the benefit of free competition in the broadcasting of such programs.

The proposed judgment filed November 17, 1976, which is scheduled to become final soon, would sanctify and approve for all three Networks, the right to engage in the very practices which the Government's action against all three Networks sought to eliminate. Such Judgment approves the continued production of entertainment programs by NBC, extensive and restrictive options, unreasonable exclusivity, creative controls which restrict outside Program Suppliers and the continuation of other exercises of the powers inherent in the current Network structure and methods of conducting its business.

The foregoing complaints are general in nature. A review of the specific provisions of such proposed Judgment magnifies the Government's failure to achieve its aims and goals as provided in its complaint. Please note the following:

1. The Judgment recognized that for a period of ten years, NBC may broadcast in network time, programs obtained from sources other than Independent Program Suppliers as follows:

Prime time- two and one half hours per week
Daytime- eight hours per week
Fringe hours- eleven hours per week.

In addition, NBC may arrange for two specials, which are not obtained from independent program suppliers, during each six month period.

To the best knowledge of the Caucus, the number of hours of programming now actually owned and produced by NBC, or on its behalf, is less than the hours permitted by said Judgment. This certainly points up real retrogression rather than progress in the achievement of the Governments aims as provided in its complaint.

2. The limitation of the number of years of options that NBC may acquire from an independent program supplier to 4 or 5 years, seems to be a step in the right direction, until one reviews the usual life of at least 90% of the TV series produced. The substantial number of series are dropped by NBC after one or two years of broadcasting. If a series survives the second year and is picked up for a third year, such Independent Supplier generally is in a position to renegotiate its deal, so that said supplier obtains more money and more favorable rights for such long running series.

3. The proposed Judgment appears to give Independent Program Suppliers greater latitude with respect to the Networks' option hold on projects not selected by the Network for series purposes. In fact, it does not. 65% of the pilots which are not picked up by the Network for series purposes are released subject to certain completely onerous conditions. The date of the Networks' continued hold for series purposes and the Suppliers obligation to repay the pilot costs to the Network, make this provision completely inequitable and impractical for such Suppliers.

4. The rights which NBC may acquire from such Suppliers include the recognition of NBC's approval of creative elements and program content. One of the major complaints by the Caucus and the Creative Community against the Networks has been the Networks' substantial abuse of such creative control and approvals. The continued recognition of such power and authority continues to adversely affect the Creative Community in the proper exercise of creative control by such Independent Supplier.

There are many other provisions of said propsed Judgment, which are inappropriate and inequitable They include the reference to the required use of Network facilities under certain circumstances, syndication (already a dead issue since these limitations were agreed to by Agreement with FCC some time ago), and restrictions against reciprocal deals between the Networks (which adds nothing, because such deals do not exist and because the competition between the Networks probably is too great to permit this).

In our opinion, this Judgment does not protect the Independent Program Supplier in any material manner, and yet, some of the basic provisions of this Judgment are conditioned upon the Justice Department obtaining a similar agreement from ABC and CBS.

A review of several of the recent newspaper and trade paper reports of the settlement of this Antitrust suit are interesting. As an example, the New York Times, on November 19, 1976, states "NBC gave little away", the article pointed out that "the prohibitions detailed in the agreement scarsely alter present business practices and are expected to have no significant economic impact on the Network itself and on the television production industry"

The weekly Variety issue of November 24, likewise reported on this proposed Judgment. Its headline read "NBC Discovers that Justice is Blind", and its subheading was "Gave Uncle Sam its 11th Toe in Decree". The Variety report stated "early indications are that NBC may have pulled off a coup last week when it signed a consent agreement with the Justice Department". The article further reported, : "In pacting with the Justice Department, NBC has agreed to rules already on FCC books, ceilings on internal production it does not expect to meet, inconsequential prohibitions and some minor concessions concerning contracts for series shows and options for pilots. In short, the network appears to have lopped off its 11th toe for Uncle Sam." The pact provides NBC with "peace of mind at the network with minimum sacrifice".

The Weekly Television Digest of November 22, reported that NBC told TV affiliates board that the settlement will have "no major financial impact" on the network

Copies of the three reports referred to above are attached.

We join the Television Industry and the Independent Program Suppliers in viewing this proposed Judgment in the Government's Antitrust actions against NBC, as being inequitable, and one that must be vigorously opposed for the good of the Industry, and urge the Government to withdraw the proposed Judgment.

Dated: January 12, 1977

SIMON & SHERIDAN
2404 Wilshire Boulevard, Suite
Los Angeles, California, 90057
(213) 380-3330
(Attorneys for the Caucus)

SS:ls

encs

Samuel Simon

NBC Is Seen as Giving Up Little In Settlement of Antitrust Suit

Continued From Page D1

tertainment programs it puts on the air.

In fact, all three networks were forced out of the syndication business by the Federal Communications Commission two years before the Justice Department suit was brought; the second time (it had been dismissed without prejudice in November 1971, when the networks fought it as a mischievous action by the Nixon Administration, but was reinstituted a month later under the Ford Administration).

CBS this season has owned three prime time programs—"Hawaii Five-O," "Spencer's Pilots" and "Ball Four" (the last two already cancelled), or two and one half hour's worth—and one day time serial, "Love Of Life."

ABC has produced a number of made-for-television movies in prime time but owns no weekly series. The daytime properties it owns are "One Life to Live," "All My Children" and "General Hospital," which consume 10 hours a week.

It also produces "Good Morning America" 10 hours a week, but that early morning entertainment program could probably acquire an exemption from the proposed quota for fringe time by being designated a news and public affairs show, like NBC's "Today."

The semantical distinction frequently depends on whether the program is produced by the news division or by the program department. It is a small matter to transfer the jurisdiction from one unit in the company to another.

Under the settlement agreement, most of the program ownership provisions will not go into effect unless ABC and CBS are also subject to them. That would depend on their accepting the terms in separate settlements of their own or on their losing the Justice Department suit.

Although conceding that what NBC has accepted as restrictions are on the whole economically unthreatening and possible for their networks to live with fairly comfortably, officials of ABC and CBS said they would continue to challenge the suit as lacking in merit.

They are also contesting the Justice Department's assumption of what it has jurisdiction over an industry that has been statutorily the responsibility of a Federal regulatory agency, the F.C.C. Motions to dismiss the case, filed by both networks last November, are still pending.

have the highest profit margin. Continued on Page D7

administration has entered in the re- Continued on Page D10

NBC Is Seen Giving Up Little in Settling Antitrust Suit

By LES BROWN

NBC gave little away in its agreement with the Department of Justice to settle a two-year-old antitrust suit against the networks. The prohibitions detailed in the agreement scarcely alter present business practices and are expected to have no significant economic impact on the television production industry—if and when the restrictions go into effect.

Economic Analysis

Knowledgeable observers point out that NBC would not have sought this settlement, but would have continued to contest the suit on principle, along with ABC and CBS, if it felt the terms were at all detrimental to its business.

If anything, NBC stands to gain from the settlement agreement in being freed from the courts and in saving prodigious legal fees that could run to hundreds of thousands of dollars.

Moreover, the restrictions give NBC [illegible] in program ownership [illegible] it now enjoys.

Generosity of Settlement

For instance, the agreement would limit the entertainment programs produced by NBC, or in which it held a financial interest, to two and a half hours a week. At present, the only prime-time series owned by NBC is "Little House on the Prairie," which represents one hour a week.

NBC thus would be permitted to add to its program holdings, under a suit that was intended to keep the networks from favoring program series for their schedules in which they had a financial interest.

Similarly, the network would be restricted under the agreement from owning more than eight hours of daytime programs a week, during the hours between 9 A.M. and 6 P.M., although as of now it owns none.

A reason for the apparent generosity of the settlement agreement is that the Justice Department's case was based on data from the years before the suit was first filed in 1972.

Forced Out of Syndication

The department's research covered a period when it was common practice for the networks to seek a share of ownership in virtually all programs it purchased from independent producers, along with syndication and other ancillary rights.

Since then, network business has been conducted differently, and what NBC has agreed to in its proposed settlement of the antitrust suit fairly conforms to the current patterns of program selection and purchasing.

One of the more bothersome provisions of the settlement is a prohibition against the network's acquisition of the lucrative syndication rights to the en-

Continued on Page D5

A scene from "Little House on the Prairie," the only primetime program produced on television by NBC.

11/19/76 NY Times

Wednesday, November 24, 1976 VARIETY RADIO-TELEVISION

ABC DISCOVERS THAT JUSTICE IS BLIND

GAVE UNCLE SAM ITS 11th TOE IN DECREE

By PAUL HARRIS

Washington, Nov. 23.

Early indications are that NBC may have pulled off a coup last week when it signed a consent agreement with the Justice Dept. concerning primetime entertainment programming practices. While offering few concessions to current biz methods, the web has not only been relieved of the uncertainty and expense of a protracted antitrust suit, but has obtained unprecedented Government approval of the concept of exclusivity against pay cable.

In pacting with the J.D., NBC has agreed to rules already on FCC books, ceilings on internal production it does not expect to meet, inconsequential prohibitions and some minor concessions concerning contracts for series shows and options for pilots. In short, the network appears to have lopped off its 11th toe for Uncle Sam.

What's more, buried deep in the lengthy agreement is a promised upper limit to be penned in future pic contracts concerning exclusivity against feevee. The web in the future may insist on exclusivity extending only from 30 days prior to first availability date and lasting no longer than 24 months.

To be sure, the provision would eliminate any tendency to warehouse pix for long periods — the subject of anguish in Washington including four days of hearings last year before the Senate Antitrust Subcommittee. In this network's case, it would cut in half the 60 days of exclusivity before the availability date normally included in its contracts.

Engraved In Stone — Maybe

But the provision also establishes Governmental approval of exclusivity against pay-cable both in concept and time, something that feevee entrepreneurs would prefer to avoid. The terms are comfortable enough for NBC — Justice had initially proposed that exclusivity last only 45 days before and after each network exhibition of a film — and approval of the agreement by L.A. District Court Judge Robert Kelleher could have the practical effect of etching them in stone in D.C.

Although nothing in the pact prevents the FCC from making any rules on the subject, the realities of that agency's rulemaking procedure are such that it is not likely to do so if major parties are satisfied.

The provision also demonstrates the importance of the JD-NBC pact for providing peace of mind at the network with minimum sacrifice. It's particularly significant because most of the onerous-looking provisions would not become effective unless identical terms were extracted from ABC and CBS, either through similar consent agreements or by a Government victory in its antitrust suit. ABC says it has no intention of signing and CBS toppers haven't made up their minds.

Room For Expansion

One such provision would limit the amount of entertainment programming the web may pro-

(Continued on page 167)

FEDERAL REGISTER, VOL. 42, NO. 94—MONDAY, MAY 16, 1977

WEEKLY
Television Digest with consumer electronics
31st YEAR OF PUBLICATION 31 1945-1976
The authoritative service for broadcasting, consumer electronics & allied fields
NOVEMBER 22, 1976 VOL 16, NO 47

SUMMARY INDEX OF WEEK'S NEWS

Broadcast

NBC-JD ANTITRUST ACCORD won't have financial impact, network assures Affiliates' Board. Most major provisions aren't effective pending settlement of suits against CBS & ABC, which vow to continue fight. (P. 1)

NETWORK CHILDREN'S TV revenues rise in 1976 despite NAB 24' Code restrictions. NBC shows 'most dramatic' increase, CBS least, in study by House Communications economist Pearce. (P. 2)

1977 CATV RULES on franchising & certification postponed a year, rulemaking started. Hassle over controlling MATVs in prospect. (P. 3) More details of definition proposal (P. 5)

'ROUGHER SLEDDING' ahead for broadcasters under Carter, Hooks tells NAB fall conference. Frey says TV-radio won't have high priority. (P. 3)

BACKE WON'T BE SPOKESMAN for industry, he tells CBS Affiliates' Board. NBC affiliates commend network for improved pre-screening procedures. (P. 3)

GOVT. RURAL TV LOANS get boost at conference on broadband service. Cable-phone cross-ownership prohibition is criticized. Goldmark discounts cable's rural potential. (P. 4)

CPB-PBS DISAGREEMENT again flares, as PBS boards denounce CPB program decisionmaking, 'wasteful bureaucracy.' (P. 6)

Consumer Electronics

VTR STANDARD WAR simmers down to JVC's VHS system vs Sony's Betamax. Matsushita, Hitachi, Sharp now have at least partial commitment to VHS. Sony denies copyright law violations (P 7) Betamax shortage seen probable by Jan., supply lightening as ad campaign fuels record 5,000-unit month Cassette changer due in mid-Jan. (P. 11)

TV INTERFERENCE susceptibility rulemaking planned by FCC in 'next year or so,' claims it has authority. TV makers angered at FCC statements, say better methods are needed (P 8)

TED VIDEODISC player & changer make U.S debut in NTSC format (P. 9)

PROJECTION TV awaits breakthroughs, commercial & technological. Magnavox & Admiral still studying Hughes Aircraft active. Sega naming distributors, goes nationwide next fall. (P. 10)

CB WAIVER 'ERRATA' explains that new 23-to-40 testing tolerance is tighter than originally indicated Rulemaking on proposed 100-db harmonic suppression limit is issued. (P. 11)

GE'S NEW CB models will be shipped to retailers from bonded warehouses on first business day of Jan. Dullmeyer sees wholesale CB dollar volume next year climbing 10%. (P. 11)

NBC—ANTITRUST ACCORD WON'T CHANGE THINGS: Day before it signed consent decree Nov. 17 with Justice Dept. (JD) settling Dec. 1974 program antitrust suit (Vol. 14:50 p2), NBC told TV Affiliates' Board settlement will have "no major financial impact." Lawyers we talked to agreed almost unanimously; network program suppliers were chary about any comment at all.

CBS & ABC—facing identical suits—are incensed that NBC "capitulated," as a network official put it, and both vowed they'd continue fight. Now pending in L.A. Dist. Court are CBS & ABC petitions to dismiss suit as "lacking merit"—but NBC's action is said to have hurt their cause tremendously. Although NBC's settlement had been expected (Vol. 16:46 p5), JD agreed that no negotiations presently are underway with other 2 networks. (Note: NBC also recently split from CBS & ABC in refusing to appeal family viewing decision [Vol. 16:46 p3].)

Meeting in Barbados last week (see p. 3), NBC also told Affiliates' Board that JD agreement merely codifies existing practices and will "cause no major changes in our way of doing business." In formal statement, NBC said settlement could "ultimately establish industry guidelines"—since most major provisions against NBC don't become active unless & until they're also applied to ABC & CBS—and that "we are pleased that this litigation...is now over, so far as NBC is concerned. By taking the lead in entering into this new charter, NBC continues its efforts to advance constructive relationships in the industry..."

Suit—charging anti-competitive program practices—first was brought in 1972 by Nixon Administration, was dismissed in Nov. 1974 by L.A. Court "without prejudice" to refiling after networks contended it was politically motivated. Ford Administration immediately refiled nearly identical suits against all 3 networks within month. Among major provisions of NBC-JD settlement which won't be effective until "similar relief" is obtained against ABC & CBS (news, public affairs & sports are exempt):

(1) Limits NBC to production of 2-1/2 hours of prime time programs per week for 10 years (network now produces only one hour, "Little House on the Prairie"); CBS now does one hour (after canceling 2 programs recently), ABC only made for TV movies, no series NBC also would be allowed to produce 2 special programs every 6 months in prime time, 8 hours per week in daytime, 11 hours in fringe.

(2) Limits "exclusivity" to network series to 4 years (now generally 5) and restricts rental of facilities for production to year—both with right to renew for year. Both restrictions are for 15 years (3) Prohibits NBC for 10 years from retaining "exclusive options" to more than 35% of programs not put into schedule. (4) Limits exclusive rights to "spin-offs" for 10 years (5) Restricts use of repeats "to the same year as that in which the initial episodes...are broadcast," with several exceptions

JD said provision limiting exclusivity of program series to 4 years was subject of "intense negotiation" Govt. originally sought 2-year option period and several other alternatives were discussed and rejected

Consent decree is to become effective in 60 days (it was filed in L.A. Court Nov. 17) and a major provision that takes effect then—without waiting for decision on CBS & ABC suits—restricts NBC's exclusivity for movies against pay TV (over-air & cable), cassettes & video discs. NBC can't obtain exclusivity more than 30 days prior to first telecast or beyond last telecast; in all cases, such exclusivity is limited to 2 years for 2 runs, another year for each additional airing. JD first proposed to limit any exclusivity to 45 days before & after each network airing, said it accepted compromise because it would "eliminate any possibility that NBC can warehouse feature films for a number of years." Judgment also prohibits NBC from engaging in domestic syndication (already prohibited by FCC).

Justice said order was signed because "the only meaningful relief that can be obtained short of restructuring the networks is to limit network program production and restrict the program rights that each network may obtain from outside suppliers...This should minimize NBC's incentive to select a program on the basis of financial interests in it." Under order, NBC is required to furnish its officers & directors (for next 10 years) list of all independent program suppliers as published in then-current Television Factbook.

NETWORK CHILDREN'S TV REVENUES RISE in 1976, despite 1974 NAB TV Code restrictions on maximum of commercial minutes allowed during weekend and early evening children's programming, all 3 TV networks showed increases in gross ad revenues for total children's programming time in 1976, according to report prepared by House Communications Subcommittee economist Alan Pearce. During same year, production costs rose "only marginally," Pearce said, adding that for 1976, despite further reductions in children's ad time, both revenues and profits are expected to be "much greater." Pearce will present report at Action for Children's Television Conference this week in Cambridge, Mass.

While at FCC Office of Plans & Policy in 1972, Pearce predicted in internal report that reduction in children's ad time wouldn't harm networks financially because as number of minutes available decreased, price would increase (Vol. 14:40 p2). FCC relied on Pearce's study in 1974 report & policy statement (Vol. 14:43 p2). CBS Broadcast Group Pres. John Schneider subsequently said Pearce was "wrong, terribly wrong," stating in May 1975: "The reduction...has been costly to the industry in general and CBS in particular" (Vol. 15:20 p4). Schneider declined for "competitive reasons" to reveal CBS children's show profits to House Communications Subcommittee 2 months later (Vol. 15:29 p1).

According to Pearce's latest study, gross revenues for 3 networks combined—for both regularly-scheduled and special children's programs—"reached an all-time high in 1975" of

NOTICES

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Ronald Austin

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*NOT ADMITTED N.Y.

March 1, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States v. National Broadcasting Company, Inc., Civil No. 74-3601 - RJK, U.S.D.C., C.D. Cal.

Dear Mr. Hollander:

We represent United Artists Corporation and Metro-Goldwyn-Mayer Inc. in connection with the proposed consent decree in the above matter. We endorse the comments submitted to you by Columbia Pictures Industries, Inc., et al. in the above matter. We also join in Mr. Liman's request for a meeting with you and with the Assistant Attorney General in charge of the Antitrust Division before the Department of Justice reaches a final decision as to whether it will withdraw its consent to the proposed decree.

We enclose additional comments on behalf of United Artists Corporation and Metro-Goldwyn-Mayer Inc., which we believe further support the necessity for a withdrawal of the Government's consent to the proposed decree.

Thank you for your consideration.

Sincerely yours,

Robert R. Salman

Received on 3-1-77 at 5:30 PM
RRS/amd
Encl.

60-211-62

COMMENTS WITH RESPECT TO PROPOSED FINAL JUDGMENT IN UNITED STATES OF AMERICA v. NATIONAL BROADCASTING COMPANY, INC., CIVIL NO. 74-3601-RJK, U.S.D.C., C.D. Cal.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
COUNSELORS AT LAW
40 WEST 57TH STREET
NEW YORK, N Y 10019

COMMENTS OF UNITED ARTISTS CORPORATION AND METRO-GOLDWYN-MAYER INC. WITH RESPECT TO PROPOSED FINAL JUDGMENT IN UNITED STATES OF AMERICA V. NATIONAL BROADCASTING COMPANY, INC., CIVIL NO. 74-3601-RJK, U.S.D.C., C.D. Cal.

These comments are submitted to the Department of Justice pursuant to the provisions of Sections 2(b) - (h) of the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §16(b) - (h), by United Artists Corporation ("United Artists") and Metro-Goldwyn-Mayer Inc. ("MGM"). United Artists is a distributor of theatrical feature films.* MGM is a producer and distributor of theatrical feature films. Both companies distribute theatrical feature films for television exhibition.

The Proposed Decree Contains No Restrictions On NBC's Production Of Theatrical Feature Films

The proposed consent decree contains no restrictions on NBC's power to produce theatrical feature films. The Competitive Impact Statement confirms that NBC uses its control over access to its network "to control the prices paid by NBC for television exhibition rights to motion picture feature

* Motion pictures which are initially exhibited in theatres and only subsequently exhibited on television.

films; and to obtain competitive advantages over other producers and distributors of ... motion picture feature films."* Despite the government's recognition of the problem, the proposed decree does nothing to prevent NBC from producing theatrical feature films whenever it chooses

The decree's "hours limitation" permits almost unlimited production by NBC of theatrical features. For instance, since the proposed decree permits NBC to exhibit a full 2 1/2 hours of NBC produced entertainment programming in prime time each week, NBC could theoretically produce 52 feature films each year and, subsequent to their theatrical exhibition, play them off one week at a time in prime time on the network.

The motion picture industry depends greatly on revenues from television exhibition of theatrical features. The fact that there are only three buyers for the first run television exhibition of theatrical feature films -- the three networks -- gives the networks unfair leverage in purchasing. The Department of Justice has recognized that such network power becomes patently anticompetitive when "... the network, through its production of entertainment programs, is in competition with outside suppliers for exhibition on its own network and that [the network] could, at any time, by unilateral decision, pre-empt all the available time on its network."*

The government, having made this accurate observation, should not now be willing to settle for a decree which gives NBC the unrestricted power to make theatrical feature films. Under the decree, NBC could fill one entire evening of prime time per week with an NBC theatrical feature film. Since the number of theatrical features shown on television has decreased, this one motion picture per week could effectively pre-empt independent producers of motion pictures from having their product shown in prime time on the NBC network.

In addition, unless its ability to make theatrical feature films is restricted, NBC will continue to use the threat of internal production to keep the prices it pays outside suppliers at an artificially low level. When ABC

* Competitive Impact Statement, p. 2.

* Page 8 of Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims filed January 19, 1976 in United States v. National Broadcasting Company, Inc., 74-3601-RJK, U.S.D.C., C.D., Cal.

and CBS entered into the production of theatrical feature films in the late 1960's, all three networks were able to suppress the price they paid other producers and distributors of motion pictures. Further, the leverage of "if you won't take our price, we'll produce it ourselves" allowed the networks to maintain the price at a level wholly unrelated to soaring costs or the natural laws of a competitive marketplace. All three networks offered the almost identical low price for the exhibition of a non-network produced motion picture. This price remained the same for several years. The producers and distributors of motion pictures had no alternative if they wanted to exhibit their films on television. They were compelled to take what the networks offered.

Allowing NBC to produce its own theatrical feature films injures competition in a variety of other ways. NBC could produce low quality theatrical feature films, expecting that any losses in theatrical exhibition would be recouped by exhibition on its own network. Also, NBC could spend vast amounts of money on a film because its prime time exhibition on NBC is guaranteed. Such expenditures would artificially force up the costs of production to outside suppliers.

The failure of the proposed decree to place any restrictions on NBC's internal production of theatrical feature films demonstrates the ineffectiveness of the so-called "hours limitation" on NBC produced programming. It also reveals that the decree provides no meaningful relief with respect to "long form" programming. For this reason alone, the proposed judgment should be withdrawn.

The Provisions Of The Proposed Decree With Respect To Network Exclusivity Over Pay Cable Provide No Meaningful Relief

Section VI(E)(iii)(e) of the proposed decree provides that for 15 years, for theatrical feature films which NBC has licensed to show on the NBC network, NBC cannot acquire exclusive exhibition rights against

> "pay or subscription television, via cable or any other means, where a per-program or per-channel charge is made to the viewer, except that NBC may acquire exclusive rights to any such feature film commencing thirty (30) days prior to the first date and extending until the last date on which NBC may broadcast such feature film under the contract between NBC and such supplier, so long as this period of exclusivity between the first and last dates on which NBC may broadcast such feature film under such contract does not exceed twenty-four (24) months, and does not exceed twelve (12) additional months for each exhibition greater than two (2) to which NBC acquires the exhibition rights" (emphasis supplied).

This provision merely codifies NBC's present contract exclusivity rights, which prevent the exhibition on pay cable of theatrical feature films licensed to NBC The government's Competitive Impact Statement recognized the injustice of this practice by noting that the action against NBC was initiated because "despite the FCC financial interest and syndication rules, NBC and the other networks continued to exact from producers such rights as ... exclusive use of [theatrical feature films] by NBC as against other communications markets "* Accordingly, NBC should not be permitted to acquire any exclusive rights with regard to pay or subscription television.

Under the proposed decree, NBC's exclusivity over pay cable may begin thirty (30) days prior to the date on which the license agreement permits NBC to broadcast the film At the very least, any such exclusivity should be limited to begin no earlier than thirty (30) days prior to the scheduled showing of the film.

The decree gives NBC two years of exclusivity over pay cable. Any exclusive rights should terminate thirty (30) days after the film has been shown on the network.

The proposed decree would merely put the court's stamp of approval on NBC's present trade practices in connection with exclusivity over pay cable. This is a further reason for withdrawal of the proposed decree.

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* Competitive Impact Statement, p.5.

Dated: New York, New York
March 1, 1977

Respectfully submitted,

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March 1, 1977

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United States v National Broadcasting Company, Inc , Civil No. 74-3601 - RJK, U.S.D.C., C.D., Cal.

Dear Mr. Hollander:

We represent the companies identified in the comments enclosed herewith in connection with the proposed consent decree in the above action.

After you and your staff have reviewed the enclosed comments, we respectfully request the opportunity to confer with you concerning the proposed decree. In addition, we respectfully request the opportunity to confer with the Assistant Attorney General in charge of the Antitrust Division before the Department of Justice reaches a final decision as to whether it will withdraw its consent to the proposed decree.

Sincerely yours,

Arthur L Liman

Received on 3-1-77 at 5:30 PM

Enclosure

60-211-62

United States of America v. National Broadcasting Company, Inc., Civil No. 74-3601 - RJK, U.S.D.C., C.D., Cal.

These comments are submitted to the Department of Justice pursuant to the provisions of Sections 2(b)-(h) of the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16(b)-(h), by the following parties:

(a) Columbia Pictures Industries, Inc.

(b) Goodson-Todman Productions

(c) Paramount Pictures Corporation

(d) Twentieth Century-Fox Film Corporation

(e) Warner Bros. Inc.

(f) Universal City Studios, Inc.

The foregoing parties constitute a substantial segment of the major creative forces in the television industry today.

For obvious reasons, the outcome of this Government antitrust action against NBC as well as the outcome of the Government's companion suits against CBS and ABC will have a profound impact on the commenting parties. For, unless the Government is able to obtain meaningful relief by consent decree or otherwise, the commenting parties will continue to be, as they have been in the past, among the principal victims of ongoing network antitrust violations which are a direct result of the networks' oligopolistic dominance of access to the nation's airwaves.

Preliminary Statement

Because we firmly believe that the proposed consent decree between the Government and NBC provides no meaningful relief against network antitrust violations -- indeed, because we believe that the proposed decree will solidify, legitimize and perpetuate the networks' dominance and illegal practices -- we respectfully urge the Department of Justice to withdraw its consent to the proposed decree, as it has an unqualified right to do. If the Department is unwilling to do so, then we shall be required to urge the Court to disapprove the decree as being contrary to "the public interest," 15 U.S.C. § 16(e).

In offering these comments, we are mindful that in judging the impact of the provisions of the proposed decree, they are not to be compared to provisions which might appear in a confession of judgment by NBC.

Nor do we mean to cast any doubt on the good faith of the Government negotiators in attempting to arrive at reasonable solutions to what one distinguished Federal appellate judge, the Honorable Edward Lumbard, has described as the

> "unique and unsettled questions regarding how the antitrust laws are to be applied to the government-licensed, limited-frequency, entry-proof market of television in which the three networks have a virtual monopoly on the type and quality of programs and ideas that are disseminated to the public by television."*

And if the proposed decree provided meaningful relief, we would surely applaud NBC and be in total agreement with the statement of NBC's President, on announcement of the proposed decree that

> "By taking the lead in entering into this new charter, NBC continues its efforts to advance constructive relationships in the industry to the benefit of our program suppliers, the NBC Television Network and most importantly, the viewing public."

But:

(a) when The New York Times, in analyzing the proposed decree, writes:

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* Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., 501 F.2d 894, 900 (2d Cir. 1974).

> "... The prohibitions detailed in the agreement scarcely alter business practices and are expected to have no significant economic impact on the network itself or on the television production industry -- if and when the restrictions go into effect."*

(b) when Variety, after a similar analysis, concludes that NBC gave "Uncle Sam Its 11th Toe In Decree";**

(c) when NBC reportedly tells its affiliates not to worry -- that the settlement it negotiated merely codifies existing practices and will "cause no major changes in our way of doing business";***

(d) when, to date, no prospective beneficiary of the "purported" relief sought by the Government in the proposed decree has come forward to endorse that decree; and

(e) finally, when a major segment of the television industry represented by the parties filing these comments comes forward, as we do here, to argue that the Government, for all practical purposes, has not obtained meaningful relief against NBC;

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*November 19, 1976, p. D1.

**November 24, 1976, p. 85.

***Television Digest, November 22, 1976, p. 1.

we respectfully suggest that the Department of Justice reconsider whether the proposed decree should continue to receive Government approval. And, surely the Government should reconsider the commercial reality of the assertion in its Competitive Impact Statement ("CIS") that (pp. 2-3)

> "The proposed judgment provides relief similar and substantially equivalent to that requested in the complaint."

In essence, our objections to the proposed decree are as follows:

(a) A realistic analysis of the terms of the proposed decree, to wit, an analysis which takes into account not only the words of the decree but the business conditions under which it is bound to operate, demonstrates that the proposed decree alters virtually nothing -- it leaves in place, with de minimus changes, the present system of program procurement practices forced on program suppliers by all three networks, a system of practices replete with violations of the antitrust laws;

(b) But the proposed decree is even worse: by putting the Government stamp of approval on such illegal and pernicious network practices as long-term options, unreasonable exclusivity and internal production, the proposed decree is a step backwards; rather than alter the networks' past oligopolistic control of

access to the airwaves, the proposed decree blesses and sanctifies those practices and insures that the gross imbalance in power between the networks and program suppliers that has existed for many years will continue unabated; and

(c) Finally, the proposed decree represents an effort by the Government -- unprecedented since the days of the National Industry Recovery Act -- to write a standard code of anti-competitive business behavior for a major American industry. For under the express terms of Section VII of the decree, key provisions (e.g., so-called restrictions on long-term options, internal production, etc.) will not become effective until similar relief has been obtained against CBS and ABC. Hence, the Government has sanctioned the proposition that the minimal and meaningless relief obtained by the proposed decree with NBC, which preserves the networks' anti-competitive practices, should be delayed until CBS and ABC agree to abide by the same so-called restrictions. In short, when all three networks agree to a standard form of anti-competitive contract, then -- and only then -- will the key provisions of the proposed decree against NBC become effective.*

Hence, parallel business practices as practiced now and a standard contract will now receive the Government seal of approval. Producers, creative forces and others will, as in the past, have no alternative when they go to the marketplace: all three networks will -- this time with Department of Justice approval -- offer and demand virtually identical anti-competitive deals. This is not, we suggest, one of the intended purposes of the antitrust laws.

* * *

We may sum up the view of the commenting parties in this fashion: as the parties on the firing line, as the parties who must deal on a daily basis with the three networks, as the parties who are required to surrender valuable property rights to those networks merely as a condition of engaging in

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* The proposed decree goes even further in guaranteeing that there will be only one code of anti-competitive behavior for all three networks. For as the CIS points out with regard to Section IX (p. 14):

> "If a non-appealable judgment were entered dismissing either of the companion actions against CBS or ABC or decreeing injunctions different from those in this judgment, this provision [Sec. IX] would permit NBC to seek and obtain whatever relief, if any, was necessary to prevent it from being placed at a competitive disadvantage with respect to CBS or ABC. While this type of provision is unusual in an antitrust judgment, it is warranted by the unique nature of this industry, and the pendency of the companion actions." (Emphasis added)

Thus, NBC has obtained the best of all possible worlds -- a heads-I-win, tails-you-lose provision of an antitrust decree which allows it to continue to engage in parallel anti-competitive economic behavior with its competitors under any and all circumstances, so that it will not be placed at a "competitive disadvantage" with its competitors.

fn. cont'd

fn. cont'd

network program development, we find ourselves in agreement with what NBC reportedly told its affiliates -- don't worry, it will be business as usual (see p. 4, supra).

A decree which sanctions that result is contrary to the public interest; we urge the Department of Justice to withdraw its consent.

If NBC is only willing to give the Government its "11th Toe," then we respectfully urge the Government to give back that toe. The Department of Justice should reopen negotiations with NBC and seek meaningful relief or else prosecute its lawsuit against NBC with vigor and dispatch.

In this respect, we should note our total agreement with the Department of Justice position previously urged in this lawsuit and the Court's recent decision in the companion cases against CBS and ABC that the FCC does not have exclusive jurisdiction over the antitrust violations alleged in the Government's complaints.

The networks' antitrust violations are proper subjects for Federal judicial inquiry. And that inquiry should continue despite the recent FCC Notice of Inquiry, dated January 14, 1977 (Doc. No. 21049) (hereafter "FCC Notice of Inquiry").*

But the ultimate result of such a judicial inquiry should be a decree -- whether by consent or after trial on the merits -- which does restrict, in a meaningful fashion, the networks' anti-competitive conduct and their egregious violations of the antitrust laws.

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* The FCC Notice of Inquiry, with reference to the pending actions against NBC, CBS and ABC, states (p. 3):

> "We would like to make it clear that, in instituting the present inquiry, we have neither the power nor the desire to foreclose the Department [of Justice] in its antitrust action. While it is inevitable that thorough inquiry into network practices will encompass many of the questions raised in the antitrust suit, we do not believe that our inquiry should in any way preclude the Department from prosecuting its case or from arranging an appropriate settlement. See United States v. Radio Corporation of America, 358 U.S. 334 (1958)."

The Antitrust Violations

We think it important to set forth in summary fashion our views as to why the three networks violate the antitrust laws and how those violations adversely affect the business activities of the commenting parties.

This analysis is not intended to detract whatever from the other antitrust allegations which have been made by the Government either in this lawsuit or in its companion cases against CBS or ABC.

Rather, our objective here is to focus (1) on the means by which the networks have been able to become the three principal buyers of first run, original television programming; and (2) how they have illegally abused that immense power to extract from the suppliers of first run, original television programming unreasonable and illegal contractual provisions relating to such matters as long-term options at pre-set prices, exclusivity, "spin-off" rights, etc. and to eliminate meaningful price competition among themselves for programs.*

* A good part of the discussion that follows deals with what we consider to be the business realities of the television industry. The only absolute statement that can be made about those business realities is that there are no absolutes. Each of the commenting parties, at various times, with respect to particular programs and particular networks, has had varying experiences. Accordingly, it would be an overstatement for us to suggest that all producers have had exactly the same experience with all three networks as to all programs. Nevertheless, we all know that in our business there are industry-wide patterns and industry-wide anti-competitive practices generally engaged in by the networks. Our focus, therefore, will be on these industry-wide practices, with full recognition that for every rule there will be an exception.

a. The Network Combinations

We begin with what we believe to be an undisputed, but sometimes forgotten proposition: in theory, there are approximately 700 VHF local television stations which are potential purchasers of first run, original television programming.

In the real world, however, there are only three such principal buyers -- the three television networks.

This peculiar state of affairs -- the reduction of a potential market from 700 to three principal buyers -- has arisen because the networks themselves each own stations in five of the nation's largest markets and because the networks have each combined with approximately 200 affiliated stations in a fashion which effectively eliminates these stations as potential separate buyers of first run, original television programs.*

* It would be oversimplification, of course, to suggest that the three networks are the only buyers of television programming. But it is not oversimplification to suggest that at a trial on the merits it could be amply demonstrated that the three networks dominate the nation's airwaves. Each network through its owned and operated and affiliated stations reaches 98% of the homes in the country. In this context, a program supplier of first run, original programming who is unable to obtain network time for his program obviously has his work cut out for him in gaining any significant access to the nation's airwaves.

The facts which support the foregoing analysis are undisputed. To begin, the networks themselves are not broadcasters; they hold no licenses from the FCC (their five owned and operated local stations are, of course, licensed). Indeed, we are unaware of any command in federal law or any other body of law that there should be television networks.

But the next question is whether there is some economic, social or other reason for the existence of networks. In this context, the principal functions the networks do perform may be easily identified: (a) each is a common buying agent of programs for approximately 200 stations; (b) each is a common selling agent of advertising time for those same 200 stations; and (c) each provides an efficient physical mechanism for transmission of the programs purchased and the advertising messages sold to the 200 stations.

Viewed in this fashion, the networks perform in economic terms what may be best described as a clearinghouse function. The networks are the "clearinghouses" which permit the producers of first run, original television programs to deal with the numerous buyers of their programs (the local television stations), without requiring the expense and inefficiency of individual bargaining. And the networks perform the same function for the advertisers and the local stations. Finally, the networks provide the technical facilities for transmission of programs and advertising messages to local stations as part of a common schedule.*

So that our views on this subject are not misunderstood, we see no evil in networks performing these various clearinghouse and technical functions. And we are surely not opposed to an industry structure in which networks exist.

But when this analysis of the network function is taken one step further, it does become meaningful in antitrust terms: a full development of the facts in this case would demonstrate that as to the 200 stations in each network line-up, each network, in reality, is virtually the exclusive buying agent of programs and virtually the exclusive selling agent of advertising time for the vast majority of programs transmitted by the networks.**

The foundation for this state of affairs is, first, the networks' control over their five owned and operated stations

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* There has been a great deal of recent discussion in the trade press and elsewhere about a "fourth network." Much of this discussion and some of the programming efforts in this area are, in reality, a reflection of the frustration of producers of first run, original programming in dealing with the three established networks and an attempt, out of desperation, to find a "fourth opportunity" for their creative efforts. In any event, efforts at establishing a "fourth network" are all in an embryonic stage and there is substantial controversy over whether any such efforts will succeed.

** According to statistics set forth in a petition recently filed by Westinghouse Broadcasting Company, Inc. with the FCC (p. 15), "the networks now program roughly two-thirds of all available time on all affiliated stations (530 out of 798 half hour units)."

in the nation's largest markets and, second, the arrangements between the networks and their affiliated stations -- these are the factors which hold together the three combinations of approximately 200 stations and permit the networks to exercise their vast economic power.* Legally, the affiliation agreement may give the affiliate a retained right to refuse to "clear" a network-offered program; but a full development of the facts at a trial of this action would demonstrate that the affiliates rarely exercise this retained right and rarely refuse to "clear" network programs.*

For present purposes, we need not concern ourselves with the reasons why local stations rarely refuse to "clear" network programs. Whatever the reasons, the undisputed fact is that the rate of clearance by local stations is extremely high; in prime-time, it is almost always 99%.**

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* The FCC Notice of Inquiry, in rather precise terms, has spelled out the reach of the networks' power, by virtue of their owned and operated stations and their affiliation arrangements, as follows (p. 5):

> "Ever since the demise of the Dumont Network in the mid-1950's, there have been only three 'national' television networks: the American Broadcasting Companies, Inc. (ABC), Columbia Broadcasting System, Inc. (CBS) and National Broadcasting Company, Inc. (NBC). Recent years have witnessed the development of a number of specialized networks offering sports or movies, but the pre-eminent position of the three national networks remains unchallenged. Their affiliates number well over 75% of all U.S. commercial television stations (approximately 600 out of slightly more than 700) and, outside the major markets, network affiliation is virtually indispensable to successful station operations. [Footnote omitted] As discussed below, it appears that about sixty percent of the broadcast programs currently presented by affiliates are supplied directly by their network. In addition to their ability to reach nearly all American households through their affiliated stations, all three networks own VHF stations in each of the nation's three largest television markets (New York, Los Angeles and Chicago), and two in other major markets (ABC, Detroit and San Francisco, the 6th and 7th markets; CBS, Philadelphia and St. Louis, the 4th and 12th markets; and NBC, Cleveland and Washington, the 8th and 9th markets). Each of these 5-station 'owned and operated' (O and O) groups reaches about 22 percent of the U.S. audience. [Footnote omitted] The networks are actively involved as brokers or middlemen connecting the program producers and national advertisers with local stations and their viewers. It is, therefore, not surprising that the networks play a very important role in the development, selection, and distribution of television programming."

* The Government itself recognized that the question of refusals to "clear" network programs by local stations was significant to its theory of the case. In its "Supplemental Statement of Genuine Issues" (p. 6), it identified as an issue to be tried:

> "Whether each network has denied independent access by outside program suppliers to its combined affiliates by insisting on a high rate of network clearance." (Emphasis added.)

The subject of local station "clearance" of network-offered programs is now also the subject of the FCC Notice of Inquiry.

** At this stage, we need not be concerned with precise numbers. If a program supplier is precluded by means of the network combinations with the local stations from dealing even with 75% of those stations for broadcast time for two-thirds of the broadcast day, the impact of the restraint is clearly substantial.

The CIS acknowledges (pp. 3-4):

> "NBC, through its affiliated television stations, has control over access to approximately 98% of all

fn. cont'd

The net effect of this industry structure from the viewpoint of the program supplier is, we suggest, also undisputed. Because there are three separate network combinations each involving some 200 stations, because the affiliates clear almost all programs offered to them by the networks, the program suppliers of first run, original programs have only three principal buyers for their product -- the three networks.

A market which would otherwise have many sellers and many buyers has been transformed into a market with only three buyers.

The issue here, of course, is not whether networks are good or bad, either in a moral or economic sense. We are not anti-network per se As "intermediaries" or "clearinghouses" the networks perform some useful functions. But the fact is that the networks are combinations which effectively restrain trade and the competition for first run, original television programming that otherwise would exist among the local stations which are now network owned and operated or are network affiliates.

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footnote cont'd

> United States television households for programs which it offers for broadcast. This is because during prime evening hours, when television viewing is at its peak, most of the 200 NBC affiliated stations and all the NBC owned and operated stations depend upon NBC for virtually all of their television entertainment programming. In early 1976, for example, NBC's primary affiliates and its owned and operated stations broadcast over 90% of the programs regularly offered by the NBC Television Network during prime evening hours." (Emphasis added; footnotes omitted)

Accordingly, Section 1 of the Sherman Act does apply to the networks' program procurement practices and does require that those practices be judged by the "rule of reason."

b. Network Procurement Practices

The three networks -- having obtained their vast economic power to control access to the nation's airwaves by ownership of five owned and operated local stations and by combinations with affiliated local stations -- have abused that power, in violation of the rule of reason of Section 1 of the Sherman Act.

They have done so by means of the contractual provisions the networks extract from program suppliers, which create and maintain anti-competitive conditions in the television industry.

The Department of Justice is fully aware of the industry-wide practices by which the three networks generally exercise virtually total domination over outside program suppliers from the very first day that the relationship between a program supplier and a network with respect to a particular program, comes into existence. For example, if the producer comes to a network with nothing more than a concept for a series, at that earliest stage, even before there can be any meaningful development of the concept, the producer is generally required to surrender virtually complete artistic control over his creative efforts to the network. The producer must give the networks what

amount to veto rights with regard to program content and the use of talent -- rights which the networks are not hesitant to exercise and may be totally at odds with the producer's own creative concepts concerning his series.* The producer must give the networks the right to determine the extent to which, and the timing of, development -- when the script will be commissioned, when the pilot will be filmed, when the series will go on the air, etc. All aspects of scheduling are within the networks' control; the supplier has no control over the competition against which he must be judged. Promotion of the program on the network -- in the pilot stage or even after the first episodes of a series have been ordered or telecast -- are within the networks' control. At any time, for rational or irrational reasons, the networks have a unilateral right to opt out -- to refuse to go to the pilot stage, to cancel a series at any time even if it meets otherwise objective standards for continued exhibition on the network.

Although a complete catalog of network abuses would unduly lengthen these comments, some description of the most serious of the network abuses is necessary, if for no other reason than as the means by which to measure the extent to which the proposed consent decree deals with these abuses. That description follows:

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* The proposed decree leaves untouched the entire subject of creative controls. NBC may continue -- as in the past -- to exact from program suppliers the same onerous provisions with regard to "approval of creative elements and program content" (Sec. IV). The failure of the Government to obtain any relief in this area is another aspect of the proposed decree we find unacceptable.

We noted before that today, for the program supplier of first run, original television programming there is one unalterable fact of life: he has only three principal buyers for his original television programming, the three national television networks.

It is perhaps of greater interest that at any trial of this action the facts would show that, on a general industry-wide basis, whichever of the three networks the producer may determine to deal with, he will be offered virtually identical terms from each of the networks. And if he desires to sell his program, he will have no choice but to accept those terms. See, e.g., Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974), cert. denied, 419 U.S. 999 (1975).

And, finally, he will find that those parallel terms are designed to insure that the networks -- but not the producer -- will be able to reap enormous profits if the program is successful.* American Tobacco Company v. United States, 328 U.S. 781 (1946).

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* As to network profits, the FCC Notice of Inquiry points out (p. 7):

> "Network control over access to the medium has also coincided with rather extraordinary increases in profits. Between 1960 and 1975, total combined network expenditures rose from $461 million to $1,465 million, for an average annual increase of 13.6 percent. Total net

1. Options

For example, as the Government well knows, it is the general pattern in the industry today that when the networks order a script for a possible "pilot" program of a possible new prime-time series, the networks will demand outside producers, among other things (see pp. 17-18, supra), to surrender long-term options on the still unborn series for what amounts, in most instances, to its entire potential useful life for prime-time exhibition at pre-set prices.

The typical option term today is five years** -- in most instances, its entire potential useful life for prime-time exhibition. The networks -- all three marching in lock-step -- will not deal in any other way. The producers must usually surrender five years of options. (If the proposed series is for non-prime time exhibition, the option period may be as long as 9 or 10 years.) On this score, the networks, by their parallel conduct, guarantee that none of them will be placed at a "competitive disadvantage."

Moreover, the price for all five years of the option period will be fixed at this early stage when it is not possible to know whether the program will be a success or a failure or what the program will cost to produce. And the price for each succeeding year in the option period will not vary contractually depending upon the success (or failure) of the program.*

fn. cont'd

broadcast revenues, on the other hand, increased more rapidly; from $495 million in 1960 to $1,673 million in 1975, which was equivalent to an average annual increase of 15 percent. Net income (total combined profits before taxes) earned by the networks has risen at an annual rate of 32 percent; increasing from $33.6 million in 1960 to $208 million in 1975. According to the Internal Revenue Service, pre-tax profits accruing to all businesses in the United States increased at an average annual rate of approximately 12 percent between 1960 and 1974." (Emphasis added)

** To be precise, the network, when it orders a "pilot," obtains the option to order episodes for the first year of telecast and then obtains options to order episodes for the succeeding four years -- hence, at the "pilot" stage of development, the producer becomes obligated, at the network's option, to produce the program for five broadcast seasons at prices set at the "pilot" stage of development.

Very few series ever get to the point where the producer is freed of his five-year contractual obligation to the network to produce episodes at pre-set prices. According to our research, between the 1966-67 television season and the 1972-73 season, 186 new series were shown on the networks; of that number, only 15 were still on the air after five years.

* The typical contract will provide for some minimal escalation of the series price in each succeeding option year (usually less than 5%) and will also provide for escalation of price on account of such matters as increases in union wages. And there have been instances when a network has granted "relief" by raising a series price so as to provide additional compensation for a recalcitrant leading actor or actress or because production costs have far exceeded original estimates or for some other reason. In these instances, however, the producer has gone to the network as a supplicant -- not because he has any contractual right to seek an increase in the series price. And if he is granted "relief," typically he will be required to do something for the network, to wit, agree to extend the option years to six, or seven, or beyond.

Next, the price being offered by each of the networks very often does not cover his production costs. It may, sometimes, yield him some small profit, but in most instances, the producer is forced to operate at a deficit. In those instances, during the prime time run of his program, his license fee from the network will not cover his production costs. And, unless the producer is lucky enough to have one of the few programs whose prime time run is sufficiently long to provide him with the possibility of obtaining additional revenues in the highly competitive syndication market, there will be no way for the producer to recoup his deficit.

And, finally, the program producer in his dealings with all three networks is likely to discover this fact: Each network (within limited ranges and with exceptions for some special situations) will be paying the same pre-set pilot and series prices for comparable types of programs (X dollars for a 1/2 hour comedy produced on tape, Y dollars for a 1 hour detective drama produced on film, Z dollars for a 1 hour western produced on film, etc.).* As a general proposition, it is fair to say that there is no price competition among the networks.

Since there are only three principal buyers, since the program supplier today has virtually nowhere else to go with his program concept, since all three buyers are offering him virtually identical terms and will not deal on any other basis, the outcome of these "negotiations" in almost every instance is a foregone conclusion -- that is, if the producer desires to remain in business.

But the net effect of these parallel program procurement practices by all three networks is also, we suggest, obvious -- the networks have successfully eliminated the possibility of any price competition among themselves for television programming. See Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974).

Once the ink is dry on the contract or the deal memorandum for a particular program, no network need fear that for the five-year option period, it will be required to compete in price terms against any other network for that program. To use the expression most commonly used by the networks in defense of their parallel practices, no network will be at a "competitive disadvantage" vis-a-vis its program suppliers. To use the words of the real world, however, no network will be required to engage

* Whatever the justification, if there be any, for parallel pricing at a time when neither the producer nor the network knows how well the program will be received by the public, when the program goes on the air and its success or failure is determinable, there is a different reality. At that stage there is no reason why price should not vary with success -- and it could, but for the fact that the network has already forced the producer to grant long-term options at pre-set prices.

in price competition against any of the other two networks for programs.*

And to make things even better for the networks, although they have no contractual obligation to increase the pre-set price to the program supplier, if the program becomes a success there are no contractual limits on the amounts they can charge advertisers for the insertion of commercial messages in the successful programs. The networks are always free to raise the advertising rates for their programs with high ratings; but the program supplier never has the contractual right to receive any portion of these increased rates. Because of long-term options at pre-set prices, it is always the networks -- not the producers -- which receive the profits available from being able to charge high advertising rates for a successful program.**

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* The networks are fond of boasting of the highly competitive activities they engage in to obtain viewers for their programs. We do not doubt the vigor of their efforts in that area. But competition for viewers is no substitute under the antitrust laws for the absence of price competition among the networks vis-a-vis their program suppliers.

** The CIS states (p. 3):

> "The value of any television program to its producer and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages."

We agree. But, because of long-term options, the price paid by a network to a producer for a television program has nothing to do with the number of television viewers who see the program.

2. Exclusivity

If parallel long-term options at pre-set prices eliminate the possibility that the producer will be able to share in network profits from a successful program, the parallel provisions demanded by the networks with regard to exclusivity as to other television uses go a step further in aggravating the producer's plight. Thus, it is an industry-wide pattern that for the entire length of the option period, the producer's price for prime time exhibition on the network will remain essentially the same (perhaps it will be a price which equals his production costs) -- but for the entire length of the option period, he will not be able to realize revenues from older episodes of the series already broadcast because the networks will force him to surrender for the entire option period the right to license older episodes of the series for other television uses (e.g., stripping during the daytime or early evening or the showing of individual episodes during early evening hours, fringe time, etc.) by other networks or by local stations, be they affiliates or independents.

Because of these exclusivity provisions, the older episodes of a series must simply sit on the shelf, gathering dust, and the producer is generally precluded from obtaining whatever value may be left in the older episodes until the option period has expired.

There might be some justification for this state of affairs if it could be demonstrated that the networks require exclusivity as to old episodes against all other television uses in other day-parts to preserve or maintain the ratings of new episodes in prime time (although it is a good question why a producer should be forced to give the networks this supposed protection at the very same time that he is forced to surrender any possibility of sharing in the profits from high ratings in prime-time).

But the facts offer little, if any, support for that justification for unreasonable exclusivity demanded by the networks against other television uses. There are just too many instances in which old episodes of a series still being telecast in prime time have been telecast in other day parts without any measurable or adverse impact on prime time ratings of new episodes of that series. Appendix A is a table which shows the instances in which old episodes of a series have been telecast in other day parts during the prime time exhibition of new episodes of the series.

It is significant that most of the examples given in Appendix A relate to instances in which a network which has obtained the broad exclusivity we noted above has determined to allow non-prime-time stripping or other non-prime-time uses of older episodes of a prime-time series on its <u>own</u> network.

The fact that a television network is willing to allow this invasion of its exclusivity rights for the benefit of its <u>own</u> network strongly suggests that the networks demand and obtain exclusivity against other television uses not for the presumably legitimate purpose of protecting prime-time ratings, but for entirely different purposes -- (a) they preserve for themselves the option to use older episodes on their own networks in non-prime-time, (b) they prevent the possibility of a bidding war among themselves, or with local stations, for non-prime-time uses of the older episodes of a successful prime-time series, and (c) they protect their owned and operated stations from the competition that might result if independent stations in the markets in which the owned and operated stations broadcast could show old episodes of prime-time programs during the early evening hours when the owned and operated stations have their local news programs on the air.

In short, the broad exclusivity provisions which the networks now routinely demand and obtain from program suppliers are not designed to protect legitimate network interests in preventing the dilution of prime-time ratings. Instead, like long-term options, they are designed to prevent price competition among networks or among networks and local stations and competition among network owned and operated stations and independent stations. Here, as in other instances, no network

places itself at a "competitive disadvantage." And, here, as in other instances, what the phrase really means is that the networks, by engaging in parallel practices, preclude the possibility of price competition among themselves, all to the detriment of the program supplier. United States v. Griffith 334 U.S. 100 (1948); Twin City Sportservice, Inc. v. Charles O. Finley & Company, Inc., 512 F.2d 1264, 1274, 1275 (9th Cir. 1975).

3. Internal Production

In addition to the economic leverage inherent in a marketplace where there are only three principal buyers and many sellers, the networks further bolster their power to deal with program suppliers on terms most favorable to the networks by engaging in internal production of entertainment programs.

Internal production, to any extent, preempts the limited network time available for programs produced by outside suppliers. And what better way is there for a network to deal with a recalcitrant independent program supplier than to suggest that the network need not deal with him at all, but can simply use its own internally-produced program.

In short, internal network production of entertainment programs -- indeed, the mere threat of interal production in a marketplace of scarce prime time dominated by three networks -- is an unfair competitive practice and an unreasonable exercise of network power. Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973); United States v. United Shop Machinery Corp., 110 F. Supp. 295, 338-346 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954); United States v. Aluminum Company of America, 148 F.2d 416, 430-431 (2d Cir. 1945). It is no surprise, therefore, that all of the networks produce some of their own prime-time and non-prime-time entertainment programming. Internal production is an ever present gun pointed at the heads of independent program suppliers -- and the threat is no less real because there may be only one bullet in the chamber of the gun.

In connection with internal production, the networks engage in another practice which is equally unreasonable and anti-competitive. They restrict the pool of talent -- actors, actresses, writers, directors, producers, etc. -- available to independent program suppliers by engaging that talent on an exclusive basis for the contracting network. In many instances, the network is able to contract for that talent on an exclusive basis by offering something no independent program supplier could possibly offer -- guaranteed network air time.

There is no justification for a network to be permitted to engage in this kind of unfair competition with independent program suppliers.

The networks should not be in the business of producing programs for exhibition on their own networks. Surely, given their dominance of access to the nation's airwaves, they should not be in the business of acquiring talent on an exclusive basis, in competition with independent program suppliers, whatever the reasons for acquiring such talent -- be it for the purpose of using such talent on internally-produced programs or for the purpose of "laying off" the talent to independent program suppliers, whether or not the independent program supplier has any need or desire for that talent.

* * *

Long-term options, exclusivity and internal production are, as we noted before, merely examples of the type of anti-competitive practices engaged in by the networks. We could add to the list such matters as the typical contract provisions which grant the networks unreasonable "spin-off" rights, unreasonable exclusivity against other media, unfair and unreasonable "creative controls," etc.

The simple facts, however, are these: the networks are combinations, which by virtue of their affiliation agreements and the economic and other pressures which they can bring to bear on affiliates to "clear" network programs, have preempted a large proportion of the most desirable broadcast time available on the nation's airwaves. In so doing, they have, for all practical purposes in most instances, eliminated the competition which might otherwise exist between hundreds of local television stations for first run, original television programming. Having thus constituted themselves as the three principal buyers of original television programming, they have abused that power by extracting unreasonable and onerous conditions from program suppliers by vertical contracts which restrain trade. They have successfully eliminated meaningful price competition among themselves as to program suppliers. They have sought to achieve -- and they have achieved -- virtually total domination of the activities of the creative community and the producers of programs in the television industry.

The anti-competitive conditions in the television industry -- the gross imbalance in power between the networks and program suppliers -- has long been recognized by all interested government agencies and by all expert groups.

Against this background, we turn to an analysis of the provisions of the proposed decree and the CIS.

The Proposed Decree

In our view the heart of the proposed decree lies in the provisions relating to long-term options (Sec. VI(E)(i)), exclusivity against other television uses (Sec. VI(E)(ii)) and internal production (Sec. V). These are the major areas of network abuse.*

Accordingly, a determination of whether the proposed decree is in the public interest rests, we submit, on an analysis of whether the Government has obtained meaningful relief in those major areas of abuse.

We respectfully submit that the Government has not.

1. Options (Sec. VI(E)(i)). As we sought to demonstrate earlier, one of the keys to network power over program suppliers and the networks' ability to eliminate price competition among themselves are the identical provisions the networks extract from suppliers with regard to long-term options.

Sec. VI(E)(i) of the proposed decree which deals with options is, in consequence, one of the key provisions of the decree.

* In the interests of brevity, we shall not discuss provisions of the proposed decree which deal with peripheral or tangential problems.

The Government, we think, would agree. The CIS says (pp. 17-18):

> "Section VI(E)(i) was the subject of intense negotiation between the parties. Although not specifically requested in the complaint, an important element of the proposed relief is the initial limitation to four, of the yearly options obtainable by NBC when it contracts for production and possible exhibition of a new program series The Government initially proposed a two year limit on the option period, and various compromises were considered, including a proposal for basing program license fees upon program popularity, which was discarded as unworkable and inappropriate."* (Emphasis added)

This portion of the CIS, however, concludes, as follows (p. 18):

> "The Government believes that the relief provided would be substantial."

We must respectfully disagree. In our judgment, the relief provided is not "substantial."

Section VI(E)(i), in full text, provides, as follows:

> "NBC is enjoined and restrained:
>
> * * *
>
> "(E) For a period of fifteen (15) years from the effective date of this Section, from:

* The CIS unfortunately is silent on the nature of the "various compromises [which] were considered"; nor does it supply any further information as to why the Government retreated from its initial proposal of a "two year limit on the option period."

"(i) Acquiring from an independent program supplier options for Network Exhibition of a prime time network entertainment program series exercisable for a period in excess of four (4) years from the date of first broadcast of an episode of such program as part of an NBC prime time television network entertainment program series; and the balance of any broadcast year in which such four (4) year period ends, provided that nothing herein shall prevent NBC, after the date of first broadcast, from negotiating new provisions which may include the purchase of an extension of the option period to five (5) years from the date of first broadcast, and the balance of any broadcast year in which such five (5) year period ends, and, at the end or during the final year of any contract term, from negotiating for and entering into new agreements with said supplier so long as the options acquired under any such new agreements do not exceed a period of four (4) years from the date of first broadcast of an episode under such new agreements, and the balance of any broadcast year in which such four (4) year period ends, plus the right to negotiate for and acquire a fifth option year, and provided further that nothing herein shall prevent NBC from acquiring first negotiation and first refusal rights for new agreements with said supplier so long as any such first refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms, and provided further that nothing herein shall prevent NBC from entering into contractual provisions incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment."

Hence, Section VI(E)(i) deals with three separate, but closely related areas: 1) the option term in the original contract (four years); 2) the right to a renegotiation to obtain a fifth year of options (permissible after the date of first broadcast); and 3) first negotiation and first refusal rights during the final year of the contract for further exhibition rights.

First, while the Government asserts that the relief is "substantial," we seriously doubt that anyone in the business of producing television programs would -- and certainly the commenting parties do not -- regard a reduction of the option term from five years to four years (even if that reduction were absolute, which it is not) as "substantial" relief.*

It is perhaps more important, however, that Section VI(E)(i) represents Government blessing for long-term options as a permissible program procurement practice by a network, in the face of the demonstrable anti-competitive impact of long-term options (see pp. 20-24, supra).

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* In commenting on this provision, the CIS states (p.11):

> "This provision is designed to restrict NBC's present ability to obtain exclusive rights to a program series for as long as seven years on terms and conditions set before the program has ever been developed."

If the reference to seven years is meant to suggest that the impact of the reduction of option years to four should be judged against a current industry-wide standard of seven years, then the reference is based on a factual misunderstanding. The typical option period today, as we noted before, is five years.

A reduction of the option term from five years to four hardly remedies the anti-competitive conditions flowing from long-term options and hardly provides a competitive marketplace for a successful program. For four years, the program supplier is still suffering from his inability to obtain competitive bidding by the three networks for his successful program. For four years, he is still receiving pre-set prices for his programs which do not reflect the success of his creative efforts. For four years, the networks are still free to reap all the profits from a successful program, without any contractual obligation to reward the producer for his successful efforts.

In these circumstances, a proposed decree which does nothing more than reduce from five years to four the length of time during which all these anti-competitive conditions are allowed to prevail does not, in our judgment, provide "substantial" relief.

Next, in many or at least in some cases, the four year term may prove to be illusory because of NBC's right to negotiate for a fifth year of options after first broadcast. We are unaware of any pro-competitive goal to be served by such a provision and the CIS is silent on that subject. We are unable to perceive any useful purpose to be served by providing an all-powerful network with the opportunity to use its leverage against a program supplier to obtain a fifth year of options after first broadcast, even if some producers will be able to resist that leverage. It is not "substantial" relief to provide the networks with that opportunity.

Finally, the provisions of the proposed decree relating to first negotiation, first refusal rights during the last year of the contract do not provide "substantial" relief.*

For one thing, those provisions will not become relevant until a series has already been on a network for four or five years -- a period of time which is eternity for most television series. Those provisions offer no relief to the program supplier for those first four or five years.

Next, most program suppliers will think twice before moving a program from a network where it has been successful and may have a favorable spot in the network schedule to another network where its future may become less certain.

Finally, the first negotiation, first refusal provisions are based on an unspoken premise which may turn out to

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* We recognize, of course, that the first negotiation, first refusal rights as set forth in the proposed decree are an improvement over the first negotiation, first refusal rights the networks today extract from program suppliers.

be a fiction -- that the networks which go to such lengths by parallel practices to avoid price competition for programs will be willing to engage in such competition for new episodes of a four- or five-year old series. Moreover, the very presence of any preferential rights is detrimental to the operation of a free marketplace.

On the subject of options, we must also note that there is nothing in the proposed decree which places any limitation on NBC's ability to extract long-term options (sometimes as long as 9 or 10 years) from suppliers of non-prime-time programming. There is nothing in the CIS which deals with that subject at all. In our judgment, the abuse of extracting long-term options is just as serious for suppliers of non-prime-time programming as it is for suppliers of prime-time programming and it should be dealt with in any proposed decree.

Before we leave the subject of options, we think it important to point out a fallacy which appears in the CIS with regard to the provisions of the proposed decree relating to options. Talking about Section VI(E) generally, the CIS states (p. 10):

> "For a period of fifteen years, the proposed judgment would place the following outer limits on the exclusive rights that NBC may acquire from an independent program supplier in obtaining network exhibition rights for a prime time entertainment program (the supplier can, of course, grant NBC fewer and lesser rights from these). . . ."

The fallacy is simple enough: the networks have the power to go to the outer limits. Indeed, we thought the Government's lawsuits were based on the theory that outside suppliers could not resist network leverage to go to the outer limits. As to options, the supplier, as a matter of business reality, cannot refuse to grant NBC fewer and lesser rights than those set forth in the proposed decree as to options -- not if he wants to get to the point where he has the opportunity to have his program broadcast. Producers have not been able to engage in meaningful negotiations with networks on the subject of options.

We are unaware of any provision in the proposed decree which would alter that result. The Government's stated "anticipat[ion] that because of the proposed judgment, the forces of competition would be able to operate more freely on NBC's program procurement practices" (CIS, p. 7) is, in our view, unfounded speculation about the business conditions under which the proposed decree is bound to operate.

2. Exclusivity (Sec. VI(E)(ii)). With respect to the provision of the proposed decree relating to exclusivity against other television uses, the CIS states (p. 11):

> "This provision should free a substantial number of entertainment program series for syndication and

other uses much earlier than is currently possible."

We are required to disagree.

Sec. VI(E)(ii) provides:

"NBC is enjoined and restrained:

* * * * * *

(E) For a period of fifteen (15) years from the effective date of this Section, from:

* * * * * *

"(ii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition, in excess of the following:

"(a) for prime time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition;

"(b) for non-prime time stripping on television broadcast stations, four (4) years from the first prime time episode broadcast; and

"(c) for all other broadcast uses, three (3) years from the first prime time episode broadcast, provided that nothing herein shall prevent NBC from negotiating for and acquiring rights, including exclusive rights, for stripping and once weekly exhibition to be utilized after the periods of exclusivity set forth above, so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series, and provided further that nothing herein shall prevent NBC from acquiring exclusive exhibition rights to series episodes for the broadcast year for which such episodes are ordered."

Section VI(E)(ii) thus deals with three separate situations concerning a network's exclusivity over older episodes of a series being shown in prime time on the network:

a) other prime time uses (total exclusivity for the network);

b) non-prime time stripping (four years of exclusivity for the network); and

c) all other broadcast uses (three years of exclusivity for the network).

First, as to other prime time uses, the proposed decree offers no relief at all. "Prime Time Hours" is defined in the proposed decree as meaning 6 P.M. to 11 P.M. in the Eastern and Pacific Time Zones and 5 P.M. to 10 P.M. in the Central and Mountain Time Zones. Hence, under the proposed

decree, a program supplier would be totally precluded -- as he is today -- from licensing older episodes for broadcast by independent stations in the early evening hours. This important part of the syndication market would be completely cut-off. And the network would still be able to protect its owned and operated stations from the competition that might result if independent stations in those markets were able to show old episodes of prime time series while the owned and operated stations had their news programs on the air in the early evening hours.

Second, as to non-prime time uses, the periods of network exclusivity are either meaningless or are far too long. For example, as to non-prime time stripping, a producer must usually have four years of negatives before stripping is a likely possibility. And under the proposed decree, four years of options are permitted. Hence, for all practical purposes, the network will obtain the same rights against prime-time stripping it obtains today -- exclusivity for the option period, except that the period may be reduced from five years to four years and non-prime time stripping may be able to commence one year earlier than is presently possible. This is not meaningful relief.

As to all other broadcast uses, in the absence of any hard proof that prime time ratings of new episodes are adversely affected by showings of older episodes in non-prime time hours, there is no justification for precluding a program supplier for three years from making whatever deals he can for non-prime time showings of older episodes.

There is no reason why a producer should not be able to provide a continuous stream of older episodes of a prime time series to the syndication market for non-prime time use, say after the first year of broadcast in prime time.

It is unreasonable, we suggest, for a television network to deprive a producer of this source of revenue for the extended period of time allowed by the decree, while at the same time depriving him of any profits from prime-time exhibition by virtue of long-term options at pre-set prices.

Finally, as with options, the provisions as to exclusivity against other television uses may prove to be illusory because of the opportunity granted by the proposed decree to NBC to acquire greater exclusivity rights so long as the acquisition takes place "after NBC has agreed to order episodes of such program for the first year of broadcast." As with options, we are unaware of any pro-competitive goal to be served by such a provision and again the CIS is silent on that subject. The network should not have the opportunity to negate the provisions of the decree by using its leverage in an effort to compel program suppliers to grant it greater exclusivity

rights, even if the use of that leverage may not succeed in all cases.

We are troubled that the Department of Justice is willing to agree to provisions which will continue to allow the networks to obtain unreasonable exclusivity from program suppliers.

3. Internal Production (Sec. V). The provisions in the proposed decree concerning network internal production of entertainment programs are among the most difficult for us to understand. The problem is not that we are unable to understand the substance of those provisions; rather, we do not understand why the Government, having with full justification asserted from the outset of this litigation that there should be no network internal production, should negotiate a consent decree with NBC which permits such a high level of internal production (2 1/2 hours of internal production in prime-time, 8 hours in daytime and 11 hours in fringe time).

The New York Times was equally concerned by the provisions in the proposed decree concerning internal production. It wrote (November 19, 1976, p. D1):

> ". . . [T]he restrictions give NBC more latitude in program ownership than it now assumes.
>
> "For instance, the agreement would limit the entertainment programs produced by NBC, or in which it held a financial interest, to two and a half hours' worth a week. At present, the only prime-time series owned by NBC is "Little House on the Prairie," which represents one hour a week.
>
> "NBC thus would be permitted to add to its program holdings, under a suit that was intended to keep the networks from favoring program series for their schedules in which they had a financial interest.
>
> "Similarly, the network would be restricted under the agreement from owning more than eight hours of daytime programs a week, during the hours between 9 A.M. and 6 P.M. although as of now it owns none." (Emphasis added)

Nevertheless, on the subject of internal production, the CIS states (p. 17):

> "While the Government at trial would have sought a complete prohibition of television entertainment program production by NBC, this judgment provides substantial relief which will prevent NBC from foreclosing significant amounts of independently produced programming from its television network."

We must respectfully disagree. Even without a detailed analysis, it is readily apparent, for example, that when each network has only 22 hours available each week for prime-time entertainment programming,* a judgment which permits

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* Although "prime-time" as defined in the proposed decree is 5 hours a night, or 35 hours a week, by virtue of the

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a network to preempt what amounts to almost one full evening of prime-time entertainment programming for its own programs does not provide "substantial relief."

Internal production by a network, as we have shown, is clearly an unfair competitive practice. It should not be tolerated or sanctioned by the Government.

Moreover, we respectfully submit that the closely related network practice of acquiring exclusive rights to talent (see pp. 29-30, supra) is also an unfair competitive practice which should not be tolerated. On this subject, the proposed decree is silent.

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prime-time access rule and local and network news programs during "prime-time," there are in fact, only 22 hours available to the network for entertainment programming.

* * *

It would unduly lengthen these comments to discuss in detail other provisions of the proposed decree which purport to grant the program suppliers some measure of relief in such areas as pilot rights or "spin-off" rights. The provisions are lengthy and, although complex, a meaningful analysis would demonstrate that the relief obtained is either non-existent or de minimus.

In any event, we believe such a discussion is unnecessary. If there are some provisions of the proposed decree which provide for some minimal changes in network procurement practices for the benefit of program suppliers, they are not sufficient to overcome the proposed decree's total lack of impact in the major areas discussed above.

4. Parallelism. There remains, however, one remaining aspect of the proposed decree which requires discussion. Having failed to achieve any meaningful relief against network abuses, the proposed decree compounds the plight of outside program suppliers by providing a method for the continuance of anti-competitive and parallel practices by all three networks.

Thus, Section VII of the proposed decree provides that certain key provisions (e.g., "restrictions" on options,

or on internal production) shall not take effect

> "until similar injunctive relief is obtained in Final Orders, Judgments or Decrees entered against CBS in United States v. CBS Inc. . . . and against ABC in United States v. American Broadcasting Companies, Inc. . . . which are not appealable or from which no timely appeal has been taken."

Hence, by virtue of Section VII, when read together with Section IX which entitles NBC to modification of its decree if the final order in either U.S. v. CBS or U.S. v. ABC, shall "order or decree for either CBS or ABC injunctions different in terms or provisions than those required" by the NBC decree, the proposed decree provides a method for the drafting of a standard anti-competitive form of contract to be forced on independent program suppliers by all three networks.*

The proposed decree, by its explicit terms, guarantees that for the future the three networks will be able, as to pivotal economic terms of their contracts with program suppliers, to continue what they have done in the past: avoid the hazards of price competition by offering and requiring program suppliers to accept virtually identical terms from all three networks.

There is, as we read it, no explanation for this unusual result in the CIS. With regard to Section VII, the Government says (pp. 13-14):

> "In order to avoid placing NBC at a competitive disadvantage with respect to CBS or ABC, this provision would delay the effectuation of certain Sections of the judgment [V, VI(C), VI(E)(i), and VI(F)-(H)] until similar injunctive relief is obtained against CBS and ABC."

And, as to Section IX, the CIS states (p. 14):

> "If a non-appealable judgment were entered dismissing either of the companion actions against CBS or ABC or decreeing injunctions different from those in this judgment, this provision would permit NBC to seek and obtain whatever relief, if any, was necessary to prevent it from being placed at a competitive disadvantage with respect to CBS or ABC. While this type of provision is unusual in an antitrust judgment, it is warranted by the unique nature of this industry, and the pendency of the companion actions."

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* There is another important consequence of Sections VII and IX. Since ABC and CBS have publicly announced that they will vigorously continue to defend the Government's actions against them and since the effective date of the provisions of the proposed NBC decree which deal with the meaningful antitrust violations of the networks (even if they do not provide meaningful relief) are delayed until final non-appealable orders are entered against CBS and ABC, the proposed decree with NBC cannot be justified on the ground that it will bring protracted litigation to a rapid conclusion and provide immediate significant relief. We must, therefore, record our dissent as to the following statements in the CIS (p. 16):

> "A full trial on the merits was considered as an alternative to settlement. However, because the agreed to relief would be substantially equivalent to that sought in the complaint, because significant relief would become effective upon entry of the judgment, and finally because appeals following a trial could delay the obtaining of

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> effective relief for a period years, the alternative of a trial on the merits was rejected."

But the CIS does not explain what is "unique" about the nature of this industry which justifies these "unusual" provisions. And the CIS does not explain the "competitive disadvantage" NBC would suffer if these provisions were not in the proposed decree.

There is, of course, in our view, something "unique" about the television industry (as we have already shown) -- there are only three principal buyers of high quality, original programs who engage in parallel practices and offer virtually identical terms to program suppliers to eliminate any meaningful price competition among themselves. And when these anti-competitive practices are challenged, the networks always defend themselves by arguing that to require any of them to act otherwise would place that network at a "competitive disadvantage."

What makes Sections VII and IX of the proposed decree even more difficult to understand is that the CIS in a footnote on page 6 clearly recognizes the impact of parallel practices and uniform contract terms on competition.* In text at pp. 5-6, the Government writes:

> "However, despite the FCC financial interest and syndication rules, NBC and the other networks continued to exact from producers such rights as: (1) long-term, yearly renewal options for exclusive NBC network exhibition of the program with pre-set license fee escalation rates, (2) exclusive use of the program by NBC as against other communications markets, (3) exclusive rights in NBC with respect to program spinoffs, (4) creative program controls in NBC, (5) NBC's right to all profits from network exhibition of the producer's program, and (6) an NBC right of first refusal at the end of the option period."

Then as a footnote to the foregoing sentence, the CIS states (p. 6):

> "At the same time, similar practices are being followed by ABC and CBS with respect to programming on their networks. The existence of uniform terms and conditions of purchase among the three major networks acts to deprive independent program suppliers of the benefits of network competition for their programs. Moreover, the network practice of obtaining exclusive exhibition rights often occurs at a time when the program is in the idea or script stage and the program supplier has little or no bargaining power." (Emphasis added)

It is difficult to understand why the Government should, on the one hand, recognize that "uniform terms and conditions" among the three networks is an anti-competitive practice and then, on the other hand, in Sections VII and IX, agree to a proposed decree which virtually insures no change in that state of affairs.

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* One other aspect of Sections VII and IX that should be changed is that the Government, neither in these sections nor anywhere else in the decree, reserves for itself the right to obtain modification of the decree in the event that the Court, after a trial on the merits against CBS or ABC, should impose more stringent restrictions than are contained in the proposed NBC decree.

The proposed decree should not become the vehicle which blesses an industry-wide anti-competitive standard contract or code of behavior and which "deprive[s] independent program suppliers of the benefits of network competition for their programs."

At the very least, NBC -- if it desires to avoid the expense and risks of a protracted antitrust lawsuit -- should not be entitled to the umbrella of protection against "competitive disadvantage" provided by Sections VII and IX.

Conclusion

The Government should withdraw its consent to the proposed decree because it suffers from the serious defects we have discussed in these comments. The proposed decree provides no meaningful relief against the major network antitrust violations. On the contrary, it legitimizes past illegal practices and provides a vehicle for preserving an industry-wide, anti-competitive code of behavior.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for the Commenting Parties
345 Park Avenue
New York, N.Y. 10022

March 1, 1977

Appendix A

Program	Network	Seasons of Concurrent Runs in Different Day Parts	Type of Concurrent Run
ALL IN THE FAMILY	CBS	75-76, 76-77	Prime & Day
ANDY GRIFFITH SHOW	CBS	66-67, 67-68	Prime & Day
BEVERLY HILLBILLIES	CBS	66-67, 67-68, 68-69, 69-70, 70-71	Prime & Day
BEWITCHED	ABC	67-68, 68-69, 69-70, 70-71, 71-72	Prime & Day
BRADY BUNCH	ABC	72-73, 73-74	Prime & Day
CANDID CAMERA	CBS	66-67	Prime & Day
DATING GAME	ABC	66-67, 67-68, 68-69, 69-70	Prime & Day
FAMILY AFFAIR	CBS	70-71	Prime & Day
THE FUGITIVE	ABC	66-67	Prime & Day
HAPPY DAYS	ABC	75-76, 76-77	Prime & Day
KOJAK	CBS	76-77	Prime & Lat Nite
LASSIE	CBS	66-67, 67-68, 68-69, 70-71	Prime & Syndication
LET'S MAKE A DEAL	ABC	68-69, 69-70, 70-71	Prime & Day
LOVE AMERICAN STYLE	ABC	70-71, 71-72, 72-73, 73-74	Prime & Day
LUCY SHOW	CBS	67-68, 68-69	Prime & Syndication
MY THREE SONS	CBS	71-72	Prime & Day

Appendix A

Program	Network	Seasons of Concurrent Runs in Different Day Parts	Type of Concurrent Run
SUNDAY MYSTERY MOVIE - MC CLOUD - COLUMBO - MC MILLAN	NBC/CBS	76-77	Prime & Late Nite
NEWLYWED GAME	ABC	66-67, 67-68, 68-69, 69-70, 70-71	Prime & Day
ROOKIES	ABC	75-76	Prime & Late Nite
SANFORD & SON	NBC	75-76, 76-77	Prime & Day
THAT GIRL	ABC	68-69, 69-70, 70-71	Prime & Day
TO TELL THE TRUTH	CBS	66-67	Prime & Day
STREETS OF SAN FRANCISCO	ABC	76-77	Prime & Late Nite
MARCUS WELBY, M.D.	ABC	74-75	Prime & Syndication
IRONSIDE	NBC	73-74	Prime & Syndication
WAGON TRAIN	ABC	63-64, 64-65	Prime & Day

Source: ARBITRON SYNDICATED PROGRAM ANALYSIS

Mr Hollander - 3706
Mr Kaplan
Mr Sullivan
Mr Selby
Mr O'Reilly
Mr Dale

TANDEM Productions INC.

ALAN F. HORN

March 3, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States vs. National Broadcasting Company, Inc.

Dear Mr. Hollander:

I recently read the comments, on the proposed consent decree in connection with the above action, which were forwarded to you by the the firm of Paul, Weiss, Rifkind, Wharton and Garrison, on behalf of several companies that produce television programs for the three national networks In reviewing these comments with Messrs. Norman Lear, Bud Yorkin, and Jerry Perenchio, I find that, while our own experience with the three networks is not entirely consistent, we share many of the opinions expressed and agree in principle with the views of the signatory companies. Accordingly, on behalf of Tandem Productions, T.A.T. Communications Company, and Bud Yorkin Productions, I endorse the comments of the signatory companies and join with them in requesting that the Department of Justice withdraw its consent to the proposed decree

Sincerely yours,

Alan F. Horn
Executive Vice President

AH/jb

60-211-62

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Mr Hollander - 3706
Mr Kaplan
Mr Sullivan
Mr Selby
Mr O'Reilly
Mr Dale

MTM Enterprises Inc.

MEL D. BLUMENTHAL
Vice President, Business Affairs

March 16, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States vs. National Broadcasting Company, Inc.

Dear Mr. Hollander:

I recently reviewed with Messrs. Grant Tinker and Arthur Price the comments, on the proposed consent decree in connection with the action referred to above, which were sent to you by the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, on behalf of several companies that produce televisoin programs for the three national television networks. Although in our dealings with the networks we have not experienced all of the matters set out in the comments, we do share many of the opinions expressed therein and agree in principle with many of the views of the signatory companies. Therefore, on behalf of MTM Enterprises, Inc., MTM Enterprises and MTM Productions, Inc., I join with the signatory companies in requesting that the Department of Justice withdraw its consent to the proposed decree.

Very truly yours,

MEL D. BLUMENTHAL

MDB:ng

Note: Mailgram copy sent to Bernard Hollander on 3/16/77.

• STUDIO CENTER • 4024 RADFORD AVE. • STUDIO CITY, CALIF 91604 • (213) 763 8411

Enterprises Inc.

MEL D. BLUMENTHAL
Vice President Business Affairs

March 18, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States vs. National Broadcasting Company, Inc.

Dear Mr. Hollander:

On March 16, 1977, I sent you a Mailgram on behalf of MTM Enterprises, Inc., MTM Enterprises, and MTM Productions, Inc., requesting that the Department of Justice withdraw its consent to the proposed decree.

In my mailgram, I inadvertently neglected to mention the various television series and special programs produced by our companies, and would like to take this opportunity to advise you of the television productions in which we are involved:

1. "Mary Tyler Moore Show"
2. "The Bob Newhart Show"
3. "Rhoda"
4. "Phyllis"
5. "The Tony Randall Show"
6. "The Ed Asner Show"

In addition to the series mentioned above, we have just completed production of a one-hour dramatic pilot and two half-hour comedy pilots for CBS, two half-hour comedy pilots for ABC, and a half hour comedy pilot for NBC. We also recently produced a two-hour television motion picture

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special entitled "Something For Joey" which will be broadcast by CBS on April 6 under the sponsorship of IBM. We have, in various stages of development, a number of additional television series, motion pictures for television and specials, including a major twelve-hour dramatization for NBC of William Goldman's "Boys & Girls Together".

If I can be of any further assistance to you, please do not hesitate to call.

Very truly yours,

MEL D. BLUMENTHAL

MDB:ng

LORIMAR PRODUCTIONS, INC
4000 WARNER BLVD BURBANK CALIFORNIA 91522
(213) 843-6000

March 17, 1977

Bernard M. Hollander, Esq
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D C. 20530

Re: United States v National Broadcasting Company, Inc., Civil No. 74-3601 - RJK, U S D.C , C D., Cal

Dear Mr. Hollander:

I am Vice President, Business Affairs, of Lorimar Productions, Inc., which currently produces three one-hour television network series and has a continuing flow of other television network programs in development and production.

I have reviewed with Lee M. Rich, President of Lorimar Productions, Inc , the recent letter and comments from Arthur L. Liman of Paul, Weiss, Rifkind, Wharton & Garrison dated March 1, 1977 concerning the proposed consent decree with NBC.

Although Lorimar has not encountered each of the matters set forth in the comments, we certainly do agree in principle and share many of the opinions and views of the signatory companies.

In view of the foregoing, on behalf of Lorimar Productions, Inc., we concur with the request that the Antitrust Division of the Department of Justice withdraw its consent to the proposed decree.

Very truly yours,

BILLIE GOLD

BG:ds
Note: Telegram sent to Bernard Hollander on 3/17/77

Charles Fries
President

March 21, 1977

Bernard Hollender, Esq.
Chief of Judgment & Judgment
Enforcement Section - Antitrust Div
U.S Department of Justice
10 Pennsylvania Avenue N.W
Washington, D.C. 20530

Re: USA v. NBC - Civil Action #74-3601 R.J.K

Dear Mr Hollender:

I recently read the comments on the proposed Consent Decree in connection with the above action, which were forwarded to you by the firm of Paul, Weiss, Rifkin, Wharton and Garrison on behalf of several companies that produce television programs for the three national networks.

In reviewing these comments I find that, while our own experience with the three networks is not entirely consistent, we share many of the opinions expressed and agree in principle with the signatory companies. Accordingly, on behalf of Charles Fries Productions, I endorse the comments of the signatory companies and join them in requesting with them the Department of Justice withdraw its consent to the proposed decree.

Very truly yours,

Charles W. Fries

CF:g

4024 NORTH RADFORD AVENUE STUDIO CITY CA 91604 / PHONE (213) 763-8411

3 106 Mr. Hollander
Mr. Kaplan
Mr. Sullivan
Mr. Jelley
Mr. O'Reilly
Mr. Reid

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IRV H GROSS
RANDALL E. GREER
D STEVE CAMERON

OF COUNSEL
JAMES J COYLE
SAMUEL SACKS

March 23, 1977

Mr. Bernard Hollander, Esq.
Chief of Judgment & Judgment
Enforcement Section - Antitrust Division
U.S. Department of Justice
10 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Re: USA vs. NBC - Civil Action #74-3601 R.J.K.

Dear Bernie:

We have noted the comments made by the various TV production organizations objecting to the proposed Consent Decree.

We are sure you know, that based on the conversation Charles Fries (Chairman of the Caucus Steering Committee) and we had with you and your associates, that we are in agreement with such comments. We have found such comments to be generally consistent with our expressed objections.

Again, on behalf of the Caucus of Producers, Writers and Directors, we endorse the comments of the various Production Companies which have requested that the Department of Justice withdraw its consent to the proposed degree.

Best wishes.

Very Sincerely Yours,

SIMON & SHERIDAN

Samuel Sacks

SS:ko

cc: Charles W. Fries

DEPARTMENT OF JUSTICE
27 MAR 28 1977
RAO

GOODSON-
TODMAN
PRODUCTIONS
NEW YORK 375 PARK AVENUE NEW YORK, NEW YORK 10022 PLAZA 1-0050

MARK GOODSON

February 25, 1977

Mr. Bernard Hollander
Anti-Trust Division
U.S. Department of Justice
10 Pennsylvania Avenue NW
Washington, D.C. 20530

RE: USA v. NBC
Civil Action #74-3601 R.J.K

Dear Mr Hollander:

Goodson-Todman Productions herewith files its objection to The Proposed Final Judgment in the case of the United States of America v. National Broadcasting Company, Inc., Civil Action #74-3601 R.J.K.

Goodson-Todman Productions is an independent program packaging company. We license programs to the national networks as well as to individual television stations. At the present time Goodson-Todman Productions supplies four different daytime program series to the CBS Television Network and one daytime program series to the ABC Television Network.[1/] Although we license several programs directly to NBC owned television stations, we have supplied no program series to the NBC Television Network since 1969

On March 14, 1973 we did a run-thru of the program entitled "MATCH GAME" for the NBC Television Network The NBC Program Department recommended the program for development to NBC management, and negotiations then ensued between NBC Business Affairs and Goodson-Todman Productions.

1/ As of this writing, we supply CBS and ABC their highest rated daytime programs (Nielsen Television Index, February 7-13, 1977).

It was quickly established by NBC Business Affairs that, as a matter of general network policy, any possibility of making a "deal" was preconditioned on our willingness to grant NBC an exclusive 'hold" on the property for 15 months (five calendar quarters) following the production of the pilot, and options for no less than ten years after the first telecast (cancellable by the network, only, at the end of any 13 week cycle during the first five years and at the end of any 26 week cycle during the second five years). Further, during that ten year period, the network was to be free to charge advertisers whatever prices the success of the program might make possible in the marketplace, but Goodson-Todman Productions was to be limited to 5% annual increases in the first five year period and 7½% increases in the second five year period.[2/]

To have submitted to this one-sided arrangement would have meant that if our program's popularity had slipped at any time during the ten year option period, the network would have had the unilateral right of cancellation on short notice. On the other hand, if the show became a hit, the network was free to charge whatever prices it could get for it without our participation in profits. We, of course, had no right of cancellation whatsoever A clear case of heads they win, tails we lose.[3/]

We considered these "non-negotiable" demands unconscionable and a clear reflection of the overwhelming imbalance in negotiating positions

2/ NBC also demanded approval rights over all celebrities booked on the program.

3/ Moreover, regardless of its degree of success, the likelihood of a program such as "MATCH GAME" surviving a ten year period is too remote to make meaningful any hypothetical possibility of more favorable renegotiation a decade later.

between the independent daytime program supplier and NBC. We decided that the time had come to refuse to submit to such demands at the risk of losing the sale. We terminated further negotiations with NBC.

After the passage of approximately three weeks, an NBC program executive requested that we resume negotiations with NBC in an effort to arrive at a mutual agreement. We undertook to do so and, once again, we were confronted by NBC Business Affairs with the identical non-negotiable demands for a fifteen month hold and one-sided options for ten years. Faced with this unyielding position by NBC, we entered into an agreement with CBS and granted that network options to the program for a period of seven years. Frankly, the seven years of options we granted to CBS were also excessive, but with only three network buyers available, we had little choice but to accede to the terms. "MATCH GAME" went on the air in 1973, and since that time it has ranked among the most popular daytime programs. 4/

By its failure to impose limitations on the number of option years NBC may demand in daytime program agreements (such as NBC demanded for "MATCH GAME"), The Proposed Final Judgment leaves undisturbed one of the most onerous and anticompetitive practices that characterize the network marketplace at the present time. While it is true that the Justice Department's inquiry into network practices originally focussed only on prime time programming, The Proposed Final Judgment nevertheless does enter the arena of daytime programming by setting forth certain limitations on NBC

4/ "MATCH GAME" is currently the highest rated daytime program in network television (Nielsen Television Index, February 7-13, 1977).

with respect to the number of programs owned by the network. Accordingly, the limitations of the original intention should not be deemed to justify leaving undisturbed the most blatant and indefensible anticompetitive network practices in the very same time bloc. At the very least, the network should be prohibited from obtaining options for a longer period of time for daytime programs than for prime time programs.

However unsatisfactory the situation of the independent program producer may be with respect to prime time programming on the networks, there are from 18 to 28 different weekly programs on each of the three networks during this time bloc. In the time bloc from 10:00AM to 4:30PM, however, there are only ten different program series on the NBC weekly daytime schedule. The imbalance between NBC and the program supplier is, therefore, even greater than in prime time and calls for no less relief from anticompetitive practices.

The Department of Justice should withdraw its approval of the Proposed Final Judgment and, failing that, the Court should refuse to sanction the consent decree unless modifications are made to provide appropriate relief.

Very truly yours,

GOODSON-TODMAN PRODUCTIONS

By Mark Goodson
Mark Goodson

Response to the Comments Submitted by Television Entertainment Production Companies.

Various television producers and production companies have filed comments on the proposed decree. 1/ Because these comments involve several different provisions of the Judgment, and since there was much overlap, this will constitute a response to all of them The comments generally express opposition to entry of the proposed Judgment because, they say, certain of its provisions do not adequately rectify NBC's violations of the antitrust laws. These objections will be discussed, provision by provision

The only issue for decision here is whether entry of the proposed Judgment is in the public interest because its provisions are consistent with the allegations of the complaint and the enforcement of the antitrust laws. 2/ We have no disagreement with the opinion expressed by the commentors that network practices have violated the antitrust laws. 3/ However, while antitrust consent settlements are an appropriate and beneficial enforcement tool, as to which the Attorney General has broad discretion, compromise is normally involved. 4/ In this particular case, the Government believes that the proposed Judgment is desirable

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1/ They consist of: The Caucus for Producers, Writers and Directors; United Artist Corporation; Metro-Goldwyn-Mayer, Inc.; Columbia Pictures Industries, Inc.; Goodson-Todman Productions; Paramount Pictures; Twentieth Century-Fox Film Corp ; Warner Bros. Inc.; Universal City Studios, Inc ; Tandem Productions; T A T. Communications Co.; Bud Yorkin Productions; MTM Enterprises; MTM Productions, Inc.; Lorimar Productions, Inc.; Charles Fries Productions, Inc. In addition, comments filed by the Citizens Communications Center also discussed certain provisions of the Judgment.

2/ For a full explanation of the Procedure and Standard of Review established under the Antitrust Procedures and Penalties Act, see Response to Comments submitted by American Broadcasting Companies, Inc. ("ABC"), Section I at 2-7.

3/ Further, we allege that these violations are continuing, and it is largely because of their continuing nature that we seek immediate relief which we believe ameliorates such violations as to NBC.

4/ As the Court stated in United States v Armour & Co., 402 U.S. 673, 681 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, the expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise, in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation

because it would provide at once relief which is similar to and consistent with that sought in the complaint. 5/

1. The Production Limitation of Section V.

All of the commentors object to the proposed limitation on NBC's production of entertainment programs for its own network. They say that NBC ought to be prohibited entirely from producing any entertainment programs for its network. They further maintain that the production limitation provided in the decree is inappropriate because NBC actually produces less today than the amount permitted, and because NBC may still be able to use the threat of such production to force the producers to give up valuable rights and interests in their programs.

In our view, Section V, which would limit the amount of entertainment programming that could be produced by NBC, should enhance competition in the television entertainment program production market, "by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers." [CIS at 8]. A central allegation of the case is that NBC's "unrestricted ability to produce prime time television entertainment programming, together with its domination and control over access to its combined and affiliated group of television stations and its course of conduct, constitutes an unreasonable restraint of non-network program producers'

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5/ See CIS at 2, 7-15.

ability to produce and negotiate for distribution and exhibition of their programming." 6/

The production limitation in Section V would prohibit NBC, for 10 years, from producing an unlimited amount of its own entertainment programming. Paragraphs IV(A) and IV(B) would permanently prohibit NBC from acquiring rights or interests in the programs produced by others, or engaging in domestic syndication, and Paragraph VI(A) would prohibit NBC from conditioning a supplier's access to its network on the supplier's grant to NBC of any other right or interest. These three injunctions together seek to insure that NBC, while permitted to provide a source of competition in program production, will no longer abuse its market power and gain unfair competitive advantages over independent program suppliers. These provisions should effectively curtail the anticompetitive effects described in the complaint. Further, Sections IV(A) and (B) and VI(A) would take effect immediately upon entry and thus provide substantial relief much earlier than if a trial on the merits were required.

2. The Program Option Period Limitation in VI(E)(1).

All of the commentors object to Section VI(E)(1) as providing insufficient relief. 7/ This provision would limit

6/ Supplemental Statement of Genuine Issues, filed May 21, 1976, Issue I(G).

7/ In addition, Goodson-Todman Productions objects to this Section because it does not apply to daytime entertainment programming. This case, however, was directed primarily at

to four the number of yearly program renewal options NBC may acquire from a program supplier initially, and would only permit one additional option year if the agreement terms were renegotiated. Although the commentors concede that this is a desirable limitation on current industry practice, they assert that it does not go far enough to provide meaningful relief.

Historically, a network obtained program renewal options for 5 years in the initial contract. Immediately after promulgation of the FCC rules, however, the networks began to demand and obtain initial program options of 6 or 7 years. Further, the initial option period for many programs is extended whenever the producer requests an increase in the license fee. 8/ This Judgment provision, by shortening the permissible option period, will increase competition for successful programs at an earlier point, and will permit program producers to share in the economic benefits of such programs at an earlier time This should encourage program suppliers to produce more entertainment programming and make entry into the market more attractive, thus enhancing competition.

7/ continued

prime time programming [Complaint, Par 16]; its settlement does not prevent any person from pursuing any course of action against NBC.

8/ License fees for the entire term of the contract are set when the network agrees to pay for a script or a pilot, long before a true measure of the program value can be ascertained, and often before accurate cost estimates can be made.

Form CBD-183
12-8-76 DOJ

None of the commentors have urged that the present length of the program option term is a per se violation of the antitrust laws Rather, they contend that its present length unreasonably restrains trade and reflects an unreasonable use of monopoly power. The Judgment provides relief as to this practice without risking the delays and uncertainties of a full trial on the merits.

Some comments criticize this provision because it does not aid producers whose programs are cancelled after one or two years. 9/ Initially, the Government sought a 2 year limit on the option period, but compromised on this provision. See CIS at 17-18 In our view, the relief actually obtained is substantial, and while it does not aid short-term programs, antitrust relief cannot be expected to bail out unpopular or unsuccessful programs The overall relief, including this provision, is consistent with the complaint, with the relief sought and with enforcement of the antitrust laws.

3. Limitations on Program Exclusivity as Against Other Commercial TV Uses in VI(E)(ii).

Presently, NBC (as well as CBS and ABC) acquire total domestic exclusivity for a television program as against any other television use for the entire prospective term of the licensing contract agreed to by the producer. As noted above, the usual term is initially 5-7 years, and with extensions may run much longer. The only time the network's

9/ See, e.g , Comments of the Caucus for Producers, Writers and Directors ("Caucus") at p. 2

Form CBD-183
12-8-76 DOJ

exclusivity is waived is when the network itself wants to strip the program, i.e., exhibit program reruns on its own network in non-prime time. If that occurs, the present exclusive contract term prevents any competition for stripping rights from other networks or television stations. Section VI(E)(ii) deals with this problem.

The Caucus, the Columbia Pictures group, and the Citizens Communications Center 10/ object to Section VI(E)(ii), which would limit NBC's ability to acquire exclusivity rights, as inadequate. This provision would keep NBC from exercising exclusivity rights over a prime time television program against other television uses for more than three years, except that NBC could acquire four years of exclusivity as against non-prime time stripping of a series, and could enjoy total exclusivity during prime time for the life of the program contract. In addition, whereas, under current

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10/ The Columbia Pictures Group, represented by Paul, Weiss, Rifkind, Wharton & Garrison, are: Columbia Pictures Industries, Inc.; Goodson-Todman Productions; Paramount Pictures; Twentieth Century-Fox Film Corp.; Warner Bros. Inc.; and Universal City Studios, Inc. In addition, the following companies filed comments agreeing with many of the comments of the Columbia Pictures Group: The Caucus for Producers, Writers and Directors; Tandem Productions; T.A.T. Communications Co.; Bud Yorkin Productions; MTM Enterprises; MTM Productions, Inc.; Lorimar Productions, Inc.; and Charles Fries Productions, Inc.

practice, the network sometimes acquires rights (including first refusal rights) to strip the program on its own network during or after the contract term, when the initial licensing agreement is reached, under the Judgment NBC could no longer acquire such a right at that time. Only after NBC had ordered the program series could it compete with other networks or television stations to acquire stripping or other exhibition rights to old episodes. To prohibit NBC from ever acquiring such rights would have the anticompetitive effect of limiting competition for these uses of television programs.

The Government's discovery has disclosed that a network program series usually must have been broadcast during prime time for three years before there are enough episodes to syndicate, and for four years before there are enough to strip. This Section of the Judgment is designed to open up the syndication and stripping markets to competition as soon as there is enough product to sell, and such relief would clearly be significant.

4. Limitation on Exclusivity as Against Pay Cable Television in Section VI(E)(iii)(c).

This provision, which would have limited network program exclusivity for theatrical feature films as against pay cable television, has been deleted from the Judgment by stipulation of the parties. 11/ The reasons for its deletion are

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11/ Of the television production entities, only United Artists Corporation and Metro-Goldwyn-Mayer Inc. filed comments on this Section.

fully explained in the Response to the Comments Submitted by Congressional, Public Interest and Pay Cable Television Entities opposing Section VI(E)(iii)(c) of the proposed Judgment.

5. Limitation on Exclusivity with Regard to Pilots in Section VI(F).

The Caucus objects to Section VI(F), which would prohibit NBC from retaining exclusive hold to more than 35% of the pilots produced for it past fixed dates; July 1 for fall season pilots and January 1 for "second season" replacement pilots After those dates, 65% of these pilots could be marketed elsewhere, in which event NBC would be entitled to recover its costs of pilot production The objections are that NBC would still be allowed too long a hold on the pilot, and that it is unfair to require the producer to reimburse NBC's production outlays

Many more pilots are produced for NBC each year than it can possibly use, but because its exclusive hold on fall season pilots extends well into that season, the producer is effectively prevented from seeking another buyer, even for "second season" replacement. NBC has now agreed to release its hold on 65% of its fall season pilots on June 1 (rather than July 1), thus providing an added opportunity for the producer to sell the rejected program to another buyer for the fall season, and a good opportunity for "second season" replacement. This provision is designed to permit competition for program pilots after the network which advanced funds for them has had an opportunity to decide whether it will schedule the series.

/////

In our view, it is not unfair, if the program is sold to another buyer, to require the producer to reimburse NBC for its pilot outlays. If NBC has broadcast the pilot before it is released and sold, then the producer gets a credit of two-thirds of NBC's costs for the first broadcast and full credit for more than one broadcast.

6 The Delay of Effective Dates of Certain Provisions in Section VII and NBC's Right to Seek Relief from the Judgment in Section IX.

Section VII would delay the effectuation of certain provisions of the Judgment until similar injunctive relief is obtained from CBS Inc ["CBS"] and American Broadcasting Companies, Inc. ["ABC"] Section IX would permit NBC to seek relief from the Judgment if a non-appealable order were entered dismissing the CBS or ABC cases or ordering dissimilar injunctive relief against either CBS or ABC. The Columbia Pictures Group objects to both sections, stating that their inclusion is not explained and that they will insure uniform practices in the industry [Columbia Pictures Group Comments at 47-52].

These actions were not brought to eliminate the three networks, but to limit their use of market power and encourage as much competition as possible within this three program buyer market structure. By opening up the stripping and syndication markets, by limiting network production, and by reducing program renewal options, the Judgment seeks to encourage competition in television entertainment program production both among networks and between networks and

other broadcasters. Moreover, the injunctions in Sections IV and VI(A)-(C) should prevent NBC from abusing its market power when acquiring network exhibition rights.

This is an unusual industry in that the three networks are the only licensors of commercial television programming for simultaneous nationwide broadcasting. Each network as a purchaser has enormous market power, not subject to meaningful competition from the other networks or from non-network stations. This Judgment seeks to limit NBC's use of its power in purchasing television entertainment programs. If, however, the Court were to decide after a trial not to prohibit or limit the use of similar market practices by CBS or ABC, then it might be appropriate for NBC to seek relief from any portions of this Judgment which place it at a competitive disadvantage vis-a-vis CBS and ABC. For example, while Section VI(E)(ii) of the Judgment would limit to three years the number of years a prime time program may be exclusive to NBC (as against syndication in other day parts), the present network practice is to require such exclusivity for the length of the initial 5-7 year contract, plus extensions which may run substantially longer. Should the Court after trial fail to award similar relief against CBS and ABC, then NBC should be free to seek modification of this provision, upon a showing that otherwise it would be placed at a competitive disadvantage.

The same analysis is valid with respect to those other portions of the Judgment, which pursuant to Section VII will not become effective until similar injunctive relief is obtained against CBS and ABC. For example, Section V of the

Judgment would among other things enjoin NBC from producing for its own network use, more than 2-1/2 hours of prime time entertainment programming per week plus 2 additional special programs every six months. Were the Court to rule after trial that CBS's or ABC's unlimited power to produce entertainment programming should not be curtailed, then NBC, because of the peculiar structure of the market 12/, should not be subject to such a prohibition.

7. Network Contracts for the Exclusive Use of Talent or Literary Properties.

A separate point raised in the comment of the Columbia Pictures Group was that the networks have been entering into exclusive contracts directly with talent. 13/ Upon investigation, it was learned that an apparently new and growing practice of the networks, particularly ABC and CBS, has been to acquire exclusive contracts with talent (performers, producers, directors and writers) 14/, or to acquire exclusive

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12/ See CIS at 5-6. It should be noted, however, that the Government has not conceded that each provision which does not become effective until similar relief is obtained against CBS and ABC would place NBC at a competitive disadvantage, if it were applicable to NBC alone.

13/ Comments of Columbia Pictures Group at 29-30.

14/ The Government is presently seeking limited discovery on these contracts. Thus, the information contained herein is based on numerous conversations with industry participants, who may not always have first hand information.

exhibition rights to literary properties, and then to "lay-off" the talent or the property on an "independent" producer 15/ In this way, a network tries to avoid labeling a program an "in-house" program, but still retains a large degree of control over it. Then, if the network decides never to go to series from a pilot or cancels a program series that has been on the air, the producer can be precluded from seeking to sell the program elsewhere, since he cannot command the use of one or more of the major elements of the program.

When a single network has an exclusive hold on talent or on a property, no other network can compete for the talent or property in question Moreover, the independent producer is in no position to bargain at arms-length over terms of the production contract or program license proferred by the network, since the latter has already established the terms of the talent's employment It is apparent that, all other things being equal, the network will attempt to fill its scarce air time first with talent and properties to

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15/ It appears that a network will "lay-off" a talent or property by assigning its contractual rights for the use of said talent or property to an independent program producer in connection with a program production agreement. The talent or property assigned normally reverts to the network at the termination of the agreement.

which it holds exclusive contracts. 16/ Consequently, the producer is not even in a position to simply refuse to use the talent or property, since he knows that if he refuses, another producer will agree to produce the pilot or program.

The Government considered various ways of limiting NBC's use of these exclusive contracts in the proposed Final Judgment, but decided that a specific provision appeared unwarranted at this time It was decided, therefore, that a satisfactory resolution of this problem was to agree with NBC that further relief under the Judgment or by a new action could be sought, if it were later found that NBC had used exclusive contracts so as to impede competition. Such an agreement is embodied in a stipulation being filed with the Judgment. 17/

16/ While we understand that no talent contract actually guarantees that particular programs will be broadcast, they apparently provide that the talent will be paid regardless of whether or not the program is broadcast.

17/ The Stipulation, in pertinent part, provides:

2 Recognizing that the proposed Final Judgment does not specifically deal with the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, the parties have nevertheless agreed that the entry of this Final Judgment shall not preclude plaintiff, upon a showing that defendant has used such exclusive rights to impede competition in the

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17/ continued
television entertainment programming, field or to circumvent any provision of the Final Judgment, from applying to the Court for relief under the Judgment against such conduct, provided that such relief would not place NBC at a competitive disadvantage with respect to CBS or ABC.

3. This Stipulation and Order, the above modifications, and the original inclusion and subsequent deletion of Section VI(E)(iii)(c) from the proposed Final Judgment, shall not estop plaintiff or defendant, or any person, in this or any other action or proceeding, from asserting any issue of fact or law as to the subject matter of Section VI(E)(iii)(c) or as to the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, nor shall they constitute any evidence or admission as to any such issue.

Bernard M. Hollander
Attorney for the United States

Form OBD-183
12-76 DOJ

4296 Wilkie Way, #H
Palo Alto, California 94306
November 29, 1976

The Honorable Robert J. Kelleher
District Judge, Central District
U. S. District Court
312 No. Spring St
Los Angeles, California 90012

60-211-62
DEPARTMENT OF JUSTICE
DEC 1 1976
ANTITRUST DIVISION
LOS ANGELES OFFICE

Dear Sir:

It was with great dismay that I read in our local newspaper (copy enclosed) of the settlement proposed by the Justice Department in the anti-trust suit against NBC. If I am interpreting this proposed settlement correctly, it would appear that NBC is essentially being told to curtail it's production and that it must buy a certain percentage of it's programming from independent producers in the interest of "fair competition".

Is the word "competition" in this instance synonomous with saying that small producers "need" to have their programs purchased in order to survive? Since when is the "need" of a company to sell it's product a criterion for success? In a free-enterprise system is not money the name of the game? If the major networks thought they could make more money from the purchase of programs from independent producers would they not do so? Do the sponsors not in fact choose to sponsor shows they feel will make money for them? And are we, the viewers, not the final determination of the success or failure of a program? Is our freedom of choice also to be superseded by the small company's "need to survive"?

If I may be allowed to digress for a moment, I would refer you to the book, "Atlas Shrugged" by Ayn Rand Although this is a work of fiction, it seems to me that it contains a great deal of philosophy pertinent to this lawsuit. First, the government directive known as the Equalization of Opportunity bill, allowing a company to own only one type of industry, and being required to divest itself of all others, including those purchased or started to guarantee the supply of raw materials for the end product The reason: the less competent, the less creative, the less ambitious claimed a moral right for survival irrespective of quantity of or quality of production. When this failed, (as it must, because limitation of one is never any assurance of increased productivity of another) a quota was imposed on production. A major industrialist was brought to trial for violation of these directives and for "working contrary to the public good". I would like to quote a few lines of his response:

> "....I do not seek the good of others is a sanction for my right to exist, nor do I recognize the good of others as a justification for their seizure of my property or their destruction of my life. I will not say that the good of others was the purpose of my work -- my own good was my purpose, and I despise the man who surrenders his. I could say to you that you do not serve the public good -- that nobody's good can be achieved at the price of human sacrifice -- that when you violate the rights of one man, you have violated the rights of us all and a public of rightless creatures is doomed to destruction."[1]

[1] Ayn Rand, Atlas Shrugged, Signet Books, N.Y., p 452

Let me go on record as saying I feel that the proposed settlement with NBC is not a settlement for the public good when it violates a company's right to production and also a consumer's right to a quality of excellence that we are in fact willing to pay for. The small producer knows when he decides to enter the industry that he is essentially going into competition with already established "corporate giants". It follows, therefore, that he also knows the only way he can survive is to produce a quality product at a mutually satisfactory price If he fails in his attempt whose fault is it? Check your premises, gentlemen:

Is anyone stopping him from developing a product?

Is there only one company to whom he could sell his product?

Is he restricted from finding his own sponsors for a program?

Is he restricted from setting up a station of his own and using his own programming?

How then is it that he is being stopped by a trade "monopoly"?

Is this whole situation not at least a little similar to the Fair Trade Act, which also was designed to protect the small manufacturer (or producer, if you will) from the large? Was it a solution to the problem? I happen to agree with Miss Rand that no solution is ever for the public good when any individual's rights (even those of the "corporate giant") are infringed upon, most especially for no better reason than the "need" of another.

Sincerely,

Rose Marie Murphy

Rose Marie Murphy

RMM:mg

cc: James J. Coyle
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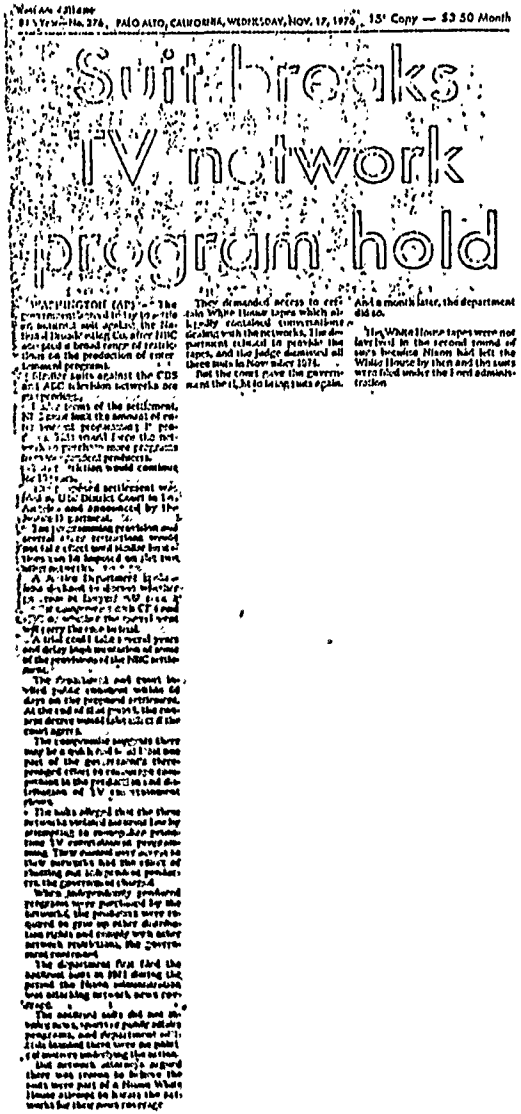

Palo Alto Times
Vol. CXIII, No. 276, PALO ALTO, CALIFORNIA, WEDNESDAY, NOV. 17, 1976 15¢ Copy — $3.50 Month

Suit breaks TV network program hold

WASHINGTON (AP) — The government settled its big trust suit against the three biggest TV networks Tuesday after NBC accepted a broad range of restrictions on the production of entertainment programs.

Similar suits against the CBS and ABC television networks are pending.

Terms of the settlement, filed in U.S. District Court in Los Angeles and announced by Justice Department officials, would prohibit the networks from producing more programs themselves and would continue the 1970 ...

... proposed settlement was filed in U.S. District Court in Los Angeles and announced by the Justice Department.

... programming provision and several other provisions would not take effect until Nov. 1, 1978. Others would be imposed on that date, others ...

A Justice Department spokesman declined to discuss whether ... was an attempt to ... Congress ... which ... the court would ... to carry the case to trial.

A trial could take several years and delay implementation of some of the provisions of the NBC settlement.

The Justice and court invited public comment within 60 days on the proposed settlement. At the end of that period, the department could ... if the court agrees.

The complaint suggests there may be a push ... all or part of the government's three-pronged effort to restrict competition in the production and distribution of TV entertainment shows.

The suits alleged that the three networks violated antitrust law by attempting to monopolize prime-time TV entertainment programming. They charged every network in their networks had the effect of shutting out independent producers, the government charged.

When independently produced programs were purchased by the networks, the producers were required to give up other distribution rights and comply with other network restrictions, the government contended.

The department first filed the antitrust suits on Jan. 1 during the period the Ford administration was attacking network news coverage.

The original suits did not include news, sports or public affairs programs, and department officials insisted there were no political motives underlying the action.

But network attorneys argued there was reason to believe the suits were part of a Nixon White House attempt to harass the television networks for their news coverage.

They demanded access to certain White House tapes which already contained conversations dealing with the networks. The department refused to provide the tapes, and the judge dismissed all three suits in November 1974.

But the court gave the government the right to bring suits again.

And a month later, the department did so.

The White House tapes were not involved in the second round of suits because Nixon had left the White House by then and the suits were filed under the Ford administration.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

BMH:KRS
60-211-62

May 4, 1977

Ms. Rose Marie Murphy
4296 Wilkie Way, #H
Palo Alto, California 94306

Re: United States v. National Broadcasting Company, Inc., (Civil 74-3601-RJK C.D. Cal.)

Dear Ms. Murphy:

This letter is in response to your letter of November 29, 1976, to the Honorable Robert J. Kelleher, District Judge, Central District of California, commenting on the proposed judgment in the above-captioned case. Though not requested to do so, we will treat this letter as if submitted as a comment under the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h).

Your letter objects to the entry of that portion of the decree which limits the amount of programming which National Broadcasting Company, Inc. ("NBC") can produce for broadcast on its network. It is the belief of the Department of Justice that this provision is important since it will eliminate the chance that NBC would significantly increase its own internal production, thus foreclosing its network to outside program producers, or that NBC would use the possibility of such production as a means to obtain restrictive rights and interests in programs developed by outside program suppliers in addition to the right of network exhibition.

The Department of Justice appreciates your comments. Your letter and this response will be published in the Federal Register and filed with the Court. In addition, we are enclosing all of the comments and the Government's responses on the proposed Final Judgment.

Sincerely yours,

Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Antitrust Division

Enclosures

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March 1, 1977

Dear Bernie:

Pursuant to the notice dated November 17, 1976 as published in the Federal Register for November 24, 1976, at page 51992 inviting comments on the proposed consent decree in United States v. National Broadcasting Company and Judge Kelleher's order extending the time within which to file such comments to March 1, 1977, I am enclosing herewith five copies of the comments of CBS

Sincerely yours,

Robert S Rifkind

Bernard M Hollander, Esq ,
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Encls

33A

BY HAND

3/6/77

COMMENTS OF CBS

ON THE PROPOSED DECREE IN
UNITED STATES v. NATIONAL BROADCASTING COMPANY
Civ. No 74-3601 RJK (C.D. Cal.)

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March 1, 1977.

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COMMENTS OF CBS

ON THE PROPOSED DECREE IN

UNITED STATES v. NATIONAL BROADCASTING COMPANY

Civ No 74 3601-RJK (C D Cal)

Introduction

On November 17, 1976, the United States submitted to the Court a stipulation with defendant National Broadcasting Company, Inc, providing for the entry of a final judgment upon the consent of the parties in accordance with the procedures set forth in the Antitrust Procedures and Penalties Act, 15 U S C § 16(b)-(h) ("APPA") At the same time the Government submitted its Competitive Impact Statement ("CIS").

Pursuant to the APPA, CBS submits this memorandum, together with the affidavits annexed hereto and incorporated herein,* detailing the reasons why the proposed consent decree should not be entered In particular, we show in Point I below that the proposed decree cannot pass muster under the public interest standard prescribed by the APPA because

(1) the proposed decree is blatantly anticompetitive and, hence, in clear conflict with the national policy declared by the Sherman Act;

(2) the proposed decree would establish a regulatory regime administered by this Court that overlaps and conflicts with the regulatory authority exercised by the Federal Communications Commission ("FCC") under the Communications Act (47 U.S C. §§ 151 *et seq*), resulting in prodigious and unnecessary

*Annexed as Appendix A to these comments is the affidavit of Franklin M. Fisher ("Fisher Affidavit"), sworn to February 22, 1977 (pp. 1a 61a, *infra*). Dr Fisher is a Professor of Economics at the Massachusetts Institute of Technology. Annexed as Appendix B to these comments is the affidavit of Richard A Posner ("Posner Affidavit"), sworn to February 23, 1977 (pp 65a-88a, *infra*). Mr. Posner is a Professor of Law at the University of Chicago Law School The appendices are an integral part of these comments.

duplication of effort, confusion, frustration and conflict of regulation, especially in view of the new Notice of Inquiry issued by the FCC on January 14, 1977 ("Network Practices Inquiry") comprehending every aspect of the television industry to be regulated under the proposed decree; and

(3) the proposed decree would seriously undermine First Amendment values by imposing severe limitations on NBC's freedom to engage in a form of expression.

In addition, we show in Point II below that the proposed decree should not be entered because the Government's CIS—a statutory prerequisite to the entry of the decree—does not comply with the requirements of the APPA

I.

ENTRY OF THE PROPOSED DECREE WOULD NOT BE IN THE PUBLIC INTEREST AS DECLARED BY THE SHERMAN ACT, THE COMMUNICATIONS ACT AND THE FIRST AMENDMENT.

Under the APPA, enacted in 1974, it is the District Court's duty to determine, as a condition precedent to the entry of an antitrust consent decree, whether the decree would serve the public interest *

*15 U.S.C. § 16(e) provides as follows:

"Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest For the purpose of such determination, the court may consider—

"(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

"(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial."

Congress did not intend this list to be exhaustive 119 Cong. Rec. 24597 (1973) (remarks of Sen Tunney)

The legislative history makes it clear that Congress intended this public interest review by the courts to be an independent inquiry into the underlying case and the merits of the proposed decree * Congress determined to put an end to "judicial rubber stamping" of antitrust consent decrees.** As Judge Aldrich observed in *United States* v *Gillette Co*, 406 F Supp 713 (D Mass 1975):

> "The legislative history shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface. Nor can one overlook the circumstances under which the act was passed, indicating Congress' desire to impose a check not only on the government's expertise—or at the least, its exercise of it—but even on its good faith" *Id* at 715

Although the "public interest" standard of the APPA is not precisely delineated and is undoubtedly broad enough to encompass public policy as declared by national legislation generally, Congress made it evident that the public policy in favor of competition, as declared by the Sherman Act, was its primary concern † It is plain that under the APPA a precondition to entry of a proposed decree is the court's determination that the decree will, as Congress intended, protect "the public by insuring healthy competition in the future" †† No such determination can be made in this case

See 119 CONG REC. 21597 98 (1973) (remarks of Sen. Tunney); S REP. No 298, 93d Cong, 1st Sess 6-7 (1973); H R REP No 1463, 93d Cong, 2d Sess 8-9 (1974)

** The report of the House Judiciary Committee states:

"One of the abuses sought to be remedied by the bill has been called 'judicial rubber stamping' by district courts of proposals submitted by the Justice Department. The bill resolves this area of dispute by requiring district court judges to determine that each proposed consent judgment is in the public interest"

H.R. REP. No 1463, 93d Cong, 2d Sess. 8 (1974) *See also* 119 CONG REC. 21598 (1973) (remarks of Sen Tunney)

† H R REP No 1463, 93d Cong, 2d Sess 12 (1974)

†† S REP No 298, 93d Cong, 1st Sess. 6 (1973)

A The Proposed Decree Is Anticompetitive and, Therefore, Inconsistent with the Policy of the Sherman Act.

The proposed decree should not be entered because it is fundamentally inconsistent with basic principles of antitrust law A consent decree that suppresses competition and restrains trade—as this decree does—cannot be held to be in the public interest

The proposed decree is designed to limit program production and to restrict the program rights that can be bought and sold Those restraints may benefit particular program producers by shielding them from the rigors of competition, but they cannot promote competition On the contrary, they are highly anticompetitive The decree ignores the fundamental fact that the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co* v *United States*, 370 U.S 294, 320 (1962)" *Brunswick Corp* v *Pueblo Bowl-O-Mat, Inc*, 45 U S L W 4138, 4141 (U S January 25, 1977)

To put the matter as simply as possible, if NBC were to agree with ABC and CBS to a limitation on either its program production or the program rights it would seek to acquire from its suppliers, that agreement would without question constitute a *per se* violation of the Sherman Act * No further analysis would be needed or indeed permitted The terms and effect of such an agreement would be precisely the same

*An agreement among competitors to limit production is the functional equivalent of price fixing, and as such it is a *per se* violation of the Sherman Act *See, e.g., United States* v. *Socony Vacuum Oil Co.* 310 U.S. 150 (1940); *American Column & Lumber Co* v. *United States*, 257 U S 377 (1921); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE STUDYING THE ANTITRUST LAWS 12 (1955)

Such restraints on production have been frequently enjoined. *See, e.g., United States* v. *General Dynamics Corp.*, 1963 Trade Cas. 78,674 (S D N.Y.); *United States* v. *Standard Oil Co of Calif.*, 1959 Trade Cas 75,525 (S.D Cal.); *United States* v *United Fruit Co*, 1958 Trade Cas 73,791 (E D. La.); *United States* v. *Chemical Specialties Co*, 1958 Trade Cas 71,631 (S D N.Y.); *United States* v. *Maine Lobstermen's Ass'n*, 1958 Trade Cas 71,373 (D Me.); *United States* v *Shade Tobacco Growers Agricultural Ass'n*, 1954 Trade Cas 69,413 (D Conn.).

Similarly, an agreement among competitors to limit the terms of trade on which they will deal with their suppliers or customers is a group boycott and thus a *per se* violation of the Sherman Act *See, e.g., Fashion Originators' Guild of America, Inc* v *FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U S 600 (1914)

as that of the proposed decree Indeed, the relevant provisions of the proposed NBC decree become operative only when, as and if CBS and ABC become bound by these same restraints * In short, the Government proffers to the Court a system of restraints so pernicious as to be unlawful *per se* were the Government not a party to it ** But the Government's sponsorship of the agreement does not alter its effect, confer any blessing, or turn black into white What is plainly unlawful under the Sherman Act is not "in the public interest" merely because the Government vouches for it. *United States* v *Columbia Artists Management, Inc*, 1963 Trade Cas 78,796 (S D N Y), *reaffirmed*, 1964 Trade Cas. 79,265 (S D N.Y), *aff'd per curiam*, 381 U S. 348 (1965)

Since the principal provisions of the decree are of the type condemned as illegal *per se*, it is not surprising that an analysis of their economic impact confirms their anticompetitive nature

1. The Production Limitation

The decree (Section V) would severely limit the amount of television entertainment programming that may be produced by NBC, but it would not alter the demand for programming. Thus, like all restrictions on supply relative to demand, the effect of Section V would be to drive up price But the effect of competition—and a principal objective of the Sherman Act—is to drive down price.† Moreover, by reducing

*Proposed Decree, Section VII

**Cf* DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON PATMAN ACT 212 (1977):

"Robinson Patman reaches the goal of protecting more efficient competitors by pricing restrictions which, if agreed to by, say, an association of small businessmen and their suppliers, would be *per se* violations of the Sherman Act Such agreements would both as are high prices to the sellers, particularly if they were oligopolists, and prevent competition for buyers."

†*See, e.g., Northern Pacific Ry* v *United States*, 356 U.S 1, 4-5 (1958). In its recent REPORT ON THE ROBINSON-PATMAN ACT (1977), the Department of Justice stressed (at 61) the importance of "the antitrust goal of preserving hard bargaining to bring down non competitive prices" and affirmed (at 211) that the "antitrust laws . . have as their goal the enhancement of consumer welfare by promoting the maintenance of competitive markets and actual competition, primarily on price."

the alternative sources of supply available to meet the demand for television programming, Section V would blunt the spur of competition among producers seeking to sell programs If the degree's limitation to two and a half hours of prime time entertainment programming per week were applied to MCA (which produces approximately 27 3% of NBC's requirements and approximately 21.4% of the three networks' requirements) rather than NBC (which produces approximately 4 5% of its own requirements and 1 6% of the three networks' requirements),* the anticompetitive impact would be more dramatic but no more real **

The fact that NBC now produces only a small amount of programming by no means eliminates the anticompetitive significance of the proposed decree because, as the Government recognizes (CIS at 8), NBC is free, absent the decree, substantially to increase its level of production Thus, even if NBC were not producing any programming, its presence as a potential competitor poised at the edge of the market, ready to enter if prices rise above a competitive level, constitutes a substantial incentive to vigorous competition among those already engaged in program production † The Government itself has acknowledged that

> "potential competition (*i e*, the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market) may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition ." Department of Justice, Merger Guidelines at 21-22 (1968)

*Fisher Affidavit, Exc. 3, at 59a-61a, *infra*

**Fisher Affidavit at 3a, 61a, *infra;* Posner Affidavit at 67a, *infra*

†Fisher Affidavit at 9a, *infra*. As the Department of Justice noted with approval in its recent REPORT ON THE ROBINSON-PATMAN ACT (at 50), a "seller is particularly vulnerable to hard bargaining when he believes . . that the buyer will produce the product himself by vertically integrating" In a nutshell, as the REPORT goes on to state (at 65): "The ability of firms to enter new markets is, of course, a key to keeping such markets competitive"

As the Supreme Court observed in *United States* v *Penn-Olin Chemical Co*, 378 U S 158, 174 (1964):

> "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated"

The production limits the Government would impose in Section V of the proposed decree eliminate the "substantial incentive to competition" which NBC's potential production capacity now represents *

It must be noted, moreover, that the Government seeks to restrict not only NBC but also CBS and ABC as program suppliers ** Thus, the reduction in supply or potential supply being sought by the Government—and the anticompetitive effects that would flow from that reduction—are very considerable indeed

Directly on point here are the decision of the Ninth Circuit Court of Appeals and the position taken as *amicus curiae* by the Government itself in *Calnetics Corp* v *Volkswagen of America, Inc*, 532 F 2d 674 (9th Cir 1976), *rev'g* 348 F Supp 606, 348 F Supp 623 (C D Cal 1972) and 353 F Supp 1219 (C D Cal 1973) In that action, a manufacturer of automobile air conditioners charged that Volkswagen's acquisition of another air conditioner manufacturer violated Section 7 of the Clayton Act The District Court (Real, J) granted summary judgment for plaintiff and entered a decree requiring Volkswagen to divest the acquired company and enjoining Volkswagen (1) from manufacturing or assembling automobile air conditioners in the United States for a period of 10 years, (2) from importing Volkswagen automobiles with air conditioners installed for a period of 7 years, and (3) from purchasing more than 50% of Volkswagen's air conditioner requirements from the divested company

*Vertical and conglomerate acquisitions and mergers have been struck down precisely because they forestall potential independent entry by internal expansion which is "the sort of entry into a new market which Congress intended to encourage" *Bendix Corp*, 77 F.T C 731, 825 (1970), *rev'd on other grounds*, 450 F.2d 534 (6th Cir. 1971); *United States* v *Philadelphia National Bank*, 374 U S. 321, 370 (1963). The elimination of such potential independent entry has regularly been held likely substantially to lessen competition. *See, e g, United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *Ford Motor Co.* v *United States*, 405 U S 562 (1972); *United States* v *Penn Olin Chemical Co*, *supra*; *FTC* v *Procter & Gamble Co.*, 386 U.S 568 (1967); *United States* v. *Phillips Petroleum Co*, 367 F Supp 1226 (C.D Cal. 1973), *aff'd*, 418 U S 906 (1974). The Government would presumably have raised precisely this argument had NBC's elimination as a potential market entrant resulted from a merger with MCA or another program supplier Yet, the anticompetitive effect of its elimination by judicial decree is every bit as great

**Proposed Decree, Section VII

That decree was sharply criticized by Assistant Attorney General Donald I Baker as "highly anticompetitive",* a criticism set forth expansively in the Government's *amicus* brief While recognizing that some ancillary restraints on internal production might in some situations be necessary to insure the viability of the divested company, the Government said that "the additional injunctive provisions which the District Court adopted do not appear to be normal or natural remedies in a Section 7 case" ** The Government went on to attack injunctive provisions that were virtually indistinguishable from the production limitation in the proposed NBC decree:

> "The provision prohibiting VWoA from manufacturing air conditioners for 10 years eliminates any competition which VWoA might provide if it entered the market during that period and also eliminates any procompetitive effect VWoA might have as a 'perceived' potential entrant The limitation on VWoA purchases from the divested company deprives the divested Company of an incentive to attempt to capture more than half of VWoA's business and provides the other manufacturers with a perpetual guarantee of one half of the business The seven year restriction on importation by VWoA of automobiles with installed air conditioning not only creates a barrier to competition from foreign air conditioner manufacturers, but may also produce an effect upon competition within

*Baker, *Outlines Priorities, Methods of Antitrust Enforcement*, [1976] 787 ANTITRUST AND TRADE REG REP (BNA) AA-1, AA-5

**Brief of the United States at 17

the automobile market by inhibiting the development and sale of Volkswagen automobiles with factory installed air conditioning"*

The Court of Appeals reversed the District Court's holding that Volkswagen's acquisition violated Section 7 and then went on to comment on the injunctive provisions that might be proper in the event that illegality was established at trial on remand ** After pointing out that divestiture could not be ordered in a private Section 7 action, the Court of Appeals essentially adopted the criticisms expressed in the Government's *amicus* brief It advised the District Court to reconsider the propriety of the import ban in view of "the unavailability of the divestiture remedy," "the anticompetitive effect of the ban with respect to competition for the sale of automobiles," and "the anticompetitive effect of the ban with respect to competition for the sale of automobile air conditioners" 532 F.2d at 693 94 As to enjoining internal production of air conditioners by Volkswagen, the Court of Appeals said:

> "Because divestiture is not an available remedy, there is scant basis for imposition of a ban on internal expansion on remand" *Id* at 691

Finally, with respect to the provision prohibiting Volkswagen from satisfying more than 50% of its air conditioner requirements from the divested company, the Court of Appeals observed:

*Brief of the United States at 18-19

**In remanding the case for trial, the Court of Appeals found that the District Court had erred in defining the product market as air conditioners sold for use in Volkswagens, because such a definition ignores "cross elasticity" of supply—that is whether manufacturers of air conditioners for Volkswagens "may with little modification of production facilities produce units for different makes of cars". 532 F 2d at 691 That is to say, while an air conditioner obviously cannot simply be slipped out of a Volkswagen and into a Chevrolet, the obstacles facing a manufacturer who wishes to make such a shift are not insurmountable, and thus manufacturers of air conditioners for different makes of cars are in competition with one another. Since thirty minutes of "All in the Family" could be played on ABC rather than CBS with no changes whatsoever, it is bizarre that the Government has here defined the market as "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours", thus excluding programs supplied to CBS and ABC in large part by the same producers who supply NBC. *See* Fisher Affidavit at 2a, *infra;* Posner Affidavit at 73a 75a, *infra.*

> " . . Calmetics argues that the 50% quota creates an open market for the competitors of the divested firm.
>
> "The 50% quota, however, creates the antithesis of an open market As the district court inadvertently acknowledged, the effect of the quota is to displace the competitive forces of the marketplace and transform a segment of the automobile air-conditioning equipment business into a regulated industry *See* 353 F Supp at 1223 ("The Court must therefore fashion some flexible standard by which the business needs of a buyer can be compatible with the needs of the various possible suppliers in this market") It is inconceivable that such a quota would serve the goals of the antitrust laws, which are designed to preserve competition, not particular competitors" 532 F 2d at 694 (footnote omitted).

The restrictive provisions of Section V of the proposed NBC decree obviously cannot be supported as merely ancillary to divestiture. The proposed decree does not provide for divestiture and, indeed, there has been no acquisition to be divested Hence, there is no possible justification for a restriction on NBC production in light of the anticompetitive impact of such a ban Like the quota system imposed on Volkswagen by the District Court and rejected by the Ninth Circuit in *Calmetics*, the quota imposed by Section V on NBC, however attractive it may be to other program producers, "creates the antithesis of an open market" and cannot "serve the goals of the antitrust laws, which are designed to preserve competition, not particular competitors" It is incomprehensible how the Government, having persuaded the Ninth Circuit to denounce in *Calmetics* a quota system that "provide[d] the other manufacturers with a perpetual guarantee of one half of [VWoA's] business",* can with a straight face here urge the Court to impose a system that would provide other program suppliers with a guarantee of approximately 90 per cent of NBC's business

Nor was *Calmetics* a fluke The same point was made by the Government in connection with the consent decree entered in *United States*

*Brief of the United States at 19.

v *Gillette Co*, 406 F Supp 713 (D Mass. 1975) In that action, the Government challenged Gillette's acquisition of Braun, a manufacturer of electric razors The consent decree required Gillette to establish a new company holding all rights to manufacture and market the Braun electric shaver in the United States Two other manufacturers of electric shavers, Ronson and Remington, objected to the fact that the proposed decree did not prohibit future entry into the electric shaving industry by Gillette utilizing technology acquired from Braun In response, the Government conceded that such future entry by Gillette was not unlikely but urged that such potential entry was desirable:

> "We look upon such entry as being beneficial due to the resultant competition in the United States electric shaver market even though that entry is facilitated by the residual knowledge derived from [Braun's] past experience"*

The Government dismissed the objections of Ronson and Remington as apparently "more directed at protecting their own market position than at protecting competiton",** and the court acknowledged the validity of the Government's position when entering the decree 406 F Supp at 717

Finally, it must be noted that the production limitation in the proposed decree is particularly inappropriate in light of the serious shortage over the years of at least one type of programming used by the television networks, namely theatrical feature films Such films are produced largely by the producers of other types of television programming When the Government sued the major studios twenty years ago for "block-booking" their theatrical films to television, the head of the Antitrust Division, Victor R Hansen, explained that shortage of film product had been a substantial problem since the earliest days of television† A decade later, at the time of ABC's and CBS's entry into

*Plaintiff's Response to Comments regarding the Proposed Final Judgment against the Gillette Co, 40 Fed Reg 16,324, 46,325 (1975)

**Id.*

†Address by Victor R Hansen, prepared for delivery to the Federal Communications Bar Association, April 18, 1957, at 16 Indeed, Judge Hansen congratulated the networks for the "excellent job" they had done in producing more and more of their own programming in the face of this shortage *Id* at 5

theatrical feature film production in 1967, the theater owners themselves (the other principal users of such product) said that they

> "vigorously applaud, approve and welcome the entry of [ABC, CBS and] all others into the field of production and distribution of feature motion pictures suitable for theatres in the sincere hope that the present and prospective critical shortage of available product will be eliminated"*

Three years later the theater owners found that the product shortage that existed in the 1967 "exists today in more aggravated and perilous circumstances for exhibition"**

In 1974, Judge Palmieri, in denying a motion by the major Hollywood studios to enjoin ABC from broadcasting ABC-produced theatrical motion pictures, found that

> " feature film product has been for a number of years in a state of continuing and acute shortage leading to a substantial escalation of film licensing costs sustained by the television industry Indeed, the extent of this increase can be gleaned from the fact that the average cost for a feature film license for network television exhibition in 1961 was $100,000 00 whereas it had risen by the end of 1967 to $800,000 00 or more It was against this background of product shortage and greatly increased licensing costs, paid in substantial part to the plaintiffs, that ABC made its decision to produce theatrical feature films" *Columbia Pictures Industries, Inc v American Broadcasting Companies*, 1974-1 Trade Cas 96,092, 96,091 (S D N Y), *aff'd*, 501 F 2d 894 (2d Cir. 1974) (footnote omitted)

Nor has the problem abated in recent years Only last month the *Wall Street Journal* reported that the Hollywood studios are slashing pro-

*Resolution of the Board of Directors of the National Association of Theatre Owners, adopted October 1967

**Resolution of the Board of Directors of the National Association of Theatre Owners, adopted November 1970

duction and thus causing the shortage of theatrical feature films to reach "crisis" proportions threatening the economic viability of exhibitors.* Given this situation, it is not surprising that theater owners are reported to be giving serious consideration to participating in feature film production and, indeed, to seeking modification of the 1950 *Paramount* decree that restrains certain of them from doing so.**

Restriction of production is antithetical to the objectives of the antitrust laws *irrespective of the adequacy of supply*. In view of the evidence of product shortage, however, the restriction on network production contemplated by the proposed decree, while perhaps a boon to the major studios in terms of higher prices and protection from competition, is completely irrational and cannot be held to be in the public interest.

2. The Restrictions on the Terms of Trade.

Just as the production limitation of Section V of the decree is patently anticompetitive, so too are the provisions of the decree that would alter and regulate the terms on which NBC may contract with program suppliers. For example, under the decree a producer may not, when selling to NBC the network broadcast right to the initial episodes of a series, also sell to NBC the right to repeat network showings in subsequent seasons of more than three of those episodes† or the right to carry a program for more than four years†† or the right to the exclusive broadcast use of a program throughout its network run.‡ As the Fisher Affidavit states (at 10a, *infra*), "such an alteration by fiat of the terms of trade between networks and program suppliers will not alter NBC's alleged status as a monopsonist [*i.e.*, a monopoly buyer] and indeed may well have the effect of further increasing concentration and

* "Film Exhibitors Face a Financial Crisis As Hollywood Studios Slash Production", Wall Street Journal, February 8, 1977, at 46; this article is annexed hereto as Appendix F, at 107a, *infra*.

** "Pinch Picture Playoff Patterns, Majors Can't Supply Full Year's Product", Variety, March 17, 1976, at 1, 31; "NATO, Distribs Link Arms Against Exhib Financing Ban", Hollywood Reporter, February 15, 1977, at 1, 9.

† Proposed Decree, Section VI(H).

†† *Id.*, Section VI(E)(i).

‡ *Id.*, Section VI(E)(ii)(a)-(c).

restricting competition" among program suppliers, the very competition the Government alleges that NBC has suppressed.

The proposed decree does not even purport to enhance the competition NBC faces as a buyer of programming. Such competition is generated by NBC's actual or potential *competitors* in the purchase of programming—*i.e.*, other *buyers*, including, particularly, CBS and ABC—but nothing in the decree affects NBC's relationships with CBS and ABC. Indeed, the Government specifically states that the decree is designed "to prevent [NBC] from being placed at a competitive disadvantage with respect to CBS or ABC" (CIS at 14). The Government's proposed alteration and regulation of the terms on which NBC may deal with its *suppliers* simply does not increase competition among the *buyers* of network programming.*

This is by no means to say that the provisions of the decree that effect this alteration are economically irrelevant. Indeed, a restriction on the rights that may be bought and sold might in itself be thought a restraint of trade. Obviously certain restraints of trade—such as an agreement to buy a barber shop only if the seller agrees not to open a new barber shop across the street—may be needed for the functioning of the market. But no such effects flow from this decree's restrictions; on the contrary, there may well be further harmful effects.

As Professor Fisher's detailed analysis demonstrates, the most likely harmful effect of these restrictions on the terms of trade between NBC and its suppliers will be to limit the ways in which the networks can compete** and to force producers to bear more of the risk of a program's failure.† While this may be of little or no consequence to major producers with ample resources, it is likely to have a highly adverse effect on small independent producers and potential

* Fisher Affidavit at 11a, *infra*.

** *Id.* at 13a, *infra*. *E.g.*, the limitation on NBC's purchase of reruns will restrict its future choices as to program scheduling—a major area of network competition.

† *Id.* at 11a, *infra*. Section VI(E)(i) of the decree, for example, would limit the reruns NBC can purchase, thus preventing producers from selling "up front" to NBC options for later years of a program, and thereby preventing them from realizing at an early date the current value of these options.

producers without such resources It is precisely these producers in whose emergence the networks have a vital interest Tomorrow's Norman Lears and Quinn Martins are obviously not now before the Court and therefore cannot complain of the heightening of entry barriers which the decree will effect.* Conversely, the present suppliers with established track records are likely to enjoy the prospect of being shielded from new competition Thus, it will hardly be surprising if the major studios and other successful producers urge that the decree should be still more restrictive; the higher the barriers to entry can be raised, the better for them

Similarly, by prohibiting NBC from acquiring any rights or interests in programming other than the network broadcast right, the decree imposes risks on producers that some of them might well prefer to avoid As stated in the Posner Affidavit:

> "The value of such rights tends to be highly uncertain; hence the effect of contracts that transfer these rights to the network is to have the network assume the risk that the program will not be successful enough to make the various secondary or residual rights in it commercially valuable. This shifting of risk from producer to network is a boon for the small producer, who may be in no position financially to assume the risks of failure involved in retaining all of the rights to subsequent exploitation of the program" Posner Affidavit at 66a, *infra*

Thus, the restraint on network production together with the barriers to entry into production and the restrictions imposed on smaller producers all have the tendency to increase concentration in the hands of the major studios As the Fisher Affidavit states:

> "Concentration resulting from the superior skill, foresight and industry of some competitors is one thing; concentration procured by fiat is quite another; and concentration resulting directly from a decree ostensibly intended to enforce the antitrust law is simply absurd." Fisher Affidavit at 18a-19a, *infra*

In a desire to provide producers with fair prices, the decree substitutes a complex system of regulation for competition But the Sherman Act, unlike minimum wage law and crop price supports, is not concerned with assuring "reasonable" prices or protecting particular competitors It is concerned with protecting competition* As stated in the Posner Affidavit:

> "The entry of a regulatory decree is almost a sure sign that the case should never have been brought The purpose of the antitrust laws is to promote free competition by dissolving restraints of trade and not, as in the proposed decree in this case, to supervise the details of bargaining between buyers and sellers" Posner Affidavit at 68a, *infra*

And as Professor Fisher concludes:

> "The decree serves the Government's apparent purposes to the extent that it substitutes regulation for competition But regulation seldom succeeds in achieving the same desirable allocation of resources that results under competition Indeed, there are usually inherent economic inefficiencies in regulation, not the least of which are the costs, burdens and delays of administering the regulatory regime" Fisher Affidavit at 19a, *infra*

*See *Times-Picayune* v *United States*, 345 U.S. 594, 622 (1953):
'Nor can we be certain that the challenged practice, though not destructive of existing competition, did not abort yet unborn competitors equally within the concern of the Sherman Act"

*As the Department of Justice recently observed in criticising the Robinson Patman Act as essentially a regulatory statute inconsistent with the purposes of the antitrust law: "The antitrust laws, as they are embodied in the bulk of the Sherman and Clayton Acts, have as their goal the enhancement of consumer welfare by promoting the maintenance of competitive markets and actual competition" On the other hand, "the regulation of price competition—direct and indirect—for the benefit of certain favored incumbents in an industry, , (along with entry regulation) characterizes the essence of economic regulation as it has developed in the American system" Such regulation, said the Department, "strikes at a process which is fundamental to a competitive market: the process by which each buyer negotiates for itself the best possible price" DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977) at 211, 213, 32

It was for these reasons that Donald F Turner, while Assistant Attorney General in charge of the Antitrust Division, cautioned that regulatory provisions in consent decrees "should be looked at with great care" and that regulatory decrees are ordinarily not "the proper business of antitrust."*

B The Redundant Regulatory Scheme Set Out in the Proposed Decree Cannot Be in the Public Interest.

At the outset of this litigation this Court recognized that there was going to be a "real and substantial problem"** of accommodating any decree in this action with the FCC's regulatory scheme Because of that "problem" the Court questioned whether it was necessary or appropriate to continue to prosecute the case, but concluded that was a decision which the Court had to leave to others Despite that admonition, it is apparent from the proposed decree and the CIS that the problem of rationalizing the provisions of the decree with the FCC's regulations has not even been considered by the Department of Justice, let alone solved.

The proposed decree presents squarely to the Court precisely the "real and substantial problem" it anticipated three and a half years ago Indeed, the proposed decree, embodying a highly complex, elaborate and obscure scheme of regulation, makes it apparent that the problem is even more substantial than might have been anticipated At the same time, the principal reasons advanced for proceeding with the litigation have clearly evaporated. In denying defendants' motions based on the primary jurisdiction of the FCC, the Court in reliance on arguments made by the Department emphasized that "the FCC is not empowered to adjudicate alleged antitrust violations" and that the FCC's regulations "provide for future conduct, they do not determine the propriety of past conduct". *Id.* But, the proposed decree now

*An Interview With the Honorable Donald F. Turner, 30 ANTITRUST L. J. 100, 103 (1956).

**United States v. National Broadcasting Co., 1974 Trade Cas. 95,987, 95,912 (C.D. Cal. 1973).

before the Court neither "adjudicates alleged antitrust violations" nor determines "the propriety of past conduct" It is purely a complex system of regulation concerning future conduct to be administered by this Court.

The regulatory scheme which the proposed decree would have this Court administer cannot be in the public interest because it would impose a system of regulation that duplicates, overlaps and collides with the FCC's pervasive regulatory regime. As this Court recently found:

> "The breadth and detail of these [FCC] regulations compel the conclusion that the regulatory scheme adopted by the FCC to deal with the problems uncovered by its investigation of the television programming market can be considered nothing less than 'pervasive.' The regulations also provide ample evidence of the fact that the FCC has been active in exercising its regulatory powers with respect to the subject matter of this suit." *United States v CBS Inc*, Civ. No 74-3599-RJK, slip op at 9 (C.D Cal, Feb 16, 1977) (footnotes omitted).

In light of that pervasive regulatory scheme, the Court took note "of the substantial likelihood that imposition of the remedies requested by the government in this action may conflict with the directives of the FCC's regulations, thereby subjecting the networks to varying standards of conduct" and that "maintenance of this action could possibly disrupt the FCC's regulatory efforts" *Id.* at 9-10

However substantial the problem of accommodating the decree in this litigation with the existing body of FCC regulations, more intractable still is the problem of accommodating what will emerge from the FCC's major new inquiry into network practices announced on January 14, 1977 ("Network Practices Inquiry").* The FCC's Notice of Inquiry explicitly announces the Commission's intent to deal

*In re Commercial Television Network Practices and the Ability of Station Licensees To Serve the Public Interest, Notice of Inquiry, Docket No. 21049, 42 Fed. Reg. 4992 (1977) (A copy of the Notice is annexed hereto as Appendix C at pp 84a-101a, *infra*)

with each of the areas covered by the proposed decree. The Notice anticipates that "a report concluding the inquiry can be completed within one year following receipt of the comments" to be submitted by June 1 *Id* at 102a, *infra*

In the meanwhile:

How can this Court be expected to rationalize the provisions of the proposed decree with regulations which are not only subject to change but not yet even written?

Why should this Court be required to determine, without benefit of an evidentiary record before it, whether the regulations in the proposed decree are in the public interest when the FCC has assembled a "special staff composed of economists, attorneys and others with relevant experience and expertise" and has called for comments by industry members and the general public preparatory to reviewing that very question? *Id* at 102a, *infra*

At best the two determinations will be duplicative, and at worst they will be totally inconsistent and will require major revisions by one or both of the tribunals addressing the question In sum, a comparison of the proposed decree and the Network Practices Inquiry makes it obvious that there is a total redundancy between what this Court is being asked to do and what the FCC is about to do, and that overlap cannot be in the public interest Nor can the Department still urge that it is necessary for the Court to proceed to an antitrust adjudication unobtainable from the FCC; the proposed decree involves no such adjudication

We do not seek to reargue here the jurisdictional motions which have been fully briefed earlier in this litigation We continue to believe that those motions were sound, although we certainly concur in the Court's view that the issues involved are "problematic" and that the Supreme Court could well shed more light on them We confine our argument here to a showing that the proposed decree does not meet the public interest standard of the APPA (1) because the decree is essentially regulatory and would require this Court to supervise the television industry for at least the next fifteen years and perhaps in perpetuity; (2) because it overlaps and conflicts with current FCC regulations; and

(3) because an assessment of the public interest with respect to every matter covered by the proposed decree has been undertaken in the new FCC Network Practices Inquiry Finally we urge that if the Court is not disposed to reject the proposed decree now, it should at least stay decision until the FCC has completed its inquiry in order to minimize the conflict and duplication between that inquiry and this proceeding

1 The Decree Will Require Continuous Judicial Supervision of the Television Industry.

The Department expressly concedes the "regulatory nature" of the decree (CIS at 9) It is important to consider precisely what that means It means that the decree will have a substantial effect on every phase of program procurement and distribution, including production, production facilities, pilots, stripping, spin offs, and other broadcast and non-broadcast uses of entertainment programs It means that the Court will be beset with requests for interpretations and modifications of the decree, exemptions from its requirements, and the like * Virtually every contract and program production will entail some question of application or interpretation under the exceedingly broad and singularly obscure provisions of the decree that will ultimately have to be settled by the Court In short the Court will be forced to oversee all the business relationships in this industry for 15 years or more **

The practical significance of such judicial oversight is illustrated by the work of the courts in administering similarly broad "regulatory" consent decrees with respect to music performance rights for the past 35 years in *ASCAP* and with respect to motion picture production and distribution arrangements for the past 28 years in *Paramount* The *ASCAP* decree was entered in 1941 † It has been amended a number of times since then, including seven times since 1960 The

*Under Section XII of the proposed decree, the Court would retain jurisdiction to entertain applications "at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions" of the decree.

**Portions of the decree are to remain in effect for ten years, others for 15 years, and others in perpetuity

†*United States* v *ASCAP*, 1940-43 Trade Cas 402 (S D N Y 1941)

court has been called upon to resolve disputes arising under the decree on a nearly continuous basis Since 1962, for example, there have been more than 60 hearings involving the decree (an average of about four per year) and at least 40 reported decisions The Department of Justice surely understated the matter when it acknowledged that the *ASCAP* decree has imposed a "heavy burden" on the judiciary *

Similiarly, in the last 28 years under consent decrees in *United States* v *Paramount Pictures, Inc*, 1948 19 Trade Cas 63,009 (S D N.Y. 1919), the District Court has been involved in a gargantuan regulatory effort. Proceedings under the decrees have been so numerous that the docket sheet alone extends for more than 200 pages Over 600 motions, applications and petitions (on the average of more than 20 a year) have been brought seeking modification, interpretation or implementation of the decrees, and requiring hearings on over 250 days and resulting in more than 50 reported judicial decisions

However great the regulatory labors of the courts in those actions, neither of the industries involved was subject to the additional problems created by the concurrent regulation by an independent administrative agency—much less an agency which like the FCC has been "active in exercising its regulatory powers with respect to the subject matter" of the proposed decree. *United States* v. *CBS Inc., supra,* slip op at 9

2. The Proposed Decree Overlaps and Conflicts with Current FCC Regulations.

Even apart from the FCC's new Network Practices Inquiry, which explicitly addresses itself to all the substantive provisions of the proposed decree, the subject matter of most of the substantive provisions in the proposed decree is covered either by existing FCC regulations or by pending FCC proceedings ** Perhaps the simplest illustration of unnecessary duplication (and the potential for conflict)

*Memorandum for the United States, dated January 21, 1974, at 8, *United States* v. *ASCAP*, Civ. No 13 95 (S D N Y.).

**Attached as Appendix B (at 106), *infra*) is a checklist of the matters covered in the proposed decree and their treatment by the FCC.

is where the provisions of the proposed decree track, virtually word for word, the language of the FCC's regulations Thus, the provisions of Section IV of the proposed decree are drawn almost *in haec verba* from the FCC's syndication and financial interest rules * So long as this identity prevails, perhaps the most that can be said for the decree is that it is totally pointless There are, however, minor (and perhaps unintended) differences in wording and in context which will immediately suggest differences in interpretation as deals are struck and contracts are drafted with both sets of regulations in mind

*With regard to financial interest, Section IV of the proposed decree provides that:

"NBC is enjoined and restrained from:

"(A) Acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by an independent program supplier, other than the right to the Network Exhibition of the program, except as provided in Sections VIII(A)-(D) of this Final Judgment, *provided that* an agreement granting NBC the right to Network Exhibition may include provisions concerning subject matters incident to the licensing and use of network programs . . "

The FCC's financial interest rule provides, in relevant part, that:

" no television network shall:

". . . acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network . " 47 C.F.R § 73.658(j)(ii) (1976)

On syndication, Section IV enjoins NBC from:

"(B) selling, licensing, or distributing entertainment programs to television broadcast stations for non network television exhibition (or otherwise engaging in the business commonly known as 'syndication'), or to foreign television stations or networks, except as provided in Section VIII(D) of this Final Judgment "

The parallel FCC rule provides:

". . no television network shall:

". . sell, license or distribute television programs to television licensees within the United States for nonnetwork television exhibition or otherwise engage in the business commonly known as 'syndication' within the United States; or sell, license, or distribute television programs of which it is not the sole producer for exhibition outside the United States . " 47 C.F.R. § 73.658(j)(i) (1976).

Furthermore, when the two tribunals—the Court and the FCC (and the separate appellate processes to which they are subject)—are called upon to construe the decree and the regulations, it would border on the miraculous for them consistently to arrive at the same interpretation

But the problem is much more serious than the likelihood that two tribunals will reach divergent interpretations The Department's CIS declares that Section IV of the decree was intended to "permanently preserve the prohibitions in the FCC's financial interest and syndication rules" (CIS at 8) But the FCC did not intend to have its avowedly experimental regulations "permanently preserved" It intended to reconsider them from time to time in light of experience Indeed, on January 14 the FCC announced its intention to review the continuing desirability of those regulations in its new Network Practices Inquiry The Notice of Inquiry states:

> "The proposed NBC consent decree contains terms prohibiting NBC from acquiring distribution rights or profit shares in programs produced by outside producers, and from engaging in syndication of such programs anywhere, and from all syndication in the U S These particular terms appear virtually identical to rules adopted by the Commission in 1970 (§ 73 658(j)), prohibiting such activities, including the acquisition of any interest in a program produced by an outside party beyond the right to network exhibition We invite interested parties to comment on the adequacy of our present rules and to propose alternatives if that appears to be warranted" Network Practices Inquiry, Notice at 98a 99a, *infra*

Thus, it would appear that the proposed consent decree is designed as a preemptive strike by the Department of Justice on the FCC, intended to forestall the FCC from effectively reconsidering its own regulations There is no conceivable reason why this Court should be required to participate in such bureaucratic infighting between two government agencies or why the cost of such an intramural struggle

should be visited on the broadcast industry. Nor is there any conceivable reason why this Court should be required to determine without the benefit of any evidentiary record that the perpetuation of those rules is in the public interest when the FCC has just assembled "a special staff composed of economists, attorneys and others with relevant experience and expertise" and called for comments by industry members and the general public to decide that very question *Id* at 102a, *infra*

The utter irrationality of the Department's position becomes apparent when one notes that another portion of the CIS states:

> "Because of the regulatory nature of many of the injunctions in Section VI, and the possibility of changes in the industry, the Department has determined that the prohibitions should contain the time limitations spelled out in this section (15 years for subsections (B), (C) and (E) and 10 years in subsections (D), (F), (G) and (II)) " CIS at 9

No explanation is given (and none can be imagined) why the Department's proposed regulations in Section VI of the decree should be temporary in light of their "regulatory nature" and "the possibility of changes in the industry", whereas the FCC's regulations, applicable to the same industry and equally regulatory, must be "permanently preserved" in Section IV, even though the FCC wishes to reconsider them

These examples of irrational duplication and conflict are only the tip of the iceberg The FCC also has been actively regulating the matters covered by other significant provisions of the decree, including those dealing with exclusivity and pilots With respect to exclusivity, the FCC has adopted a complex set of rules which regulate the use that pay cable may make of feature films being used on conventional television * That is the same subject covered by Section VI(E)(iii) of the decree, which would regulate network acquisition of exclusive rights to feature films as against pay or subscription television In addition, the FCC has instituted a new proceeding to conduct an "in depth exploration" of exclusivity provisions (as between broadcast and cable

*47 C F R. § 76 225(a) (1976); see First Report and Order, Docket Nos 18373 and 19554, 52 F C C 2d 1 (1975)

television) "which give one form of television service exclusive use of program material vis-a-vis the other . . ."* That proceeding is ongoing and is likely to deal with many of the same matters to which the exclusivity provisions in the decree (Section VI(E) (ii) and (iii)) are addressed With respect to alleged "warehousing" by networks of program pilots, the FCC has adopted a rule that is similar, though not identical, to the prohibition in Section VI(F) of the decree **

Another example of the conflict is provided by the FCC's lifting of the ban on pay cable use of program series *See* Second Report and Order, FCC Docket No 19554, 35 R R 2d 767, 770 (1975). Those who had opposed that action had argued that producers of entertainment series would switch their programs to pay cable The FCC found that because network-producer contracts generally provide for extended option periods, such an exodus was unlikely to occur The FCC concluded that the rule would not unduly disrupt broadcast television operations and that it was therefore in the public interest *Id.* at 772 In the proposed decree (Section VI(E)), the Department now seeks to limit the contract option provisions upon which the FCC relied The successful operation of the FCC rule might be jeopardized if the proposed decree is entered.

The proposed decree also adopts relief which the FCC has previously considered and rejected The proposed decree would limit NBC's production of prime time entertainment programming to 2½ hours per week (Section V) or approximately, 10% of its schedule Such relief is necessary, according to the Government, because of the networks' predisposition to use their own programming thus foreclosing outside suppliers of programs (CIS at 8). The FCC previously considered that same contention in connection with the proposed "50/50" rule which would have had the effect of limiting network program

*Notice of Inquiry, FCC Docket No. 20103, 52 F C.C. 2d 87, 88 (1975)

**47 C.F.R. § 73.658(j)(ii) (1976). The FCC rule requires that if a network does not avail itself in timely fashion of its license to network exhibition of a program, the licensor may repurchase the program by reasonably compensating the network. The decree would prohibit NBC from keeping more than 35 percent of its pilot inventory for more than six months and would require that it sell the remainder at prices representing NBC's unrecouped costs.

production in prime time to 50% of its schedule * However the FCC declined to adopt even a 50% limitation when it adopted instead the prime-time access rule which intentionally draws no distinction between programs produced by the networks and those obtained by them from independent producers and applies by its terms only to stations in the top 50 markets **

The FCC has thus considered and rejected as not in the public interest a restriction on production much less stringent than the restriction in the proposed decree, adopting instead an alternative means of dealing with the same problem The production limitation in the proposed decree would conflict with that public interest determination Furthermore, the FCC has repeatedly amended that alternative (the prime-time access rule)and has expressly left the rule subject to future review in the light of experience *Id.* at 384, 401 There is, therefore, not only current conflict but the potential for additional conflict should the FCC decide to modify the prime-time access rule in the future or to adopt some other solution

Finally, it should be noted that all of the FCC's work in this area has been guided by its perception that the public interest requires that the networks assume responsibility for their program offerings and not operate merely as common carriers of other people's programming. Indeed, the networks have been repeatedly urged by the FCC, Congress and the public to be vigilant in exercising their responsibility for programming. The provision in the decree limiting the network's program production seriously curtails the network's capacity to meet that responsibility.

As the foregoing makes clear, there were ample grounds for the Court's recent finding that there is a "substantial likelihood that impo-

*Report and Order, Docket No 12782, 23 F C.C.2d 382, 391 (1970).

***Id.* As this Court noted in its exclusive jurisdiction opinion:

". . . [T]hese regulations were promulgated for the express purpose of fostering free competition in the television program market and clearly reflect the Commission's efforts to change many, if not all the practices challenged by the government in this antitrust action" *United States* v *CBS Inc*, *supra*, slip op. at 8-9.

sition of the remedies requested by the Government in this action may conflict with the directives of the FCC's regulations" and "that maintenance of this action could possibly disrupt the FCC s regulatory efforts" *United States* v *CBS Inc , supra,* slip op at 9-10 Whatever one thinks of the desirability or wisdom of this mass of FCC regulations surely the only sound way either to modify, repeal or perpetuate them is by proceeding before the FCC, or by obtaining judicial review of the FCC s actions, and not by the ambush of collateral attack The inappropriateness of such a collateral attack is particularly apparent in light of the Court's observation that: "The FCC has demonstrated its attentiveness to the problems of competition in the prime time television program market and has taken steps, within its statutory powers, to see that the public interest is served The Commission's obligation to regulate for the public interest can, and should offer sufficient assurance that antitrust policy and concerns will be considered in the course of regulating the telecommunications industry" *United States* v *CBS Inc , supra,* slip op at 13-14

3 The FCC's New Network Practices Inquiry Is Explicitly Addressed to All the Matters Covered by the Proposed Decree

However difficult the problems noted above of accommodating the proposed decree with rules that are extant, the problems of accommodation created by the FCC's new Network Practices Inquiry are still greater According to the FCC, this broad inquiry into "television network practices and policies regarding the acquisition and distribution of television programming" was prompted in part "by allegations contained in antitrust complaints" in this action and the two companion cases Network Practices Inquiry, Notice at 87a, *infra* The FCC recognized that its inquiry and the judicial proceeding will be "concurrently examining similar issues " *Id* at 88a, *infra*

The matters covered by the FCC inquiry and the proposed consent decree are not only similar, they are virtually identical Indeed, the FCC inquiry—which will embrace, *inter alia,* network syndication, network program production, program contract options and exclusivity provisions, use of network production facilities, and network program reruns—is designed to consider the same factors of competition addressed by the antitrust court, as well as the need, if any, for *every* substantive provision in the proposed consent decree * For example, the CIS asserts the decree would place "specific outer limits" on network program production in order to reduce NBC s ability to make use of its alleged power over program sources (CIS at 7) But the FCC has directed its inquiry at that very issue: whether the networks have such power ; if so, whether they have an "anticompetitive advantage over potential competitors", and how that advantage, if it exists, affects the supply of independently produced programs Network Practices Inquiry, Notice at 99a, *infra*

The Department of Justice appears now to admit some concern that this latest FCC proceeding, which the Department generally supports, will create problems for this Court and, accordingly, it urged that the FCC not consider the issues raised by the litigation Thus, while the Department initially filed comments with the FCC urging that it conduct a "comprehensive inquiry into network television"**—just as it has urged this Court to conduct "a complete inquiry into this industry" †—the Department subsequently filed a letter with the FCC

*Section IV of the proposed decree, concerning syndication and financial interests, is covered by paragraphs 21 and 22 of the Notice of Inquiry ; Sections V and VI(D) of the proposed decree, concerning network program production, are covered in paragraph 23 of the Notice; Sections VI(B) and (C) of the proposed decree, concerning production facilities, are covered by paragraph 24 of the Notice; Section VI(E)(i) of the proposed decree, concerning program options, is covered by paragraph 25 of the Notice; Sections VI(E)(ii) and (iii), (F), (G) and (H), concerning network exclusivity of program series and feature films, pilots, spinoffs and reruns, are covered by paragraphs 26 and 27 of the Notice *See also* the chart attached as Appendix E which lists FCC treatment of the items of relief in the proposed decree. As this Court has noted "The powers of the Commission to regulate the radio and television industries are unquestionably broad and flexible" and that "regulatory scheme is broad enough to comprehend the subject matter of this litigation" *United States* v *CBS Inc supra,* slip op at 5 6

**Comments of the United States Department of Justice, pp 2, 4, Network Practices Inquiry, FCC File RM-2749 (filed November 23, 1976).

†Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 25

urging that the FCC not inquire into the issues of competition in program supply involved in these cases That letter stated:

> "While we continue to believe that a general inquiry by the Commission into network practices is appropriate and fully warranted at this time, we wish to emphasize that the Department's comments should not be considered as suggesting that the inquiry encompass those issues now being litigated in the Federal District Court in California"*

But the FCC has flatly rejected such a limitation It has decided instead to consider the same competitive issues and the wisdom of the same types of regulatory provisions sought in the proposed decree, and thus has reaffirmed its intention actively to exercise its jurisdiction to impose whatever prospective rules are necessary to improve competition in connection with the matters that are the subject of these cases To be sure, the FCC has also expressed its view that its inquiry should not preclude the Department from prosecuting these cases or seeking consent decrees Network Practices Inquiry, Notice at 88a, *infra*. But the FCC has emphasized its own intention to review the competitive issues, and to decide whether or not to order the same or different remedial measures Thus, whatever the FCC's views on the pending antitrust cases against the networks, it now appears inevitable that the proposed decree will either duplicate or conflict with the regulatory orders of the FCC and with the FCC's assessment of the public interest.

It is clear from its Notice of Inquiry that the FCC believes that a further careful study of each of the issues covered by the proposed decree is warranted, thus virtually ensuring that this Court would have to revisit the decree when the FCC's investigation and study are completed next year. Therefore, even if the redundancy and conflict inherent in the two regulatory schemes does not persuade this Court that it should now disapprove the proposed decree as not in the public interest, the Court should, at the very least, postpone consideration of

*Letter from Donald I. Baker, Assistant Attorney General for the Antitrust Division, to FCC Chairman Richard E. Wiley, p 1, December 3, 1976. A copy of this letter is annexed hereto as Appendix D.

the proposed decree until completion of the FCC's current inquiry in order to enhance the possibility of an accommodation, to mitigate the inevitable conflicts and to reduce the danger of divergent views of the public interest.* As the Ninth Circuit Court of Appeals said in *Chronicle Publishing Co* v *National Broadcasting Co*, 294 F.2d 744, 747 (9th Cir 1961), in upholding a stay of an antitrust action pending an FCC review:

> "We are then confronted with the prospect of two tremendously complex proceedings simultaneously assembling the same factual data in painstaking detail for the purpose of considering these facts from different points of view The situation is one which cries out for the elimination of wasteful duplication of effort If the mechanics of justice are not to be wholly overwhelmed by the steadily increasing burden of complex antitrust litigation, means must be found for easing that burden The elimination of unnecessary duplication does not appear unreasonable under these circumstances"

C. The Proposed Decree Conflicts with the Paramount Public Interest in Freedom of Speech.

The proposed decree is not in the public interest because the program production limitation seriously impairs the freedom of speech protected by the First Amendment.

It is beyond dispute that the television networks have First Amendment rights, *Columbia Broadcasting System, Inc* v *Democratic National Committee*, 412 U.S. 94 (1973); *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892, 895 (3rd Cir. 1969), *aff'd*, 403 U.S. 29 (1971), and that entertainment programming is a form of speech protected by the First Amendment, *Schacht* v. *United States*, 398 U.S. 58, 63 (1970); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952). As the Supreme Court wrote in *Winters* v. *New York*, 333 U.S. 507, 510

*Cf. *United States* v. *American Telephone & Telegraph Co.*, 39 R R.2d 203, 209 (D.D C., Nov. 24, 1976). While Judge Waddy declined to refer the early proceedings in that case to the FCC, he nevertheless expressly noted that certain matters might be referred to the Commission later in the case, after the issues were "more sharply defined".

(1948): "What is one man's amusement, teaches another's doctrine." Nor does speech lose its constitutional protection because it is undertaken for profit This fact is, in the words of the Supreme Court, "as immaterial in this connection as is the fact that newspapers and books are sold" *New York Times Co* v *Sullivan*, 376 U S 254, 266 (1964) *See Bigelow* v *Virginia*, 421 U S 809 (1975)

The proposed decree represents a gag which was avowedly designed to curtail the network's capacity to engage in a form of protected speech It constitutes, therefore, a species of prior restraint —the very core of the evil to which the First Amendment was addressed *See, e g, New York Times Co* v *United States*, 403 U S 713, 714 (1971); *Carroll* v *President and Commissioners of Princess Anne*, 393 U S 175, 181 (1968); *Lovell* v *Griffin*, 303 U S 444, 451-52 (1938); *Near* v *Minnesota*, 283 U S 697, 713 (1931) The fact that the proposed ban on NBC production is less than total does not alter the fact that the proposed decree explicitly "abridges" freedom of speech The decisions striking down prior restraints have seldom if ever involved total bans; most have involved abridgments that were much more limited Indeed, in protecting freedom of speech, the courts have held invalid not only express prohibitions but also much more subtle forms of restraint * Similarly, the fact that the decree would leave the network free to produce news, sports and public affairs programming does not legitimatize the serious restraint that it does impose on a significant and protected category of speech A decree prohibiting Doubleday from publishing novels and poetry would not be rescued from constitutional infirmity because it permitted the publication of history and biography *See Schneider* v *New Jersey*, 308 U S. 147, 163 (1939)

*E g, *Dombrowski* v *Pfister*, 380 U.S 479 (1965) (chilling effect on First Amendment rights of threatened prosecution under statute purporting to regulate expression justifies injunctive relief by federal court); *New York Times Co* v *Sullivan*, 376 U S 254 (1964) (award of damages to a public official for defamation, absent proof of actual malice, violates the First Amendment); *NAACP* v. *Button*, 371 U S. 415 (1963) (law prohibiting NAACP from assisting in litigation voided as infringing First Amendment rights); *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (order compelling NAACP to list organization's members violated members' constitutional right of association)

Nor is it relevant that NBC would remain free under the decree to broadcast programs produced by others A broadcaster's rights, protected by the First Amendment, include the right to speak for itself, and not merely to transmit the speech of others A speaker has a right "to advance its own views", *Columbia Broadcasting System, Inc* v *Democratic National Committee*, 412 U S 94, 117 (1973), and to be "more than a passive receptacle or conduit" for the views of others, *Miami Herald Publishing Co* v *Tornillo*, 418 U S 241, 258 (1974) As is plain from *Tornillo*, a newspaper cannot be required to carry a letters-to-the editor column *A fortiori*, a newspaper could not be prohibited from carrying more than two columns a day of articles by its own reporters, even though it was left free to fill the balance of each issue with material from syndicated columnists and wire services Yet that is in substance precisely what Section V of the proposed decree does *

Finally, we are not making any claim that the First Amendment immunizes broadcasters or anyone else from liability under the Sherman Act We are concerned here only with the particular provisions of an ostensibly remedial decree The Supreme Court and other courts have repeatedly recognized that, even where liability has been clearly established by an evidentiary record, injunctions must be carefully

*By limiting the amount of entertainment programming which the network may produce itself, the proposed decree would compel the network to fill its remaining programming needs from independent program suppliers But if, under the Supreme Court's decision in *Democratic National Committee*, a network cannot be compelled to *sell* advertising time, neither can it be compelled to *buy* someone else's programming

It should be noted that, beyond the proscription of the First Amendment, Congress has provided in the Communications Act that "a person engaged in radio broadcasting shall not . . be deemed a common carrier" 47 U.S.C. § 153 (h). *See also* 47 U S C § 326 Indeed, the Communications Act, 47 U.S C §§ 151 *et seq*, and the regulations issued by the FCC thereunder, *see* 47 C.F R §§ 73 658 (d) (e), impose on broadcasters an affirmative obligation to exercise independent judgment in determining what to broadcast Thus, broadcasters have not only a right but a duty to broadcast those programs—and only those programs—that they independently believe should be broadcast The decree clearly conflicts with that right and that duty What is NBC to do if it is dissatisfied with the programs offered to it by other program producers? The decree bars NBC from broadcasting what it believes should be broadcast, when it cannot get what it wants from others

framed to avoid intrusion upon rights protected by the paramount dictates of the First Amendment Thus, in *Associated Press* v *United States*, 326 U S 1 (1945), in sustaining an injunction prohibiting an association of publishers from excluding other publishers from membership, the Supreme Court was careful to point out that the decree involved had no effect whatsoever on the First Amendment activities of the association:

> "The decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published. It only provides that after their 'reason' has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication" 326 U S at 20 n. 18.

And in *United States* v *Lorain Journal Co*, 92 F Supp 794 (N.D. Ohio 1950), *aff'd*, 342 U.S 143 (1951), the district court wrote:

> "There is no appeal to any Court more apt to strike a responsive chord than an appeal to rights guaranteed by the First Amendment and under no consideration would this Court reach the conclusions here expressed were they instrumental in undermining or even affecting a free press In the balance of our constitutional scheme the importance of the First Amendment may be such that sanctions consonant with the Commerce Clause, art. 1, § 8, cl 3, and clearly applicable to other enterprises cannot be used against a newspaper." 92 F. Supp at 800.

By contrast, in *Sun Publishing Co* v. *Walling*, 140 F.2d 445 (6th Cir.), *cert denied*, 322 U.S 728 (1944), where the district court had enjoined delivery or transport of newspapers that had been published by an employer who violated the Fair Labor Standards Act, the court of appeals found the injunction constitutionally impermissible because it amounted to "suppression and injunction which is a restraint upon publication. *Near* v. *State of Minnesota, supra*," 140 F.2d at 450.

Like the decree reversed in *Sun Publishing*, the proposed NBC decree entails "suppression and injunction". The Government is asking the Court to find that an enforceable judicial decree restraining freedom of speech is in the *public* interest Given the paramount expression of the public interest set forth in the Constitution, such a finding cannot be made here

II.

THE GOVERNMENT'S COMPETITIVE IMPACT STATEMENT FAILS TO SATISFY THE REQUIREMENTS OF THE ANTITRUST PROCEDURES AND PENALTIES ACT.

The Antitrust Procedures and Penalties Act* constituted a major reform of the procedures and conditions for entry of antitrust consent decrees The Act was designed to help restore public confidence in the enforcement of the nation's antitrust laws by providing the court and the public with a full assessment of a proposed decree's anticipated effects on competition as well as the circumstances under which the decree was negotiated In the words of the bill's sponsor, Senator Tunney:

> "It is more sunlight that we are seeking to shed on the methods and manner by which we settle complex and costly antitrust suits through the consent decree process.**

The principal tool for illuminating the consent decree process is the "competitive impact statement" which the APPA requires the Department of Justice to file with the court and publish in the Federal Register when the proposed decree is filed. The CIS must not only state the "nature and purpose" of the case but also describe the "practices or events" giving rise to the alleged antitrust violation

*15 U.S.C. § 16(b)-(h).
**119 Cong. Rec. 24599 (1973)

and must then explain "the anticipated effects on competition" of the proposed relief * Congress clearly intended the competitive impact statement to be similar in function to the "environmental impact statement" required under the National Environmental Protection Act.**

*The act provides that:

". . Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, *and the anticipated effects on competition of such relief;*

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

"(5) a description of the procedures available for modification of such proposal; and

"(6) a description and evaluation of alternatives to such proposal actually considered by the United States" 15 U S C § 16(b) (emphasis added)

**42 U S C §§ 4321 *et seq*, 4332 (2) (c). *See* remarks of Senator Tunney and Senator Gurney, 119 CONG REC. 24599, 24600 (1973) Again to quote Senator Tunney:

"The public impact statement, perhaps the most novel feature of the bill, is similar to the environmental impact statement presently called for under the National Environmental Protection Act. It is, therefore, not without precedent, but rather reflects a continuing concern on the part of Congress to assure that decisions having a major public impact be arrived at through procedures which take account of that impact" 119 CONG REC 24599 (1973)

As litigation under the analogous provision of NEPA has made clear, an impact statement is inadequate if it consists of conclusions unsupported by facts or fails to disclose and evaluate fully both the negative as well as the positive impact of the proposed action *See, e.g., Silva v Lynn*, 482 F 2d 1282 (1st Cir 1973); *Monroe County Conservation Council, Inc v. Volpe*, 472 F.2d 693 (2d Cir 1972); *Chelsea Neighborhood Associations v. United States Postal Service*, 389 F Supp 1171, 1184 (S D N Y 1975), *aff'd* 516 F.2d 378 (2d Cir 1975)

Congress left no doubt that the "impact" with which it was primarily concerned is the impact on competition As the House Judiciary Committee wrote:

> "Wherever appearing in the bill, your Committee has substituted the word, 'competitive' for the word, 'public' in the phrase, 'public impact statement' because: (a) the antitrust laws protect and promote competition; (b) the expertise the Antitrust Division is charged by the Congress with institutionalizing focuses on 'competitive' effects; (c) ambiguities arising from the usage of 'public impact' in environmental case law and statutes are foreclosed; (d) current proposals for inflationary 'impact statements' might otherwise be thought to be adopted which they are not except to the extent that the analysis of, or the prediction of competitive effects in antitrust law traditionally entail inflationary considerations; and (e) the substitutions refine and emphasize legislative purposes and guidelines for the contents of the 'impact statement' mandated by the bill "*

Thus, the essential purpose of a CIS is to explain the competitive effects, both positive and negative, that the proposed decree may have

A. The CIS Fails To Explain the Impact of the Proposed Decree on Competition.

We have discussed above the respects in which the proposed decree is anticompetitive** Even if that discussion were less conclusive than we believe it to be, the points we have raised are obviously not so inconsequential that they can be ignored Yet the CIS ignores them completely *** It contains no discussion of the proposition that eliminating a supplier or potential supplier is inherently anticompetitive, even though the Government has frequently asserted that proposition in the past, and

*H R Rep No 1463, 93d Cong, 2d Sess 12 (1974)

**See pp 2-17, *supra*

***This is particularly surprising inasmuch as before the proposed decree and CIS were filed, we fully described the anticompetitive effects of the proposed decree to the Department of Justice.

there is no attempt to rationalize the provisions of the decree with the prior conflicting statements of antitrust policy by the Government Nor is there any discussion of the prospect that the shifting of risks, resulting from the decree's restrictions on the rights that may be bought and sold, will lead to increased concentration and restriction of competition among program suppliers Whether right or wrong, these points are clearly not frivolous Failing even to allude to them is inherently deceptive* Indeed, the CIS is subject to all of the criticisms that the Government, in its *amicus* brief in *Calnetics*, heaped on Judge Real for his failure to analyze the economic significance of the decree entered and later vacated in that action **

In so far as the Government says anything about the competitive impact of excluding a competitor, it engages not in discussion but in mere *ipse dixit*:

> "[The production limitation] would enhance competition in television entertainment program production and exhibition by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers". CIS at 8

In plain and simple terms, this statement says that competition will be enhanced by eliminating a competitor, and that is arrant nonsense Obviously, every time NBC selects one of its own programs, the slot in the schedule occupied by that show cannot be occupied by a program produced by someone else. The exclusion that results when NBC chooses an NBC program is no different from the exclusion that results when NBC chooses an MCA program instead of a Warner Bros. program As far as Warner Bros is concerned, the result is the same. *See* Fisher Affidavit at 6a-7a, *infra* Competition among producers is no more suppressed when NBC selects one of its own

*See comments on the proposed decree submitted by the Institute for Public Interest Representation (letter from Victor H. Kramer and Thomas Krattenmaker to Bernard M Hollander, dated January 19, 1977)

**See pp. 8-9, *supra*.

programs than it is suppressed when NBC selects an MCA program. Moreover, the CIS fails to consider that the production limitation eliminates the likelihood that the large market shares of others—which, in the case of MCA, approximates 30% of NBC's prime time entertainment programming—will be threatened with erosion by, among other things, NBC's competition. But that threat is the essence of competition * Thus, for the CIS to claim, without the slightest rational explanation, that prohibiting NBC from selecting one of its own programs will "enhance competition", when in fact it will suppress it, is simply to call black, white

In so far as the CIS says anything about the effects on competition likely to result from the alteration of the terms of trade on which NBC may contract with program suppliers, it provides not an explanation, but only the spare and opaque statement that the "regulatory" provisions of the decree will enable program suppliers "to compete free of the artificial leverage which NBC, and other networks, have exercised in the past". CIS at 9. Plaintiff may know what is meant by "artificial leverage"; we certainly do not. A CIS should not be a guessing game. It should state forthrightly the anticipated effects on competition Instead, plaintiff offers up a meaningless formula of words

Furthermore, inasmuch as one of the paramount objectives of the

*We do not deny that NBC's presence as a competitor or potential competitor in program production may be quite uncomfortable for program suppliers, but here as in *Brunswick Corp v Pueblo Bowl O Mat, Inc*, 45 USLW 4133 (US Jan. 25, 1977), the grievance is at best that they are being deprived "of the benefits of increased concentration". *Id* at 4141. Their position is entirely analogous to the plaintiffs' in *Brunswick* who claimed that the antitrust laws had been violated when Brunswick, one of the two largest manufacturers of bowling equipment in the United States, acquired a large number of failing bowling alleys to whom it had extended credit. Plaintiffs sought as damages an amount equal to the increased profits they would have earned had Brunswick allowed the defaulting bowling alleys to close. The Supreme Court rejected this claim, holding that "the profits [plaintiffs] would have realized had competition been reduced" were not recoverable as antitrust damages. *Id* The Court stated that "it is quite clear that if [plaintiffs] were injured, it was not 'by reason of anything forbidden in the antitrust laws' ." Indeed, the Court explained, since the "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) . . . [i]t is inimical to the purposes of these laws to award damages for the type of injury claimed here." *Id.*

Sherman Act is lower prices,* the CIS certainly ought to have indicated what impact the proposed decree will have on the price of programing The CIS does not deal explicitly with that subject, however, and in so far as it says anything implicitly, it says—we believe correctly—that the price of programming will rise ** Of course, for the Government to have said that explicitly would have exposed what the CIS carefully conceals: the decree will drive up prices by suppressing competition: As the Fisher Affidavit states (at 5a 6a, *infra*):

> " one can either seek to stimulate competition among sellers (and thereby drive down price) or one can seek to increase the remuneration that sellers receive (by driving up price), but one cannot increase sellers' remuneration by stimulating the competition among them In so far as the Government's goal is to increase the remuneration of program suppliers, the decree may well achieve that goal, but it will do so only to the extent that it suppresses competition among them "

In sum, the CIS fails either to warn of the competitive costs of the proposed decree or to demonstrate any competitive benefit Since those costs are quite significant and any benefit is far from self-evident, this failure is sufficient reason to reject the proposed decree

*See, e g., *Northern Pacific Ry* v *United States*, 356 U S 1, 4-5 (1958) (emphasis added):

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, *the lowest prices*, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the act is competition "

**See also* Memorandum of the United States in Opposition to Defendants Motion for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10 ("the independent television production industry is suffering undue hardship at a time when network profits are soaring") and 20 21 ("the network effectively precludes the producer from receiving payment commensurate with the success of his program and from re-negotiating his contract . All three networks engage in parallel conduct with respect to the below cost pricing ")

Moreover, the CIS is defective in two other critical respects, as we show below It fails to provide an adequate understanding of the nature and purpose of the proceeding and the practices and events giving rise to the alleged antitrust offense, and it fails to provide a rational link between whatever harm is complained of and the relief set forth in the proposed decree

B. The Statement of Nature, Purpose, Practices and Events Is Either Unintelligible or Devoid of Antitrust Significance

The APPA requires the Government to specify the "nature and purpose" of the case and the "practices or events" upon which it is based 15 U S C § 16(b)(1), (2) Such information is obviously necessary in order adequately to assess a proposed decree Nevertheless, the CIS fails to meet those requirements Moreover, in so far as the CIS purports to identify nature, purpose, practices and events, it is unintelligible and hence does not provide the basis for analysis required by the APPA Indeed, what it says is either so contradictory or so devoid of antitrust significance as to retard rather than advance analysis

For example, the CIS states (at 2) that each of the networks has "monopolize[d] prime time television entertainment programming", which would seem necessarily to mean that the networks are not in competition with one another But the CIS goes on to state (at 13) that Section VII of the decree, which provides that certain provisions of the decree will not go into effect until similar injunctive relief is obtained against CBS and ABC, is needed to "avoid placing NBC at a competitive disadvantage with respect to CBS and ABC . " The Government does not explain the clear incompatibility between these two claims One can only be placed at a competitive disadvantage with respect to one's competitors; but if NBC is in competition with ABC and CBS, it is clearly not a monopolist *

*Of course the claim that the three networks do not compete with one another is a fiction. *See e g., Columbia Pictures Industries Inc.* v *American Broadcasting Companies, supra*, 1974 1 Trade Cas at 96,095 ("The television networks are in vigorous competition with each other They are engaged in a continuous and lively rivalry for the attention of audiences, which is the very crux of their commercial objectives"); Fisher Affidavit at 2a, n 1, *infra*; Posner Affidavit at 73a 75a, *infra*

The CIS proceeds from inconsistency to absurdity when it states that

> "NBC, through its affiliated television stations, has control of access to approximately 98% of all United States television households for programs which it offers for broadcast." CIS at 3.

Does this statement mean that NBC controls access to 98% of the viewing audience, with CBS and ABC dividing the remaining 2%? Obviously not, since the Government has also charged that CBS and ABC also "control access" to a like percentage of all television households * Thus, the quoted statement must mean that the "control" NBC exercises is compatible with the exercise of like control by both CBS and ABC But that means that none of the three exercises "control" in any known sense of that word Thus, one must ask what does "control of access" mean? What, for example, happened to NBC's alleged "control of access" when ABC attracted 71% of the national viewing audience last month with "Roots"? The absurdity becomes even more apparent if we apply the above quoted statement to Macy's, Bloomingdale's and Gimbel's, assuming they are the only department stores in town:

> "Macy's, Gimbel's and Bloomingdale's each have control of access to approximately 98% of all New York City department store customers for the goods which they offer on their counters"

That says no more than that Macy's, Gimbel's and Bloomingdale's are in competition with each other.

When, based on the notion of "control of access", the CIS attempts to capsulize the gravamen of the complaint, it ascends to the

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*See Plaintiff's Second Request for Admission of Facts, *United States* v *CBS Inc.*, Civ. No. 74-3599-RJK (C.D. Cal.), filed Dec. 27, 1975, ¶ 15; Plaintiff's Second Request for Admission of Facts, *United States* v. *American Broadcasting Companies, Inc.*, Civ. No. 74 3600-RJK (C.D. Cal.), filed Nov 4, 1975, ¶ 15

surreal. According to the CIS, the central economic problem to which this antitrust suit is addressed is that:

> "[E]ach of three networks controls program producers' and advertisers' access to the nation's commercial television audiences and each network has abused its power by refusing access to programs which it did not produce or in which it had no financial interests" CIS at 7.

This statement is without a shred of antitrust significance, as the analogy to Macy's, Bloomingdale's and Gimbel's makes clear No one has ever suggested any impropriety in the fact that each of those stores pursues the normal practice of selling goods that they have either produced or bought (*i e*, in which they have acquired an "ownership" or "financial interest") Conversely, it would not be surprising if these stores declined to sell goods that they did not own and declined also to let other people set up counters in their stores. Again, if we simply take the Government's language and apply it to the department store analogy, its absurdity becomes patent:

> "[E]ach of the three department stores controls manufacturers' access to department store customers and each store has abused its power by refusing access to goods which it did not produce itself or which it had not bought at wholesale."

If this statement makes out a violation of the antitrust laws, then the norm of the American economy is the continuous and universal violation of those laws.

The notion lurking in the CIS that the networks supply program suppliers "access" to the television viewing audience is utterly bizarre. The networks are not "selling access" to program suppliers; they are buying programs from them. And program suppliers are not "buying access" from the networks; they are selling programs to them. To be sure, program suppliers are delighted when large numbers of viewers choose to watch their programs, but the fact remains that the people who are *their customers* and by whom they are paid are the networks

and other program purchasers, not the remote, unpaying viewing audience:

No matter how the Government rephrases its arguments premised on the notion of "control of access", it does not come close to making out a violation of the antitrust laws For example, the Government states:

> "There is a substantial economic incentive for NBC to gain control of programming on its network, and NBC has exercised its control of access to the viewing public so as to exclude from the NBC Television Network programs controlled by others" CIS at 4

Again, the same could be said of Macy's:

> "[T]here is a substantial economic incentive for Macy's to gain control of (*i e*, buy) the goods it subsequently sells from its counters, and Macy's has exercised its control of access to those who shop at Macy's so as to exclude from Macy's counters goods controlled by others"

As part of its infatuation with "control of access" the Government stresses the decline of advertiser-supplied programming as one of the events giving rise to the alleged antitrust violation CIS at 5 Yet the reasons for the decline of advertiser-supplied programming are well known and have nothing to do with "control of access" As the FCC has said in announcing the new Network Practices Inquiry, the decline in advertiser-supplied programming

> "is largely attributable to increases in the costs of producing programming as well as the costs of network advertising time Between 1960 and 1976, the average cost of a single half-hour episode of a new prime-time program increased by about 237 percent from

> nearly $49,000 to approximately $165,000 Network program expenditures reflected this trend, rising from $376,948,000 in 1960 to $1,273,241,000 in 1975, an increase of 238 percent The average cost of a thirty-second tv advertising spot rose by 153 percent during the same period Cost increases have also been accompanied by a general recognition that shorter commercial messages are, for the most part, more cost effective than longer tv advertisements
>
> Given these developments, it is not surprising that advertisers have become increasingly inclined to spread their commercials over a larger number of programs Consequently, they no longer produce their own regularly scheduled programming but, rather, purchase a number of commercial spots which are usually placed in a variety of programs" Network Practices Inquiry, Notice at 91a-92a, *infra*

Moreover, the FCC has recognized that while this development has inevitably "shifted almost exclusive control over the development and selection of programs to the networks, it has also permitted more businesses, particularly small ones, to use television as an advertising medium" Network Practices Inquiry, Notice at 92a The CIS simply ignores these factors in its discussion of the decline of advertiser-supplied programming But in light of these factors, it is not apparent how the antitrust claims in this case can have arisen from that decline

C. The CIS Does Not Disclose Any Rational Link Between the Purported Harm and the Proposed Decree.

Not only does the CIS speak nonsense about the "nature and purpose" of the case and the "practices or events" giving rise to it, but it fails to articulate in any comprehensible fashion how the proposed decree relates to the charges of the complaint

The complaint charges that NBC has monopolized the "trade and commerce in entertainment television programs exhibited on the NBC television network during prime evening hours" (Complaint, ¶ 16) Even assuming that this is a relevant market (and, hence, that NBC

does not compete with ABC and CBS for programs),* nothing in the decree remedies the supposed evil, since nothing in it increases the competition that NBC will face from ABC or CBS in any market, relevant or otherwise. Nor does the CIS even claim the decree will increase that competition. Indeed, in so far as the decree would prevent the networks from competing as producers of programs, it circumscribes the area in which they can compete with one another. Moreover, by limiting the terms on which the networks may deal with program suppliers, the decree prevents the networks from competing with one another for those rights which the decree would prevent them *from buying from* program suppliers **

The complaint charges that the effect of NBC's behavior has been to suppress competition in the production of television programming (Complaint, ¶ 19(b)). But even assuming that NBC has inexplicably chosen to suppress competition among its suppliers (and, hence, to drive up the price it must pay for programs), the CIS fails to explain how the decree will enhance such competition and ignores the possibility that it will actually suppress it by limiting NBC's status as a potential competitor in the production of programming and by increasing the financial risks borne by small or potential producers.

The complaint alleges that NBC has "control[led] the prices paid by NBC for television exhibition rights to motion picture feature films" (Complaint, ¶ 17(d)). Even assuming that it is wrong for NBC to stop buying feature films when the price for them is too high, nothing in the decree requires NBC to buy feature films at prices it deems too dear; this is again a point on which the CIS is silent.

The Government alleges that the networks are forcing program suppliers to "deficit finance" the programs they produce.† The decree will not only not remedy the "problem", but will, as the Fisher Affidavit states, actually "reduce the flow of funds from the network at the early stages of production and broadcast" and thus exacerbate the alleged evil of "deficit financing".*

As noted above, the Government apparently attaches importance to the decline in advertiser-supplied programming, but there would appear to be nothing in the decree, and the CIS does not claim that there is, which will encourage advertisers to reenter the program supply business or increase their chances of success should they try. The factors which the FCC has cited as explaining the decline in advertiser-supplied programming are certainly not affected by the decree; the costs of producing programming as well as the costs of network advertising time will not be reduced by the decree. Indeed, they may be increased since the suppression of competition among program suppliers that will result from the decree will presumably lead to even higher program costs and prices which will in turn lead to higher costs and prices of network advertising time.

Finally, the Government has charged that NBC insists on a high rate of program clearance by its affiliates,** but there is not a single provision in the decree even mentioning much less affecting NBC's relationship with its affiliates, and the CIS understandably does not claim any such effect.

In sum, the decree is a mass of highly complex relief in search of a logical relationship to the harm it is intended to remedy. The CIS does not aid in that search. Indeed, it repeatedly suggests that the "harm" to be remedied is illusory.

But see Fisher Affidavit at 2a, n. 1, *infra*; Posner Affidavit at 73a-75a, *infra*.

**See* Fisher Affidavit at 10a, *infra*.

†Memorandum of the United States in Opposition to Defendants' Motions for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10, 20.

*Fisher Affidavit at 15a, *infra*. As Professor Fisher explains (*id.* at n. 14), "to some extent the proposed decree tracks the FCC financial interest rule. 47 C.F.R. § 73.658(j)(ii). There is good reason to believe that that rule has had precisely the effect that I suggest [*i.e.*, increasing deficit financing]. Thus, Edward A. Montanus, Vice President of MGM-TV, is quoted in Exhibit 4(a) (p. 52) of the affidavit of Bernard M. Hollander, sworn to January 19, 1976, as follows:

> 'When the networks were allowed to invest in shows for a minority interest, they assumed much of the burden that represents our deficit financing today.'

See also Crandall, *FCC Regulation, Monopsony, and Network Television Program Costs*, 3 Bell Journal of Economics and Management Science 483 (1972)." (This article is annexed as Ex. 2 to the Fisher Affidavit at 33a-58a, *infra*.)

**Plaintiff's Supplemental Statement of Genuine Issues, served May 21, 1976, at 5.

Conclusion

For the foregoing reasons, CBS urges that the proposed decree should not be entered

Respectfully submitted,

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March 1, 1977

APPENDIX A

AFFIDAVIT OF FRANKLIN M. FISHER

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

FRANKLIN M. FISHER, being duly sworn, deposes and says:

I am a Professor of Economics at the Massachusetts Institute of Technology. My curriculum vitae, including a list of the books and articles I have written, is set forth in Exhibit 1.

I have been asked by counsel for CBS Inc. to analyze the probable economic impact of the proposed consent decree submitted to the Court in United States v. National Broadcasting Company, Inc. on November 17, 1976. I have also been asked to assess the Competitive Impact Statement ("CIS") filed by the Government with the proposed decree. In carrying out that analysis and assessment, I have taken into consideration numerous studies, articles, reports and other materials relating to the production, procurement and distribution of television entertainment programming, including reports of the Federal Communications Commission ("FCC"), industry and trade publications, interviews with executives in the broadcasting, program production and advertising industries, testimony of program suppliers and others engaged in those industries, and the pleadings, affidavits and other

materials filed in United States v. NBC and the companion actions against ABC and CBS.

I have reached the conclusion that the proposed decree would tend to diminish competition. I have also concluded that the CIS fails to describe the competitive impact of the proposed decree.

Introduction

As in any market, there are two aspects of competition to consider: competition among sellers and competition among buyers. If NBC has any power in the market for television entertainment programs purchased by networks, it is surely power that it has as a buyer.[1] Indeed, it is that power which is stressed by both the Complaint (¶¶ 7, 10) and the CIS (at 3, 4-5). NBC is indisputably a

1. For purposes of this affidavit I shall generally assume that the market definition of the Government complaint makes sense and that it is appropriate to define the relevant market as consisting of "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours" (Complaint ¶¶ 16, 17).

It should be noted, however, that such a narrowly drawn market--excluding as it does programs sold to ABC and CBS--makes no sense whatever for purposes of economic analysis since it is clear that ABC, CBS and NBC are in competition with each other not only for audiences and advertising revenues, but also for programs which attract audiences and thus earn advertising revenues. Indeed, the decree (Paragraphs VII and IX) and the CIS (at 14) proceed on the supposition that NBC is in competition with ABC and CBS and should not be "placed at a competitive disadvantage with respect to CBS or ABC".

major buyer. It acquires rights to approximately one-third of the entertainment programs carried by the three television networks and, obviously, rights to all of the programs carried by NBC.

On the other hand, NBC's share of any market as a producer of such programs is quite small and has steadily declined over the past twenty years. In 1974-75 NBC-produced programs amounted to approximately 4 2% of the prime time entertainment programs carried by NBC and approximately 1.4% of the total carried by all three networks.[2] With either of those market shares, it is impossible to believe that NBC has monopolized or poses a credible threat of monopolizing the production of television entertainment programs. Indeed, if the Government is correct in asserting that NBC as a buyer of programming has been able to drive suppliers to the wall and leave them "hanging on by a slender thread"[3]--in other words, if NBC can drive the price it pays down to the barest minimum needed to keep suppliers in business--it is hard to

2. See Affidavit of J. Marshall Wellborn, sworn to November 25, 1975, submitted in support of NBC's Motion for Summary Judgment on the Sherman Act Claims.

3. According to the Government, NBC has inflicted "undue hardship" on program suppliers by not giving them "payment commensurate with the success" of their programs. Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10, 20.

see how NBC could obtain any additional advantage by monopolizing the production of programming for NBC. That is, if, as the Government asserts, NBC can force "deficit financing" on its suppliers, there cannot be any advantage to NBC in making those deficits its own. Nor is it credible that NBC would monopolize the production of television programs for NBC in order to be able to drive up the price it must pay as a buyer of television programming.

It must be recognized that, notwithstanding the allegation of the complaint that NBC has sought to suppress competition among the suppliers of television programming to NBC, it cannot possibly be in NBC's interest to suppress competition among its suppliers either by monopolizing the production of programming or by any other means. Doubtless NBC, like any other buyer, seeks to pay the lowest possible price to its suppliers; but, like any other buyer, NBC can achieve that end by stimulating competition among its suppliers and not by suppressing such competition.

Given NBC's insubstantial position as a producer of programming and its interest in maximizing competition among its sources of supply, and in light of the focus of the complaint and CIS, one would have expected the proposed consent decree to focus on NBC's alleged power as a buyer. Strangely, the proposed consent decree is not designed to augment the competitive constraints to which NBC is subject as a buyer;

if, as the complaint alleges, NBC were a monopsonist (i.e., a monopolist buyer) before the decree, it would be a monopsonist after the decree. Instead of dealing with NBC's alleged monopsony power, the decree seems calculated to diminish competition among program suppliers, as I show more fully below. Although such a restriction of competition among suppliers might tend ultimately to increase their bargaining power and thus might result in a transfer of income from NBC to certain of its suppliers, shifts of that sort do not increase competition at any level and do not serve the public interest in economic efficiency that a procompetitive policy is designed to foster.

To be sure, at one time or another restrictions on competition among suppliers have been fostered by a variety of Government programs including, for example, the National Industrial Recovery Act, the Agricultural Adjustment Act, and the National Labor Relations Act. But the Sherman Act is not of that sort. The policy of preserving and promoting competition as the governing mechanism of the market place simply cannot be served by suppressing competition among sellers to counterbalance a real or supposed absence of competition on the buying side. Stating the matter differently, the bargaining between buyer and seller, however intense, is not a species of competition.

To put it simply, one can either seek to stimulate

competition among sellers (and thereby drive down price) or one can seek to increase the remuneration that sellers receive (by driving up price), but one cannot increase sellers' remuneration by stimulating the competition among them. In so far as the Government's goal is to increase the remuneration of program suppliers, the decree may well achieve that goal, but it will do so only to the extent that it suppresses competition among them.

For the reasons set forth below, I believe that the decree would, in fact, tend to reduce competition among program suppliers. Inasmuch as the Government's complaint charges that NBC has, inexplicably, pursued the self-defeating course of restricting competition among its suppliers, it is particularly strange to submit a decree which would itself operate to restrict such competition.

1. The Proposed Decree Would Restrict Supply.

Paragraphs V(A) and (B) of the decree severely restrict the extent to which NBC may produce its own programs. This restriction reduces the number of sources of supply of programs competing to be purchased by television networks. If an existing independent supplier (such as MCA or Warner Bros.) or a potential supplier were so restricted, the adverse effect on competition would be perfectly obvious. But there is no practical difference between restricting NBC

as a supplier and restricting any other supplier. NBC's ability to produce simply provides another source of supply to which it can turn, and it thereby contributes to competition among program suppliers by providing an incentive for them to sell to NBC at as low a price as possible lest NBC increase its internal production. The case would be precisely the same if there were a wholly new, independent source of programming with NBC's production capacity. The existence of such a source would contribute to competition among existing program suppliers by providing an incentive for them to sell to NBC at as low a price as possible lest NBC expand its purchases from the new company. In either case, removal of such an incentive is anticompetitive. Furthermore, the elimination of NBC as a competitor cannot be viewed as forestalling predation since not only is NBC now producing a miniscule part of its own requirements but also, as I have indicated above (pp. 3-4), it is impossible to suppose that NBC would seek to drive its suppliers out of business in order to monopolize the business of producing for itself

Restricting NBC's production not only restricts the supply of television programs carried by NBC but also restricts supply in the market for network television programs generally (or, in terms of the markets alleged by the Government, in the markets for network television programs

shown on CBS or on ABC). This is so because all three networks face a common supply of programs [4] The aggregate demand of the three networks is undiminished by the decree (i.e., they will each remain free to schedule approximately 3 hours of programming per night and 21 hours per week), but the potential supply to meet that demand is decreased. This necessarily causes an effective reduction in the supply of programs available to CBS and ABC as well as NBC [5]

The impact of the decree's restriction on NBC's production is economically significant even though NBC has not recently been a substantial producer of television programs. Indeed, even if NBC produced nothing, its status as a potential producer standing in the wings, with the capacity to produce and a vital interest in the adequacy of supply, would have a significant procompetitive impact.

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4. Exhibit 7 to the Affidavit of Robert S. Rifkind, sworn to November 18, 1975, submitted in support of CBS's Motion for Summary Judgment on the Sherman Act Claims. That exhibit, which has not been challenged by the Government, shows for the 1970-71 through 1974-75 television seasons that 67 firms supplying approximately 63% of the three networks' prime time entertainment programming supplied at least two of the three networks and that 24 firms supplying approximately 57% of the total supplied all three networks.

5. The fact that the decree does not prevent NBC from selling to CBS or ABC is not of any practical consequence. No network could afford to depend on its close rival for any part of its regularly scheduled programming. It is easy to imagine the dilemmas that would arise if NBC were the supplier to CBS of a highly successful series such as "All In The Family".

The proposed decree would eliminate NBC as a potential entrant. It must be noted, moreover, that the Government seeks the elimination not only of NBC but also of CBS and ABC as program suppliers.[6] Thus the reduction in supply or potential supply contemplated by the proposed decree would appear to be significant.

In view of the inherent anticompetitiveness of eliminating a supplier or potential supplier, I would have expected a statement assessing the "competitive impact" of the proposed decree to consider the obvious anticompetitive effects of the decree's production limitation. The CIS does not begin to analyze this important subject, however.

2. The Decree Will Not Affect NBC's Alleged Status as a Monopsonist But Will Tend to Increase Concentration in the Supply Industry.

I have shown above that the effect of Paragraph V of the proposed decree will be to diminish competition among program suppliers by removing NBC as a supplier and that the decree is thus inconsistent with a procompetitive public policy. Also inconsistent with such a policy are the provisions of the decree that seek to alter the terms on which NBC may deal with program suppliers. For example, under the decree a producer may not, when selling to NBC the network

6. See Paragraph VII of the proposed decree.

broadcast right to the initial episodes of a series, also sell to NBC the right to repeat network showings in subsequent seasons of more than three of those episodes[7] or the right to carry a program for more than four years[8] or the right to the exclusive broadcast use of a program throughout its network run.[9] Such an alteration by fiat of the terms of trade between networks and program suppliers will not alter NBC's alleged status as a monopsonist and indeed may well have the effect of further increasing concentration and restricting competition in the supply industry.

I find nothing in the proposed decree that would enhance the competitive constraints to which NBC is subject as a buyer. Such competitive constraints can only be imposed by NBC's actual or potential competitors in the purchase of programming--i.e., other buyers, including, particularly, CBS and ABC. But there is nothing in the decree that affects NBC's relationships with CBS and ABC. Indeed, the Government specifically states that the decree is designed "to prevent [NBC] from being placed at a competitive disadvantage with respect to CBS or ABC" (CIS at 14). The Government's proposed alteration and regulation of the terms on which NBC may

7. Paragraph VI(H).

8. Paragraph VI(E)(i).

9. Paragraph VI(E)(ii)(a)-(c).

deal with its suppliers does not increase competition among the buyers of network programming.

Indeed, since the decree does not increase such buyer's competition, it cannot affect any power NBC might have over the price it pays its suppliers, except to the extent that it suppresses competition among them. So long as NBC's suppliers compete with one another, they will bid the price of the rights they sell down to a competitive level, and NBC will pay a competitive price for those rights. When told that it can no longer buy all the rights it used to buy, NBC will pay less for the rights it continues to buy because it will be getting less. The suppliers, competing for NBC's favor, will accept less from NBC because they are getting more elsewhere. Indeed, the reduction in what NBC pays will be equivalent to the value to the supplier of the rights the supplier may no longer sell to NBC The value to the supplier of those rights will be no greater than the value it received when it sold these rights to NBC since, by hypothesis, NBC bought the rights at a competitive price.

In sum, the effect of limiting the rights that NBC can buy from those suppliers will be to reduce, by the value of those rights, what NBC will pay to the suppliers, irrespective of whether NBC is a monopsonist or not. The decree's alteration of the terms of trade will enhance the aggregate remuneration of the suppliers only to the extent that it

reduces competition among them. I show later that it is likely to do precisely that.

To say that the alteration of the terms of trade will not increase the competitive constraints to which NBC is subject as a buyer is by no means to say that the provisions of the decree that effect this alteration are economically irrelevant. Indeed, a decree which restricts the rights that may be bought and sold might in itself be though a restraint of trade. Obviously certain restraints of trade--such as an agreement to buy a barber shop only if the seller agrees not to open a new barber shop across the street--may be needed for the functioning of the market. But I foresee no such effects from this decree's restrictions; on the contrary, there may well be further harmful effects.

For example, to preclude program suppliers, when selling to NBC network broadcast rights to the initial episodes of a series, from also selling NBC the right to repeat network showings in subsequent seasons of all such episodes would not seem to serve any procompetitive purpose where NBC perceives a popular demand for additional broadcasts. If a network wants to pay for such repeats because it believes it will have an audience for them, and if the supplier is willing to sell the right to such repeats, how will competition be promoted by forbidding such a transaction?

Moreover, such a restriction could be affirmatively harmful in at least two respects. First, if a network, at the time it contracts to buy original episodes, cannot also contract to buy repeats, it will pay less for what it is getting in the original transaction.[10] Since it will be paying less at a time when the program supplier is incurring production costs, the result will be artificially to force back on to the program supplier the risk that the value of the repeats will prove to be little or nothing because the show has had little or no success. If the show is successful, the supplier will win, if unsuccessful he will lose, but he will in any case be forced to accept the gamble and deeper "deficit financing". Second, the prohibition on the purchase of repeat rights will, as a practical matter, preclude a network from abandoning the current practice of running original and repeat episodes in the same year in favor of running, for example, only originals in the first year and only repeats in the second. Since such a pattern would be extremely expensive in the first year, it would be commercially feasible only if the network knew at the outset that the second year would be correspondingly inexpensive so that

10. An option to run repeats of a series in future years obviously has a present value and that value necessarily affects the level of "up front" network payments for outline, script, pilot and the initial episodes of a series.

the aggregate cost would be approximately the same. The decree, however, would preclude such a new pattern for running repeats and would essentially lock the networks into the present pattern. Thus, they would be prevented from trying to compete with one another by organizing their program formats in novel ways.

One might as well tell an author that he cannot sell the right to the publication of more than 5,000 hard cover copies of a book, even though he has a publisher who wants to pay for the right to print 10,000 copies. Even if such a restriction would accelerate reissue in paperback, it hardly helps the author to realize the maximum value from his work in his dealings with the publisher or the publisher to employ his resources in the manner he deems most efficient.

Similarly, it is hard to see the economic utility of the provision in the decree proscribing the sale of an option for more than four years.[11] By forcing program suppliers to sell fewer years "up front" and thus to be paid less "up front",[12] this provision would force them to take

11. Paragraph VI(E)(i).

12. The option to run a series in future years, just like the option to run repeats discussed above, has a present value that affects the level of "up front" payments for outline, script, pilot and the initial episodes of a series. Thus, to limit the number of options for future years of a program that may be sold will have the effect of reducing these "up front" payments.

the risk that the rights to the fifth and later years, which they can no longer sell at the outset, will be worth little or nothing because the program has had little or no success in the earlier years. In short, they would be substantially restrained in seeking to lay off their risks. By comparison, authors selling books to publishers are not forbidden from selling at the outset the right to keep the book in print after four years Such a prohibition might ultimately enrich the authors of books that turned out to be long-lived best sellers, but it would surely reduce the incomes of the rest

In general, it may be said of the decree's proposals concerning the terms of trade that they will tend to reduce the initial funding that program suppliers will receive from the networks In light of the Government's assertion that so-called "deficit financing" by producers is an evil to be eliminated,[13] the decree's alteration of the terms of trade in a fashion that must reduce the flow of funds from the network at the early stages of production and broadcast is particularly odd since it will exacerbate the alleged evil.[14]

13. Memorandum of the United States in Opposition to Defendants' Motions for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10, 20.

14. I recognize that to some extent the proposed decree

The most important result of the alteration of the terms of trade by the proposed decree may be a substantial increase of concentration and restriction of competition among program suppliers. Under the proposed decree, program suppliers will have to find alternative means of realizing the value of the rights they are prohibited from selling to the networks. In principle, the suppliers will have to decide whether to sell those rights at the outset or to hold them for later exploitation The latter course necessarily involves assuming the risk that the rights will prove to be of little or no value because the program has enjoyed little or no popularity. It also necessarily involves deferring for some appreciable period of time cashing in on whatever value those rights may have.

Some suppliers may be happy to assume those risks

tracks the FCC's financial interest rule. 47 C.F.R. § 73 658(j)(ii). There is good reason to believe that that rule has had precisely the effect that I suggest Thus, Edward A. Montanus, Vice President of MGM-TV, is quoted in Exhibit 4(a) (p. 52) of the affidavit of Bernard M. Hollander, sworn to January 19, 1976, as follows:

> "When the networks were allowed to invest in shows for a minority interest, they assumed much of the burden that represents our deficit financing today "

See also Crandall, "FCC Regulation, Monopsony, and Network Television Program Costs", 3 Bell Journal of Economics and Management Science 483 (1972). This article is appended to this affidavit as Exhibit 2.

and be financially capable of deferring the receipt of cash. Others may be either unwilling or unable to do so. This group is likely to include suppliers "yet unborn" who will be deterred from entry by the necessity of bearing increased risks. It would also include those already in the industry who are financially weak or risk averse, such as new, independent producers struggling to establish themselves. Such producers will presumably seek new buyers for the rights they can no longer sell to the networks. If they fail to find buyers, they may go out of business, either because they are unwilling to gamble on the success of their programs or because they will lack the financial resources needed to produce programs of a quality that will compete successfully. In either case, the result will be to concentrate production in the large, well-established firms, notably the major motion picture studios (some of which are subsidiaries of large conglomerates) which already enjoy the lion's share of the production business (as explained more fully below).

If producers do find buyers for these rights, who are the buyers likely to be? Three principal buyers--the three networks--will have been forced out of the market by the NBC decree and its counterparts. The most likely alternative buyers are the firms that are already in the business of acquiring such rights--again, the major studios. It is

extremely doubtful that any procompetitive purpose would be served by forcing the financially weaker producers to seek financing from their competitors by forbidding them from obtaining financing from their customers

It must be noted that the major studios (Universal, MGM, 20th Century-Fox, Warner Brothers, Paramount, Columbia Pictures) already occupy a large share of that market, with Universal in particular supplying a very high share of the programs carried by NBC.[15] Whatever the relationship between concentration and competition, it is odd that the Government should propose a decree in an antitrust suit that promotes concentration among program suppliers, particularly where the Government contends that competition among those suppliers has been restrained. Concentration resulting from the superior skill, foresight and industry of some competitors is one thing; concentration procured by fiat is quite another; and concentration resulting directly from a decree ostensibly

15. Appended to this affidavit as Exhibit 3 is a chart that appeared in Variety on September 15, 1976, which identifies the suppliers of regularly scheduled, network prime time programs for the current 1976-77 season. (While this chart does not also identify the suppliers of the eleven and one-half hours per week of movies carried by the networks, it is commonly known that such programming, which this season constitutes over 18% of the networks' prime time entertainment schedule, is supplied mainly by the major Hollywood studios.)

intended to enforce the antitrust law is simply absurd.

I have carefully reviewed the CIS to see whether it deals with the prospect that the shifting of risks resulting from the decree's restrictions on the terms of trade will increase concentration and restrict competition among program suppliers. As stated, the CIS is completely silent on this question as on most questions having to do with competition rather than with protection of suppliers.

Conclusion

The focus of the decree and the CIS suggests that the Government's principal concern is in assuring producers a "reasonable" price for their goods. That can only be achieved by substituting a regulatory regime for a competitive market because under competition goods change hands at the market price--and not at a price that can be said by the Government to be abstractly "fair" or "reasonable". The decree serves the Government's apparent purposes to the extent that it substitutes regulation for competition But regulation seldom succeeds in achieving the same desirable allocation of resources that results under competition. Indeed, there are usually inherent economic inefficiencies in regulation, not the least of which are the costs, burdens and delays of administering the regulatory regime.

The provisions in the proposed consent decree which are supposed to affect competition will be likely to decrease the very competition which the complaint claims NBC has, inexplicably, restrained, namely the competition among program suppliers. The decree will reduce the number of actual or potential suppliers of programs and the total supply of programs. Further, by restricting what producers may sell and networks may buy, the decree will not alter NBC's alleged status as a monopsonist but will probably lead to greater concentration in the production of programming and impair the ability of new, weak or risk-averse program suppliers to compete with the large, established studios

Franklin M. Fisher

Franklin M. Fisher

Sworn to before me this

22nd day of February, 1977.

Albert Marcellino

Notary Public

ALBERT F. MARCELLINO
Notary Public, State of New York
No. 43-2519700
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1977

Exhibit 1
to the Affidavit of
Franklin M. Fisher

VITA

Name: Franklin M. Fisher

Born: December 13, 1934 (New York, New York)

Degrees: A.B. Summa Cum Laude, Harvard University, 1956;
M.A., Harvard University, 1957
Ph.D. Harvard University, 1960

Fellowships, Scholarships and Professional Honors:
Phi Beta Kappa, 1955
Junior Fellow of the Society of Fellows, Harvard University, 1957-59
Econometric Society: Fellow, 1963- ; Council Member, 1972- ; Vice President, 1977-
Irving Fisher Lecturer at Econometric Society Meetings, Amsterdam, September 1968
Operations Research Society of America Prize for best paper dealing with a military subject published in Operations Research, 1967
Fellow of American Academy of Arts and Sciences, 1969-
John Bates Clark award, American Economic Association, 1973
F. W. Paish Lecturer, Association of University Teachers of Economics, Sheffield, England, April 1975

Positions: Assistant Professor of Economics, University of Chicago, 1959-60
Massachusetts Institute of Technology: Assistant Professor of Economics, 1960-62; Associate Professor, 1962-65; Professor, 1965-
Ford Foundation Faculty Research Fellow in Economics, London School of Economics and Hebrew University, 1966 67
Visiting Professor of Economics: Hebrew University, 1973; Tel-Aviv University, 1973

Consultant, Federal Power Commission, 1965-69
Consultant, Federal Reserve Board, Price Statistics Committee, 1965-69
Member, The Brookings Institution Advisory Committee on Studies in the Regulation of Economic Activity, 1967-70
Consultant, National Association of Broadcasters, 1964-65
Consultant, The RAND Corporation, 1964-75
Consultant, Institute of Naval Studies, 1965-66
Consultant, General Services Administration, 1966-67
Consultant, President's Task Force on Communications Policy, 1968

Associate Editor: Journal of the American Statistical Association, 1965-68

American Editor: Review of Economic Studies, 1965-68

Editor: Econometrica, 1968-1977

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Exhibit 2
to the Affidavit of
Franklin M. Fisher

The Bell Journal of Economics and Management Science,
Vol. 3, No 2 (Autumn 1972)

FCC regulation, monopsony, and network television program costs

Robert W Crandall
Associate Professor of Economics
Massachusetts Institute of Technology

In this paper, a television program cost function is derived from a simple model of network rivalry based upon the Cournot postulate. This cost function is then fitted to data from a cross section of new network entertainment series for 1960–1965. The resulting estimates are quite unfavorable to two different aspects of FCC policy towards television broadcasting.

First, the Commission's implicit attempt to create monopoly profits for networks and their affiliates in entertainment programming for the purpose of subsidizing nonremunerative "public interest" programming is shown to be extremely inefficient. As much as two-thirds of entertainment program costs are simply rents paid to star performers and other inputs to the program production process—rents which derive from the Commission's allocations policy.

Second, the Commission's recent decision to bar network investment in non network rights to programs first exhibited on their interconnected stations is demonstrated to be unnecessary. The Commission has enunciated this policy in its recent Prime Time Rule in order to protect program suppliers from monopsonistic exploitation by the networks. But the cost-function estimates show that the networks have paid their suppliers the economic value of the non-network rights obtained in the initial bargaining process. The only effect of prohibiting network investment in these ancillary rights is to limit the ability of suppliers to sell risky assets.

1. Introduction

The Federal Communications Commission's recent admission that it is unable to regulate interstate common carriers of communications services may strike the casual observer as shocking, but it is no more than a candid admission of the problems facing this commission and others as they attempt to render precise judgments about market relationships which they cannot measure. Whether it is the Federal Power Commission regulating the supply of natural gas,[1] the Interstate Commerce Commission regulating surface transportation,[2] or the FCC regulating television broadcasting, a common problem looms. Without precise empirical knowledge of price cost relationships, these regulatory bodies must sit as puzzled arbiters of conflicting claims made by various private and public interest groups.

One might think that the FCC requires little precise knowledge about television markets, since it does not regulate the networks' or stations' profits directly by limiting the prices charged to advertisers or by prescribing a minimum output level. Rather, the Commission focuses upon performance in "the public interest," which is variously defined as providing the maximum diversity or quality of television programming. But price cost relationships are no less important in this pursuit than in the attempt to regulate common carriers, for the Commission has followed a policy of subsidizing nonremunerative "public service" programming by protecting local stations and networks from new sources of competition. Severe restrictions upon "pay" television,[3] limitation on the growth of cable television activity,[4] and even quantitative restrictions upon network broadcasting during prime time are enacted principally to protect local television stations from an erosion in their profits—profits which the Commission wishes to see devoted in part to public service programming. But most restrictions upon competition at the local level result in the limitation of the number of national networks as well, for it is the paucity of local affiliates which has prevented entry into network broadcasting for two decades.

Unfortunately, what has not occurred to the Commission is the possibility that its attempt at cross subsidization has largely failed and that it has simply conferred large rents upon performers and other persons involved in producing network entertainment programming. Nonprice rivalry among networks and local stations is likely to result in dissipation of the monopoly rents which the Commission wishes to allocate to public service programming, with the result that viewers are forced to contribute to the high salaries of television celebrities by sacrificing popular programming choices.

The most recent indication of the Commission's failure to grasp the nature of competition and nonprice rivalry in network broadcasting and program supply is to be found in its 1970 Prime Time Rule.[5] This decision limits network broadcasting in "prime time" (7:00 P.M. to 11:00 P.M., Eastern time) to three hours per day in the nation's largest 50 markets and prohibits network investment in subsequent non network distribution of programs first exhibited on national television. The latter prohibition is designed to protect program suppliers from network monopsony power, but the FCC

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[1] See MacAvoy [4] for a rather pessimistic appraisal of the FPC's performance.
[2] Among the almost universally critical studies of the ICC, the most recent treatise is that of Friedlaender [3].
[3] The Commission's attitude toward pay television is chronicled in the two seven divisions rendered under FCC Docket 11279.
[4] See Final Cable Television Decision [6].
[5] See *Report and Order* [9].

has no evidence that such power actually exists.[6] Even more troubling is the Commission's discussion of program "costs" in defending its rule-making, for there appears to be little recognition that these expenditures are not exogenously determined social opportunity costs

Clearly, if the FCC is to pursue its policy of cross subsidization, it could benefit considerably from careful research into the nature of network and local station rivalry and the determinants of programming expenditures This paper represents a modest start in that direction, for in it we seek to provide an econometric estimate of a network program cost function by utilizing actual cost data from the three national commercial networks for 1960–1965[7] Included in the program cost function are variables which measure the extent of network investment in non network exhibition rights of programs first shown on the networks The regression coefficients for these variables may be compared with financial returns from program distribution in order to determine the extent to which networks exercise monopsony power over their suppliers In addition; we are able to derive from these regressions estimates of the magnitude of the economic rents which are siphoned off by performers and other inputs to the production of programs Finally, we utilize the program cost regressions to draw some inferences about the price elasticity of advertising demand facing the networks

2 Network markets

The product market A network is in large part a broker of its affiliates' time It contracts with these affiliates to sell time to national advertisers who may conceivably bring their own programming to the network for exhibition In practice, the networks have also become program brokers, selling not only time but viewers[8] Each network schedules its programs and offers commercial announcements at regular intervals during these program hours

Since there are three or fewer competitive commercial stations in most local markets, there are only three national brokers At present, a fourth broker would be able to offer advertisers fewer viewers at each hour for programs similar to those broadcast by its three rivals Given the current profit margins (per unit sales), it is doubtful that a fourth network could survive with this disadvantage

Despite the entry barriers provided by regulation of the spectrum and fewness of rival firms, network companies do not necessarily enjoy monopoly power in the national advertising market Given the numerous substitute media—newspapers, radio magazines, and local television advertising time—it is distinctly possible

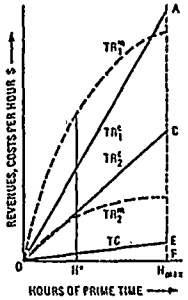
[6] The informal oral evidence heard by the Commission's staff is reproduced in two Interim Reports on television network program procurement [7]. The second of these reports will be referred to hereafter as the Second Interim Report.

[7] The years 1960–1965 were chosen because data for this period were most accessible when the author began to collect data for this study. Moreover older data would be less valuable simply because network advertising sales were undertaken in a different fashion before the 1960s.

[8] For a detailed description of this development, see Crandall [1].

FIGURE 1

GROSS ADVERTISING REVENUES FOR A SINGLE NETWORK DURING PRIME TIME



that variations in a network's output of viewer hours have no effect upon the price of viewer hours in the market But even with a network television market demand curve, which is infinitely elastic at a per viewer exposure price set by competition from other media, the revenues per period for each network are a function of the number of rivals in network broadcasting. Unless the total number of viewers per hour increases in proportion to the number of rival networks—an unlikely possibility—any increase in the number of networks must decrease revenues per hour and, therefore, total revenues per year[9]

If we assume that the number of viewers per hour of prime viewing time is constant, that they divide equally among the networks' offerings, and that the number of prime time hours per year is fixed at H_{max}, the network's revenue function may be depicted quite simply as in Figure 1 If there is but one national network facing a competitive advertising market, its total revenue function, TR_1^a, will be linear with a slope AF/OF which is equal to revenues per hour; but the appropriate measure of a network's output is the number of viewer exposures to commercial messages of a given length If the number of these messages is fixed per hour of broadcasting, output can be expressed in viewer hours of programming. The price of these viewer hours in a competitive advertising market is determined by the price of equivalent advertising messages in alternative media Therefore, in this competitive setting, the network's revenues per hour are exogenously determined by the number of viewers watching television during each time period and the cost of advertising in the other media The entry of a second network with access to equivalent affiliates and similar program fare will simply reduce each network's total revenue by one half and shift its revenue function down to TR_2^a, where revenues per hour are equal to CF/OF If program costs are invariant against changes in average audience size, each network incurs programming costs combined with brokerage, interconnection, and affiliation costs, which sum to a total cost per hour of TC In this hypothetical world, entry could continue until the TR schedule of each network fell to a slope of EF/OF.

Under these restrictive assumptions about viewer and cost behavior, network monopoly power in advertising markets simply alters each network s total revenue function For instance, a single network's schedule becomes TR_1^m under the assumption that it faces the same price per viewer exposure as a competitive firm at an output corresponding to H^* hours of programming Entry of a second network shifts the total revenue schedule down to TR_2^m, under the assumption that each firm chooses to broadcast the full H_{max} hours per year The limit to entry occurs when the appropriate TR schedule is just tangent to the TC schedule Obviously, this entry limit is reached sooner if networks enjoy monopoly in their advertising market than if they are perfect competitors in this market

[9] At present over 60 percent of the nation's homes have their receivers switched on during prime time. Clearly this audience could not swell appreciably with the development of new viewing options.

We see then that the effect of "monopoly" power is somewhat different in network television from that in most normal markets For instance, if entry is so effectively impeded by allocations policy as to allow only, say, two national networks, profits may be earned by each network even though its demand curve has infinite elasticity. Given the assumption of fixed audience sizes during prime time, monopoly power could only be exercised by limiting the number of hours broadcast Thus, in this model, the existence of network monopoly power in advertising markets is quite unimportant except as it provides a limit to the number of networks which could compete successfully Once we relax the assumption of fixed program costs, however, this conclusion is modified but not completely negated

☐ The input markets. The preceding discussion abstracts rather heroically from reality. A television network does not face a fixed audience, but rather it may be assumed that its audience will vary with its choice of programming Indeed, one might argue that the most important management decision in network broadcasting is the choice of programs and the scheduling of these programs against rivals' offerings In addition, the network's affiliation costs —the prices it must pay for access to its affiliates—cannot be assumed to be given exogenously We may dispose of the affiliation costs first, since the principal focus of this paper is upon program choice and program supply

An important source of network rents is the limitation upon local station spectrum allocations. The FCC has allocated the spectrum to television in such a manner that no more than three competitive commercial stations may operate in a great number of markets In those markets in which a fourth station may obtain a license, it is frequently limited to the UHF band But a number of markets have four or more competitive local stations, and this inconsistent allocation provides the best of all possible worlds for the three existing networks Without a fourth station in virtually every large market, a fourth network cannot hope to enter profitably, but the presence of four stations in many of the largest markets allows the networks to appropriate a large share of the rents from network broadcasting. With more stations than potential affiliations, cartel like agreements among stations are not likely to develop in bargaining with networks, simply because there is no simple method for the winners to compensate the losers in the affiliation competition. Were there only three stations in every market, the local stations would certainly appropriate a larger share of the net revenues from the sale of network advertising.[9]

More important for this paper's analysis is the nature of program supply and the networks' position as purchasers of programming, especially entertainment programming. With the trend

[9] For an econometric estimate of the effect of local station competition for affiliation agreements see Baldwin [4] Baldwin' study reveals that the networks pay significantly more per hour wanted by affiliates in markets with three or fewer stations than they do in markets with four or more stations. Of course a limit to the difference in compensation rates is provided by the threat of entry of a fourth network.

toward direct network negotiation with program suppliers came the possibility that networks might obtain monopsony power in program supply In earlier years, a number of advertisers licensed their own programs and brought them to the networks in return for payment for an entire time period In the past decade, however, this procedure has practically vanished for prime time entertainment programming For all intents and purposes, it is the networks who choose the programs in which advertisers intersperse their messages; but this is hardly sufficient proof that they possess monopsony power over the price of programs

Entertainment programs are simply filmed or taped products which are exhibited on television rather than in alternative media They require virtually the same inputs as motion pictures or other films and may be produced by any of scores of production companies throughout the world. Thus, television networks must bid resources away from alternative media in order to obtain their required program inputs. Given the increasing number of buyers of filmed products, it is quite clear that the networks' monopsony power must be limited

Even if the three networks were the only buyers of filmed entertainment output, it would be necessary for program supply to be increasing cost for them to exert monopsony power And if this monopsony power were exerted, it would become evident in the networks' failure to offer programming during some periods of considerable viewing frequency Clearly, this last condition is not satisfied and has not been in the past few years Before FCC restrictions on the length of the network program day, there were only occasional half hours during prime time which were not filled, and most of these periods were on A B.C., which continues to have a comparative disadvantage in affiliations Certainly, A B C. was not exerting monopsony power while N B C. and C B.S. struggled along as competitors for programs!

But a more fundamental objection to the standard monopsony question obtains: it is impossible to draw a supply curve for homogeneous programs because programs are far from homogeneous Networks are not buying standardized items from the supplying companies; rather, they are selecting the appropriate program input mix and contracting with suppliers to supervise their combination into programs. Given the number of such 'packages" of programs, the networks need only promise them a return sufficient to cover their costs, including the costs of invested capital They may pay no less; they need pay no more

The quantity and value of resources employed by the networks in their entertainment programming depends upon the degree of competition for audience and the price per viewer which advertisers are willing to spend The greater are program revenues, the greater will be network expenditures upon programming Networks will choose to employ more reproducible resources per program; and nonreproducible inputs, such as star performers, directors, and writers, will obtain higher rents when program revenues are high. While increasing the number of networks may increase the percentage of revenues diverted to programming expenses, the expenditures per program must certainly fall and with them rents to talent inputs.

But even if program costs vary directly with revenues, it is still possible that the condition of blockaded entry in network broadcasting finds each network with a total revenue function which is above the total cost function in Figure 1 All we have argued thus far is that the TC schedule will shift downward with the TR schedule as the number of networks increases, but TC will fall less rapidly than TR if nonprice rivalry increases with the number of competing networks This is neither new nor profound, but it serves to emphasize two points: (1) neither monopoly power in advertising markets nor monopsony power in programming markets is required to yield the networks a substantial scarcity rent; and (2) the attempt by the FCC to create large excess profits in network entertainment programs in order to finance local and network "public service" programs may be frustrated by the nonprice competition which results The latter point is especially important if program rivalry results in large increases in program costs which are not valued highly by viewers To the extent that this rivalry simply bids up performers' rents, the profits are clearly wasted If the rivalry takes the form of attracting scarce resources from other markets, an additional social cost results which must be weighed against the increase in viewer satisfaction But, in any case, unless the FCC acts to curb this type of nonprice rivalry, its implicit attempt to create monopoly profits for the purpose of subsidizing other services is surely weakened

☐ Residual rights Few network programs are fully exploited during their network run In practice, each network licenses the right to exhibit a program for one or more exhibitions, and if this program is recorded on videotape or film it may be shown subsequently in other markets This further exploitation of the program is referred to as "syndication," and it assumes two forms First, the program may be licensed to foreign markets almost simultaneously with its United States network exhibition Such foreign syndication accounted for $57 million in revenues in 1967 [11] In addition, after the network program series has concluded its run, the program may be licensed to United States television stations for additional local exhibitions These domestic "off network" syndication sales accounted for $43 1 million in total revenues in 1967 [12]

The success of a program in syndication sales to local stations and to foreign markets is a direct function of its success during the initial network run If it has a long run on the network, it will probably be quite successful for two reasons: (1) it has a demonstrated audience appeal; and (2) there are a number of episodes available for distribution This latter factor is extremely important, because it is uneconomical to produce additional episodes once a series has ended its network run In addition a television station is much less interested in procuring a series for which there are only 20 or 30 episodes than it is in one which has hundreds of episodes.

In recent years the three domestic networks have purchased approximately 90 percent of their prime time entertainment series

[11] See Little [3], p. 109 hereafter referred to as the Little Report.
[12] *Ibid.*

from independent "packagers" of programs [13] As networks turned to direct licensing of programs from independent suppliers, they obtained in the initial bargaining process rights to a share of the programs' future syndication revenues as well as interests in the revenues which might be generated by any exploitation of copyrighted matter from these programs in the sale of merchandise Our primary interest lies only in syndication revenues however since merchandising revenues are less than 5 percent of the syndication yield

It is crucial to understand that network syndication interests have always been obtained during the initial bargaining process between the program supplier and the network Before the program series reaches the network, an agreement is reached between the network company and the supplier as to the price which the network will pay for each episode in the series, the price to be paid for repeat episodes on the network, and the shares of syndication rights and profit shares to be retained by the network as well as a myriad of other matters such as allowances for unexpected cost increases in producing the programs, escalator clauses for subsequent seasons, the division of merchandising interests, penalties to be paid in case of network cancellation of the series and technical details concerning delivery of episodes to the network In most cases, the network obtains the rights to the network exhibition of the program series for five years

The rights to distribute program episodes to domestic television stations after the initial network run and to foreign stations during and after network exhibition are referred to as domestic and foreign syndication rights The right to share in the net revenues from syndication- equal to total revenues less distribution costs entertainment guild royalties, and other costs—is referred to as a profit share, and this share is usually identical for domestic and foreign revenues Prior to the 1970 Prime Time Rule, the initial contract between network and packager not only allocated the above interests, but it also specified the precise distribution fee to be charged by the distributor These fees ranged from 10 percent to 45 percent, the larger fees being exacted for the smaller sales In addition, networks often agreed to allow packagers to recoup excess production costs from the networks profit shares

While the syndication market is not highly concentrated, one may not assume that syndication rights and profit shares are not valuable. The fee stipulated in the original network packager contract may be sufficiently large to compensate the distributor more than amply for his costs of distribution Moreover, the actual costs incurred in distribution are very small since the episodes have already been produced Only shipping print, and other miscellaneous costs such as royalty payments to members of entertainment guilds are deducted from the revenues which remain after imposition of the distributor's fee Thus syndication revenues are an important contributor to net profits even if they are small in comparison with the original network payments for the programs

According to available data [14] networks obtained the syndica

[13] *Ibid.* p. 5.
[14] *Ibid.*, p. 46 The FCC Office of Network Study also collects these data.

tion rights in one fourth to slightly more than one third of their prime time programs from 1957 through 1968 This proportion reached its maximum in 1964—35 percent for domestic distribution rights and 35 7 percent for foreign rights—but it declined steadily to 25 9 percent for both in 1968 [15] The networks' share of actual syndication sales was estimated at 22 percent of the domestic market and 29 percent of the foreign market for 1967, the most recent year for which data are available [16] Although neither datum is likely to indicate substantial market power, the FCC's Prime Time Rule has imposed a total prohibition upon network distribu tion in domestic syndication markets As we shall see, this decision was motivated as much by the FCC's fear of network monopsony power as by its concern about undue concentration in syndication

3. The FCC rule

In 1965, the FCC issued a *Notice of Proposed Rule Making*[17] which sought to prohibit: (1) all domestic syndication (distribution) by network companies; (2) network ownership of syndication profit shares in programs produced wholly or in part by others; and (3) foreign syndication by the networks of programs produced wholly or in part by others In 1970, these provisions formally adopted by the Commission in its Prime Time Rule, whose princip l thrust is to limit the number of hours of prime time network broadcasting in the nation's largest 50 markets [18]

Why should the FCC act to prohibit network purchase of these rights from packagers? Even if it fears monopoly control over domestic syndication, is it necessary to prohibit networks from buying even a minority interest in the profits from syndication? Prohibition of network distribution might be warranted, but it is surprising that the Commission has chosen to limit suppliers' right to sell profit shares in their productions.

A reading of both the Proposed Rule and the Prime Time Rule reveals that the Commission believes that it is not restricting suppliers' prerogatives but rather protecting these packagers from the monopsony power of the networks. By prohibiting the networks from bargaining for syndication profit shares and distribution rights, the Commission is reserving these lucrative privileges for the suppliers. The Commission reasons that the networks have been utilizing their monopsony power to bid these profits away from suppliers at little or no compensation As a result, program producers were courting bankruptcy, and causing a threat to the continuance of many sources of program supply The Commission's implicit theory of network producer bargaining may be inferred from various statements appearing in the *Notice of Proposed Rule-Making* For instance, it is claimed that:[19]

> . . network corporations usually as a *quid pro quo* for initial financing but sometimes as compensation for assumption of the risk of sale to advertisers . . seek and frequently obtain . . the right to distribute the programs or series in domestic syndication and foreign markets; the right to share . . in the profits from d omestic and foreign syndication sales . .

[15] *Ibid.*
[16] (Percentages of off-network sales only.) *Ibid.*, pp. 105 9
[17] [8]
[18] See [5].
[19] [5] p. 8.

But these rights were being ceded unwillingly by producers, since in earlier years:[20]

> [t]hese rights usually were retained by independent producers and constituted valu ible commercial assets which contributed to their economic stability and vi ability The importance of the retention of these rights to the financial stability of independent producers is supported by testimony of producers that in many if not most, instances they do not recover their initial production costs from the network run but must look to syndication and foreign sales to 'make them whole' and to show a profit

There can be little doubt that the Commission believed that its Proposed Rule would save independent producers from network exploitation, for the Commission stated:[21]

> [I]t is our hope that the proposed rule would reduce the possibility that independent producers may be *forced* to give up rights in their programs in order to obtain access to network time

What did not occur to the Commission is the possibility that independent producers "gave up" rights in their programs because networks offered to buy them The Prime Time Rule allows networks to sell the rights in the programs which they produce for themselves, but ignores the possibility that transfers of rights in the other direction are equally compensated This is not an unusual posture for a regulatory agency which finds itself enmeshed in transactions between very large and very small firms It is a com mon regulatory notion that large firms exploit the smaller firms simply because they are larger, but more often than not this theory does not stand up to careful scrutiny

The alternative theory which is tested below is very simple. It is merely that networks purchase ancillary rights in programs exhibited originally on their networks at prices which reflect *ex ante* expectations of their discounted present value. If a network wishes to invest in either syndication rights or profit shares, it must com pensate the supplying company through correspondingly higher initial prices for episodes of the program which are shown on the network. Therefore, program prices to the networks should vary directly with the magnitude of their syndication interests in each

4. A model of network programming

It is impossible to posit program supply function without also addressing the problem of network rivalry and network supplier negotiations for residual rights. The value of a program is directly related to its ability to attract audiences, but actual audience is inversely related to the strength of competing programs at the same hour Moreover, the number of viewers attracted to a pro gram will vary systematically throughout the day and even during prime time. Finally, we shall argue that the network is more likely to invest in residual rights of less valuable programs than in the rights for more expensive programs, and this investment decision must be incorporated into the empirical model of the next section

In this paper, we address ourselves to the determinants of the

[20] *Ibid.*, p. 7.
[21] *Ibid.*, p. 19 Emphasis supplied

cost of regularly scheduled new prime time entertainment series These series appear sporadically throughout the year as each network discards shows which fail to attract a substantial share of the prime-time audience but most changes are made at regular intervals of approximately 13 weeks. The largest number of changes occur in the fall and winter, and our sample mainly includes programs which appeared for the first time in the fall of the years 1960 through 1965

Negotiations for a new series may begin as much as one or two years before a program appears on a network, and it is rare for the lag to be less than six months At this time, a formal contract or a memorandum of agreement will be drawn up between the supplier and the network In fact, some of these important details may be omitted until a later date as both parties abide by an informal understanding Therefore, in most cases, the prices to be paid by the network are stipulated considerably in advance of the network's decision to schedule the program or even order a single episode, and the value of the program series must be determined *a priori* without any definite notion of the nature of the competition which the program will face when it is finally exhibited

Once the program series is actually ordered, the network begins to search for the appropriate prime time hour for its exhibition Approximately 60 to 70 percent of the shows in the rival two networks' schedules will be continuations of last season's series, and these rivals will be reluctant to move continuing series regardless of the new series chosen by the network to appear opposite them Thus, for the most part, each network will choose to replace its series failures under the assumption that rivals will not move most of their more successful shows in response We have, therefore, the basis for a "Cournot" theory of programming, where each network takes its rivals' choices as given in attempting to maximize its profits

Our Cournot model of network triopoly is exposited in terms of a single time period within prime time The inputs for the ith network's program will be denoted t_{ij}, referring to the number of units of the jth input into the ith network's program For the first network, for example, there exists a "production function' of the form

$$A_1 = A_1(t_{11}, \ldots, t_{1M}; t_{21}, \ldots, t_{2M}; t_{31}, \ldots, t_{3M}) \quad j = 1, \ldots, M, \quad (1)$$

where A_1 represents the audience potential of the first network's program The inputs to this production function include the services of cameras, settings, film or tape and a number of other goods as well as the services of all technical and creative persons involved in "producing" an audience through the creation of a given program The precise relationship between each of these productive services and the audience yield of the program is extremely difficult to specify empirically; therefore the analysis is delineated in terms of heterogeneous inputs only for pedagogical purposes in this section A more detailed elaboration of the Cournot model is undertaken in Section 7 below

The network sells viewers to advertisers at a price P_A and therefore faces a net profit (Π) function:

$$\Pi = P_A A_1 - \sum_{j=1}^{M} p_j t_{1j} \quad (2)$$

where p_j is the market price of the jth input Its problem is to choose the t_{1j}'s which maximize (2) This requires that for each t_{1j}:

$$\left[P_A + \frac{dP_A}{dA_1} A_1\right]\left[\frac{\partial A_1}{\partial t_{1j}} + \sum_{i=1}^{M}\left(\frac{\partial A_1}{\partial t_{2i}} \frac{dt_{2i}}{dt_{1j}}\right) + \sum_{i=1}^{M}\left(\frac{\partial A_1}{\partial t_{3i}} \frac{dt_{3i}}{dt_{1j}}\right)\right] = \left[p_j + \frac{\partial p_j}{\partial t_{1j}} t_{1j}\right] \quad (3)$$

The first bracket on the left hand side of (3) is simply marginal revenue (of audience) facing the network. The second bracket has three terms: the first is the marginal product of the t_{1j} and the next two terms are conjectural response terms for the other two networks In our Cournot model, the conjectural response terms are equal to zero, thus simplifying the algebra and the analysis considerably The term on the right-hand side is simply the marginal cost of the jth input

Under Cournot assumptions, the conjectural response terms in (3) disappear, and we are left with

$$\left[\frac{\eta - 1}{\eta}\right]\left[\frac{\delta_{j+1}}{\delta_j}\right] P_A \frac{\partial A_1}{\partial t_{1j}} = p_j, \quad j = 1, \ldots, M, \quad (4)$$

where η represents the price elasticity of advertising demand facing the network and δ_j is the elasticity of supply of the jth factor to the network We shall simply denote $(\delta_j + 1)/\delta_j$ by k_j hereafter

Equation (4) is the first order condition for the employment of each of the M inputs Solved for each t_{ij}, it represents a variety of a Cournot reaction curve since it is obvious that $\partial A_1/\partial t_{1j}$ varies with the strength of rival networks' fare Specifically, it is likely that $\partial^2 A_1/\partial t_{1j}\partial t_{2j}$ and $\partial^2 A_1/\partial t_{1j}\partial t_{3j}$ are negative, implying that networks will "counter program," placing their more expensive programs opposite the rivals' weakest fare and vice versa

While (4) holds for any type of input, the mechanism by which it is achieved varies across different varieties of program inputs. For nonreproducible talent or "stars", $\partial A_1/\partial t_{1j}$ should be replaced by a discrete term reflecting the increment to audience attributable to the performer. Moreover, given that the network may only choose whether to employ the performer or not t_j may not assume values other than zero or unity It is p_j which varies to satisfy (4) in this case, and as long as this price is above the performer's opportunity cost in other media, he will offer his services to program packagers.

For the other inputs the network varies t_j according to the magnitude of the marginal productivity term the price of network advertising, and its monopoly and monopsony power in the respective markets In practice, however many nontalent inputs to the production process are used in fixed proportions either because of the nature of the production function or union agreements For instance, the amount of lighting, the number of technicians

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the number of feet of film or videotape, the amount of stage space required, the editing of the film or tape, and numerous other production services are not utilized in significantly variable proportions. Nevertheless, the prices of these services are likely to contain considerable economic rent, since bargaining agents may press for higher wages for the suppliers of the services as their marginal revenue products [according to (4)] rise. But these prices should vary with the average profitability of all entertainment fare in a given year. Thus we expect some nontalent costs to be fixed while others vary with the strength of demand for network advertising.

A simple manipulation of (4) allows us to summarize our model by distinguishing between the rents paid to talent and the prices earned by nontalent inputs. If we assume that the first K of the M inputs are talent, total payments to talent for the first network run (C_t) may be written

$$C_t = \frac{\eta - 1}{\eta}\left[\sum_{j=1}^{K} k_j \frac{\partial A_i^1}{\partial t_{ij}} \frac{1}{A_i^1}\right] P_A A_i^1, \qquad (5)$$

where A_i^1 is the expected audience of the given program and $(\partial A_i^1/\partial t_{ij})(1/A_i^1)$ is the elasticity of expected audience with respect to the jth talent input. Similarly, nontalent costs (C_{nt}) may be written

$$C_{nt} = C_0 + \frac{\eta - 1}{\eta}\left[\sum_{j=K+1}^{M} k_j \frac{\partial A_1}{\partial t_{ij}} \frac{t_{ij}}{A_1}\right] P_A \bar{A}_1, \qquad (6)$$

where $\bar{A}$ is the average audience for network programs in the current year and C_0 represents fixed costs which do not vary with the net revenues from the sale of entertainment programming.

5. The empirical estimation of program costs

☐ The previous two sections have led us to hypothesize that the cost of any program to a network will vary with the anticipated audience of that program, the average revenue yield of programs in network exploitation, and the residual rights obtained by the network. The basic equation to be estimated from available data is of the form

$$C_i = a_0 + a_1(P_A \bar{A}_i) + a_2(P_A A_i^1) + a_3 n_i D_i + a_4 n_i S_i + u_i. \qquad (7)$$

where C_i is the cost per exhibition of the ith program, A_i^1 is its expected audience, D_i is a dummy variable which is equal to unity if the network obtains the distribution right for syndication of the program and zero otherwise, and S_i is the profit share from syndication obtained by the network. Both S_i and D_i are multiplied by n_i, the proportion of exhibitions represented by first runs, since the value of syndication interests is directly proportional to the number of episodes filmed. A randomly distributed error term with zero mean and constant variance is denoted u_i.

The magnitude of the coefficients of a_1 and a_2 in (7) will depend upon the relative importance of nontalent and talent expenditures in total program costs and the degree of monopoly or monopsony power exercised by the networks in their output and input markets [see equations (5) and (6)]. If either $(\eta - 1)/\eta$ or the k_j differ substantially from unity, the networks will be paying inputs to the production process less than the value of their marginal product and a_1 and a_2 will be correspondingly smaller than they would be if the networks were perfect competitors in all markets. Similarly, if a_3 and a_4 are found to be smaller than the discounted present value of accounting returns from syndication, we may infer that the networks possess monopsony power in dealing with their suppliers.

☐ The data. Data for new regularly scheduled entertainment series on the three networks in the fall seasons of 1960 through 1965 were obtained from the contracts signed by the networks. In all, contracts for 148 program series were available, and of these 148, complete data were available for 121 series.[22]

The cost datum, C_i, is an estimate of the average cost of one half hour of a single episode in its first exposure on the network. In order to obtain this estimate, it is assumed that the network would schedule 52 episodes during a year by purchasing the maximum number of new episodes possible and filling out the year with repeats. Since repeats generally bring audiences of only 70 percent of new episodes, the total cost of 52 weeks of the series is divided by the sum of the number of new episodes plus 0.7 times the number of repeats required.[23]

As an estimate of $P_A \bar{A}_i$, the total estimated network night time sales to advertisers for each year is utilized. Since the number of networks and the number of prime time hours per week did not vary from 1960 through 1965, these industry sales serve well as a proxy for the average revenues per hour during each of the six years studied.

The estimate of *expected* revenues per program, $P_A A_i^1$, was obtained by asking each network to provide its initial price for a single commercial minute of advertising in each series during its fall season. An attempt was made to obtain the prices offered by the networks before advertisers began placing their orders. This set of prices provides the earliest recorded estimates of the networks' own expectations concerning the revenue potential of their programs.

Measures of D_i and S_i are taken directly from the contracts with suppliers. D_i is a set equal to unity if the network owns either the domestic distribution right or the foreign right or both. S_i is equal to the proportion of net profits from foreign and domestic syndication granted to the network company by the contract.

[22] For 19 of these programs, there was no record in the network files of the initial asking price for commercial minutes. For 8 others, it was impossible to obtain a precise cost estimate.

[23] In addition, an adjustment in C_i is made for network investment in a pilot and for "overage" agreements. It is assumed that any pilot program is counted as an episode in the series, and the cost of this pilot is included in the cost of a year's run of the series. Overage payments are network rebates of cost overruns which are granted from the network's syndication profit share. Approximately one-third of network programs earn profits from syndication; therefore, the net value of the overage agreement to the supplier is assumed to equal one-third times the limit to overruns specified in the contract, which, in turn, is usually 5 or 10 percent of stipulated program costs.

In the empirical analysis below two additional series are used A variable indicating the average strength of programs scheduled by the two rival companies at the same hour, A_t^r, is constructed by averaging the percentage of total television homes watching each rival program in the preceding year [24] If the rival program is new during the current season its strength is measured by multiplying the average performance of that network s programs by 0 9, an arbitrary weight designed to reflect a lower probability of audience acceptance Another variable H_t measures the total homes normally watching television during the specific hour of the week during which the program is scheduled

C] Regression results Equation (7) was fitted to data for the entire 121 program sample and for a 108 program subsample which excludes all music variety programs The exclusion of these programs is based upon an *a priori* judgment that the values of a_3 and a_4 are likely to be much smaller for such fare given the rapid obsolescence of popular music, and that relative production costs for this type of programming are quite different from the costs of other series Both samples were also utilized to fit a variant of (7) in which the time trend, T_t, was substituted for $P_A\bar{A}_t$ in order to determine if the latter was merely capturing the trend of general cost inflation during 1960–1965 The results demonstrate that $P_A\bar{A}_t$ serves as a better regressor in the program cost equation, but the difference is not statistically significant

The ordinary least squares estimate of (7) for both samples is satisfactory, with one glaring exception The coefficient of the syndication profit share variable is negative and significant, suggesting that networks pay less for programs in which they obtain profit shares See Table 1. This counterintuitive result derives from

TABLE 1

ORDINARY LEAST-SQUARES ESTIMATES OF PROGRAM COSTS (EQUATION 7)

REGRESSION	SAMPLE SIZE	ESTIMATED COEFFICIENTS FOR THE INDEPENDENT VARIABLES*						
		CONSTANT	$P_A\bar{A}$	P_AA^e	D	S	T	R^2
(i)	121	12,304 (2 42)	0 21864 (3 82)	0.18467 (5.62)	664 (0.48)	−7474 (2 03)		0 410
(ii)	108	16,608 (4 30)	0.25948 (5 81)	0.09271 (3 35)	2433.1 (2 30)	−6868.3 (2 31)		0.448
(iii)	121	27,590 (8.33)		0.18569 (5.54)	662.44 (0 48)	−7384.5 (2 00)	1128.5 (3 75)	0.403
(iv)	108	35,119 (13 07)		0.09434 (3.39)	2482.4 (2 28)	−6710.7 (2.24)	1339.9 (5.65)	0 440

*t STATISTICS IN PARENTHESES.

MEAN $P_A\bar{A}$ = $90,000.

MEAN P_AA^e = $93,611 FOR 121-PROGRAM SAMPLE; $97,965 FOR 108-PROGRAM SAMPLE (BASED UPON 0 85 TIMES THE ASKING PRICE FOR THREE COMMERCIAL MINUTES IN EACH PROGRAM)

SOURCE OF MEAN $P_A\bar{A}$: LITTLE REPORT [3], P. 65.

[24] This series is simply last year's Nielsen rating for continuing shows

the networks' tendency to purchase larger shares in the less expensive programs with lower audience appeal It is not perfectly clear why this pattern should exist, but an explanation may be attempted The networks tend to place the weakest of their new programs opposite their rivals' strongest returning series; therefore, program suppliers are less interested in retaining profit shares in these shows, since they are aware that low cost series are less likely to survive on the networks than more expensive shows Given that a program series must have a fairly long network run to accumulate sufficient episodes to make syndication profitable, program suppliers may be less interested in retaining syndication interests in any series with relatively low probability success on the network

It thus becomes necessary to estimate (7) as part of a simultaneous equation system which includes a profit share investment function Unfortunately, not many exogenous variables recommend themselves for such an equation, since there is no obvious *a priori* theory which predicts the outcome of negotiations for these subsidiary rights The following simple linear form is utilized for the purposes of this investigation:

$$S_t = b_0N_t^a + b_1N_t^b + b_2N_t^c + b_3R_t + b_4C_t + b_5T_t + v_t \quad (8)$$

The N_t variables are dummies for each of the three networks, ABC, NBC, and CBS, respectively R_t is a dummy variable equal to unity if the program is an hour series and zero if it is a half-hour series This variable is included simply because the networks tended to procure profit shares in hour series more than in half-hour series during our sample period A time trend, T_t, is included to capture the response of the networks to increasing FCC concern about network ownership of profit shares during the period

When (7) is estimated by two stage least squares utilizing all exogenous variables in (7) and (8) in the first stage, a very large value for a_4, the coefficient of S, results An examination of the residuals reveals that the relationship is misspecified The expected value of a program is measured by its anticipated revenues for a given competitive situation, but if networks systematically place their weaker fare against the rivals' strongest programs and vice versa, $P_A\bar{A}^e$ does not measure the value of each program for a given competitive situation Put another way, this variable does not reflect the value of specialized inputs in attracting audience under invariant conditions It cannot be expected that a star performer will accept a lower rent in performing in a program which is to be sacrificed before another network's most popular series

In order to adjust $P_A\bar{A}^e$ for the effect of network rivalry this variable is multiplied by the square root of A_t^r,[25] the average

[25] Expected revenues are multiplied by the *square root* of the average of rivals' program ratings for the past year because a log-linear regression of ex post audience upon program cost rivals' program ratings from last year A_t^r and television homes watching at the given hour H_t yielded a coefficient for A^r of approximately 0 5 Equation (7) was also estimated with $R_t^e = (P_A\bar{A}_t^e)(A_t^r)$, but the results were little different from those in Table 2 The proportion of explained variance fell very slightly and the value of $a_3 + a_4$ was reduced by approximately 20 percent

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audience appeal of other network programs appearing during the same time period. But including A' in equation (7) introduces a further complication, since we expect the cost of a program to vary *directly* with the value of $P_A A'(A')^{0.5}$ but we also expect each network to schedule its most expensive programs opposite its rivals' least successful series Thus we expect the scheduling decision to find C varying *inversely* with A'. In order to avoid biased estimates of (7), we must introduce equation (9) to reflect the scheduling decision for each program This scheduling relationship includes each of the network dummy variables as well as H_t, a measure of the number of households normally watching television during the time period in which the tth program is scheduled.

Our complete model may now be written as follows:

$$C_t = a_0 + a_1(P_A\bar{A})_t + a_2 R_t^* + a_3 n_t D_t + a_4 n_t S_t + u_t \qquad (7')$$

$$S_t = b_0 N_t^* + b_1 N_t^{\dagger} + b_2 N_t^* + b_3 R_t + b_4 C_t + b_5 T_t + v_t \qquad (8)$$

$$C_t = c_0 N_t^* + c_1 N_t^{\dagger} + c_2 N_t^* + c_3 H_t + c_4 A_t^{\dagger} + w_t, \qquad (9)$$

where R_t^* is equal to $(P_A A_t^{\dagger})(A_t^{\dagger})^{0.5}$ and u_t, v_t, and w_t are random disturbance terms with zero mean and constant variance. There are three endogenous variables, C_t, $A_t^{\dagger}$, and S_t, in a simultaneous system of three equations

Estimates of the parameters of (7') are obtained by the method of two-stage least squares. Reduced form estimates of $A_t^{\dagger}$ and S_t are first obtained by ordinary least squares regressions of each variable upon all exogenous variables. The reduced form estimates of R_t^* and $n_t S_t$ are then obtained by regressing each on all exogenous variables and the corresponding transformation of each variable's reduced form. The second stage estimates of (7') are presented in Table 2, along with approximate t statistics and coefficients of multiple determination

TABLE 2

TWO-STAGE LEAST-SQUARES ESTIMATE OF PROGRAM COSTS (EQUATION 7')

REGRESSION	SAMPLE SIZE	ESTIMATED COEFFICIENTS FOR THE INDEPENDENT VARIABLES*					
		CONSTANT	$P_A\bar{A}$	R^*	D	S	R^2
(v)	121	15,923 (2.793)	0.18224 (3.058)	0.10172 (5.710)	1758.8 (0.7677)	241.6 (0.05246)	0.418
(vi)	108	15,800 (3.501)	0.21278 (3.870)	0.10770 (3.297)	1823.8 (1.493)	12,285 (1.412)	0.295

*t STATISTICS IN PARENTHESES.

As expected, the regression for the smaller sample is quite different from the one which includes observations on music-variety programs, and the large differences in the values of the coefficients of $P_A\bar{A}$ and R^* support our assertion that the ratio of talent to other production costs varies substantially between music-variety and all other program types. Regression (vi) provides an estimate of the combined value of the distribution right and a 100-percent share of profits from syndication of $1,891 plus $12,285 times the mean value of n(0.788), or $11,031 per new half-hour episode of entertainment programming. The sum of the coefficients of these variables is equal to 1.7 times the standard error of the sum. Expressed as a percentage of mean program costs for the period, these syndication interests amount to 23 percent of network program costs or 19 percent of the total value of network exhibition and syndication interests. These results are compared with published estimates of syndication profits in Section 6

Of equal interest is the low value of the constant term in regressions (v) and (vi), suggesting that only $16 000 of the costs of an average half-hour program were not price determined during the period The relative importance of the other two terms can best be explained by evaluating them at the point of means of the regression The mean value of program costs is $48,725 per half-hour for the larger sample and $48,328 for the smaller sample The mean value of D and S is approximately 0 22 in each sample For the smaller sample, therefore, the net cost of the network exhibition alone is $48,328 − 0 22(14,179) = $45,209

For the entire 108 program sample, the mean value of the networks' expected revenue per half hour ($P_A A'$) is $97,965 Therefore, $a_2 R^*$ may be estimated at $10,045 at the point of means, or 22 percent of total program costs Our theory leads us to assign all of these costs to talent expenses, but we have only informal evidence that such an allocation is justified The Little Report found that by 1964 above the line costs had risen to approximately 48 percent of total costs These expenditures include payments for actors, directors, producers, and other personnel We have no further data on the division of program costs in commercial broadcasting in the United States, but it is interesting to compare the Little datum with data for a foreign noncommercial network operating in competition with a single commercial network.[26] For 1964–1965, above the line costs for this foreign network represented 44 percent of total program costs for entertainment programming. Expenditures for performing artists were 22 percent of total costs, or precisely the same as the value of $a_2 R^*$ in regression (vi) above.

At the midpoint of the sample period, average network revenues per half hour ($P_A\bar{A}$) were approximately $90,000. Thus, at the point of means, $a_1 P_A\bar{A}$ is equal to $19,200 in regression (vi) or 42.5 percent of network program costs. This component of costs represents the price-determined payments to program inputs which do not vary across programs within a single year. Our theory leads us to assign these payments to the price-determined elements of nontalent costs, but we cannot identify with precision the recipients of such payments.

6. The value of syndication interests

The regression results presented in Table 2 provide an estimate of the value of distribution rights and profit share income from syndication of 19 percent of network program outlays in 1960–1965 Can this estimate be reconciled with published data on the actual returns from syndication? A comparison with the Little

[26] This network has kindly provided detailed data on its program costs which are utilized in Section 7 At the request of the network, its identity is not revealed in this paper.

Report data provides the only available answer to this problem

In a 1967 prospectus,[27] Twentieth Century Fox reported that:

> [c]ommencing with the television series produced in 1964 . [production costs] are being amortized in the proportion that any year's actual net revenue bears to the estimate of total net revenue expected to be realized from networks and syndication distribution This change has resulted in the amortization of approximately 80 per cent of production cost of films released each year against television network revenue

Fox is among the largest suppliers of prime time series, and there is no reason to believe that its experience is not representative of the entire industry As a check on this estimate, it is useful to compare the data in the Little Report on network program payments and total program payments to suppliers and their own production subsidiaries of $290 3 million for prime time series in 1964, and total "off network" syndication sales of $78 million in the same year[28] Sales were 27 percent of prime time program costs in 1964. This may be a misleading comparison however, since syndication revenues follow network program payments by the networks in the same series with a mean lag of perhaps one or two years In 1965–1966, the average flow of syndication sales from old network series was $89.4 million, or 31 percent of 1964 program payments by networks[29] Some of these sales may have come from series not originally shown on the networks during prime time, but it is unlikely that there was a large contribution from this source It seems reasonable, therefore, to assume that the ratio of syndication sales to networks' prime time program costs was 0 30 in 1964

The network data appearing in the Little Report show that new series cost the networks about $125,000 per hour episode in 1964, an average which was rising at an annual rate of approximately 7 percent at the time[30] Since at least one third of network prime time series are new to the network in a typical year, it seems reasonable to assume that the average cost per new episode shown on the networks during prime time in 1964 was $110,000 per hour But the networks license programs for more than one exhibition Therefore, we require data on the payments for repeats as well as new exhibitions

Once more the Little Report provides the necessary data In 1964 the networks paid $290 3 million for prime-time entertainment series Given 71½ hours of such programming per week,[31] the average cost per hour may be estimated at $78 000. During 1964–1965, the networks exhibited original episodes for most series from mid September until mid April filling out the remainder of the season with repeat episodes Thus original episodes formed 7/12 of the season's offering for an average program, and the ratio of the cost of new episodes to total program payments may be estimated at 7/12 ($110,000/$78,000) or 0 82 Given that syndication revenues are 30 percent of total network program payments, they are 0 30 divided by 0 82 of new program costs (C) for the first run of the programs The ratio of syndication revenues to program costs is thus 0 366 See Figure 2

[27] Dated November 22, 1967, p 8

[28] See Little Report [3] vol. 2, pp 130 and 141

[29] *Ibid.* p 141.

[30] This datum is used rather than the mean value from the sample collected for the regressions in Section 5. The latter is not a complete census of all new programs. *Ibid.*, p 69

[31] *Ibid.* p. 5

FIGURE 2

CALCULATION OF THE VALUE OF SYNDICATION INTERESTS FROM 1964 COST–REVENUE DATA FOR PRIME–TIME ENTERTAINMENT SERIES

$$\frac{\text{SYNDICATION PROFIT}}{\text{NEW EPISODE COST PER HOUR}} = \left[\frac{\text{PROFIT FROM DISTRIBUTION}}{\text{SYNDICATION SALES}} + \frac{\text{PROFITS FROM PROFIT SHARES}}{\text{SYNDICATION SALES}}\right]\left[\frac{\text{SYNDICATION SALES}}{\text{TOTAL NETWORK PROGRAM PAYMENTS}}\right]\left[\frac{\text{TOTAL NETWORK PROGRAM PAYMENTS}}{\text{TOTAL PROGRAM HOURS}}\right]\left[\frac{\text{TOTAL PROGRAM HOURS}}{\text{TOTAL HOURS OF NEW EPISODES}}\right]\left[\frac{1}{\text{COST PER HOUR OF NEW EPISODE}}\right]$$

$$= \left[0.11 + 0.35\right] \cdot \left[\frac{\$87.1 \text{ MILLION}}{\$290.3 \text{ MILLION}}\right]\left[\frac{\$290.3 \text{ MILLION}}{71\frac{1}{2} \times 52}\right]\left[\frac{71\frac{1}{2} \times 52}{7/12 \times 71\frac{1}{2} \times 52}\right]\left[\frac{1}{\$110\,000}\right]$$

$$= 0.168$$

$$\frac{\text{EXPECTED SYNDICATION PROFIT}}{\text{NEW EPISODE COST PER HOUR}} = \left[1 + \text{EXPECTED RATE OF GROWTH}\right]\left[0.169\right]$$

$$= 1.15 \times 0.168 = 0.193$$

The profitability of syndication may also be inferred from the Little Report's interpretation of network data, but only after some adjustment The networks report a "net gain" from syndication distribution fees of $2,319,000 and net gains from profit-share income of $5,419,000 in 1964[32] Estimates of producers' (and presumably other participants') shares in the profits from syndication are estimated in a rather simple fashion in the Little Report The networks' average profit share in the current year's network series is divided into profit share net gains for 1964 in order to obtain an estimate of the total profits accruing to all participants Similarly, the calculation of industry profits from distribution fees is effected by simply dividing the network datum by the share of programs in which networks have obtained the rights for currently exhibited network series Both estimates must be considered to be biased downward

In the calculation of industry profit share net gains, the bias occurs in utilizing the net profit figure for the networks Our data for new program series in the 1960 1965 period reveal that the network profit shares are inversely correlated with program success and, therefore syndication profitability. As a result the Little Report technique of dividing network "profit" share into network imputations of profits from syndication must lead to an underestimate of industry profits from syndication We cannot know the magnitude of this downward bias, but the Little Report estimate of $19 5 million of industry profits from this source in 1964—35 8 percent of net revenues after deducting distribution fees[33]—

[32] *Ibid.* p. 132.

[33] *Ibid.*, p 130 It is assumed that the average distribution fee is 0 30 and that producers' profit-share income from syndication represents the same share of total profit share income as for the network companies.

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must be adjusted upward Given that only shipping costs, print costs, production overages, and a few miscellaneous expenses are deducted from net syndication revenues before computing profit shares, it would be surprising if total profit shares did not amount to at least 50 percent of net revenues

The estimate of industry distribution fees is also too low, as a simple assumption will demonstrate There is no reason to believe that other distributors are less efficient than the network subsidiaries which realized profit margins of 11.0 percent of sales in 1964. Since industry sales were $78 million, industry profits from distribution fees should approximate $8 58 million, not $6 5 million as estimated by the Little Report [34]

The network company which was bidding for syndication interests at the midpoint of our sample—the beginning of the 1963 season—could hardly be unaware that syndication profits were growing at a very rapid rate in 1960–1963, a rate of more than 30 percent according to the Little estimates This company would expect syndication profits to be realized from its successful programs far past 1964; therefore, the simple estimates for 1964 calculated in the above paragraphs are probably considerably below the profits expected by interested parties in 1963 There is no way of knowing what growth rate might have been applied by these bidders, but given an annual rate of growth of syndication sales of 15 to 20 percent[35] and a more rapid rate of growth of profits, it would not seem unreasonable to apply a 15-percent rate to the above profit data

The final estimate of syndication profitability is derived as follows Syndication fees contribute 11 0 percent of total sales in net profits while profit share income adds 0.50 of 70 percent of sales (obtained by deducting 30 percent for average distribution fees) Therefore, 1964 profits from syndication were 0 46 of total sales. Given a growth rate of 0 15 percent, *expected* profits may be assumed to be 0 529 of 1964 *actual* syndication sales Since syndication sales represent 0.366 of new program costs (*C*), syndication profits from the distribution fee and a 100 percent profit-share are estimated at 0 529 times 0 366 times new program costs, or 0 193 *C* for the average program during the midpoint of our sample period This procedure is depicted schematically in Figure 2.

The final estimate is admittedly rough, relying upon network data in which important cost imputations cannot be known. There is a considerable increase in the estimated profitability of profit shares from that appearing in the Little Report, but all other estimates are quite conservative.

It remains to estimate the *present value* of 0 193 *C* since syndication revenues are not realized immediately upon payment of program costs, but only after a considerable lag. Since foreign sales may begin immediately and account for nearly 60 percent of all revenues, it seems reasonable to assume that the bulk of syndication revenues may be realized in four years Again using a conservative estimate, assuming that these revenues are realized evenly over the four-year period and that the opportunity cost of capital in 1963

[34] *Ibid.*
[35] *Ibid.*, p. 141.

1964 was 0 10, the present value of 0.193 *C* may be calculated as follows:

$$[(0\ 193\ C)/4]\int_0^4 e^{-rt}dt = 0\ 04825C[(1 - e^{-0\ 4})/0\ 10] = 0\ 159\ C$$

A long, tortuous route has brought us to an estimate of the value of syndication profits, which is nearly 16 percent of the price of a new episode of a program series to the networks

How sensitive are these estimates to the assumptions made along the way? For instance, if the Little data were taken literally, the estimate of the present value of syndication profits would fall to 11 6 percent of new program costs If all other assumptions were to be retained, an increase in the assumed cost of capital to 15 percent would lower present value from 0 159 to 0 145 *C* An assumed growth rate of syndication profits of 20 percent would raise the estimate to 16 6 percent. Only the denial of the assumptions in the Little Report's calculations of industry profits seems of great importance, but this denial seems warranted even though our adjustment is certainly a rough one

The final accounting estimate of the value of all syndication interests—16 percent of new program costs to the networks—is well within the confidence interval of our econometric estimate of 19 percent (Table 2) It would therefore appear that networks have paid an amount equal to the discounted present value of the distribution rights and profit shares which they have obtained The Prime Time Rule has not saved the program suppliers from the rapacious tendencies of network buyers; it has simply required the suppliers to assume more risk or to sell these syndication interests to other buyers.

7. An extension of the results

□ If we extend the theoretical model developed earlier in this paper, we may utilize the regression results along with further empirical analysis to make a rough estimate of the degree of monopoly monopsony power possessed by the networks.

For instance, suppose that (1) is appropriately represented by (1'):

$$A_i = \begin{cases} f\left(\sum_{n=1}^{N} t_{ij}\right) & \partial A_i/\partial t_{ij} > 0 \\ F\left(\sum_{n=1}^{3}\sum_{j=1}^{N} t_{ij}\right) & \partial A_i/\partial t_{nj} < 0 \\ & n \neq i. \end{cases} \qquad (1')$$

If we assume further that $f'(\ ) \approx F'(\ )$, then:

$$\frac{\partial A_i}{\partial t_{ij}}\cdot\frac{t_{ij}}{A_i} = \frac{f_j'(\ )\,t_{ij}}{f(\ )}\left[1 - \frac{f(\ )}{F(\ )}\right], \qquad (10)$$

where $f_j'(\ )\,t_{ij}/f(\ )$ is the elasticity of the network's own audience with respect to its own investment in the jth input If we call this elasticity μ_j, we may insert (10) into (4) to obtain

$$\left|\frac{\eta - 1}{\eta}\right| \cdot P_A A_i \sum_{j=1}^{N} k_j \cdot \mu_j\left[1 - \frac{f(\ )}{F(\ )}\right] = \sum_{j=1}^{N} P_j t_{ij}. \qquad (11)$$

At Cournot equilibrium, $1 - f(\ )/F(\ )$ becomes $1 - 1/N$, where N is the number of rival networks. If we assume further that all $k_j = k$, we may write the expression for Cournot equilibrium as

$$k\left[\frac{\eta - 1}{\eta}\right]\left[\frac{N-1}{N}\right]\left[\sum_{j=1}^{M} \mu_j\right][P_A A_1] = \sum_{j=1}^{M} p_j t_{1j} \qquad (12)$$

For talent inputs alone, this relationship simply states that above-the line expenditures are equal to the product of the audience expected from the program and the sum of the elasticities of audience with respect to each input multiplied by three terms which reflect the intensity of competition among networks for audience, advertising revenue, and performers In our regression results of the previous section, the estimate of a_2 is

$$a_2 = k\left[\frac{\eta - 1}{\eta}\right]\left[\frac{N-1}{N}\right]\left[\sum_{j=1}^{K} \mu_j\right] \approx 0.10$$

If we could determine the value of the sum of the elasticities, $\sum_{j=1}^{K} \mu_j$, we would be able to estimate the value of $k[\eta - 1/\eta]$ for $N = 3$, the number of networks throughout our sample period

Unfortunately, we do not have precise data on the distribution of above the line and below the line costs for our U S sample, but the foreign noncommercial data do permit us to attempt to estimate $\sum_{j=1}^{K} \mu_j$ These foreign data contain observations on above the line costs, payments to performing artists, and audience for 54 light entertainment and drama series The light entertainment series —mostly filmed comedy or light drama and music variety programs- -are likely to be chosen to provide the maximum audience per unit cost, but the drama series may well be chosen to satisfy the tastes of a sizeable minority despite the costs involved in their production For this reason, empirical investigation into cost audience relationships are likely to be useful only for the light entertainment series

In order to obtain a measure of $\sum_{j=1}^{K} \mu_j$ from the noncommercial program experience we estimate two forms of simple regressions of audience upon costs—one which is linear and one which is log linear [36] The independent variables are either artists costs or all above the line costs and the dependent variable is average audience per program The results are presented in Table 3 for filmed comedy or light drama series and for music-variety series as well for a combination of the two The final column in Table 3

TABLE 3

ELASTICITY OF AUDIENCE WITH RESPECT TO EXPENDITURES UPON TALENT; FOREIGN NONCOMMERCIAL NETWORK 1964–1965*

	SAMPLE	CONSTANT TERM	COSTS OF PERFORMING ARTISTS	ABOVE–THE–LINE COSTS	R^2	ESTIMATED ELASTICITY
LINEAR FORM REGRESSION COEFFICIENTS	ALL LIGHT ENTERTAINMENT (n = 29)	3341 (3 02)	1.350 (3.77)		0.345	0.513
		3262 (2 73)		0.7202 (3.51)	0 313	0 533
	FILMED COMEDY AND LIGHT DRAMA (n = 13)	4489 (1 62)	1.039 (1 39)		0.150	0 446
		4034 (1 21)		0 5983 (1 20)	0.130	0.503
	MUSIC–VARIETY PROGRAMS (n = 14)	2846 (2 24)	1.535 (3.26)		0.470	0.537
		2577 (1 94)	1.001 (3 29)		0.475	0 591
LOG LINEAR FORM REGRESSION COEFFICIENTS	FILMED COMEDY LIGHT DRAMA (n = 13)	4.201 (1 70)	0.5846 (1 91)		0 248	0 585
		2.525 (0.78)		0.7262 (1.99)	0.262	0.720
	MUSIC–VARIETY PROGRAMS (n = 14)	3.478 (1 82)	0.6740 (2 63)		0 309	0 674
		3 003 (1 36)		0 6807 (2 42)	0.328	0.681

*t STATISTICS IN PARENTHESES.

contains the estimated elasticity of audience with respect to the independent variable at the point of means These elasticity measures for all above line costs range from 0.5 to more than 0 7, and we may take 0 6 as an approximation to the mean estimate

If networks had no monopoly nor monopsony power, $k(\eta - 1)/\eta$ would equal unity Therefore if $\sum_{j=1}^{M} \mu_j$ is equal to 0.6, we would expect $[(N - 1)/N] \sum_{j=1}^{M} \mu_j$ to equal 0 4 for a three network oligopoly Our econometric estimate of this expression (a_2) is only 0 1; therefore, application of the Cournot model leads us to reject the hypothesis of competition in both markets While we cannot dismiss the possibility of network monopsony in some input markets, our results in Sections 5 and 6 provide some evidence that k is not likely to differ much from unity These results suggest that $\eta - 1/\eta$ is approximately equal to 0.25 and that η is equal to 1.33 for each network

[36] The regression of audience upon either component of costs provides us with a direct estimate of the effect of talent inputs upon audience. The linear regression gives us a slope coefficient equal to $\sum_{j=1}^{k}(\partial A/\partial t_j)$ and the loglinear regression yields slope coefficients equal to $\sum_{j=1}^{K} \mu_j$. This result may be proved quite simply. If audience is denoted A and total factor payments of the appropriate category are denoted $\sum_{j=1}^{K} p_j t_j$ and if we assume that $A = \beta\left[\sum_{j=1}^{K} p_j t_j\right]^{\mu}$, $\partial A/\partial t_j = (\beta \mu p_j)\left(\sum_{j=1}^{K} p_j t_j\right)$ and $(\partial A/\partial t_j)(t_j/A) = \beta(p_j t_j)\left(\sum_{j=1}^{K} p_j t_j\right)$. Summing over all K inputs gives $\sum_{j=1}^{K}(\partial A/\partial t_j)(t_j/A) = \beta$. But $\sum_{j=1}^{K} \mu_j = \sum_{j=1}^{K}(\partial A/\partial t_j)(t_j/A)$; therefore, $\sum_{j=1}^{K} \mu_j = \beta$.

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NOTICES

If there is a single theme to this paper it is that offhand attempts to connect the fewness in television network broadcasting to theories of monopoly or monopsony behavior are likely to be unsuccessful. Network broadcasting is far from a typical economic activity since its principal output is donated to viewers while advertisers purchase rights to address these viewers with commercial messages. Networks may have monopoly power in national advertising markets; but this market power is not easily identified in output markets since it may only be implemented through a restriction in the number of viewer hours offered to advertisers in any period. It is obvious that this restriction of output is not serious among the current network triopoly, for each firm broadcasts during every hour possible and more than 60 percent of the nation's homes watch this output during prime viewing hours. It is only the FCC—through its imposition of the Prime Time Rule—which has sought to restrict network output to advertisers and viewers alike by limiting prime time network broadcasting to three hours per day.

Suppose that each of the three networks faces a market demand curve which is much less than infinitely price elastic. Our rather crude estimate of this price elasticity is -1.33 for each firm, an estimate which is certainly inconsistent with the hypothesis of perfect competition in national advertising markets. But what power does this confer upon the networks? Surprisingly, virtually the only effect of this imperfectly competitive situation is to allocate the rents from television broadcasting to the networks and their stations rather than to television celebrities. The size of the total prime time audience is likely to be rather insensitive to small changes in program quality, and performers are available to the networks in inelastic supply; therefore, the effect of monopoly power in advertising markets is to lower the derived demand for talent used in programs without much change in the nature of those programs. Star performers available at $20,000 per week are also available at a mere $10,000 per week. In our Cournot (competitive) model of program expenditure, monopoly power in advertising markets is simply translated into lower rents for performers.

Obviously, the impact of network monopoly in advertising markets upon program quality depends upon the relative importance of the various types of resources used in producing programs. Our econometric estimates of program costs suggest that as much as two thirds of all program outlays are directly dependent upon the revenue potential of network programs in their advertising market. We cannot be sure how much of this two thirds share represents economic rents paid to participants in program production, but fragmentary evidence on the division of program expenditures suggests that a very large share of these price determined outlays is appropriated by performers and other talent. If there were greater competition in national advertising markets, the derived demand for these services would rise and be reflected in larger economic rents. Profits would be diverted from television networks and their stations to television celebrities.

The FCC has not connected the networks' position in their output markets with their programming behavior, but rather it has focused upon the networks' possession of *monopsony* power. Its restrictions upon network investment in syndication interests is based upon the assumption that the networks do not pay their suppliers the full value of these syndication rights, an assumption which is not confirmed by the econometric estimates presented in Section 5, above. Comparison of these estimates with accounting returns from syndication markets demonstrates that the networks purchase syndication interests at prices which reflect the present value of net revenues generated in syndication markets. This conclusion should surprise no one outside of the Commission, for it is inconceivable that the networks could force suppliers to accept a rate of return on program investments which is below the opportunity cost of capital. If monopsony power were present, it would be reflected in a reduced quantity of programs ordered for network exhibition, not in exploitation and eventual bankruptcy of program suppliers. Most firms supplying network entertainment series during the past decade are alive and well and still competing for network business.

The results of this paper should not be a discouragement to the FCC. That the Commission is not required to protect the small suppliers of entertainment programs—to a large extent, the major motion picture companies—from the rapacious tendencies of the television networks should be a source of considerable relief. Moreover, the identification of the relationship between network profits and market power in national advertising markets should cause the Commission no concern. The major change which would emanate from the development of greater competition in advertising markets would be a redistribution of profits toward television performers. Clearly, the FCC prefers to see these profits in the hands of the networks and stations where they may be devoted to "public service" programming. Of course, the Commission could consider the possibility of taking the necessary steps to permit an increase in the number of national networks, but this would require a reduction in the subsidies paid to local programs which attract few viewers and a major increase in the popular fare so deprecated by the Commission and its staff.

6. Summary

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1976-77 Network Primetime Season At A Glance

Includes Series Titles (listed alphabetically by network), Time Slots, Suppliers, Production Staff Heads, Cast Regulars and Semi-Regulars and Estimated Production Costs per Segment (costs do not include time charges or commercials)

Series Title	Day	Hr.	Mins.	Supplier	Production Principals	Cast Regulars & Semi-Regulars	Estimated Prod. Fee per Episode
ABC-TV							
ABC Friday Night Movie	Fri	9:00	120	Various			Various
ABC Sunday Night Movie	Sun	9:00	120	Various			Various
Baretta	Wed	9:00	60	Universal TV - Roy Huggins/Public Arts	EP: Anthony Spinner, Leigh Vance. P: Charles E. Dismukes	Robert Blake, Ed Grover, Tom Ewell, Michael D. Roberts	$ 350,000
Barney Miller	Thu	8:[illegible]	30	Four D Prods.	EP: Danny Arnold P: Roland Kibbee	Hal Linden, Barbara Barrie, Abe Vigoda, Maxwell Gail, Jack Soo, Ron Glass, James Gregory, Ron Carey, June Gable, Steve Landesberg	175,000
Bionic Woman, The	Wed	8:00	60	Universal TV - Harve Bennett Prods.	EP: Harve Bennett P: Kenneth Johnson	Lindsay Wagner, Richard Anderson	370,000
Captain & Tennille, The	Mon	8:00	60	Moonlight & Magnolias Inc. - Bob Henry Prods.	EP: Alan Bernard P: Bob Henry D: Tony Charmoli	Daryl Dragon, Toni Tennille	220,000
Charlie's Angels	Wed	10:00	60	Spelling-Goldberg Prods.	EP: Aaron Spelling, Leonard Goldberg P: Rick Husky, David Levinson	Kate Jackson, Farrah Fawcett-Majors, Jaclyn Smith, David Doyle	310,000
Cos	Sun	7:00	60	Jemmon Inc.	P: Chris Beerde D: Jeff Margolis	Bill Cosby, Jeffrey Altman, Tim Thomerson, Marion Ramsey, Buzzy Linhart, Willie Bobo	220,000
Donny & Marie	Fri	8:00	60	Osmond Prods. - Sid & Marty Krofft Prods.	EP: Raymond Katz P: Sid & Marty Krofft D: Art Fisher	Donny & Marie Osmond, Jimmy Osmond, Paul Lynde, The Ice Vanities, Osmond Brothers, Jim Connell, Larry Larsen	230,000
Family	Tue	10:00	60	Spelling-Goldberg Prods.	EP: Aaron Spelling, Leonard Goldberg, Mike Nichols P: Nigel & Carol Evan McKeand	Sada Thompson, James Broderick, Meredith Baxter Birney, Gary Frank, Kristy McNichol, Mary Grace Canfield, Season Hubley	280,000
Happy Days	Tue	8:00	30	Paramount TV - Miller-Milkis Prods.	EP: Garry K. Marshall, Thomas L. Miller, Edward K. Milkis P: Tony Marshall, Jerry Paris D: Jerry Paris	Ron Howard, Henry Winkler, Tom Bosley, Marion Ross, Anson Williams, Donny Most, Erin Moran, Al Molinaro, Roz Kelly	180,000
Holmes & Yoyo	Sat	8:00	30	Universal TV - Heyday Prods.	EP: Leonard B. Stern P: Anne Sultan	John Schuck, Richard B. Shull, Bruce Kirby, Andrea Howard	110,000
Laverne & Shirley	Tue	8:30	30	Paramount TV - Miller-Milkis Prods. Henderson Prod. Co.	EP: Garry K. Marshall, Thomas L. Miller, Edward K. Milkis P: Tony Marshall, Mark Rothman, Lowell Ganz	Penny Marshall, Cindy Williams, Phil Foster, Eddie Mekka, David L. Lander, Michael McKean, Betty Garrett, Carol White	160,000

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Exhibit 3
to the Affidavit of
Franklin M. Fisher

1976-77 Network Primetime Season At A Glance

(Continued from page 50)

CBS-TV

Series Title	Day	Hr.	Mins	Supplier	Production Principals	Cast Regulars & Semi-Regulars	Estimated Prod. Fee per Episode
CBS Friday Night Movie	Fri	9:00	120	Various			Various
Delvecchio	Sun	10:00	60	Universal TV - Crescendo Prods.	EP: William Sackheim P: Steven Bochco, Michael Rhodes	Judd Hirsch, Charles Haid, Michael Conrad, Mario Gallo	$300,000
Doc	Sat	8:30	30	MTM Enterprises	EP: Ed. Weinberger, Stan Daniels P: Martin Cohan, Laurence Marcus	Barnard Hughes, Audra Lindley, David Ogden Stiers, Ray Vitte, Lisa Mordente, Herbie Faye	140,000
Executive Suite	Mon	10:00	60	MGM-TV - Stanley Rubin/Arena Prods.	EP: Norman Felton, Stanley Rubin P: Don Brinkley	Mitchell Ryan, Stephen Elliot, Sharon Acker, Leigh McCloskey, Richard Cox, Gwyda Donlowe, Paul Lambert, Byron Morrow, Trisha Noble, Wendy Phillips, Joan Prather, Madlyn Rhue, Percy Rodrigues, William Smithers, Maxine Stuart, Brenda Sykes, Carl Weintraub	325,000
Good Times	Wed	8:00	30	Norman Lear-Bud Yorkin Tandem Prods.	EP: Allan Manings P: Austin & Irma Kalish D: Gerren Keith	Esther Rolle, Jimmie Walker, Janet DuBois, BernNedette Stanis, Ralph Carter	180,000
Hawaii Five-O	Thu	9:00	60	CBS-TV	EP: Philip Leacock P: James Heiter, Douglas Green	Jack Lord, James MacArthur, Kam Fong, Herman Wedemeyer, Harry Endo, Richard Denning, Peggy Sherman, Amanda McBroom	285,000
Jeffersons, The	Sat	8:00	30	T.A.T. Communications Co. - NRW Prods.	P: Don Nicholl, Michael Ross, Bernie West D: Jack Shea	Isabel Sanford, Sherman Hemsley, Roxie Roker, Franklin Cover, Damon Evans, Zara Cully, Berlinda Tolbert, Paul Benedict, Mavis Gilbert, Ned Wertimer	170,000
Kojak	Sun	9:00	60	Universal TV - FRP Prods.	EP: Matthew Rapf P: James McAdams	Telly Savalas, Dan Fraser, Kevin Dobson, George Savalas, Mark Russell, Vince Conti	260,000
Mary Tyler Moore Show, The	Sat	9:00	30	MTM Enterprises	EP: James L. Brooks, Allan Burns P: Ed. Weinberger, Stan Daniels	Mary Tyler Moore, Edward Asner, Murray MacLeod, Ted Knight, Georgia Engel, Betty White	225,000
Mash	Tue	9:00	30	20th-Fox TV	EP: Gene Reynolds P: Don Reo & Allan Katz, Burt Metcalfe	Alan Alda, Mike Farrell, Harry Morgan, Loretta Swit, Larry Linville, Jamie Farr, William Christopher	190,000
Monroe	Mon	9:00	30	Norman Lear-Bud Yorkin Tandem Prods.	EP: Rod Parker, Hal Cooper P: Charles Hauck D: Hal Cooper	Beatrice Arthur, Bill Macy, Adrienne Barbeau, Conrad Bain, Rue McClanahan, Angela Buckley, Brian Morrison, J. Pat O'Malley	190,000
One Day At A Time	Tue	9:30	30	T.A.T. Communications Co.-Allwhit Inc.	EP: Jack Elinson, Norman Paul P: Perry Grant, Dick Bensfield D: Herbert Kenwith	Bonnie Franklin, Mackenzie Phillips, Richard Masur, Pat Harrington, Valerie Bertinelli, Mary Louise Wilson	150,000
Phyllis	Mon	8:30	30	MTM Enterprises	P: Ed. Weinberger, Stan Daniels	Cloris Leachman, Henry Jones, Jane Rose, Judith Lowry, Gorn Stephens, John Lawlor, Carmine Caridi, Lisa Gerritsen, Bart Maxtin	170,000
Mr. T & Tina	Sat	8:30	30	Komack Co.	EP: James Komack P: Bob Carroll Jr., Madelyn Davis, Gary Shimokawa	Pat Morita, Susan Blanchard, Jane Angela, Gene Prohaska, Pat Suzuki, Jerry Fujikawa, Miriam Byrd Nethery, Ted Lange	120,000
Most Wanted	Sat	10:00	60	QM Prods.	EP: Quinn Martin, John Wilder, Paul King P: Harold Gast	Robert Stack, Shelly Novack, Jo Ann Harris	320,000
Nancy Walker Show, The	Thu	9:30	30	T.A.T. Communications Co.	EP: Rod Parker P: Arnie Rosen, Jerry Davis D: Dennis Steinmetz	Nancy Walker, William Daniels, Ken Olfsen, Beverly Archer, Sparky Marcus, James Cromwell	125,000
NFL Monday Night Football	Mon	9:00	120+	ABC Sports	EP: Roone Arledge P: Don Ohlmeyer D: Chet Forte	Frank Gifford, Howard Cosell, Alex Karras	400,000
Rich Man, Poor Man-Book II	Tue	9:00	60	Universal TV	EP: Michael Gleason P: Jon Epstein	Peter Strauss, Gregg Henry, James Carroll Jordan, Susan Sullivan, Ray Milland, Kay Lenz, William Smith, Tim McIntyre, Dick Sargent, Herbert Jefferson Jr.	325,000
Six Million Dollar Man, The	Sun	8:00	60	Universal TV - Harve Bennett Prods.	EP: Harve Bennett P: Lionel E. Siegel, Allan Balter	Lee Majors, Richard Anderson, Martin E. Brooks	370,000
Starsky & Hutch	Sat	9:00	60	Spelling-Goldberg Prods.	EP: Aaron Spelling, Leonard Goldberg P: Joseph T. Naar	David Soul, Paul Michael Glaser, Antonio Fargas, Bernie Hamilton	340,000
Streets Of San Francisco, The	Thu	10:00	60	QM Prods.	EP: Quinn Martin P: William Robert Yates	Karl Malden, Richard Hatch, Darleen Carr	350,000
Tony Randall Show, The	Thu	9:00	30	MTM Enterprises	P: Tom Patchett, Jay Tarses	Tony Randall, Rachel Roberts, Barney Martin, Allyn Ann McLerie, Deven Scott, Brad Savage	150,000
Welcome Back, Kotter	Thu	8:00	30	Komack Co.-Welper Prods.	EP: James Komack P: Eric Cohen, George Yanok	Gabriel Kaplan, Marcia Strassman, John Sylvester White, Robert Hegyes, Lawrence-Hilton Jacobs, Ron Palillo, John Travolta	150,000

CBS-TV

All In The Family	Wed	9:00	30	Norman Lear-Bud Yorkin Tandem Prods.	EP: Mort Lachman P: Milt Josefberg D: Paul Bogart	Carroll O'Connor, Jean Stapleton, Rob Reiner, Sally Struthers, Vincente Carrell	225,000
All's Fair	Mon	9:30	30	T.A.T. Communications Co.	EP: Rod Parker P: Bob Schiller, Bob Weiskopf D: Bob Claver	Richard Crenna, Bernadette Peters, J.A. Preston, Judy Kahan, Lee Chamberlin, Jack Dodson	125,000
Alice	Wed	9:30	30	Warner Bros. TV	EP: Thomas G. Kuhn, William P. D'Angelo, Harvey Bullock, Ray Allen P: Bruce Johnson	Linda Lavin, Philip McKeon, Vic Tayback, Beth Howland, Polly Holliday	110,000
Bell Four	Wed	8:30	30	CBS-TV	P: Don Segall	Jim Backus, Jack Somack, David-James Carroll, Ben Davidson, Bill McCutcheon, Lenny Schultz, Marco St. John, Jaime Tirelli, Sam Wright	110,000
Barnaby Jones	Thu	10:00	60	QM Prods.	EP: Quinn Martin P: Philip Saltzman	Buddy Ebsen, Lee Meriwether, Mark Shera, John Carter	320,000
Blue Knight, The	Wed	10:00	60	Lorimar Prods.	EP: Lee Rich, Philip Capice P: Robert Schlitt	George Kennedy, John Steadman	300,000
Bob Newhart Show, The	Sat	9:30	30	MTM Enterprises	EP: Tom Patchett, Jay Tarses P: Michael Zinberg, Gordon & Lynn Farr	Bob Newhart, Suzanne Pleshette, Peter Bonerz, Bill Daily, Marcia Wallace, Pat Finley, Will Mackenzie, Jack Riley	200,000
Carol Burnett Show, The	Sat	10:00	60	Punkin Prods.	EP: Joe Hamilton P: Ed Simmons D: Dave Powers	Carol Burnett, Harvey Korman, Vicki Lawrence, Tim Conway, Lester Flatt Dancers	250,000

(Continued on page 62)

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1976-77 Network Primetime Season At A Glance

(Continued from page 52)

NBC-TV

Series Title	Day	Hr.	Mins.	Supplier	Production Principals	Cast Regulars & Semi-Regulars	Estimated Prod. Fee per Episode
(Quincy)				Universal TV-Glen A. Larson Prods.	EP: Glen A. Larson P: Lou Shaw	Jack Klugman, Garry Walberg, Lynnette Mettey, John S. Ragin, Robert Ito, Joseph Roman, Val Bisoglio	
Police Story	Tue	10:00	60	Columbia Pictures TV-David Gerber Prods.	EP: David Gerber P: Liam O'Brien	Scott Brady, Dane Clark	$350,000
Police Woman	Tue	9:00	60	Columbia Pictures TV-David Gerber Prods.	EP: David Gerber P: Douglas Benton	Angie Dickinson, Earl Holliman, Ed Bernard, Charlie Dierkop	320,000
Practice, The	Wed	8:00	30	Danny Thomas Prods.-MGM-TV	EP: Paul Junger Witt P: Ron Rubin	Danny Thomas, David Spellberg, Dena Dietrich, Shelley Fabares, Didi Conn, Mike Evans, Allen Price, Damon Raskin	160,000
Quest, The	Wed	10:00	60	Columbia Pictures TV-David Gerber Prods.	EP: David Gerber P: Mark Rodgers, James H. Brown	Kurt Russell, Tim Matheson	200,000
Rockford Files, The	Fri	9:00	60	Universal TV-Cherokee Prods.-Roy Huggins/Public Arts	EP: Meta Rosenberg P: David Chase, Charles Floyd Johnson	James Garner, Noah Beery, Joe Santos, Stuart Margolin, Gretchen Corbett	365,000
Sanford & Son	Fri	8:00	30	Norman Lear-Bud Yorkin Tandem Prods.	EP: Bud Yorkin P: Saul Turteltaub, Bernie Orenstein D: Alan Rafkin	Redd Foxx, Demond Wilson, LaWanda Page, Don Bexley, Nathaniel Taylor, Hal Williams	220,000
Serpico	Fri	10:00	60	Paramount TV-Emmet Lavery Jr. Prods.	EP: Emmet Lavery Jr. P: Don Ingalls, Barry Oringer	David Birney, Tom Atkins	320,000
Van Dyke & Company	Thu	10:00	60	Catspaw Prods.-Blye-Einstein Prods.	EP: Byron Paul P: Allan Blye, Bob Einstein D: John Moffitt	Dick Van Dyke, The L.A. Mime Company, Andy Kaufman, Marilyn Sokol	240,000
Wonderful World Of Disney, The	Sun	7:00	60	Walt Disney Prods.	EP: Ron Miller		335,000

Abbreviations: EP - Exec Producer; P - Producer; D - Director; SP - Supervising Producer; EIC - Exec In Charge

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Rhoda	Mon	8:30	30	MTM Enterprises	EP: James L. Brooks, Allan Burns P: David Davis, Charlotte Brown	Valerie Harper, David Groh, Anne Meara, Julie Kavner, L. Music	160,000
60 Minutes	Sun	7:00	60	CBS News	EP: Don Hewitt SP: Palmer Williams D: Arthur Bloom	Mike Wallace, Morley Safer, Dan Rather, Shana Alexander, James J. Kilpatrick	200,000
Sonny & Cher Show, The	Sun	8:00	60	Apis Prods.-Yongestreet Entertainment	EP: Nick Vanoff P: Frank Peppiatt, Phil Hahn D: Tim Kiley	Sonny Bono, Cher Allman, Chastity Bono, Shields & Yarnell	240,000
Spencer's Pilots	Fri	8:00	60	CBS-TV	EP: Edward H. Feldman, Bob Sweeney P: Larry Rosen	Christopher Stone, Todd Susman, Gene Evans, Margaret Impert, Britt Leach	290,000
Switch	Tue	10:00	60	Universal TV	EP: Matthew Rapf P: Jack Laird	Robert Wagner, Eddie Albert, Charlie Callas, Sharon Gless	340,000
Tony Orlando & Dawn Rainbow Hour, The	Tue	8:00	60	Ilson-Chambers Prods.-Yellow Ribbon Prods.	P: Saul Ilsen, Ernest Chambers D: Bill Foster	Tony Orlando, Joyce Vincent Wilson, Telma Hopkins, George Carlin, Bob Holt, Susan Lanier, Jimmy Martinez, Edie McClurg, Nancy Steen	240,000
Waltons, The	Thu	8:00	60	Lorimar Prods.	EP: Lee Rich, Earl Hamner P: Andy White	Richard Thomas, Ralph Waite, Michael Learned, Ellen Corby, Will Geer, Judy Norton Taylor, Mary McDonough, Jon Walmsley, Eric Scott, David W. Harper, Kami Cotler, Joe Conley, Ronnie Claire Edwards	320,000

NBC-TV

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Baa Baa Black Sheep	Tue	8:00	60	Universal TV	EP: Stephen J. Cannell P: Philip DeGuere Jr.	Robert Conrad, Dana Elcar, James Whitmore Jr., Dirk Blocker, Robert Ginty, W.K. Stratton	300,000
Best Sellers	Thu	9:00	60	Universal TV	EIC: Charles Engel		325,000
Big Event, The	Sun	9:30	90	Various	EIC: Alvin Cooperman		Various
Chico & The Man	Fri	8:30	30	Komack Co.-Wolper Prods.	EP: James Komack P: Michael Morris D: Jack Donohue	Jack Albertson, Freddie Prinze, Della Reese, Scatman Crothers	120,000
Emergency	Sat	8:00	30	Universal TV-Mark VII Ltd.	EP: R.A. Cinader	Robert Fuller, Julie London, Bobby Troup, Randolph Mantooth, Kevin Tighe, Tim Donnelly, Michael Norell, Mike Stoker, Marco Lopez	320,000
Gemini Man	Thu	8:00	60	Universal TV-Harve Bennett Prods.	EP: Harve Bennett P: Leslie Stevens, Robert F. O'Neill, Frank Telford	Ben Murphy, William Sylvester, Katherine Crawford	340,000
Little House On The Prairie, The	Mon	8:00	60	NBC-TV-Ed Friendly	EP: Michael Landon P: John Hawkins	Michael Landon, Karen Grassle, Melissa Gilbert, Melissa Sue Anderson, Victor French, Lindsay & Sidney Green Bush, Dabbs Greer, Richard Bull, Katherine MacGregor, Alison Arngrim, Kevin Hagen	320,000
NBC Monday Night At The Movies	Mon	9:00	120	Various			Various
NBC Movie Of The Week	Wed	8:00	90	Various			Various
NBC Saturday Night At The Movies	Sat	9:00	120	Various			Various
NBC Sunday Mystery Movie	Sun	8:00	90	Universal TV			500,000
(Columbo)				Universal TV	P: Everett Chambers	Peter Falk	
(McCloud)				Universal TV-Glen A. Larson Prods.	EP: Glen A. Larson P: Ronald G. Satlof	Dennis Weaver, J.D. Cannon, Terry Carter, Ken Lynch, Sidney Clute, Ken Scott	
(McMillan)				Universal TV-Heyday Prods.	EP: Leonard B. Stern P: Jon Epstein	Rock Hudson, John Schuck, Martha Raye, Richard Gilliland	

(Continued on page 54)

APPENDIX B

AFFIDAVIT OF RICHARD A. POSNER

STATE OF ILLINOIS,)
) ss.:
COUNTY OF COOK,)

RICHARD A. POSNER, being duly sworn, deposes and says:

I am a Professor of Law at the University of Chicago Law School, specializing in antitrust law. My curriculum vitae, including a list of the books and articles I have written, is annexed hereto as Exhibit 1. Counsel for CBS Inc. has asked me to examine the proposed consent decree in United States v. National Broadcasting Company, Inc. (Civil Action No. 74-3601-RJK, C.D. Cal.), together with the other documents filed in the case, including the Justice Department's Competitive Impact Statement ("CIS"), with a view to advising whether the decree is consistent with the "public interest", the standard governing entry of antitrust consent decrees under the Antitrust Penalties and Procedure Act ("APPA"), 15 U.S.C. § 16. My conclusion is that the proposed decree is inconsistent with the public interest as expressed by the Sherman Act.

The legislative history of the APPA makes clear that the purpose of the Act is to bar the entry of antitrust

consent decrees that do not advance the policy of the antitrust laws, which is to promote competition. "The primary focus of the Department's enforcement policy should be to obtain a judgment--whether litigated or consensual--which protects the public by insuring healthy competition in the future". S. Rep. No. 93-298, 93d Cong., 1st Ses. 6 (1973). The proposed consent decree in NBC will not insure "healthy competition"; on the contrary, it is an anticompetitive decree.

I.

The main thrust of the decree is to limit the rights (e.g., to a later syndication of the program) that NBC may acquire from a producer of programs. The value of such rights tends to be highly uncertain; hence the effect of contracts that transfer these rights to the network is to have the network assume the risk that the program will not be successful enough to make the various secondary or residual rights in it commercially valuable. This shifting of risk from producer to network is a boon for the small producer, who may be in no position financially to assume the risks of failure involved in retaining all of the rights to subsequent exploitation of the program. The effect of the proposed consent decree, if adopted, would be to force this risk back on to the producer. That can only weaken the position of the small

producer in a market where the major sellers are large producers. Such a result would be antithetical to the policy of the antitrust laws.

The proposed decree is further anticompetitive in limiting the program production by NBC itself. NBC is a small factor in the program production market (certainly small relative to its principal supplier, MCA), but its competitive potential is significant and presumably helps keep the independent producers "on their toes". They know that if they try to cartelize the market NBC can step in and satisfy a major part of its programming needs internally. The Supreme Court has repeatedly emphasized the importance of preserving potential competition in concentrated markets. See, e.g., United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964). And the Ninth Circuit in a recent case specifically indicated its disfavor for provisions in antitrust decrees limiting production by a potential competitor. See Calnetics Corp. v. Volkswagen of America, 532 F.2d 674, 693-94 (1976)

The entry of an antitrust decree having such serious anticompetitive features as I have outlined, without any effort at responsible justification by the government in its CIS, would flout the purposes of the APPA. And there is

still another consideration that suggests to me that the decree is not in the public interest: its "regulatory" character, which the government acknowledges in its CIS (p. 9). The entry of a regulatory decree is almost a sure sign that the case should never have been brought. The purpose of the antitrust laws is to promote free competition by dissolving restraints of trade and not, as in the proposed decree in this case, to supervise the details of bargaining between buyers and sellers See Posner, Antitrust: Cases, Economic Notes, and Other Materials 563-65 (1974); Posner, "A Statistical Study of Antitrust Enforcement", 13 J. Law & Econ. 365, 386, 388 (1970). Apart from the unsuitableness of regulatory decrees in the implementation of a statute designed to promote competition as an alternative to regulation, such decrees impose unreasonable burdens on the time and expertise of the federal district courts, which become charged--as will be true in this case if the proposed decree is entered--with the detailed supervision of ongoing commercial relationships.

II.

The proposed decree in its present form is I think manifestly contrary to the statutory standard. But its deficiencies are not mere matters of wording or the inclusion of this rather than that provision. The decree seems based on a legal theory that has no basis in the antitrust laws.

The government needs to rethink the whole case.

The basic premise of the decree is that NBC has combined with the television stations comprising the NBC television network to suppress competition in the production of prime time television programs carried on the network, or alternatively that NBC has monopolized this programming. The government's CIS states that NBC has "used and continues to use its dominance and control over access to the broadcasting time of the NBC Television Network, to condition independent program suppliers' access to said network upon the suppliers' relinquishing valuable rights and interests in their programs", and that NBC "has favored programs in which it obtained such rights and interests over other programs" (p. 6). While recognizing that NBC itself produces only a minute fraction of the prime time entertainment programs broadcast over its network, the government also expresses concern "that NBC's unrestricted ability to produce prime time television entertainment programming" has unlawfully restricted "independent program suppliers' ability to produce and negotiate for distribution and exhibition of their programming". Id.

It seems plain from the language quoted above, the terms of the decree, and the government's earlier filings in

the network cases that the government's theory of how NBC and the other two major networks have reduced competition in the production of television programs is simply that they have driven an unconscionably hard bargain with the producers--or, as the government put it in its memorandum in opposition to CBS's motion for summary judgment, that the networks failed to give the producer "payment commensurate with the success of his program" (p. 20), thereby inflicting "undue hardship" on the producers (p. 10). This theory of the violation that the proposed consent decree is designed to rectify lacks a basis in either common sense or antitrust law. Why would the networks wish to eliminate competition among their program suppliers? A rational network would take every step possible to maximize such competition in order to keep down the prices of programs it buys. Of course the networks want to pay as little for programs as possible--that is why they want to promote rather than to stifle competition among the producers.

Firms may want to reduce competition in the markets in which they sell, but they have absolutely no interest in reducing competition among their suppliers, thereby possibly placing themselves at the mercy of a cartel of suppliers or a monopoly supplier. The proposed decree is thus premised on

a completely unrealistic conception of network self-interest. Further, in seeking to rectify an alleged inequality of bargaining power between producers and networks that has allegedly enabled the networks to drive an unconscionably hard bargain with the producers, the decree strays outside the recognized boundaries of the antitrust laws. No antitrust cause of action is stated by an allegation that a buyer has refused to pay a fair price to a seller. The antitrust laws--unlike the Uniform Commercial Code or the Automobile Dealers Day in Court Act--have never before been thought to provide a remedy for a seller to whom a buyer pays an unconscionably low price. A one-sided sales contract is simply not a restraint of trade.

It should be emphasized that the contractual provisions between NBC and the producers about which the government complains are simply provisions allocating the various profit opportunities created by the contract between the parties to it in a way that may be less favorable to the supplier than alternative provisions would be. For example, the government complains about the practice, prohibited by the FCC since 1971, whereby NBC received not only the right to show the program on its network but also shared in the revenues from subsequent broadcasts of the program by independent television stations In effect, that practice simply reduced the price that NBC paid the producer for network exhibition--and as I have said there is nothing in the antitrust laws that gives a seller the right to complain about the price in his contract with the buyer. To treat a contract of sale as an unreasonable restraint of trade because the advantages of the contract appear to inure primarily to the benefit of the seller rather than the buyer, or of the buyer rather rather than the seller, would be to alter fundamentally the character of the antitrust laws and cast a cloud of suspicion over virtually all sales contracts.

I have said this is a case, utterly unprecedented in antitrust jurisprudence, in which the gravamen of the complaint is that the buyer has driven a hard bargain with his sellers. The character of the case as I have described it would not be altered by the allegations that NBC has monopoly power even if those allegations had any possible basis in fact. The offense of monopolization is defined in the Supreme Court's most recent formulation (see United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)) as monopoly power plus exclusionary practices, i.e., practices designed to punish, destroy, or intimidate a competitor or potential competitior of the

monopolist. I know of no case where charging customers high prices, or paying suppliers low prices, has itself been deemed an act of monopolization

In any event, it is plain as a matter of law that NBC does not have monopoly power. The government concedes that the programs broadcast on the NBC network compete for viewers' and therefore advertisers' patronage with the programs shown on the other two networks (not to mention the programs shown on the many independent television stations). Since each of the television networks carries approximately the same amount of prime time programming as the others, it follows that NBC purchases at most one-third of the programming at issue in this case. A firm that purchases only one-third of a product can under no accepted judicial doctrine be deemed a monopolist.

The government appears to concede this, but argues that the NBC television network is itself a relevant market somehow separable from the broader market for prime time network television. This approach is untenable. To fragment a market into the individual outputs of each of the sellers, or the purchases of each of the buyers, in the market is to make every firm a monopolist and to expand enormously the

reach of Section 2 of the Sherman Act. Hence the courts have consistently held that the "natural monopoly" that the producer has over his own output is not the kind of monopoly with which Section 2 is concerned. See, e.g., United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 392-94 (1956); Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 917-19 (10th Cir. 1975); ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55-57 (9th Cir. 1975); Bushie v. Stenocord Corp., 460 F.2d 116, 120-21 (9th Cir. 1972). That principle applies a fortiori to a case where the firms in question, CBS, NBC, and ABC, are purchasing from a common pool of program suppliers who can sell to any one of the networks. The differences among the programming carried by the three networks seem to be even smaller than those which distinguish, say, Chevrolet and Ford automobiles--different brands recognized to be in the same product market, even though General Motors and Ford have sought to differentiate their products in minor but significant ways. See, e.g., Hogul v. General Motors Corp., 391 F. Supp. 1305, 1313 (E.D. Pa. 1975), aff'd, 527 F.2d 645 (3d Cir. 1976); Merit Motors, Inc. v. Chrysler Corp., 417 F. Supp. 263, 269 (D.D.C. 1976). In contrast, very few viewers, simply by looking at a television program, could tell whether it was a CBS, an NBC

or an ABC program.

It is true that once the network has signed a contract with the producer for a particular program idea, the contract will usually obligate the producer to offer the completed program to the network. But this is to say that the relevant competition among the networks for programming occurs at the point at which the producer has come up with an idea for a program that he thinks is marketable. He can peddle his program idea to any of the three networks. Their competition for promising program ideas assures that none of the networks has a monopoly in the purchase of programming.

The facts I have recited to show that this case and the proposed decree have no relation to the objectives of antitrust policy, which are to prevent monopoly and foster competition, are not in dispute. The government claims it can also prove the allegedly improper purpose of each defendant in using its control over access to its network to force the program suppliers to give up certain interests in their programs. But the only improper purpose suggested is that each defendant deliberately uses whatever bargaining power it may have to drive a hard bargain, one that involves annexing to itself as many of the profit opportunities created by the

program in question as it can. And, as I have emphasized, the use of individual bargaining power to minimize the cost of program acquisition, while conceivably objectionable on other social grounds, raises no question of illegality under the antitrust laws.

Nor is anything significant added to the case by the fact that the programs offered by the networks are carried by a large number of affiliated stations or that the networks produce some television entertainment programs themselves. The existence of station affiliations and of some internal production by the networks does not change the antitrust issues. That NBC owns some stations and has affiliation agreements with others adds nothing to a complaint that NBC is not paying enough to the independent television producers. Ford Motor Company sells its automobiles to the public through a system of franchised dealers, most of whom purchase exclusively from Ford. But a supplier of steel to Ford could not on that account complain under the antitrust laws that Ford was not paying him a high enough price to keep him in business. There is simply no right under the antitrust laws to demand a "reasonable" price from a supplier; the buyer's distribution system is irrelevant. This case involving the market for programs would be no

different if NBC owned all of its affiliated stations. NBC might be stronger as a buyer of television programs, but it would still not have a monopoly position in the relevant market--the market in which it competes with ABC and CBS in the purchase of programs--and its contracts with its suppliers would still not be reviewable by an antitrust court for adequacy of consideration.

Equally irrelevant is the fact that NBC produces some of the entertainment programming shown on its network (though less than 5 percent of it). One can imagine an antitrust case whose gravamen was that NBC had a monopoly in one market (program distribution) which it was using to take over a related market (program production). But that is not this case. Not only is the premise (monopoly in one market) false, but NBC's small market share as a producer refutes any suggestion that it has been seeking to take over the production of all of its own programs. Moreover, even if NBC produced all of its own programming, its market share as a producer would be no higher than its current market share as a buyer. Since it is not claimed that ABC and CBS could be compelled to buy their programs from NBC, its market share as a producer cannot be more than approximately one-third. But, if NBC cannot produce more than one-third of the total

programs, it cannot be deemed a monopolist of production any more than it can be deemed a monopoly buyer. Presumably the complaint is that NBC is trying to depress the profitability of the independent producer industry in order to increase its own network profits, and not in order to increase its own market share in the production of network programming.

NBC's affiliation agreements and its internal production are red herrings in this case. The Government here is challenging the terms on which NBC buys television programs. The Government claims these terms are too hard, impose undue hardships on the independent producers and have impaired the vigor of competition among them. These allegations are irrelevant to the antitrust claims. NBC has very good commercial reasons for wanting to have a large number of suppliers vigorously competing for NBC's business, but NBC has no duty under the antitrust laws to pay a supplier a price that will keep him in business. Relatively inefficient suppliers when faced with competition from other producers offering similar products at lower prices may indeed be driven out of business. But that is the result of competition and not the suppression of competition. The antitrust laws were enacted for "the protection of competition, not competitors". Brown Shoe Co. v. United States, 370

is

U.S. 294, 320 (1962).

My point is not that the government's case against NBC has legal infirmities; that would not be decisive on the question whether this Court should enter a consent decree. My point is rather that the case is so devoid of even a colorable claim of an antitrust violation that a decree based on the theory of the complaint cannot be deemed "in the public interest", even if the defendant, for whatever private reasons it may have, is inclined to accept the decree rather than litigate. The Antitrust Penalties and Procedure Act requires this Court to make an independent judgment whether the proposed decree is in the public interest To be in the public interest under the Act a decree must be, at the very least, reasonably related to the policy of the antitrust laws. The proposed decree, even if it could somehow be purged of the anticompetitive features discussed at the outset, would not be reasonably related to the policy of those laws.

[SEAL: Gladys Fuller, Notary Public, Cook County, Ill]

Richard A. Posner
Richard A. Posner

Sworn to before me this 23rd day of February 1977.

Gladys Fuller
Notary Public

Exhibit 1
to the Affidavit of
Richard A. Posner

February 1977
University of Chicago Law School
1111 East 60th Street
Chicago, Illinois 60637

Richard A. Posner

CURRICULUM VITAE

Education:	A.B., Yale College, 1959, summa cum laude; LLB., Harvard Law School, 1962, magna cum laude and Fay Diploma (first in class); President, Harvard Law Review
Occupation:	Law Clerk to Mr. Justice William J. Brennan, Jr, U.S. Supreme Court (1962-1963)
	Assistant to Commissioner Philip Elman, Federal Trade Commission (1963-1965)
	Assistant to the Solicitor General of the United States (1965-1967)
	General Counsel, President's Task Force on Communications Policy (1967-1968)
	Assistant Professor of Law, Stanford Law School (1968-1969)
	Professor of Law, University of Chicago Law School (since 1969)
Other Activities:	Senior Research Associate, National Bureau of Economic Research (1971-1976)
	Senior Research Staff, National Bureau of Economic Research (since 1976)
	Editor, Journal of Legal Studies (since 1972)
	Member, President's Task Force on Competition and Productivity (1969); American Bar Association's Commission to Study the FTC (1969)

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APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 77-53
43947

In the Matter of	)	
	)	
Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest	)	DOCKET NO. 21049 (RM-2749)

NOTICE OF INQUIRY

Adopted: January 14, 1977 Released: January 14, 1977

By the Commission: Commissioners Lee and Hooks concurring in the result; Commissioner Fogarty issuing a separate statement.

1. Notice is hereby given of the institution of an inquiry into commercial television network practices and policies regarding the acquisition and distribution of television programming. Almost two decades have elapsed since the Commission completed its last overall study of network practices.1/ Developments in recent years suggest that a new inquiry is warranted.

2. This inquiry will encompass a number of subjects surrounding the matter of alleged dominance of the nation's commercial television industry by the three major commercial networks, but will focus most specifically on the relationship between these networks and their affiliated stations. In this regard, the Commission has consistently emphasized that it is the individual licensee who has the right and the responsibility to program his station:

> ...the Commission in administering the Act and the Courts in interpreting it, have consistently maintained that responsibility for the selection and presentation of broadcast material

1/ Between 1955 and 1957, a special network study staff conducted a broad-ranging inquiry into network practices. This study resulted in the release of the "Barrow Report." Network Broadcasting, H. Rep. No. 1297, 85th Cong., 2nd Sess. (1958). (Hereinafter cited as the "Barrow Report.")

ultimately devolves upon the individual station licensee and that fulfillment of such responsibility requires the free exercise of his independent judgment

En Banc Programming Policy Report, 20 R.R 1901, 1911 (1960) It is clear, furthermore, that this responsibility for the independent exercise of programming judgment cannot be delegated to a network or to any other entity or individual.2/ Accordingly, we propose to carefully examine whether particular network practices may improperly compromise or restrict the programming discretion of the broadcast station licensee.

3. In giving proper consideration to this question, it is not possible to limit our inquiry simply to an examination of the contractual relations which exist directly between a network and its affiliated stations. The networks play a central role in our commercial television industry and their activities have a direct bearing on the entire market relating to the production and distribution of television entertainment programming Station discretion can be meaningfully and effectively exercised only in circumstances where this market is in a healthy, competitive state and is in a position to offer alternative sources of programming. For this reason, our inquiry will encompass the question of whether the networks have maintained anticompetitive policies which unduly restrict the development of other programming sources

Preliminary Observations

4 This study is prompted, in part, by a rulemaking petition brought before us by Westinghouse Broadcasting Company, Inc. (RM-2749) and by allegations contained in antitrust complaints which the Department of Justice filed

2/ As also stated in the Programming Policy Report (20 R R 1901, 1914), the broadcaster is obligated to provide programming to meet the needs and interests of his local community and this "is a duty personal to the licensee and may not be avoided by delegation of responsibility to others." See also Broadcast Licensees and Public Agreement, 57 FCC 2d 42, 49-51 (1975)

against the networks in the Central District of California.3/ The Westinghouse petition called for a "comprehensive inquiry and rulemaking proceeding to review the changing role and function of the three national television networks." Westinghouse Petition in RM-2749, September 3, 1976, p. 1. The Justice Department filed comments in support of this petition but, in a supplemental letter, emphasized that its comments "should not be construed as suggesting that the inquiry encompass those issues now being litigated in the Federal District Court in California," and that neither this letter nor the Department's formal comments were intended "to preclude either the Commission or the Department of Justice from taking any action consistent with its respective responsibilities " Letter from the Honorable Donald I. Baker, Assistant Attorney General, Antitrust Division, December 3, 1976, pp. 1 and 2.

5. We would like to make it clear that, in instituting the present inquiry, we have neither the power nor the desire to foreclose the Department in its antitrust action While it is inevitable that thorough inquiry into network practices will encompass many of the questions raised in the antitrust suit, we do not believe that our inquiry should in any way preclude the Department from prosecuting its case or from arranging an appropriate settlement. See United States v. Radio Corporation of America, 358 U.S. 334 (1958). In concurrently examining similar issues, the Department of Justice has a direct responsibility for the enforcement of the Sherman Act, whereas the Commission's inquiry will focus on public interest questions affecting communications policy pursuant to our responsibilities under the Communications Act of 1934. In this connection, we note that in mid-November 1976 a proposed consent decree was agreed to by the Department and by NBC in one of the three antitrust actions mentioned (Case No 74-3601 - RJK), and is now pending before the Federal District Judge handling the case. See 41 Fed. Reg 51991 (November 24, 1976). This is discussed below, in connection with the general subject of network-producer relationships.

3/ United States v. American Broadcasting Companies, Inc , Civil Action No 74-3600 - RJK (C.D. Cal.); United States v. CBS Inc., Civil Action No 74-3599 - RJK (C.D. Cal.); United States v. National Broadcasting Company, Inc., Civil Action No. 74-3601 - RJK (C.D. Cal.).

6. In the discussion of specific topics below, there is extensive reference to allegations raised in the Westinghouse petition, statements in response to that petition filed by public interest groups and other parties, the Department of Justice antitrust complaints, and the proposed NBC consent decree. The networks vigorously oppose most of these allegations, as to their relevance and materiality and in some cases their accuracy. They also advance counter-arguments, both in respects mentioned below and otherwise. We have carefully considered the networks' positions, just as we have carefully noted assertions made by Westinghouse, the Department of Justice, and public interest groups. Given the networks' highly important role in the commercial television industry, allegations regarding abuses of power, and the lapse of 20 years since the last overall network study and investigation, we believe that this Inquiry is appropriate at the present time. This is true not only in connection with consideration of possible Commission regulation by rule or adjudication, but also in connection with possible legislative recommendations to Congress. The Commission hastens to point out, however, that we have not reached any conclusions, even of a tentative nature, regarding those issues discussed below. What we contemplate at this time is solely a fact gathering inquiry designed to provide the Commission with information necessary to a thorough understanding of television networking.

7. The Commission is, of course, cognizant of the vital contributions which the networks have made to the development of the television medium. As pointed out in the 1960 Program Policy Statement, supra, (20 R.R. 1914):

> The programs provided first by "chains" of stations and then by networks has always been recognized by this Commission as of great value to the station licensee in providing a well-rounded community service. The importance of network programs need not be reemphasized as they have constituted an integral part of the well-rounded program service provided by the broadcast business in most communities.

While it is certainly not our intention to adopt any regulatory measures which would impair the ability of the networks to serve the public interest, we must assure ourselves that the networks are not engaging in practices which might unduly encroach on the discretion of our licensees, or unnecessarily restrict the development of new sources of television programming.

8. As a matter of convenience, this Notice has been divided into three sections: (1) background on the role of the networks; (2) questions concerning the relationship between networks and their affiliated stations; and (3) questions concerning the relationships between the networks and program producers and suppliers. It is obvious, of course, that the categories of questions concerning network-affiliate relations and network-program supplier relations are far from being mutually exclusive. Developments in one area can and generally do impact on the other. Nevertheless, we believe that this division of questions will be useful for the purposes of discussion and inquiry. Commenting parties should be careful, however, to keep in mind the fact that to a very large extent these categories are inextricably intertwined. The fact that we are studying various particular aspects of commercial television broadcasting does not mean that these are viewed as problem areas. It simply means that information pertaining to these activities is indispensable to a thorough understanding of network practices. In this regard, our inquiry addresses the identification of problems, not the consideration of possible remedies for any abuses that may be identified.

Background: The Role of the Networks

9. Ever since the demise of the Dumont Network in the mid-1950's, there have been only three "national" television networks: the American Broadcasting Companies, Inc. (ABC), Columbia Broadcasting System, Inc. (CBS) and National Broadcasting Company, Inc. (NBC). Recent years have witnessed the development of a number of specialized networks offering sports or movies, but the pre-eminent position of the three national networks remains unchallenged. Their affiliates number well over 75% of all U.S. commercial television stations (approximately 600 out of slightly more than 700) and, outside the major markets, network affiliation is virtually indispensable to successful station operations.4/ As discussed below, it appears that about sixty percent of the broadcast programs currently presented by affiliates are supplied directly by their network. In addition to their ability to reach nearly all American households through their affiliated stations, all three networks own VHF stations in each of the nation's three largest television markets (New York, Los Angeles and Chicago), and two in other major markets (ABC, Detroit and San Francisco, the 6th and 7th markets; CBS, Philadelphia and St. Louis, the 4th and 12th markets; and NBC, Cleveland and Washington, the 8th and 9th markets). Each of these 5-station "owned and operated" (O and O) groups reaches about 22 percent of the

4/ There are only ten commercial independent stations (in the conterminous U.S.) outside the top 50 markets.

U.S. audience.5/ The networks are actively involved as brokers or middlemen connecting the program producers and national advertisers with local stations and their viewers. It is, therefore, not surprising that the networks play a very important role in the development, selection, and distribution of television programming.

10. This role, with respect to program development and selection, has not remained unchanged. Twenty years ago, more than half of the programs carried by the networks were either produced or purchased by major advertisers who acquired the necessary amount of network time to broadcast their programs Today, for a variety of economic reasons, virtually all regularly scheduled network programs are either obtained by the networks directly from an independent producer or produced by themselves. With this development, the ability to determine what types of television programming will be made available to the American public has largely shifted from the advertising community to the networks.

11 This change is largely attributable to increases in the costs of producing programming as well as the costs of network advertising time. Between 1960 and 1976, the average cost of a single half-hour episode of a new prime-time program increased by about 237 percent from nearly $49,000 to approximately $165,000.6/ Network program expenditures reflected this trend, rising from $376,948,000 in 1960 to $1,273,241,000 in 1975, an increase of 238 percent. The average cost of a thirty-second network tv advertising spot rose by 153 percent during the same period. Cost increases have also been accompanied by a general recognition that shorter commercial messages are, for the most part, more cost effective than longer tv advertisements. That is, a 20 or 30-second spot, in many instances, is thought to be as nearly effective as a 60-second spot besides being less expensive. Given these developments, it is not

5/ In terms of "ADI households" (households located in the market stations' "area of dominant influence") the figure was 22.82% for ABC, 22.76% for CBS and 21.91% for NBC. See Broadcasting Yearbook 1976) p. B-80, American Research Bureau (ARB) estimates for 1975-76.

6/ The average cost of a prime time network episode was obtained from Arthur D. Little, Television Program Production, Procurement, Distribution and Scheduling, (April 21, 1969) p. 41. Production costs are based on individual program production fees published in Variety, September 15, 1976, pp. 50-54.

surprising that advertisers have become increasingly inclined to spread their commercials over a larger number of programs. Consequently, they no longer produce their own regularly scheduled programming but, rather, purchase a number of commercial spots which are usually placed in a variety of programs. While this development has shifted almost exclusive control over the development and selection of programs to the networks, it has also permitted more businesses, particularly smaller ones, to use television as an advertising medium:

12. Network control over access to the medium has also coincided with rather extraordinary increases in profits. Between 1960 and 1975, total combined network expenditures rose from $461 million to $1,465 million, for an average annual increase of 13.6 percent. Total net broadcast revenues, on the other hand, increased more rapidly; from $495 million in 1960 to $1,673 million in 1975, which was equivalent to an average annual increase of 15 percent. Net income (total combined profits before taxes) earned by the networks has risen at an annual rate of 32 percent; increasing from $33.6 million in 1960 to $208 million in 1975. According to the Internal Revenue Service, pre-tax profits accruing to all businesses in the United States increased at an average annual rate of approximately 12 percent between 1960 and 1974 7/

13. Westinghouse alleges that increases in network profits have partially resulted from expanded program schedules and relative reductions in station compensation payments. It is stated that between 1960 and 1976 the networks increased the length of their program schedules from 434 to 516 half-hours, or by 19 percent.8/ It is further argued that these

7/ According to the Statistics Division of the Internal Revenue Service, net income earned by proprietorships, partnerships and corporations increased from $79,809 million in 1960 to $225,120 million in 1974 Statistics are not available for 1975

8/ "Clearance" of network programs by affiliate stations is usually very high; ABC shows it as 95% or more for prime time and Monday-Friday daytime programming (though less in other parts of the week).

increases occurred at the expense of local station time which has declined by 25 percent since 1960. Additionally, Westinghouse maintains that network programming currently occupies up to two-thirds of the available time on affiliated stations. The networks, it is claimed, have also reduced the proportion of their total revenues devoted to station compensation which, of course, has also enhanced their profits. Westinghouse further maintains that between 1964 and 1975, station payments as a percent of network revenues declined from 23.1 to 13.4 percent. Similarly, it is contended that station compensation payments as a percent of station receipts decreased from 19.8 to 10.7 percent during the same period. It is suggested that these and related developments have adversely affected the ability of affiliated stations to meet their public service responsibilities.

14. When the allegations of Westinghouse and other parties are considered against this background of significant change in the commercial television industry, it appears that an inquiry is warranted. In order to protect the interest of the public in receiving the best possible programming service, the Commission must take a careful look at the question of whether the networks may have engaged in conduct which hampers the independent judgment of the affiliated station, and which restricts effective competition in the programming market.

Network-Affiliate Relations

15. In the paragraphs which follow, we will briefly discuss three areas of network-affiliate relationships which appear to be particularly pertinent in connection with this inquiry, and as to which comments are specifically invited, although, of course, parties may wish to discuss others. These are: (1) clearance of network programming and the expansion of network program schedules, (2) previewing of network programming by affiliated stations, and (3) the relationship between station compensation plans and the independence of affiliate stations. While we are confident that larger licensees will supply comments, we particularly urge affiliates in smaller markets and independent stations to provide us with their views. With respect to each of these matters, we would hope that commenting parties will support their arguments, as completely as is possible, with relevant statistics and other factual information. This will facilitate our assessment of the merits of these arguments as well as assist the staff in its fact-finding efforts.

16. Clearance of Network Programs and the Expansion of Network Schedules. Westinghouse has estimated that, in 1960, network schedules filled only about one-half of the total hours broadcast by affiliate stations, but that today network programs occupy approximately two thirds of these hours. It is argued that this increase has caused a corresponding decrease in the opportunities for independent programming decisions by station licensees. Implicit in this argument is an assumption that affiliated stations really do not wish to clear additional network programming, but that circumstances compel them to accept these programs anyway. In response to these claims, the networks argue that the overall figures on network program expansion are misleading and that regardless of the amount of increase, affiliates have supported and benefited from the additional programs.9/ We specifically invite comments on the extent to which such clearances are other than voluntary and the nature of any contractual provisions or other economic relationships which might serve to undermine the independent judgment of the station licensee.10/

17. In addition, we seek comments on the likelihood of further expansion of network schedules and whether this would impact on the financial performance of local stations as well as their ability to serve the interests

9/ It is further argued that these increases are largely attributable to ABC which accounted for more than half of the overall expansion of combined network schedules since 1960. Moreover, the networks maintain that the expansion was part of a "long process of building ABC into a fully competitive network." CBS and NBC, on the other hand, only expanded their schedules by 9 and 5 percent, respectively. Furthermore, the new network material has largely been late night, early morning (cleared, ABC and CBS note, by only about 80 percent of their affiliates) and weekend sports programming which has meant increased station compensation and/or made possible station broadcasts at times when the affiliates were previously off the air.

10/ Westinghouse has also suggested that the lack of joint efforts by affiliates in dealing with their network with respect to program clearances and other matters may have impeded their ability to serve the public. Some parties may wish to comment on the need for, legality, and propriety of such joint efforts.

of the local community.11/ We invite additional comments regarding any relationships between the length of network schedules, and the supply and demand for syndicated programming, particularly first-run material, available to affiliated and independent stations. With regard to the latter questions, we have noted various reports indicating that the networks, at some time in the near future, may increase the total amount of available commercial minutes per hour in prime time. We ask for comments on whether this would significantly impede the development of additional networks, specialized networks, and other syndicated program offerings in competition with network programming.

18. Previewing of Network Programs by Affiliate Stations. Westinghouse has also alleged that the networks do not afford affiliated stations a reasonable opportunity to review network programming before it is shown to local audiences, thereby making it difficult for station licensees to exercise independent judgment concerning the suitability of particular episodes for their communities. With regard to this issue, it is suggested that audiences will become confused or angered if a program is cancelled after it has been promoted over-the-air or has been published as part of an announced program listing. Westinghouse contends that prescreening opportunities are commonly delayed until after this promotional material has been provided to the public. Network comments in response to the Westinghouse petition contain extensive descriptions of present (in the case of NBC, recently amended) procedures for informing affiliates in advance of network program content, procedures which the networks claim are "adequate."12/ We invite comments on

11/ With regard to this specific question, Westinghouse has estimated that an expansion of network news to one hour would cost affiliate stations a total of $75 million annually and would increase total network income (including O and O's) to 50 percent of all industry income.

12/ All three networks provide affiliates with written materials summarizing future programs. Policies on allowing actual previews of programs are: ABC - up to 15 hours per week (9 on the average), including all programs which carry a parental guidance advisory; CBS - no hour per week figures, but provides programs of particular interest "virtually on a daily basis" and theatrical movies approximately 4 weeks in advance where practical; NBC - up to 20 hours per week (series episodes, theatrical and made-for-television movies, specials), programs with parental guidance advisories and any available program requested by an affiliate. (Continued.)

the nature and adequacy of the information which is presently provided to affiliates concerning up-coming programs, and the extent to which improvements may be needed so as to allow the effective exercise of licensee discretion. We also invite comments on the cost and inconvenience which may be associated with the provision of additional, or more timely, program information. Finally, we encourage comments regarding the extent to which affiliates currently prescreen network programs as well as their willingness to make use of additional prescreening opportunities if made available.

19. Station Compensation Plans Traditionally, the networks have paid their affiliated stations for clearing network programming, or more precisely, for clearing the network commericals which are associated with that programming. While the methods used to determine these payments are rather complicated, they are directly related to the size of a station's audience and constitute an important ingredient contributing to the financial health of affiliated stations While the Commission is not concerned with the earnings of stations per se, we do become interested when financial arrangements detract from the ability of these stations to live up to their responsibilities as public trustees. In 1963, for example, we found that a proposed CBS compensation plan would discourage affiliates from rejecting network programs which they believed to be unsatisfactory or contrary to the public interest. CBS Network Compensation Plan, 24 R.R 520a; 1 RR 2d 696 (1963). In this instance, the Commission stated that:

> Any graduated payment plan wherein the average hourly rate of compensation varies greatly with or is heavily influenced by the number of hours

11/ (Continued.) ABC and NBC both refer to their program standards departments as one way of insuring that programs are "acceptable" to affiliates (although Westinghouse points out that licensees must determine acceptability based on local, not national standards). Other network policies in this area include showing pilot programs to affiliates at annual meetings and during the preceding season and permitting affiliates to invite newspaper television critics to previews. Finally, it is said that there are practical problems in providing affiliates with programs 4 weeks in advance, as Westinghouse requests - production schedules and editing, MPAA classifications and dealing with the creative community.

taken and which as a practical matter, requires an affiliate to take the majority of its programs from the same network without regard to the merits of the programming offered, is barred by our rules.

Id. at 698.13/ We invite comments on the extent to which the networks' present compensation plans are consistent with this principle. These contracts variously call for affiliates to carry up to an equivalent of 24 hours of prime time programming per month without compensation or for dollar discounts which amount in substance to roughly the same thing. We are specifically interested in the effect these provisions have on the independent discretion of our licensees and on the ability of syndicators and other program suppliers to compete with the networks by dealing directly with affiliated stations.14/ We are further interested in (1) whether and to what extent uncompensated prime time represents a justifiable means of sharing the overhead expenses associated with network program procurement and (2) the extent to which the average amount of compensation for each half hour of network programming cleared by a station varies depending on the total amount of network programming cleared by that station.

20. In its petition, Westinghouse states that between 1964 and 1975 the net income of the networks increased by 246%, whereas compensation payments to stations increased only 20%. It is argued that, by virtue of their powerful economic position, the networks have been able to limit compensation payments and thus realize a rather dramatic increase in their profits. This argument suggests that the advantages of networking, as opposed to syndication, are very substantial. That is, in the absence of anti-competitive practices, artificially depressed levels of station compensation would be expected to provide a fertile opportunity for entry by non-network program sources. We are most interested in comments on the question of whether the

13/ Aside from this concept, network control over a station's network rate has the potential for use by the network to influence the station's clearance decisions and also the level of its national spot advertising rates. See American Broadcasting Company, 17 R.R. 458, 462-463; Columbia Broadcasting System, Inc., 17 R.R. 447, 449; National Broadcasting Company, Inc., 17 R.R. 449, 452-453 (all 1958).

14/ A brief discussion of this issue may be found in the "Barrow Report," supra, pp. 463-66.

economic picture painted by Westinghouse is complete and accurate and, if so, what factors exist which discourage vigorous competitive activities by syndicators or the creation of a "fourth network." Comments are also invited on the effects which various changes in compensation plans might have on the health and viability of networking and the ability of the networks to contribute to programming in the public interest. We would encourage comments, particularly from our licensees, regarding relationships between compensation payments and expenditures to serve local programming needs (including locally produced material) as well as their ability to compete effectively with networks for national spot advertising. With regard to the latter two questions, it is alleged that relative decreases in compensation have forced stations to increase prices for national spots, while at the same time, permitting the networks to reduce commercial rates charged to national advertisers. This, according to Westinghouse, has afforded the networks a substantial competitive advantage which has adversely impacted on station revenues and on the quantity and quality of local service. Finally, parties are free to comment on any other aspect of network compensation plans or contractual relations which may be inconsistent with legitimate public interest objectives. We stress again, however, our unwillingness to become involved in the amount of station compensation per se (i.e., without reference to practices which are anti-competitive or contrary to the public interest).

Network-Program Supplier Relations

21. Our discussion of the relationships between the networks and program producers and suppliers is divided into the following six categories: (1) network interests in syndicated programs produced by independent suppliers, (2) network produced entertainment programming, (3) contractual tying agreements relating to production facilities and program options, (4) exclusive exhibition rights to new programs, (5) exhibition rights to network reruns, and (6) relations between network owned and operated stations and program suppliers. Once again, parties are free to comment on other matters which may be relevant to this Inquiry. All parties are urged, however, to make every effort to support their arguments with factual information.

22. Network Interests in Syndicated Programs Produced by Independent Suppliers. The proposed NBC consent decree contains terms prohibiting NBC from acquiring distribution rights or profit shares in programs produced by outside producers, and from engaging in syndication of such programs anywhere, and from all syndication in the U.S. These

particular terms appear virtually identical to rules adopted by the Commission in 1970 (§73.658(j)), prohibiting such activities, including the acquisition of any interest in a program produced by an outside party beyond the right to network exhibition. We invite interested parties to comment on the adquacy of our present rules and to propose alternatives if that appears to be warranted. Parties may wish to comment, particularly, on programs such as the current Dinah program--created originally by CBS, produced for its 5 owned and operated stations by an outside entity, and syndicated nationally by a different company but often, according to Westinghouse, carried by CBS-affiliated stations. Westinghouse and NAITPD claim that this violates the spirit if not the letter of the 1970 rules, particularly in light of Dinah Shore's other contractual relations with CBS.15/

23. Network "In-House" Production of Entertainment Programs. Although most network entertainment programs are acquired from outside producers, a small number have been and are produced entirely by the networks themselves. This was one subject of the Department of Justice's antitrust action. The Department's position (as set forth in its competitive impact statement filed with the NBC consent decree) is that, just as with programs produced by others but in which the network acquires subsidiary rights, there arises a network predisposition to use such material regardless of its merit, and independent producers are thus unduly excluded from the network program market. Other parties have alleged that the unlimited network potential for producing their own entertainment programs can be used to obtain first-run programming at unreasonably low prices. While we are not concerned with the profits of program producers as such, we are interested in the question of whether this factor gives the networks an anti-competitive advantage over potential competitors, and whether the advantage works to limit the supply of independently produced programs. Parties addressing the possibility of Commission regulation in this area should attempt to assess the possible effects of such restrictions on: (1) network programming

15/ Westinghouse also mentions the fact that the program is produced by CBS facilities (see para. 25, below). While not mentioned by Westinghouse, other pertinent factors in this connection could be: (1) the proportion of guests on the show which are CBS "talent"; and (2) whether or not CBS advanced financing for the program.

schedules, as to quality and type of programming; (2) prices paid for network exhibition rights; and (3) the cost and supply of syndicated programming available to local stations.

24. Contractual Tying Agreements Relating to Production Facilities and Program Options. Independent production companies have periodically maintained that the networks agree to purchase a particular program on the condition that the producer grant the networks other rights or interests which are not incidental to network exhibition of that program. These interests, it is said, sometimes include a commitment to use network-owned production facilities to produce the program. We suggest that commenting parties address themselves to the question of whether such arrangements to the extent that they exist, may affect competition in the offering of program production facilities. We are further interested in obtaining information regarding the following questions: (1) what proportion of all network programs are produced using network owned facilities or that of other networks, (2) how does the cost of leasing these facilities compare with the cost of leasing facilities owned by others, (3) what percentage of total production costs is attributable to the cost of leasing facilities, and (4) does that percentage vary by type of program?

25. It is also alleged that the networks commonly demand options on exhibition rights for as much as five to seven years following the development of a script or program pilot, thereby precluding competition in bidding for the rights to a program which develops into a highly successful series. We invite comments on the effects which such practices could have on competition, and, more specifically, on the supply of programs available to local stations through the syndication market, and also on the extent to which these clauses may limit the life expectancy of a first-run series Comment is also invited on (1) the extent to which extended options may be necessary to cover a network's heavy expenses in developing and promoting program series, (2) whether the terms and conditions of options differ for various types of programs, (3) their impact on the profitability of an investment by a producer in independently produced entertainment series, (4) the relationship between program options and the life expectancy of a new series and the subsequent availability of that series in the syndication

markets and (5) the extent to which changes in program options would or could affect station compensation payments.

26. Exclusive Exhibition Rights for Program Pilots. In a given year, the networks typically purchase exhibition rights to a far greater number of new programs than they can possibly use. In large measure, such purchases are necessary to enable the network to select an attractive line-up of programs and to replace those which generate relatively small audiences. Nevertheless, we believe that it is appropriate to seek comments on whether some present practices unduly restrict the release of a significant number of pilots for further development and thereby limit the amount of first-run material available for syndication, and whether this programming might, in some instances, provide viable competition to network offerings. More specifically we invite comments regarding (1) the extent to which networks have eventually used programs which were initially rejected for regularly scheduled distribution; (2) the amount of elapsed time between initial rejection and eventual acceptance of these programs during the past 10 television seasons; and (3) any differences in the duration of exclusive rights to new series which depend on the type of program (e g. prime-time series as opposed to day-time, situation comedy as opposed to drama etc.). Finally, parties are invited to comment on whether these rights influence the diversity of network schedules or the availability of first-run syndicated programs.

27. Exhibition Rights to Network Reruns. The Department of Justice has raised a question as to whether limitations should be placed on the ability of networks to secure exclusive rights to rebroadcast episodes originally shown in a previous television season. Specifically, the consent decree contains a provision that negotiations for exhibition rights to repeats, originally broadcast in a preceding season, must be separated from negotiations for rights to first-run exhibition. We invite comments regarding the need for such restrictions and their effect on (1) the cost of repeats to the network and local stations, (2) network use of repeats in day-time, prime-time and fringe hours, (3) investment opportunities in new first-run network and syndicated programming and (4) the demand for new as well as repeated syndicated material available to local stations. Parties are invited to comment on any other aspect of this issue which warrants our attention. It is not our wish to reopen here the issues regarding same-year repeat episodes which were dealt with in the Commission's inquiry concerning the networks' use of reruns in prime-time entertainment programming (Docket No. 20203, 37 RR 2d 1435).

28. The Relations Between Network Owned and Operated Stations and Program Suppliers. The networks also participate in the programming market as station owners. It has been alleged by Westinghouse that certain practices used by the networks in acquisition of programming for the owned and operated stations have adversely influenced the quantity and quality of syndication offerings. It would be helpful to the Commission to know the extent of block buying of programming for each network owned station group (i.e., the purchase of the same programs for exhibition on all of the stations in that group.) The Commission is also interested in whether any relationship exists between the purchase of first-run programs for O and O exhibition and the leasing of network owned facilities for the production of those programs. Comments are invited on whether a "network deal" in the form of a contract for exhibition on an O and O group is a prerequisite for the success of a first-run program sold in the syndication market. Parties are also free to address other issues concerning the impact which network practices with respect to owned and operated stations may have on the programming market and, in particular, the impact which such practices might have on the successful syndication of programming in direct competition with network offerings. While this inquiry concerns the business practices of the networks as they may impact on industry competition, and while attention, thus, must be paid to network practices with respect to the O and O's, we wish to make it clear that this is not a multiple or "group" ownership proceeding.

29. The Nature of this Proceeding Comments and other information filed in connection with this inquiry will be evaluated by a special staff composed of economists, attorneys, and others with relevant experience and expertise. This staff will be under the direct supervision of the full Commission.16/ The staff's analysis of the comments and reply comments may be followed by the issuance of questionnaires or inquiries designed to provide a complete factual record. If at any point it appears that these procedures are inadequate, the special staff will be authorized to initiate compulsory processes under Section 403 of the Act. It is hoped that a report concluding this inquiry can be completed within one year following receipt of the comments.

16/ The special staff which conducted the 1955-57 inquiry was under the supervision of a committee of four Commissioners. In the present instance, however, we see no need for the establishment of such a committee.

30. IT IS ORDERED, that the petition for inquiry, rule making and immediate temporary relief, filed September 3, 1976, by Westinghouse Broadcasting Company, Inc IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

31. Authority for the institution of this proceeding is contained in Sections 4(i), 303(g), (i) and (r) and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set out in Section 1.430 of the Commission's Rules, interested persons may file comments on or before May 2, 1977 and reply comments on or before June 1, 1977. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken herewith. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice. We recognize that some parties may wish to file comments which include confidential financial information or other material which they may be reluctant to make public In a manner consistent with the Freedom of Information Act (5 U.S.C §552) we will consider requests for confidential treatment made under §0.459 of our Rules As set forth in that section such requests may be made in advance

32. In accordance with the provisions of §1.419 of the Rules, an original and 5 copies of all comments, replies pleadings, briefs, and other documents shall be furnished the Commission Material filed will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D C

FEDERAL COMMUNICATIONS COMMISSION*

Vincent J Mullins
Secretary

*See attached Separate Statement of Commissioner Joseph R Fogarty

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest

While I agree fully with the Commission's decision to undertake this Inquiry into network programming practices and policies, I wish to state my understanding of one particularly important aspect of the Notice we announce today.

At paragraph 28 of this Notice, we request comment on the relations between network owned and operated stations (O&O's) and program suppliers, noting certain allegations which have been raised regarding possible adverse effects of these relations on the quantity and quality of syndicated programming. The Commission also notes, however, that "this is not a multiple or 'group' ownership proceeding " While I agree that this aspect of our Inquiry should not be considered a "multiple ownership" proceeding per se, I do not read this advisement as precluding the examination of any issues as to multiple ownership as it may affect the programming market Nor do I view this statement as precluding future Commission consideration of appropriate action to remedy any abuses which this Inquiry may disclose

APPENDIX D

DEPARTMENT OF JUSTICE
WASHINGTON, D.C 20530

December 3, 1976

HONORABLE RICHARD E WILEY
Chairman
Federal Communications Commission
1919 M Street, N W
Washington, D C

Re: Westinghouse Broadcasting Company, Inc
Petition for Inquiry, Rule Making and Immediate
Temporary Relief. FCC File No RM-2749

DEAR CHAIRMAN WILEY:

It appears that the Comments we filed in the above captioned proceeding may have raised questions concerning the relationship between the Comments and currently pending litigation between the United States and the three major television networks (*United States* v. *CBS Inc*, *United States* v *American Broadcasting Companies, Inc.*, *United States* v. *National Broadcasting Company, Inc.*, Civil Action Nos 74-3599, 74-3600, and 74-3601-RJK)

While we continue to believe that a general inquiry by the Commission into network practices is appropriate and fully warranted at this time, we wish to emphasize that the Department's Comments should not be construed as suggesting that the inquiry encompass those issues now being litigated in the Federal District Court in California.

Further, this letter and the Comments are, of course, in no way intended to preclude either the Commission or the Department of Justice from taking any action consistent with its respective responsibilities. *United States* v. *Radio Corp of America*, 358 U.S 331 (1959). We ask that a copy of this letter be associated with and made a part of the public record in this proceeding.

Sincerely yours,

DONALD I. BAKER
Assistant Attorney General
Antitrust Division

Copies to:
All Commissioners
American Broadcasting Companies, Inc.
CBS Inc.
National Broadcasting Co, Inc.
Citizens Communications Center
Westinghouse Broadcasting Co., Inc.

APPENDIX E

Overlap Between FCC Actions and Provisions of the Proposed Decree

Proposed Decree Provisions	FCC			
	Adopted Similar Relief	Adopted Different Relief	Currently Under Consideration	Note
Syndication (IV)	X		X	1
Financial interest (IV)	X		X	1
Production (V, VI(D))		X	X	2
Production facilities (VI(B), (C))			X	3
Contract options (VI(E)(i))			X	4
Exclusivity-program series (VI(E)(ii))		X	X	5
Exclusivity-feature films (VI(E)(iii))		X	X	6
Pilots (VI(F))	X		X	7
Spin-offs (VI(G))			X	8
Reruns (VI(H))			X	9

Notes

1 Network syndication and network acquisition of financial interests were considered in the FCC's Report and Order, Docket No 12782, 23 F.C C.2d 382 (1970) ("Program Practices Rulemaking"), and regulations were adopted that are similar to Section IV of the proposed decree. Those matters are being considered again in the FCC's recent Notice of Inquiry, Docket No 21049 (Jan 14, 1977) ("Network Practices Inquiry")

2. Network program production was considered in the FCC's Program Practices Rulemaking However, the FCC declined to adopt a 50% limitation when it adopted instead the prime-time access rule. Report and Order, Docket No 12782, 23 F C.C.2d 382, 384 (1970) Network production is being considered again in the Network Practices Inquiry.

3 The terms on which network facilities for program production are made available to third parties are being considered in the Network Practices Inquiry.

4 Option provisions in contracts between networks and independent program suppliers are being considered in the Network Practices Inquiry

5. The extent to which a network may obtain the exclusive use of program series was considered in the FCC's Second Report and Order, Docket No 19554, 35 R R. 2d 767 (1975) ("Pay Cable Rulemaking(II)"), and regulations were adopted, governing the use by cable and subscription television of program series, that are different from Section V(E)(ii) of the proposed decree. The matter is under consideration again in the Network Practices Inquiry and in the FCC's Notice of Inquiry, Docket No 20402, 52 F. C. C. 2d 87 (1975) ("Broadcasting—Cable Inquiry").

6. The length of time which a network may obtain the exclusive use of a feature film was considered in the FCC's First Report and Order, Docket Nos. 18893 and 19554, 52 F.C.C.2d 1 (1975) ("Pay Cable Rulemaking (I)"), and regulations were adopted that are different from Section V(E)(iii) of the proposed decree. The matter is under consideration again in the Network Practices Inquiry and in the Broadcasting—Cable Inquiry.

7. The length of time during which a network may have the exclusive right to order a series based on a pilot produced for that network pursuant to a step deal was considered in the FCC's Program Practices Rulemaking, and regulations were adopted that are similar to Section VI(F) of the proposed decree. 49 C. F. R. § 73.658(j) (ii). The matter is again under consideration in the Network Practices Inquiry.

8. Spin offs from series exhibited on networks were considered in the Pay Cable Rulemaking (II). 35 R. R. 2d 767, 770 (1975). That matter is again under consideration in the Network Practices Inquiry.

9. The rerun rights a network may acquire with respect to original network series programming are under consideration in the Network Practices Inquiry.

APPENDIX F

Movie Blues

Film Exhibitors Face a Financial Crisis As Hollywood Studios Slash Production

By EARL C GOTTSCHALK JR
Staff Reporter of THE WALL STREET JOURNAL

HOLLYWOOD—To the growing list of shortages, add another: a dearth of movies

The studio dream factories have slashed their output to a comparative trickle, because mounting costs and competition from television continue to make movie production less lucrative But theater owners, citing economic considerations of their own, have been expanding the number of movie screens

And so the exhibitors are reeling Faced with fewer films when they need more, they are in the midst of a financial crisis Some marquees have already gone dark, and many more theaters are struggling to stay open

"The shortage is driving me right out of business," says Tom Patterson, owner of the Jonesboro (Ga) Twin Theaters near Atlanta, which since last summer have been playing mainly reruns and some relatively obscure nature and horror films. During the Christmas season, normally the biggest moviegoing period all year, all Mr Patterson could offer were a nature film and a terror flick almost nobody had heard of After a week of tiny audiences, his theaters reverted to showing "Jaws" and "Bad News Bears," both for a third run

At least Mr Patterson is still operating The Walter Reade Organization, a national theater chain, has been forced to close seven of its 29 movie houses and it also has been forced into federal bankruptcy court Sheldon Gurseberg, the Walter Reade president, says, "We had other financial problems, but if we had had a good flow of movies we could have avoided bankruptcy"

Production Is Falling

But a good flow of movies is impossible with Hollywood's tight fist on the faucet During 1976, the first year for which the National Association of Theater Owners has figures, 272 movies (including 40 revivals) were released in the U S , a record low and down from 386 five years earlier During Hollywood's heyday, the so-called Golden Age of the Forties, the studios produced some 400 movies a year (The figures don't include recently available pornographic films to which more theaters are turning)

Figures on 1976 releases aren't available yet, but theater owners say the figures are certain to show a further decline And still fewer movies are being projected for this year Daily Variety, an entertainment industry newspaper, reports that only 10 major studio movies have been set for first quarter production this year, down from 16 in the same period last year (And some of these productions may be imperiled by a Writers Guild strike expected March 1 upon expiration of a contract)

The producers of course say they haven't any choice but to make fewer movies Costs are soaring, increasing the production risks and movie audiences aren't growing very much. The Motion Picture Association, an industry group, says that the average cost of making a movie has risen more than 60% during the last four years to $7 million; and advertising and distribution costs can run $4 million on a $5 million movie The number of tickets sold, while well above the depressed levels of the Sixties, is still only a fraction of the sales level before the television era An estimated 1 63 billion movie tickets were sold in 1975 compared with more than four billion a year in the forties

On top of all that, movie production is being hit further by a recent federal tax change that wiped out a key tax shelter used by individuals who financed movies The change will result in reduced investments and thus fewer movies, industry officials say

Hollywood's production slump is compounded by the theater owners' expansion The number of movie houses has risen in recent years to about 16,000 from a low of 12 652 in 1952. That's still below the 1948 level of about 18 620 but the addition of multiple screens at many theaters means there are perhaps 20 000 screens today

The theater owners say that they're adding screens (and making each theater smaller) to reduce the risks in booking a flop "If you have one theater with 1 600 seats and have a film that's not doing well you're in trouble" says Marvin Goldman, president of the National Association of Theater Owners If you have six 150 seat theaters, you might have three or four winners and two or three losers You're better off " This assumes of course you have more movies to show

But Samuel Z Arkoff, chairman of American International Pictures Inc, a production company, says "The theater owners are their own worst enemies We can't possibly produce enough movies to cover all these new screens"

Limited Copies

Indeed, the producers claim it wouldn't be profitable even to increase the number of prints of each movie Although a record 2 500 prints of the latest version of "King Kong" were planned, movie makers normally hold down production to fewer than 1 000 prints The producers say they limit the number of prints mainly to hold down costs

Such realities are hitting the theaters even harder They are facing the toughest rental terms in history from film distributors Robert Selig, an executive of Pacific Theaters a 150-house West Coast chain, says that distributors a decade ago typically got 40% of the gross on a major picture; now they often demand—and get—90%, plus a whopping guaranteed minimum gross

Pacific Theaters says it was offered Paramount Pictures' "King Kong" on such tough terms that it had to turn it down "Other chains may be able to make a profit on those terms, but we couldn't," Mr Selig says. Pacific Theaters was hard pressed last year to find enough first run movies We scrounged and researched every piece of film ever made to put something on the screen," an official says

Independent theaters complain that relatively well heeled chains get first crack at all the good movies I had to wait eight months after 'Jaws' was released to get it, and eight months for 'The Exorcist' too" says Mr Patterson the Jonesboro Georgia owner 'About the time it's dead they turn it over to us'

Feast or Famine

The theater owners also complain bitterly that movie companies dump most of their output on the market for the Fourth of July and Christmas periods, exacerbating the shortage during the rest of the year During one slack period last year new releases were so scarce that many theaters around the country closed for periods of three weeks to two months until the Christmas releases arrived.

"This is the first time in history that so many large, economically successful theaters close because there were no movies," says Joseph Allerman, executive director of the National Association of Theater Owners, who says he doesn't know exactly how many theaters shut But at least three big theaters in New York City were affected

Whether the theater owners can overcome their difficulties isn't clear Lately, spokesmen at conventions of exhibitors have pleaded for an end to theater expansion But nobody knows yet if the pleading has had any effect.

Meanwhile, the owners say they're struggling to stay in business, often by exhibiting movies that don't deserve to be shown Reports Sy Evans, an official of General Cinema Corp , the world's largest theater chain, commenting on the quality of many of last year's movies "Thank God we sell popcorn and candy too"

1964 was 0 10, the present value of 0 193 C may be calculated as follows:

$$[(0\ 193\ C)/4]\int_0^4 e^{-rt}dt = 0\ 04825C[(1-e^{-0\ 4})/0\ 10] = 0\ 159\ C$$

A long, tortuous route has brought us to an estimate of the value of syndication profits which is nearly 16 percent of the price of a new episode of a program series to the networks

How sensitive are these estimates to the assumptions made along the way? For instance, if the Little data were taken literally, the estimate of the present value of syndication profits would fall to 11.6 percent of new program costs If all other assumptions were to be retained, an increase in the assumed cost of capital to 15 percent would lower present value from 0 159 to 0 145 C An assumed growth rate of syndication profits of 20 percent would raise the estimate to 16 6 percent Only the denial of the assumptions in the Little Report's calculations of industry profits seems of great importance, but this denial seems warranted even though our adjustment is certainly a rough one

The final accounting estimate of the value of all syndication interests—16 percent of new program costs to the networks—is well within the confidence interval of our econometric estimate of 19 percent (Table 2) It would therefore appear that networks have paid an amount equal to the discounted present value of the distribution rights and profit shares which they have obtained The Prime Time Rule has not saved the program suppliers from the rapacious tendencies of network buyers; it has simply required the suppliers to assume more risk or to sell these syndication interests to other buyers

7 An extension of the results

If we extend the theoretical model developed earlier in this paper, we may utilize the regression results along with further empirical analysis to make a rough estimate of the degree of monopoly monopsony power possessed by the networks

For instance, suppose that (1) is appropriately represented by (1'):

$$A_1 = \frac{f\left(\sum_{j=1}^{M} t_{1j}\right)}{F\left(\sum_{n=1}^{3}\sum_{j=1}^{M} t_{nj}\right)} \quad \begin{matrix} \partial A_1/\partial t_{1j} > 0 \\ \partial A_1/\partial t_{nj} < 0 \\ n \neq 1 \end{matrix} \qquad (1')$$

If we assume further that $f'(\ ) = F(\ )$, then:

$$\frac{\partial A_1}{\partial t_{1j}}\frac{t_{1j}}{A_1} = \frac{f_j(\ )t_{1j}}{f(\ )}\left[1-\frac{f(\ )}{F(\ )}\right] \qquad (10)$$

where $f_j(\ )t_{1j}/f(\ )$ is the elasticity of the network's own audience with respect to its own investment in the jth input If we call this elasticity μ_j we may insert (10) into (4) to obtain

$$\left|\frac{\eta-1}{\eta}\right| P_A A_1 \sum_{j=1}^{M} k_j\ \mu_j\left[1-\frac{f(\ )}{F(\ )}\right] = \sum_{j=1}^{M} P_j t_{1j} \qquad (11)$$

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NOTICES

At Cournot equilibrium, $1 - f(\ )/F(\ )$ becomes $1 - 1/N$, where N is the number of rival networks If we assume further that all $k_j = k$, we may write the expression for Cournot equilibrium as

$$k\left[\frac{\eta - 1}{\eta}\right]\left[\frac{N-1}{N}\right]\left[\sum_{j=1}^{M} \mu_j\right][P_A A_1] = \sum_{j=1}^{M} p_j t_{1j} \qquad (12)$$

For talent inputs alone, this relationship simply states that above-the line expenditures are equal to the product of the audience expected from the program and the sum of the elasticities of audience with respect to each input multiplied by three terms which reflect the intensity of competition among networks for audience, advertising revenue, and performers In our regression results of the previous section, the estimate of a_2 is

$$a_2 = k\left[\frac{\eta - 1}{\eta}\right]\left[\frac{N-1}{N}\right]\left[\sum_{j=1}^{K} \mu_j\right] \approx 0\ 10$$

If we could determine the value of the sum of the elasticities, $\sum_{j=1}^{K} \mu_j$, we would be able to estimate the value of $k[\eta - 1/\eta]$ for $N = 3$, the number of networks throughout our sample period

Unfortunately, we do not have precise data on the distribution of above-the-line and below the line costs for our U S. sample, but the foreign noncommercial data do permit us to attempt to estimate $\sum_{j=1}^{K} \mu_j$ These foreign data contain observations on above the-line costs, payments to performing artists, and audience for 54 light entertainment and drama series The light entertainment series—mostly filmed comedy or light drama and music-variety programs—are likely to be chosen to provide the maximum audience per unit cost, but the drama series may well be chosen to satisfy the tastes of a sizeable minority despite the costs involved in their production. For this reason, empirical investigation into cost audience relationships are likely to be useful only for the light-entertainment series.

In order to obtain a measure of $\sum_{j=1}^{K} \mu_j$ from the noncommercial program experience, we estimate two forms of simple regressions of audience upon costs—one which is linear and one which is log linear.[36] The independent variables are either artists' costs or

[36] The regression of audience upon either component of costs provides us with a direct estimate of the effect of talent inputs upon audience The linear regression gives us a slope coefficient equal to $\sum_{j=1}^{K}(\partial A/\partial t_j)$ and the log-linear regression yields slope coefficients equal to $\sum_{j=1}^{K} \mu_j$. This result may be proved quite simply If audience is denoted A and total factor payments of the appropriate category are denoted $\sum_{j=1}^{K} p_j t_j$ and K we assume that $A = \beta\left[\sum_{j=1}^{K} p_j t_j\right]^{\mu}$, $\partial A/\partial t_j = (\beta\mu p_j)\left(\sum_{j=1}^{K} p_j t_j\right)^{\mu-1}$ and $(\partial A/\partial t_j)(t_j/A) = \beta\mu p_j t_j\left(\sum_{j=1}^{K} p_j t_j\right)^{\mu-1}$ Summing over all K inputs gives $\sum_{j=1}^{K}(\partial A/\partial t_j)(t_j/A) = \beta\mu\left(\sum_{j=1}^{K} p_j t_j\right)^{\mu-1}$ But $\sum_{j=1}^{K} \mu_j = \sum_{j=1}^{K}(\partial A/\partial t_j)(t_j/A)$; therefore, $\sum_{j=1}^{K} \mu_j = \beta\mu$.

Response to Comments Submitted by CBS Inc.

CBS directs its comments to two general propositions. First, it argues that the entry of the proposed NBC Judgment is not in the public interest because the activities attacked in the three network complaints are not cognizable under the antitrust laws and in any event are protected by the First Amendment; and, second, it asserts that the Competitive Impact Statement ("CIS") fails to satisfy the requirements of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S C. §16(b)-(h) (1976) For the reasons stated below, both of these contentions are, we believe, without merit

I Entry of this Judgment is in the Public Interest Since it Satisfactorily Settles an Antitrust Case, Does Not Conflict with any Past or Anticipated FCC Regulatory Action and Does Not Offend the First Amendment.

CBS seeks to paint the proposed Judgment as anticompetitive 1/, but as the Competitive Impact Statement demonstrates,

1/ Under the guise of filing comments on the NBC Judgment, CBS apparently seeks to resurrect for reargument and reconsideration every motion it has made and lost during the pendency of its own case In that connection, on February 9, 1977, the Court denied CBS's Summary Judgment Motion, finding that the existence of genuine issues of material fact, the complex nature of the litigation, and the controlling issues of motive, intent and reasonableness of the challenged agreements made summary judgment inappropriate. Further, on February 16, 1977, the Court ruled that the FCC did not have exclusive jurisdiction over the subject matter

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its provisions are pro-competitive and they provide satisfactory and expeditious relief Moreover, the Judgment's entry is not precluded either by past or anticipated actions of the FCC or by the First Amendment. In sum, when measured against the appropriate antitrust public interest standard, this Judgment is in the public interest

A. The Procedure and the Standard of Review Established Under the Antitrust Procedures and Penalties Act.

Pursuant to the APPA, the Court must find that entry of a proposed Judgment is in the public interest [15 U S.C §16(e)]. While such a requirement is not new [United States v. Carter Products, 211 F Supp. 144, 147-48 (S D N.Y 1962)], the procedure for arriving at such a finding has been altered dramatically under the Act

The APPA sets forth explicit requirements which must be satisfied by the Department of Justice before the Court can enter a judgment The Act requires that notice be given to the public, and a Competitive Impact Statement ["CIS"] be filed with the Court and published in the Federal Register [15 U:S.C §16(b)], that the public have a period of at least 60 days from publication within which to file comments to the proposed Judgment, and that the comments and the

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1/ continued
of the three network cases, and denied CBS's motion to dismiss. United States v. CBS Inc., 1977 Trade Cas. ¶61,327 (C.D. Cal. 1977).

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Government responses thereto be filed with the Court and published in the Federal Register. [15 U.S.C. §16(d)].

Once this procedure has been completed, the Court has broad discretion in deciding what further to consider. The APPA suggests that the Court consider the matters addressed in the CIS, including the competitive impact of the judgment, the provisions for enforcement or modification, the alternatives considered, and the impact on the public generally [15 U.S.C. §16(e)(1) and (2)].

While there is broad discretion in the Court in deciding what issues to consider and what steps to take to insure a complete ventilation of the consent process, the cases in which the public interest standard has been considered and the legislative history both strongly suggest that the standard to be met in determining whether entry is in the public interest, is whether the Judgment is consistent with the allegations of the complaint and the enforcement of the antitrust laws. United States v. Associated Milk Producers, Inc., 394 F.Supp. 29 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, U.S. , 97 S.Ct. 355 (1976); United States v. Gillette Co., 406 F.Supp. 713 (D. Mass. 1975); United States v. Morgan Drive Away, Inc., 1976-1 Trade Cas. §60,949 (D.D.C. 1976); see United States v. Carter Products, Inc., 211 F.Supp. 144, 148 (S.D.N.Y. 1962). This determination must include a recognition that antitrust consent settlements are an appropriate and beneficial enforcement tool, that compromise may be involved, and that the Attorney General has broad discretion as to the terms of such settlements.

In United States v Associated Milk Producers, Inc., supra, the District Court entered a consent decree after finding the Government's resolution of dissolution or divestiture relief to be "well within the discretionary power of the Attorney General under existing law." [394 F.Supp. at 45]. The Eighth Circuit, in affirming, noted:

> It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. [534 F.2d at 117].

In United States v. Gillette Co., supra, the Court, in approving a consent decree, explained:

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest. Basically I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass. [406 F.Supp. at 716].

In United States v. Morgan Drive Away, Inc., supra, the Court also imposed a limited standard of review in determining whether entry of the decree was in the public interest. Judge Flannery stated that:

> The result of the bargaining toward settlement should not be measured against what concessions the Government might have succeeded in exacting from the defendants had it bargained somewhat harder, or even against the probable outcome had the case gone to trial. [1976-1 Trade Cas. at p. 69,191]

The Court went on to rule, after considering comments in opposition, that the comments "have not undermined the conclusion of the United States that the proposed Judgment is in the public interest . ." [1976-1 Trade Cas at p. 69,191].

These decisions are consistent with the Congressional intent that consent decrees must remain a viable enforcement option. Such an option would not long remain viable were it necessary for a Court to conduct a de novo determination of the factual issues relevant to the adequacy of the proposed decree 2/ In fact, the Senate Report advises that, "[o]nly where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so." [S. Rep. No. 298, 93d Cong., 1st Sess. 1, 6 (1973)]. 3/

Moreover, Congressional intent is clear that the applicable public interest standard is one of judicial construction based on the antitrust laws and antitrust precedents. The

2/ The Senate Report states:

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand, the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible . . . .
>
> [S. Rep. No. 298, 93d Cong. 1st Sess 6 (1973)]

3/ The competitive impact statement required by the APPA is similar to the environmental impact statement required by the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S C. §4321, [119 Cong. Rec. 24599 (1973)] NEPA, like the APPA, does not call for a de novo review of governmental action. Upper W. Fork River Watershed Ass'n. v. Corps of Engineers, 414 F.Supp. 908, 915 (N.D. W.Va. 1976) Cf. Camp v. Pitts, 411 U.S 138 (1973) Further, the Court is neither empowered to substitute its own judgment for that of the Government, Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F 2d 289, 300 (8th Cir. 1972), nor required to make findings of ultimate fact or resolve conflicts between the economic theory and data relied on by the Government and that presented by those objecting to the Government's action. Environmental Defense Fund, Inc. v. Froehlke, 368 F.Supp. 231, 240-41 (W.D. Mo. 1973), aff'd sub nom Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir 1974).

original bill included a provision 4/ which stated that the entry of a consent decree must be found to be "in the public interest as defined by law." The phrase "as defined by law" was deleted from the bill according to the House Report,

> . . .as a recognition that the content of the phrase, "public interest," is a product of judicial construction in the context of particular statutes . . . and to provide illumination and consistency in the usage of the phrase, the "public interest" . . . . Preservation of antitrust precedent rather than innovation in the usage of the phrase, "public interest," is, therefore, unambiguous. 5/

Thus, based upon the Act itself, upon the interpretive Court decisions to date, and upon the Congressional intent as expressed in the legislative history, the Court must decide, after taking into consideration all evidence in support of the proposed Judgment and all opposition to it, whether the Government made a clear error in judgment or abused its discretion. If, based upon that review, the Court finds that the entry of the decree would be consistent with the allegations of the Complaint and the enforcement of the antitrust laws, then the Court should enter this Judgment in order to provide expeditious relief by eliminating anti-

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4/ In Section 2(c).

5/ H.R. Rep. No. 1463, 93d. Cong., 2d Sess. 1, 11 (1974).

competitive restraints. See United States v. Carter Products, Inc., 211 F.Supp. at 148.

B. The Judgment Provides Satisfactory and Expeditious Relief from the Violations Alleged in the Complaint.

The proposed Judgment addresses the antitrust violations alleged in the NBC complaint and seeks to provide procompetitive relief from those violations. 6/ CBS has challenged

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6/ The CIS states:

> The Complaint alleges that NBC used its control over access to the broadcasting time of the NBC Television Network during prime evening hours for the following purposes: to exclude from network broadcast those entertainment programs in which NBC had no financial interest; to compel independent program suppliers to grant to NBC financial interests in television programs which it accepted for broadcast; to refuse to sell air time to advertisers and other independent program suppliers seeking to have their own programs shown on the NBC network; to control the prices paid by NBC for television exhibition rights to motion picture feature films; and to obtain competitive advantages over other producers and distributors of television entertainment programs and of motion picture feature films. [CIS at 2]

The Judgment addresses those issues: (1) by limiting for a period of 10 years, the amount of television entertainment programming that NBC may produce for use on its own network;

the entry of the proposed decree as anticompetitive, basing its contention on the proposition that the antitrust laws do not apply to the activities alleged in the complaint. [CBS Comments at 4-17]. However, the Court already rejected the contention that the antitrust laws do not apply to such network activities when it denied defendants' Motions for Summary Judgment. 7/ Further, the Government believes that the relief provided in the Judgment would be procompetitive

CBS first argues that the program production limitation of Section V is anticompetitive, since it would to some

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6/ continued

(2) by prohibiting NBC from conditioning access to its television network upon an independent program supplier's grant of any other right or interest to NBC, including its agreement to use NBC's production facilities; (3) by limiting for periods of 10 or 15 years the contractual rights which NBC may obtain in connection with network exhibition of a program, including limitations on NBC's right to exclusive use of a program; (4) by enjoining NBC from obtaining any right or interest in television entertainment programs produced by others, except for the right to network exhibition; (5) by enjoining NBC from engaging in domestic syndication of any television entertainment programs, and from engaging in foreign distribution of programs other than those produced abroad or by NBC; and (6) by prohibiting reciprocal program production arrangements between NBC and either CBS or ABC.

7/ See p. 1 at n 1, supra.

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extent eliminate NBC as a potential competitor in the program production market. [CBS Comments at 6-7]. 8/ The limited ban, however, is procompetitive, not anticompetitive, because it would eliminate the possibility that NBC could substantially increase its internal production of network programs, thereby excluding independent program suppliers with which it competes. While it prevents NBC from supplying more than 2-1/2 hours during prime time, plus 2 specials every six months, it at the same time insures that the remaining prime time is open to all potential program producers to compete with each other in supplying programs to NBC. 9/ CBS's position mistakenly assumes that each network has an unquestioned right to require that all the entertainment programming

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8/ Plaintiff originally sought a complete ban on production by NBC, and will continue to press for this relief against CBS and ABC. Relief against NBC's internal production was limited in order to put a lid on such production without the necessity of a full trial.

9/ CBS's reliance on United States v. Penn-Olin Chemical Co., 378 U S. 158 (1964), for the proposition that NBC is important as a potential entrant to the oligopolistic entertainment program production market, is misplaced. The problem being addressed in these cases is the illegal conversion of each network's power in broadcast distribution and exhibition into monopsonistic buying power in the television program procurement market.

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broadcast by its nationwide chain of affiliated television stations be produced by it. 10/

A limitation on total integration, in the face of an abuse of market power or a restraint of trade, is a recognized remedy under the antitrust laws. Thus, in the movie cases, the Supreme Court upheld a Judgment which prohibited the defendants from engaging in all phases of the movie industry:

10/ CBS asserts, in effect, that it not only has a legal right to produce all the prime time entertainment programming shown on its network, but that it can condition access to its network on program suppliers' agreement to grant subsidiary rights and interests in programs, can refuse to sell air time to advertisers or others who might provide their own programs, and can extract long term options and exclusivity from program suppliers, all without scrutiny under the antitrust laws. This argument goes well beyond a possible, plausible objection to entry of this Judgment. For, under the antitrust laws,

> . . .the existence of power 'to exclude competition when it is desired to do so' is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power [citation omitted]. It is indeed 'unreasonable, per se, to foreclose competitors from any substantial market.' International Salt Co. v. United States, 332 U.S. 392, 396. [United States v. Griffith, 334 U.S. 100, 107 (1948)].

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production, distribution and exhibition. United States v. Paramount Pictures, Inc., 334 U.S. 131, 170-175 (1948). Here, NBC is currently in the production, distribution and exhibition of television programs; the production limitation would prohibit it from using the combined power of its affiliated group of television stations to totally engross television entertainment program production unto itself.

The production limitation is also important because it would curtail NBC's ability to favor internally produced programs over independently produced programs in which it had no rights and interests. In sum, in conjunction with the prohibitions of Sections IV and VI of the proposed Judgment, the production cap would severely inhibit NBC's ability to use its control over access to its nationwide chain of stations to restrain trade.

CBS also asserts that the "restrictions on the terms of trade" found in Section VI are anticompetitive [CBS Comments at 13-17]. 11/ The gist of CBS's argument is that each network should be permitted to continue to exact, as its price for considering an entertainment program (including feature films), the producer's agreement not to permit its use by any other network, station or communications medium. 12/

11/ It specifically criticizes Sections VI(E)(i) and (ii) and VI(H).

12/ Another element of CBS's argument against these restrictions is that the networks will offer decreased license fees for programming because they can no longer

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In short, CBS wants to continue to eliminate any possible competition for any possible use of an entertainment program, and the proposed Judgment would put some limits on this practice. 13/ All of the contract provisions affected by

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12/ continued
acquire various residual rights and protection from competition, and as a result, will force out small independent producers without ample resources This, CBS asserts, would result in higher concentration in the program production industry. [CBS Comments at pp. 13-16]

While this theory is open to question on several grounds, the basic difficulty with it is that it involves sheer speculation as to whether or not NBC will offer decreased license fees, a dubious premise since such fees are presently below the cost of production for many programs Moreover, CBS itself contradicts this hypothesis when it states that entry of the decree would be anticompetitive because it allegedly would "restrict the supply of programming and drive up program prices." [CBS Pleading in Intervention, dated April 20, 1977, par. 4, at p. 2] CBS's observations on the decree's effects on programming price levels appear to differ depending upon which provision CBS is attacking

13/ The antitrust laws are as much violated by the prevention of competition as by its destruction United States v Aluminum Co. of America, 148 F 2d 416, 428-429 (2d Cir 1945). Thus, acquisition of syndication and other distribution rights and profit shares, often before the development

this Judgment involve restraints on competition, be that competition during the first "prime time" run, or competition for the use of repeat rights or syndication rights. Restraints such as NBC's exclusivity against domestic syndication or stripping, prevent local stations and the other networks from competing for the right to broadcast the program until after NBC has milked every possible bit of revenue from it This exclusivity provision also allows the network, if it so chooses, to strip reruns of the program on its own network at a different time without any fear that the supplier can seek a better price or better terms from any other broadcaster. The proposed Judgment seeks to increase the chance that a program supplier could exploit the after market uses of his product much earlier than is currently possible, and would permit other networks and television stations to compete with NBC for rights to do so. This is hardly anticompetitive

Antitrust relief often involves the imposition of limitations on the contractual abilities of a defendant who

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13/ continued
of a program has passed the idea stage, prevents competition for those rights by other syndication or merchandising companies. Long term renewal options on the program prevents competition for successful programs among the networks or from first run syndication on a station by station basis. The current contracts of all three networks also prevent the supplier from stripping or syndicating older episodes of a series for the entire life of the series on the network

has violated the Sherman Act. 14/ It is not a valid ground for objection that the particular contractual terms subjected to injunctive provisions may be legal in themselves. 15/ Indeed, a court may affirmatively "interfere" in the bargaining process by requiring mandatory selling or leasing on reasonable terms, and even by setting reasonable rental charges, if such measures are necessary to reestablish competitive market conditions. 16/

Since the relief in an antitrust case must be structured to effectively redress violations and restore competition,

14/ For example, the consent decree entered in United States v. Swift & Co., No. 37623 (D.C. Sup. Ct., Feb. 27, 1920), a case in which several large meatpacker defendants were accused of unduly extending their market power into other related lines of commerce, enjoined the defendants from inter alia (1) engaging in the business of manufacturing, selling or transporting any of over a hundred commodities, (2) using or permitting others to use their distribution facilities for the handling of any of those commodities, (3) selling meat at retail, (4) holding any interest in any public cold storage plant and (5) selling fresh milk or cream.

15/ See International Salt Co. v. United States, 332 U.S. 392, 400 (1947). Cf. American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

16/ See United States v. Glaxo Group Ltd., 410 U.S. 52, 64 (1973); United States v. United States Gypsum Co., 340 U.S. 76, 94 (1950); In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 235-236 (9th Cir. 1976).

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"the District Court is clothed with 'large discretion' to fit the decree to the special needs of the individual case" 17/, and it is clear that in these cases, the networks' power to coerce restrictive contract provisions cannot remain unbridled.

C. The Entry of this Judgment is not and should not be Precluded by Past or Anticipated Actions of the Federal Communications Commission.

Despite the fact that the FCC itself has made clear that its actions should not "in any way preclude the Department from prosecuting its case or from arranging an appropriate settlement" 18/, CBS has dusted off its well-worn and oft rejected argument that the FCC's actions can and should do just that [CBS Comments at 17-18]. In particular, CBS contends that because the proposed consent Judgment does not adjudicate the illegality under the antitrust laws of NBC's

17/ Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972), citing International Salt Co. v. United States, 332 U.S. at 401; United States v. DuPont & Co., 353 U.S. 586, 608 (1957); United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944). See United States v. Glaxo Group, Ltd., supra, at 64.

18/ Notice of Inquiry, In the Matter of Commercial Television Network Practice and the Ability of Station Licensees to Serve the Public Interest, Docket No. 21049, January 14, 1977 ("Notice of Inquiry"), at Par. 5, 42 Fed. Reg. 4992. See also the FCC Memorandum to the Court in this litigation, January 11, 1973.

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past conduct, this litigation should not be settled, but should instead be referred to the FCC for some uncertain resolution at some undetermined date. While a consent Judgment does not, by definition, adjudicate any issue of law, this Judgment's provisions are fashioned so as to prevent the continuation of conduct which the Complaint charged was anticompetitive. The cases against CBS and ABC are proceeding to trial because the Court has repeatedly determined that it has jurisdiction to fashion relief against their alleged antitrust violations It would be strange indeed if, because NBC has agreed to settle its own litigation, that fact and the nature of the relief achieved could deprive the Court of its jurisdiction in this action.

CBS further argues that entry of the provisions of the decree would duplicate, overlap and collide with the FCC regulatory scheme. [CBS Comments at 18]. Yet, no examples of actual collision between the decree and the regulatory scheme of the FCC are cited Rather, CBS, as does ABC, attempts to conjure up numerous possible problems with the FCC's new Notice of Inquiry However, the FCC, which is perfectly capable of speaking for itself, has, as already noted, commented only that its announced inquiry should not be used to "foreclose" the Department of Justice in its antitrust action, or to preclude the Department from arranging "an appropriate settlement." 19/

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19/ Notice of Inquiry, Par. 5, 42 Fed. Reg. at 4992.

CBS also alleges that this Judgment is inconsistent with the FCC rules [CBS Comments at 21-22], but cites Section IV which is completely consistent with and supportive of the FCC's financial interest and syndication rules. [47 C.F.R §73 658(j)(i)-(ii)]. CBS further contends that Section IV is inconsistent with the FCC's authority because it is not limited in time [CBS Comments at 24-25], but neither are the corresponding FCC rules so limited. If the FCC, after its Notice of Inquiry, were to propose changes in its rules, and if the changes were enacted on a full record, the Court retains jurisdiction in Section XII to consider any appropriate modification of the Judgment, if that were desirable under antitrust standards.

Finally, CBS's contention that the continued production of entertainment programming by the networks was specifically approved by the FCC, is without merit. [CBS Comments, at 25-26] The FCC did consider a ban on a network's offering any network supplied program to its affiliates during 50% of prime time, and did so because it was concerned with "continuing dominance by network corporations of the television program production and procurement process." 20/ Thereafter, the FCC concluded

20/ The Notice of Proposed Rulemaking, Docket 12782, 45 F C.C. 2146, 2162 (1965), states:

> Strict adherence to the principle of free competition would perhaps suggest the total elimination of network corporations from production and financial and proprietary control of tele-

that network program production should be limited. 21/ This is precisely what Section V of the proposed Judgment would

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20/ continued

vision programming. However, the record of the Program Inquiry and our general knowledge of the situation as it currently exists in network television leads us to the view that the public interest in a nationwide television structure sustained by network program service would not be furthered by eliminating network corporations entirely from the program production and procurement process. We are persuaded that, in order reasonably to insure the quantity and quality of television programming necessary to maintain adequate community service, network corporations should be permitted to engage to a substantial but limited degree in program production, procurement and financing. On the other hand, it is our tentative view that to permit continuing dominance by network corporations of the television program production and procurement processes as disclosed by the record of our Inquiry not only would injure the public interest in a competitive national television structure but also would act as a stricture on the "larger and more effective" use of television channels in the public interest.

21/ The FCC considered prohibiting each network from producing, procuring or financing entertainment programs

accomplish. Significantly, the FCC has not objected to the proposed production limitation of Section V, but merely sought comment on that provision among others in its recently instituted inquiry into commercial television network practices. 22/

D. Retention of Jurisdiction by the Court is Standard Practice in Antitrust Cases and Should Not Preclude Entry of the Proposed Judgment.

CBS asserts that entry of this Judgment is not in the public interest because the Court would have to maintain continuous supervision of it. [CBS Comments at 20-21]. Of course, all antitrust judgments provide that the Court retains jurisdiction over the subject matter thereof, and

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21/ continued

during 50% of all prime time hours. Ultimately, in 1970, the FCC prohibited each network from originating any entertainment program during one hour of prime time, prohibited network acquisition of subsidiary interests or profit shares and prohibited each network from engaging in domestic syndication of television programming. These prohibitions are commonly referred to as the Prime Time Access, Financial Interest and Syndication Rules, 47 C.F.R. §73.658(j) (1975). [Report and Order, Docket No. 12782, 23 F.C.C. 2d 382, 384 (1970), aff'd sub nom. Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 482 (2d Cir. 1971)].

22/ See Notice of Inquiry, par. 23, 42 Fed. Reg. at 4995.

this case is no exception. The Court, once it recognizes its jurisdictional duty, has no other choice. If Courts refused to consider or enter judgments in antitrust cases simply because to do so might be burdensome, few antitrust cases would be successfully concluded. In any event, the provisions of this Judgment will not prove to be unduly burdensome to the Court. Many of its provisions are limited to terms of 15 years or less 23/, for the express purpose of not burdening the Court with matters which may prove to be temporal. Only Sections IV(A), IV(B), VI(A) and VI(B), which embody general antitrust principles, have no time limitations. However, none of the Judgment provisions call for the type of Court supervision that evolved in United States v. Paramount, 1948-49 Trade Cas. ¶62,377 (S.D.N.Y. 1949), or in United States v. ASCAP, 1940-43 Trade Cas. ¶56,104 (S.D.N.Y. 1941).

An examination of the Paramount and ASCAP decrees quickly reveals features which substantially distinguish them from this proposed Judgment. The RKO decree 24/, for example, enjoined defendant:

> From acquiring a beneficial interest in any theatre, other than those named [in the decree] unless the acquiring defendant shall show to the satisfaction of the court and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures (emphasis added). [1948-49 Trade Cas. at 62,886]. 25/

The ASCAP decree calls for extensive judicial review of proposed license fees to be paid applicants. 26/ Section IX provides, in part:

> If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee . . . . [1950-51 Trade Cas. at 63,754].

These two provisions, which resulted in much of the post-Judgment litigation under those decrees, have no counterpart in the NBC Judgment Here, the Court would not be required to pass on each and every transaction, or indeed any transaction, engaged in by NBC This substantial distinguishing difference

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23/ Sections V, VI(C), VI(D), VI(E), VI(F) and VI(G) are all effective only for fifteen years or less.

24/ United States v. Paramount Pictures, 1948-49 Trade Cas. ¶62,335 (S.D.N.Y. 1948). (The RKO decree is one of the Paramount decrees.)

25/ Also see United States v Paramount Pictures, 1948-49 Trade Cas ¶62,377 (S.D.N Y 1949) (the Paramount Decree). Paragraph III A.6(a)(iii-iv) and (b) are to similar effect as the RKO decree

26/ United States v. ASCAP, supra, as amended United States v ASCAP, 1950-51 Trade Cas. ¶62,595 (1950)

between the judgments cited by CBS and the proposed NBC Judgment demonstrates that the extensive Court oversight envisaged by CBS is a myth.

E. The Proposed Judgment Does Not Violate NBC's First Amendment Right to Free Speech.

Curiously, CBS argues that the Judgment would violate NBC's constitutional right to free speech. [CBS Comments at 30-34]. CBS, however, has no standing to object to an alleged violation of NBC's First Amendment rights. The Courts have long held that persons may not raise or adjudicate the constitutional rights of third parties who have not asserted those rights in their own behalf. Tileston v. Ullman, 318 U.S. 44, 46 (1942); Warth v. Seldin, 422 U.S. 490, 509-510 (1975); Paton v. LaPrade, 524 F.2d 862, 874 (3d Cir. 1975). In any event, there is no First Amendment issue in this proceeding.

CBS argues that this Judgment would infringe First Amendment rights because, as a broadcaster, a network is immune from prosecution under the Sherman Act. However, the First Amendment affords no antitrust immunity for businesses such as newspaper publishing or broadcasting. In Associated Press v. United States, 326 U.S. 1 (1945), the Court denied outright Associated Press' argument for immunity. Justice Black, writing for the Court, stated:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity. [326 U.S. at 20].

In addition, the Supreme Court similarly denied a claim for unlimited immunity by a broadcaster in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), where the Court stated that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [395 U.S. at 388]. See Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101-103 (1973). Unfortunately, NBC's network cannot be used by all who would desire to do so. National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 226 (1943). Certainly, it cannot be used by NBC to restrain or monopolize a substantial part of trade and commerce.

Further, in the case of United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the Supreme Court, overriding a similar First Amendment challenge, held that in the face of a restraint of trade, it was proper to prohibit movie distributors from integration into the related business of exhibition. [334 U.S. at 170-175]. Subsequently, the District Court ordered that the theatre circuits of each defendant be divested from their production and distribution

arms. [85 F.Supp. 881, 895-896 (S.D.N.Y. 1949)]. While not totally precluding such integration, the proposed Judgment in this case seeks to insure that there will be no abuse flowing from NBC's limited production of programs and that total engrossment of its entertainment program production by NBC cannot occur.

CBS raised the same First Amendment claim when the FCC imposed the prime time access rule which prohibited each network's affiliates in the top fifty markets from accepting network originated programming for an hour period each night. It said this constituted an absolute ban on network "speech." The Second Circuit expressly considered and rejected CBS's claimed infringement, stating:

> The unique structure of the broadcast media requires a determination as to who will have priority in the exercise of First Amendment rights when there is a potential conflict in the operation of the industry. The Supreme Court has ruled that the public's right to access must prevail over all other claims. . . . [Mt. Mansfield Television, Inc. v. FCC, 442 F 2d 470, 477 (2d Cir. 1971)].

Plaintiff can conceive of no more serious restriction on free speech than acceptance of CBS's argument that it, NBC and ABC should be permitted to produce all of the television programming broadcast on their respective networks, totally foreclosing all independent program suppliers from their

nationwide chains of affiliated stations. This Judgment, rather than infringing on constitutional rights, seeks to insure that no such infringement is possible.

II. The Competitive Impact Statement Satisfactorily Complies With the Requirements of the Antitrust Procedures and Penalties Act.

CBS seeks to bolster its opposition to entry of the Judgment by alleging that the CIS does not satisfy the requirements of the APPA [CBS Comments at 34-46]. Upon analysis, however, CBS's entire argument is the same as that raised in an earlier portion of its comments; that is, that entry of the Judgment would be anticompetitive because no valid antitrust claim is asserted by the complaints. [CBS Comments at 4-17, 40-44]. However, the Government has alleged serious violations of the antitrust laws, and this Judgment seeks to neutralize those violations. That CBS does not presently concede the validity of the Government's claims is understandable, but not persuasive. Since the competitive effects of this Judgment, as well as the nature and purpose of the case were fully discussed above, no further response is deemed necessary

Bernard M Hollander

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Attorney for the United States

Form OBD-183
12-8-76 DOJ

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February 25, 1977

BY HAND

Bernard M. Hollander, Esquire
Department of Justice
Antitrust Division
Room 3222
Washington, D.C. 20530

Re: United States v. National Broadcasting Company, Inc. (Civil No. 74-3601-RJK, C.D. Cal.)

Dear Mr. Hollander:

Pursuant to 15 U.S.C., Section 16(d)(Supp. 1976) and the order of the court extending the time within which comments may be submitted to and including March 1, 1977, enclosed are copies of ABC's Comments on the Proposed NBC Consent Decree.

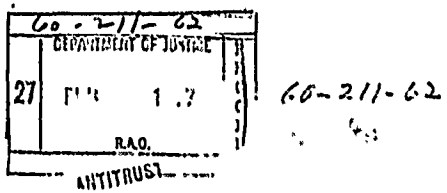
Very truly yours,

Daniel H. Margolis

Daniel H. Margolis

DHM:jc

Enclosures



60-211-62

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., Defendant.	Civil Action No. 74-3601-RJK

COMMENTS OF AMERICAN BROADCASTING COMPANIES, INC ON THE PROPOSED NBC CONSENT DECREE

American Broadcasting Companies, Inc. ("ABC") submits these comments pursuant to the Antitrust Procedures and Penalties Act [1/] ("APPA"), with respect to the proposed consent decree filed in this case on November 17, 1976. [2/]

Companion civil suits brought by the Antitrust Division of the Department of Justice ("the Department") are pending against ABC and CBS Inc., [3/] both of which operate national commercial television networks in competition with NBC. These suits challenge the same network conduct and practices which are alleged to be unlawful in the suit against NBC. Some of the provisions of the proposed decree will not become effective unless similar relief is obtained against ABC (and CBS) [4/]

ABC has been vigorously defending, and will continue to defend, the action pending against it. Because ABC believes that the Government's allegations are utterly without merit, and that the Court should dismiss these actions on jurisdictional as well as other grounds, ABC is moved to submit these comments with respect to the proposed decree in the pending action against NBC.

Before this proposed consent decree may be entered, the Court is required by statute to determine that its entry "is in the public interest." [5/] For the reasons explained in the comments

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1/ 15 U.S.C. § 16(b)(Supp 1976)

2/ Proposed Consent Judgment, 41 Fed. Reg. 51992 (1976); United States v. National Broadcasting Co , Civil Action No. 74-3601-RJK (C.D. Cal., Complaint filed December 10, 1974).

3/ United States v. American Broadcasting Cos., Civil Action No 74-3600-RJK (C D Cal., filed December 10, 1974); United States v. CBS Inc., Civil Action No 74-3599-RJK (C D. Cal., filed December 10, 1974).

4/ Competitive Impact Statement, 41 Fed. Reg. 52015 (1976) [hereinafter cited as "Impact Statement"] Section VII of the proposed decree suspends the effectiveness of several provisions of the decree "until similar injunctive relief is obtained in Final Orders, Judgments or Decrees" entered against CBS and ABC. The suspended provisions are as follows: V, VI(C), VI(E)(i), and VI(F) through (H) Proposed Consent Judgment, 41 Fed. Reg. 51992, 52007-08 (1976). Also, if a final order is entered against either CBS or ABC that places NBC "at a competitive disadvantage," Section IX of the decree requires the Court to modify or exempt NBC from any provision of the proposed decree "as may be necessary to prevent NBC from being placed at a competitive disadvantage with respect to CBS or ABC." Proposed Consent Judgment, 41 Fed. Reg. 51992, 52009 (1976).

5/ 15 U.S C. § 16(e)(Supp. 1976).

which follow, ABC submits that the Government should withdraw its consent to the proposed decree; and if the Government declines to do this, then the Court should reject the decree as not in the public interest. In brief, the reasons for ABC's position are as follows.

FIRST, this decree would superimpose inflexible, judicially fashioned regulations on an industry already subject to pervasive and ongoing regulatory control by the FCC. The Court can neither make the required public interest determination, nor administer the decree, without duplicating the FCC's role and conflicting with the FCC's authority.

A. The proposed decree is entirely regulatory in nature. If entered it will substantially, directly, and unnecessarily impinge on a recently commenced FCC proceeding encompassing precisely the same allegedly anticompetitive network practices, policies and conduct. See Notice of Inquiry, Docket No. 21049 (In the Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest), released January 14, 1977, 42 Fed. Reg. 4992 (1977).

B. Thus, in this respect the Court is confronted with a dilemma: Either the Court must evaluate

and administer the decree under the FCC's view of the public interest, which would be redundant, or the Court must create and adopt its own, different and inevitably conflicting version of the public interest.

SECOND, Congress has charged the FCC with the responsibility and granted it the power and authority to regulate the broadcast industry in accordance with the "public interest, convenience and necessity."[6/] While the Court may have power to adjudicate antitrust issues and determine antitrust liability, the FCC has concurrent power and its "regulatory scheme is broad enough to comprehend the subject matter of this litigation."[7/] Moreover, the FCC's power to regulate is not dependent upon a determination that a particular practice violates the antitrust laws. Therefore, it would be unwise, unnecessary and contrary to the public interest for the Court in the first instance, and without regard to an ongoing FCC proceeding covering the same subjects, to attempt to regulate the matters covered by the proposed decree.

A. The Department of Justice could request the FCC to exercise its authority to remedy the alleged anticompetitive

6/ 47 U.S.C. § 309 (1970).

7/ United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK slip op. at 6 (C.D. Cal. February 16, 1977).

network conduct and practices by promulgating rules identical to those embodied in the proposed consent decree. The FCC is both competent and required to weigh antitrust as well as other concerns in regulating the broadcast industry.

B. If the Court enters the proposed consent decree, it will necessarily become enmeshed in an enduring and burdensome task of regulation and industry administration.

C. There is no legal or practical reason why the Court should become involved at this time in attempting to regulate the television broadcasting industry. Accommodation of antitrust policies to FCC policies requires the Court at least to await the outcome of the pending FCC inquiry before undertaking to determine whether the provisions of the proposed consent decree are in the "public interest."

THIRD, the FCC's congressionally mandated jurisdiction over the subject areas of the proposed decree may not be ignored or defeated by a mere stipulation of the parties purporting to transfor the FCC's regulatory functions to the Court. The Department's only

justification for invoking the jurisdiction of the Court, rather than the jurisdiction of the FCC, is that the FCC does not have the power also to determine that the challenged network conduct was in violation of the antitrust laws, although its remedial powers are concededly at least as broad as the Court's. The decree which the Department of Justice has now submitted to the Court for approval, however, is a consent judgment. By its terms, the Court expressly refrains from making any finding that NBC's conduct or practices violated the antitrust laws.[8/] Hence, the Government's purported jurisdictional premise no longer exists Since the Government is willing to accept a consent decree absent a finding of antitrust liability, the question whether the regulatory provisions of the proposed decree are in the "public interest" should now be referred, at least initially, to the agency specifically empowered by Congress to deal with such matters

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8/ The proposed consent decree provides that the parties consent to the entry of judgment

> without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding . . .

Proposed Consent Judgment, 41 Fed Reg. 51992, 51995 (1976) (emphasis added).

I.

Entry of the Proposed Decree Will Inevitably Involve the Court in Duplicating the FCC's Role and Conflicting with the FCC's Authority

A. The Decree is Entirely Regulatory in Nature.

In the Competitive Impact Statement filed pursuant to Section 2(b) of the APPA, the Government presents (without any factual support) the following statement of the nature and purpose of the proposed consent decree.

> The structure of the market is such that each of three networks controls program producers' and advertisers' access to the nation's commercial television audiences and each network has abused its power by refusing access to programs which it did not produce or in which it had no financial interest. Consequently, the only meaningful relief that can be obtained short of restructuring the networks is to limit network program production and restrict the program rights that each network may obtain from outside suppliers to the rights essential to networking, which are those incident to the right to exhibit the program. This the proposed NBC judgment seeks to do. It would establish specific outer limits on NBC's own program production and on the type of rights and interests which NBC may acquire from independent program suppliers in addition to the right of network exhibition. 9/

The Government admits that "many" of the proposed decree's injunctive provisions are of a "regulatory nature." 10/ The actual extent to which those provisions are indeed identical to already promulgated FCC rules, or would affect the precise network policies and practices which are the subject of a new

9/ Impact Statement, supra note 4, at 52021.

10/ Id. at 52023.

and comprehensive FCC inquiry, 11/ is startling. Thus:

(1) Section IV of the proposed decree embodies, without material alteration, the FCC's existing financial interest and syndication rules. 12/

The FCC's Notice of Inquiry in Docket 21049 (released January 14, 1977) recognizes this, but indicates that these present rules may be modified as a result of its current inquiry "if that appears to be warranted."

> The proposed NBC consent decree contains terms . . . virtually identical to [the Commission's financial interest and syndication rules] . . . . We invite interested parties to comment on the adequacy of our present rules and to propose alternatives if that appears to be warranted. 13/

(2) Section V of the proposed decree restricts the number of hours of NBC-produced entertainment programming that NBC may schedule each week. 14/ The Government argues in the Competitive Impact Statement that this will eliminate

11/ See Notice of Inquiry, Docket No. 21049 (In the Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest), released January 14, 1977, 42 Fed. Reg. 4992 (1977) [hereinafter cited as "Notice of Inquiry in Docket No. 21049"].

12/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 51998-99 (1976).

13/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4995.

14/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 51999-52000 (1976).

"the possibility that NBC could substantially increase its internal production . . . and thereby exclude independent program suppliers." 15/

The FCC's Notice of Inquiry in Docket 21049, however, indicates that the Commission is considering regulation in the same area, although expressly recognizing that this is an issue in this antitrust action.

> Although most network entertainment programs are acquired from outside producers, a small number have been and are produced entirely by the networks themselves. This was one subject of the Department of Justice's antitrust action. The Department's position (as set forth in its competitive impact statement filed with the NBC consent decree) is that, just as with programs produced by others but in which the network acquires subsidiary rights, there arises a network predisposition to use such material regardless of its merit, and independent producers are thus unduly excluded from the network program market. Other parties have alleged that the unlimited network potential for producing their own entertainment programs can be used to obtain first-run programming at unreasonably low prices. While we are not concerned with the profits of program producers as such, we are interested in the question of whether this factor gives the networks an anti-competitive advantage over potential competitors, and whether the advantage works to limit the supply of independently produced programs. 16/

15/ Impact Statement, supra note 4, at 52022.

16/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4995.

(3) Section VI(B) of the proposed decree enjoins NBC, in connection with its acquisition of network exhibition rights, from requiring a program supplier to use NBC production facilities; and Section VI(C) prohibits NBC from leasing facilities for the production of a filmed or taped program for a period longer than the time needed to produce episodes for one season. 17/

In its Notice of Inquiry in Docket 21049, the FCC notes that independent production companies have periodically maintained that networks condition the purchase of a program on the use of network-owned production facilities, and then suggests

> that commenting parties address themselves to the question of whether such arrangements to the extent that they exist, may affect competition in the offering of program production facilities. 18/

(4) Section VI(E)(i) of the proposed decree reduces to three the number of annual renewal options that NBC may initially acquire on a series program. 19/ The Government purports to justify this restriction on the ground that it "is

17/ Proposed Consent Judgment, 41 Fed Reg. 51992, 52000-01 (1976).

18/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4995.

19/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52001-02 (1976).

designed to restrict NBC's present ability to obtain exclusive rights to a program series for as long as seven years on terms and conditions set before the program has ever been developed." 20/

The Notice of Inquiry in Docket 21049 addresses the identical question.

> It is also alleged that the networks commonly demand options on exhibition rights for as much as five to seven years following the development of a script or program pilot, thereby precluding competition in bidding for the rights to a program which develops into a highly successful series. We invite comments on the effects which such practices could have on competition. . . . 21/

(5) Section VI(F) of the proposed decree requires NBC to release every pilot it has not financed by the earliest date on which an episode of the contemplated series may be broadcast under the series development contract. 22/ Upon payment of its unrecouped development investment, NBC must release 65% of the pilots it has financed but does not select for broadcast within three to nine months after delivery. 23/ NBC

20/ Impact Statement, supra note 4, at 52025.

21/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4995.

22/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52004-06 (1976).

23/ Id. at 52005.

must release the balance of the pilots it has financed within one year. 24/

In its Competitive Impact Statement, the Government contends that this provision "would permit increased competition between the networks by freeing the producers of as many as 65% of the program pilots not selected by NBC to offer their pilots to other networks or television stations." 25/

The FCC's Notice of Inquiry in Docket 21049 addresses the same issue, asking whether

> some present practices unduly restrict the release of a significant number of pilots for further development and thereby limit the amount of first-run material available for syndication, and whether this programming might, in some instances, provide viable competition to network offerings. 26/

(6) Section VI(H) of the proposed decree generally prohibits NBC from acquiring the right to repeat a series episode after the season in which it was first broadcast. 27/ NBC may, however, acquire the right to choose three new episodes

24/ Id.

25/ Impact Statement, supra note 4, at 52026.

26/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4996.

27/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52007 (1976).

each season and repeat these episodes in later seasons.[28] Section VI(H) does not apply to cartoon or other children's series.[29]

The FCC's Notice of Inquiry in Docket 21049 expressly notes that

> [t]he Department of Justice has raised a question as to whether limitations should be placed on the ability of networks to secure exclusive rights to rebroadcast episodes originally shown in a previous television season. [30]

It then invites comments on the need for restrictions on this practice.[31]

(7) Section VI(E)(ii) of the proposed decree limits the duration of NBC's exclusivity rights against non-network stripping during daytime and fringe time to four years from the date the first episode of the series is broadcast.[32] Against all other broadcast uses during day time and fringe time, such as daytime network stripping, Section VI(E)(ii) limits exclusivity to three years from that date.[33]

28/ Id.

29/ Id.

30/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4996.

31/ Id.

32/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52002-03 (1976).

33/ Id. at 52003.

Section VI(G) of the proposed decree limits NBC to first negotiation/first refusal rights in a spin-off involving a non-continuing character (one who appears in no more than 25 percent of the previous year's episodes).[34]

Although neither exclusivity as applied to non-network stripping nor first refusal rights in spin-offs is expressly referred to in the Notice of Inquiry in Docket 21049, these issues are within the ambit of the FCC's inquiry "whether the networks have maintained anticompetitive policies which unduly restrict the development of other programming sources."[35] Thus, the Notice of Inquiry observes that

> [i]t is obvious, of course, that the categories of questions concerning network-affiliate relations and network-program supplier relations are far from being mutually exclusive. Developments in one area can and generally do impact on the other. [36]

(8) Section VI(E)(iii) of the proposed decree prohibits NBC from acquiring any exclusive rights in a theatrical feature film against methods of exhibition other than pay or subscription television.[37]

34/ Id. at 52006-07.

35/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4992.

36/ Id. at 4992-93.

37/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52003-04 (1976).

With respect to pay or subscription television use, Section VI(E)(iii) limits the duration of NBC's exclusive rights in a film to 25 months (plus one year for each run beyond two acquired by NBC), commencing no earlier than thirty days prior to the film's availability to NBC for use on the NBC network.[38/]

The question of the extent to which the commercial television networks need exclusive rights with respect to theatrical feature films as against subscription television is presently under investigation by the FCC in a proceeding commenced on March 20, 1975.[39/] The Notice of Inquiry in that proceeding states that

> [t]he second major focus of this inquiry concerns the question of what measure of contractual exclusivity, if any, is appropriate as between the conventional and subscription television services.[40/]

The Commission then specifically asks for comments as to: "What are the relevant anti-trust implications of existing or foreseeable exclusivity arrangements?"[41/] It invites comments on the need for restrictions on this practice.[42/]

38/ Id. at 52004.

39/ FCC Docket No. 20402.

40/ Notice of Inquiry, Docket No. 20402, 52 F.C.C.2d 87, 90 (1975).

41/ Id. at 92.

42/ Id. at 91.

Thus, the decree which the Court has been asked to evaluate and enter is the precise subject of comprehensive regulatory FCC investigations.

B. The Proposed Decree Confronts the Court with A Dilemma: Either it Must Evaluate and Administer the Decree Under the FCC's View of the Public Interest, Which Would be Redundant, or it Must Create and Adopt Its Own, Conflicting Version of the Public Interest.

Before entering the proposed consent judgment, the Court must find pursuant to Section 2(e) of the APPA that the decree is in the public interest. But what public interest standard is to be applied in making this determination?

In light of the breadth of the FCC's concern, and the many interests it must take into account, the Court might be constrained to evaluate, enter and attempt to administer the proposed decree in accord with the FCC's public interest standard, accepting those provisions which conform, rejecting those which do not. That would seem to minimize disruption of the FCC's regulatory plan. But merely duplicating an existing regulatory regime hardly serves any cognizable public interest. And because the decree is regulatory and essentially prospective in nature, attempting to mimick the FCC would be expensive and difficult to accomplish.

In the first place, the Court would have to determine in each instance how the FCC would interpret the public interest. While that may be apparent when the FCC has issued specific regulations covering the matters in issue, when the FCC has not formulated a clear policy or has not given it concrete expres-

sion -- such as in the critical area of network production of television programming -- the Court would have to wait for the FCC to develop a position (or engage in guesswork) before duplicating the result the FCC would reach under the same circumstances.

In the second place, the Court will have to keep up with the FCC. As we have observed, the FCC is currently investigating the television industry to determine whether, considering the issues raised by the antitrust complaints, its existing regulatory scheme best serves the public interest. It is possible that, after investigation, which the FCC predicts may take a year, the FCC may find the public interest requires that it vary the current regulations as to syndication by and financial interests of networks, for example, or it may create new regulations or determine that regulation is not in the public interest Any addition to, subtraction from or variation by the FCC of its rules would be based on a determination that the existing rules do not serve the public interest as adequately as the proposed variation In such a case, the Court would be faced with the unenviable choice between modifying the NBC decree to follow the FCC rules revision (thus pointing up the meaninglessness of a judicial decree on the same subject) or declining to modify the decree (thus without the benefit of any evidentiary record both disagreeing with the expert agency designated by Congress to deal with this industry as to what

was "in the public interest" and imposing inconsistent requirements on NBC which are likely to interfere with the effectiveness of the FCC's pervasive regulatory scheme).

Alternatively, rather than attempting to follow the FCC, the Court may be constrained to evaluate, enter and administer the decree according to its own, distinct conception of the public interest. While there are innumerable other ways of defining or giving different emphasis to elements of the public interest, using this decree to give different concerns a greater role in broadcast regulation would be wrong for a number of reasons.

As the Court suggested in denying the networks' 1972 motions for a stay, to second guess the FCC by administering the decree according to a conflicting interpretation of the public interest would subvert the purpose of administrative agencies The Court stated:

> Nevertheless, assuming antitrust violations are proven, accommodation of antitrust policies to F.C.C policy in terms of remedies will be a real and substantial problem Accordingly, the court will give great weight to the F C.C. rules in the event that it becomes necessary to afford to plaintiff a remedy. This caveat, as a practical matter, might render the prosecution of these cases unnecessary, but that is for others than the court to decide. 43/

Equally significantly, second guessing the FCC would exceed the appropriate role of a reviewing court. By statute, exclusive jurisdiction to review final orders of the FCC is lodged in

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43/ United States v. National Broadcasting Co., 1974 Trade Cas. ¶ 74,885, at 95,992 (C D. Cal. 1973).

the courts of appeals, not the district courts.[44/] And, the scope of appellate review of FCC orders is narrow. FCC action must be sustained if it is "based upon findings supported by evidence"; trial de novo of the matters considered by the Commission is improper.[45/] It is equally improper for the reviewing court to consider whether the FCC correctly weighed and balanced the conflicting factors it took into account in determining that its actions served the public interest. As the Supreme Court stated in upholding the programming origination rules the Commission applied to cable, "[i]t was, of course, beyond the competence of the Court of Appeals itself to assess the relative risks and benefits of cablecasting."[46/]

The reason for the limited role of a reviewing court lies in the expertise of administrative agencies. The FCC was created to regulate the communications industry. After more than a generation in that role, the Commission has developed expertise in that field and of course has been funded and staffed to maintain that expertise. The judiciary does not possess those resources. The Court of Appeals for the Second Circuit recognized this in upholding the FCC's second modification of the prime time access rule.

44/ 28 U.S.C. § 2342 (Supp. 1976); 47 U.S.C. § 402(a)(1970).

45/ National Broadcasting Co. v. United States, 319 U.S. 190, 224, 227 (1943).

46/ United States v. Midwest Video Corp., 406 U.S. 649, 674 (1972).

> The issue of whether network dominance has actually increased under [the original prime time access rule] is peculiarly within the competence of the Commission, which has access to all phases of the industry and has conducted hearings not only under this docket but under related dockets as well. We cannot, as a reviewing court, determine de novo the relative weight of the several conflicting economic factors that should be considered 47/

The Court, therefore, would effectively circumvent the permissible bounds of judicial review of agency action if it decided to administer the proposed decree according to a different standard from the one employed by the FCC. As a matter of public policy and the proper allocation of responsibilities between court and agency, the weighing and balancing of factors involved in formulating the public interest in broadcast regulation must be left exclusively to the FCC.

Moreover, if the Court evaluates the decree according to a standard different from the FCC's, unless that evaluation results in rejection of the decree, the networks will a fortiori be caught between inconsistent regulatory schemes. Indeed, the Court took note of this problem in its Memorandum of Decision and Order filed February 16, 1977, denying the defendant's motion to dismiss.

> . . . [I]mposition of the remedies requested by the government in this action may conflict with the directives of the FCC's regulations, thereby subjecting the networks to varying standards of conduct. 48/

47/ National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 534 (2d Cir. 1975). See also Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 481-82 (2d Cir. 1971).

48/ United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK slip op. at 9 (C.D. Cal. February 16, 1977).

And it is reasonable to predict that the burden and unfairness of this inconsistency will not be confined to an occasional instance. In many practical respects, important provisions of the proposed decree overlap, duplicate and are inconsistent with the FCC's already existing regulatory scheme We discuss three of these

1. Limitations on Production.

Part V of the proposed consent decree would prevent NBC from producing more than 2-1/2 hours per week of its own prime time entertainment programming.[49/] Thus, regardless of marketplace circumstance, NBC would be forced to fill at least approximately 90% of its prime time entertainment programming needs from outside sources. Additional restraints would apply to daytime and fringe time programming[50/]

The Government claims in its Competitive Impact Statement that there is a predisposition by networks to use their own programming which forecloses outside suppliers of programs[51/]

49/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 51999 (1976).

50/ Id. at 51999-52000.

51/ In its Competitive Impact Statement, the Department states that the proposed decree

> would establish specific outer limits on NBC's own program production and on the type of rights and interests which NBC may acquire from independent program suppliers in addition to the right of network exhibition. This should minimize NBC's incentive to select a program on the basis of financial interests in it.

Impact Statement, supra note 4, at 52021.

The FCC considered this contention when it declined to adopt the "50/50" rule, which would have limited network-originated programs in prime time to 50% or 14 hours per week[52/] The proposal had a purpose similar to the instant provision:

> to restrain network domination of nighttime television and to open access to the valuable nighttime hours to independent producers. 53/

As the Commission noted, however, in rejecting the 50/50 rule,

> the public interest . . would not be furthered by eliminating network corporations entirely from the program production . . . process We are persuaded that, in order reasonably to insure the quantity and quality of television programming necessary to maintain adequate community service, network corporations should be permitted to engage to a substantial but limited degree in program production . . . 54/

The Commission chose instead to adopt the prime time access rule,[55/] as an alternative solution to the same alleged problem The Commission explained its decision in part on the ground that networks might not be able to secure sufficient product from independent sources to fill their schedules, and thus might be damaged competitively by a limitation on internal

52/ Notice of Proposed Rule Making, Docket No 12782, 4 R.R.2d 1589, 1611 (1965) [hereinafter cited as "Notice in Docket No. 12782"].

53/ Report and Order, Docket No. 12782, 23 F.C.C.2d 382, 384 (1970).

54/ Notice in Docket No. 12782, supra note 52, at 1611.

55/ Report and Order, Docket No. 12782, supra note 53, at 383-84.

production.[56] The FCC expressly left open for future consideration in the light of experience whether the institution of the 50/50 proposal or some other variation was necessary, and consistent with that continuing responsibility, this is precisely what the FCC is now undertaking to do in its new investigation.[57]

By consenting to the proposed decree, which permits some production, the Department of Justice has conceded agreement with the position of the FCC that networks "should be permitted to engage to a substantial but limited degree in program production . . ."[58] Thus the question is no longer whether a network may, consistent with the antitrust laws, produce its own entertainment programming. The only issue now is whether any limitation on network production is necessary in the public interest.

From an economic and competitive standpoint, production limitations such as those in the proposed decree are clearly contrary to the public interest. They curtail network flexibility to create new and innovative programs and to schedule network produced programming during periods of short supply. The integration of television program suppliers into the business of networking, coupled with increasing competition from other purchasers of such programming has made the continued

56/ Id. at 384, n.6.

57/ See supra pp. 8-15.

58/ Notice in Docket No. 12782, supra note 52, at 1611.

availability of an adequate supply of high quality programming from non-network sources highly uncertain and unpredictable.

Some recent examples of developments which threaten to diminish the supply of quality programming available to networks from outside sources include the following:

(a) Paramount Pictures Corporation, a subsidiary of the conglomerate, Gulf & Western Industries, Inc , aided and encouraged by its joint venture connections with Sony Corporation of America, is reported to have acquired the Hughes Television Network and to have signed a $2.8 million agreement to expand the network's delivery capabilities via satellite to virtually 24 hours a day[59]

(b) MCA/Universal, the largest supplier of television programming to networks, has agreed with a pool of affiliated and independent television stations to produce made-for-television movies and distribute them directly to the stations, bypassing the networks.[60] MCA's first offering, an eight-hour first-run mini series, was commissioned by over 50 stations and is scheduled to begin airing in May, 1977. One licensee is reported to have characterized this activity as an "explosion" caused by "Hollywood production studios, as well as advertisers, [who] were anxious to open markets other than those afforded by ABC, CBS and NBC."[61]

59/ Variety, December 29, 1976, at 33, Col. 1; Broadcasting, January 31, 1977, at 62, Col. 1.

60/ Variety, December 22, 1976, at 75, Col. 2.

61/ Broadcasting, January 24, 1977, at 21, Col. 1; The New York Times, January 19, 1977, at 22, Col. 1.

(c) Metromedia Television and a major advertising agency have announced plans to offer stations prime time programming five nights a week beginning in October, 1977 with thirty minutes a night, but planning to expand upwards.[62] The plan was said to be designed to reach 60% of the nation's television households and to include plans for up to three hours of weekend programming.[63]

(d) Another leading advertising agency plans soon to announce an offering of Sunday programming from 7-9 p m., also developed in association with Metromedia.[64]

(e) Norman Lear has indicated he plans to offer an entire evening of Lear-generated programming on Saturday nights as an alternative to the networks, beginning next year.[65]

Some of these developments present the possibility of fourth (or fifth) networks[66] They all present serious threats of curtailing the outside supply of important programming available to the existing networks While they may represent legitimate competitive efforts, they underscore the undesirability of placing artificial and inflexible restraints on the

62/ Broadcasting, January 24, 1977, at 20, Col. 3; The Washington Post, January 18, 1977, at B1, Col. 1; The New York Times, January 24, 1977, at 38, Col. 3

63/ The New York Times, January 24, 1977, at 38, Col. 3; The Washington Post, January 18, 1977, at B4, Col. 1-2.

64/ Broadcasting, January 24, 1977, at 20, Col. 3.

65/ Id.

66/ The New York Times, January 19, 1977, at 22, Col 1.

networks ability to produce their own programs.

Furthermore, the production limitations contravene established antitrust policies favoring business growth through internal expansion Vertical integration through internal expansion is prima facie lawful under the antitrust laws, particularly because entering a new phase of production or distribution necessarily results in the addition of a new competitor.[67]

Most importantly, on economic and competitive grounds the production restrictions in the decree are unnecessary There are natural limitations on network production that inhere in the business of networking The advertising revenues that a network receives for the commercial time in its programs depend upon the expected audiences of those programs Because networks compete among themselves and with other media for those audiences, they must include in their schedules only the best programs available, regardless of source.

Ignoring these economic facts of life, the Government argues in its Competitive Impact Statement that the proposed internal production limitations "should minimize NBC's incen-

67/ Ford Motor Co. v. United States, 405 U S. 562, 568 (1972); Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 1974 Trade Cas. ¶ 74,912 (S.D N.Y. 1974), aff'd, 501 F.2d 894 (2d Cir. 1974); The Bendix Corp., 77 F T.C. 731 (1970), rev'd on other grounds, 450 F.2d 534 (6th Cir 1971); Hiland Dairy, Inc. v. Kroger Co., 274 F. Supp. 966 (E.D. Mo 1967), aff'd, 402 F.2d 968 (8th Cir. 1968), cert denied, 395 U.S. 961 (1969). See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 1977 Trade Cas. ¶ 61,255 (U.S. January 25, 1977).

tive to select a program on the basis of financial interests in it" and will eliminate "the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers."[68] That, however, is the same argument which was raised and rejected in Columbia Pictures Indus., Inc. v. American Broadcasting Cos[69] In that case the major producers and suppliers of television entertainment programming sought to enjoin ABC from offering for telecast theatrical feature films produced by ABC. The majors argued that "[b]y its own evaluations [of feature films being considered for broadcast], ABC creams the product of its competitor-suppliers and accepts the mediocre product of its own."[70] In denying the producers' motion for a preliminary injunction, however, Judge Palmieri found that "the intense nature of the competition between the networks for television audiences"[71] effectively prevents a network from discriminating

68/ Impact Statement, supra note 4, at 52021-22.

69/ Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 1974 Trade Cas. ¶ 74,912 (S.D.N.Y. 1974), aff'd, 501 F.2d 894 (2d Cir. 1974).

70/ Memorandum of Law in Support of Plaintiffs' Motion for Temporary Relief Against ABC's Exhibition of Its Own Films on Its Own Network, July 3, 1973, at 31, Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 70 Civ. 4202 (S.D.N.Y., filed September 28, 1970).

71/ Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 1974 Trade Cas. ¶74,912, at 96,096 (S.D.N.Y. 1974), aff'd, 501 F.2d 894 (2d Cir. 1974). In affirming Judge Palmieri the Court of Appeals observed that plaintiffs had injected "a 'public interest' argument which, viewed in one light, is as

[continued]

in favor of its own product

> [T]he Court is not persuaded that ABC . . . has deliberately embarked upon a policy of selecting inferior [self-produced] programming to its own financial advantage and to the prejudice of plaintiffs The television networks are in vigorous competition with each other. They are engaged in a continuous and lively rivalry for the attention of audiences, which is the very crux of their commercial objectives. The advertising revenue and thus its profits are directly related to and dependent upon the share of the television audience each network can attract with its programming. 72/

Thus, the natural discipline of competition for audiences supplies the only production limitation needed to protect the public interest.

2. Restrictions on Series Options.

The decree's provisions limiting NBC's acquisition of series options to four years (Part VI(E)(i)) also conflict with already existing FCC regulation.[73] In 1975, the FCC decided to elimi-

71/ [Footnote continued from preceding page]

much to say that they believe the public has more of a right to view their films than those of ABC . . . ." 501 F.2d at 896. Moreover, Judge Palmieri had found "[a] persuasive showing has been made . . . that feature film product has been for a number of years in a state of continuing and acute shortage . . . ." 1974 Trade Cas. at 96,094. It has recently been reported that the major theatrical film producers "have slashed their output to a comparative trickle . . ." and ". . . 'a good flow of movies' is impossible with Hollywood's tight fist on the faucet." The Wall Street Journal, February 8, 1977, at 46, Col. 1.

72/ Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 1974 Trade Cas. ¶ 74,912, at 96,095 (S.D.N.Y. 1974), aff'd 501 F.2d 894 (2d Cir. 1974). In this respect the Government's Competitive Impact Statement shows the proposed decree is based on wrong and naive assumptions which are not only lacking in evidentiary support but are also contrary to prior judicial determinations. Impact Statement, supra note 4, at 52018-21.

73/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52001-02 (1976).

nate its restraints on pay cable broadcast of series.[74/] It did so despite the contention that pay cable might siphon off successful conventional television series because it believed that this would not happen in light of the fact that

> almost all network series contracts include a purchase option from one season to another for a period of five or more television seasons . . . [I]t is likely that the networks will continue to have sufficient leverage to demand and receive similar contract provisions. 75/

Thus, while the FCC clearly viewed siphoning of series by pay cable as an evil to be avoided, it felt that the networks' ability to protect themselves against this eventuality by five year and longer option contracts provided sufficient protection against this evil By prohibiting such option contracts, the proposed decree would eliminate this protection and open the door to series siphoning by pay cable

3. Restrictions on Cable Exclusivity.

The proposed decree's provisions as to cable exclusivity (Section VI (E)(iii)(e))[76/] also conflict with Commission regulation Under the decree, NBC could obtain exclusivity against subscription television of feature films for at most 25 months (for two runs of a film) of which no more than 30 days could

74/ Second Report and Order, Docket No. 19554, 35 R.R.2d 767 (1975).

75/ Id. at 772.

76/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52003-04 (1976).

precede the first date for which NBC held exhibition rights.[77/] Commission regulations, on the other hand, prohibit subscription showing of English language films (i) in the fourth through tenth years following theatrical release unless a broadcaster in the market has a present contractual exhibition right and (ii) after the tenth year if the film has never been shown on the market on a subscription basis, but has been shown on conventional television in the preceding three years.[78/] In promulgating this regulation, the Commission noted that "the public interest in maintaining the conventional television structure has outweighed the interest in unregulated competition."[79/]

Thus two regulatory authorities would attempt to deal with the same alleged problem (conflicts between conventional and subscription broadcasters over rights to television exhibition of feature films) in vastly different ways. And the regulations of the FCC, at least, are subject to change. As indicated earlier, the FCC has now open a proceeding to determine "what measure of contractual exclusivity, if any, is appropriate as between the conventional and subscription television services."[80/] This proceeding may culminate in a rule identical

77/ Id. at 52004.

78/ 47 C F.R § 76.225.

79/ First Report and Order, Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 45 (1975).

80/ Notice of Inquiry, Docket No. 20402, 52 F.C.C.2d 87, 90 (1975). See supra p. 15.

or similar to the decree provision; alternatively, the FCC may determine that no relief, or quite different relief, is dictated by all the public interest considerations involved. In any event, the Commission has made it clear that it is interested in "the relevant anti-trust implications of existing or foreseeable exclusivity arrangements."[81/]

Whatever action the FCC takes in the three areas discussed above, this decree will not further the public interest. If the two forms of regulation coincide, the decree will be superfluous and will merely serve to burden the Court, the parties and the interested members of the industry If the Commission, applying its public interest standards, orders different relief because, for example, it has considered, in addition to competitive considerations, the importance of maintaining a free television system which is able to present quality programs to the public at no direct cost to viewers,[82/] there will be a regulatory collision.

II.

The Government Has Offered No Reason Why the Court Should Oust the FCC from Jurisdiction

It is unnecessary and would be unwise and contrary to the public interest for the Court to enter the decree and circumvent the FCC, both because the FCC can readily deal with all the

81/ Id. at 92.

82/ See Further Notice of Proposed Rulemaking and Notice of Inquiry, Docket No. 11279, 7 R.R.2d 1501, 1508 (1966); First Report and Order, Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 45 n. 30 (1975); Notice of Inquiry, Docket No. 20402, 52 F.C.C.2d 87 (1975).

issues raised by this case, including competition, and because the administration of the decree by the Court would be highly burdensome to all concerned. There is no excuse for such waste and burden.

A. In Fulfilling Its Statutory Responsibilities the FCC Is Both Competent and Required to Weigh Competitive and Other Public Interest Concerns.

Competition is a factor which the FCC has consistently weighed in carrying out its statutory mandate. The Communications Act of 1934 requires the FCC, in exercising its authority over broadcasting, to act in accordance with the "public interest, convenience and necessity."[83/] As the Supreme Court has made clear, the phrase "public interest" comprehends the principle of free competition in the broadcasting industry. In FCC v. Sanders Bros. Radio Station,[84/] for example, the Court stated:

> In contradistinction to communication by telephone and telegraph . . . the Communications Act . . . recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads. . . . [85/]

In practice, the FCC has vigorously pursued competitive objectives. The history of Docket 12782, the FCC's earlier, extensive investigation of network contracts and practices,

83/ 47 U.S.C. § 309 (1970).

84/ 309 U.S. 470 (1940).

85/ Id. at 474. Accord, United States v. Radio Corp. of America, 358 U.S. 334 (1959).

supports the FCC's declaration that competition will be a major focus of the FCC's comprehensive new inquiry into the television industry In the notice of proposed rulemaking in Docket 12782, which culminated in the syndication, financial interest and prime time access rules, the FCC declared:

> The purpose of the rule proposed herein is to foster free competition in television program markets. Specifically, the proposed rule is designed (a) to provide opportunity for entry of more competitive elements into the market for television programs for network exhibition and (b) to encourage the growth of alternate sources of television programs for both network and non-network exhibition 86/

The FCC entertained the views of, and allowed extensive participation by, the Department of Justice at every stage of Docket 12782 87/ During the investigation leading to the rulemaking proceeding, the FCC utilized the Antitrust Division's independent investigation of the networks and discussed the proposed rules and supporting data with the Division's staff 88/ During the rulemaking proceeding itself, the Antitrust Division repeatedly informed the FCC of its belief that its proposed rules would have a beneficial effect on competition 89/

86/ Notice in Docket No. 12782, supra note 52, at 1591.

87/ Television Network Program Procurement, Second Interim Report by The Office of Network Study pt. I (1962), reprinted in H R Rep No. 281, 88th Cong., 1st Sess (1963); Television Network Program Procurement, Second Interim Report by The Office of Network Study pt II (1965)

88/ Transcript of May 4, 1959, at 13-14, Docket No. 12782

89/ Letter from Assistant Attorney General Richard W McLaren to FCC Chairman Dean Burch (April 22, 1969); Letter from Assistant Attorney General Richard W. McLaren to FCC Chairman Dean Burch (July 15, 1970).

Similarly, on petition for review of the Commission's rules in the United States Court of Appeals for the Second Circuit, the Commission was strongly supported by the Justice Department 90/ in urging affirmance of the Commission's order. 91/

Now again, the Commission's Notice of Inquiry in Docket 21049 makes abundantly clear its intention to focus on competitive factors

> [T]he Commission must take a careful look at the question of whether the networks may have engaged in conduct which . restricts effective competition in the programming market
>
> . . .
>
> . . . [T]his inquiry concerns the business practices of the networks as they may impact on industry competition 92/

Indeed, the Court has recognized that "[t]he Commission's obligation to regulate for the public interest can, and should offer sufficient assurance that antitrust policy and concerns will be considered in the course of regulating the telecommunications industry " 94/

90/ Brief for the United States and FCC, Mt. Mansfield Television, Inc. v. FCC, 442 F 2d 470 (2d Cir 1971)

91/ In a similar fashion, the FCC has considered competitive concerns often at the urging of the Department, in more recent rulemaking proceedings. See, e.g , Comments of the United States Department of Justice, May 3, 1976, Docket No. 20350 (New Jersey Television Service).

92/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4993, 4996. See also supra pp 8-15.

93/ United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK, slip op. at 13-14 (C.D. Cal. February 16, 1977).

FCC, as opposed to judicial, action is appropriate in this case also because there are complementary and at time countervailing concerns -- going beyond the scope of the antitrust laws -- which Congress has mandated as objectives in the regulation of the broadcast industry Thus, the FCC must weigh, among others, four general objectives in carrying out its statutory mandate: to insure (1) locally-oriented programming;[94/] (2) diversity in programming content, concepts and sources;[95/] (3) high-quality, informative, socially desirable programming;[96/] and (4) competitive market structure.[97/]

Because of this broad mandate, the FCC has the ability to strengthen competition in circumstances in which the Department of Justice cannot act. As the Department noted in its joint brief with the FCC urging the Second Circuit to uphold the FCC's

94/ National Broadcasting Co. v. United States, 319 U.S. 190, 203-04 (1943); National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 537-38 (2d Cir. 1975); Henry v. FCC, 302 F.2d 191, 193 (D.C. Cir. 1962).

95/ United States v. Midwest Video Corp., 406 U.S. 649, 666, 667 (1972); National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 533, 536, 542 (2d Cir. 1975); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 474-76, 479 n.29 (2d Cir. 1971); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 859-60 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

96/ FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940), cited in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 479 (2d Cir. 1971); National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 538-39 (2d Cir. 1975); Citizens Communications Center v. FCC, 463 F.2d 822, 823 (D.C. Cir. 1972).

97/ FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953); General Telephone Co. v. United States, 449 F.2d 846, 857-58 (5th Cir. 1971); Metropolitan Television Co. v. FCC, 289 F.2d 874, 876 (D.C. Cir. 1961).

rules in Docket 12782,

> [i]t is precisely because of the preventive nature of the Commission's powers in the area of competition that its regulation need not derive, for example, from findings of antitrust violation, for the antitrust laws exhaust neither the Congressional policy favoring free competition in radio communications (FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474) nor the Commission's particularization of that policy in rules designed to promote the most effective utilization of broadcast resources and to protect licensee responsibility from unwarranted infringements. The courts have long since held that the proper reach of such policies is far broader than any mere determination as to whether a particular practice violates the antitrust laws. 98/

At times, the FCC has determined that the interest in competition must be subordinated to other elements of the public interest. In Stauffer Publications, Inc.,[99/] for example, the FCC granted a license renewal to a qualified licensee even though the Department contended that, because the licensee also published morning and evening newspapers, control over communications media in the community would become unduly concentrated. Similarly, in decisions governing cable television, the FCC has

98/ Brief for United States and FCC at 67 n.19, Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971)(citations omitted).

99/ Stauffer Publications, Inc., 59 F.C.C.2d 836 (1976). In rejecting the Department's views, the FCC declared that

> antitrust considerations are but one element of many which enter into the Commission's evaluation of the public interest. "The development of competition, while desirable, is not the single goal for the Commission, as it may be for the Department of Justice." Id. at 848 (citations omitted).

determined that the public interest in unfettered competition in some instances is outweighed by other FCC objectives.[100/]

B. Entry of Proposed Decree Will Enmesh the Court in the Burdensome Task of Administering the Television Industry

Entry of the decree will not end the Court's regulatory involvement with the FCC and this industry Section IX requires the Court to modify or waive any provision of the decree if a final judgment against ABC or CBS places NBC at a competitive disadvantage and Section XII preserves jurisdiction in the Court "for the purpose of enabling either party to apply at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions . "[101/] It is reasonable to expect that there would be many such applications. Managing and disposing of applications for further orders and directions concerning this decree will be predictably burdensome

100/ In a recent decision upholding, over the Department's objection many of the restrictions on cable television, the FCC stated:

> That our rules affect competition between the two forms of television is apparent and uncontroverted The proper question is not whether our rules affect competition, but whether the public interest considerations which underlie the rules outweigh the public interest considerations in support of unfettered competition.

First Report and Order, Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 45 (1975).

101/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52009, 52011 (1976).

For the same reasons the Court is required by the APPA to consider the comments of all interested parties before entering a decree, the Court will find it necessary to provide for public comment on petitions to construe, modify or enforce the decree.[102/] In this important and highly visible industry, public comment could often be voluminous There are many parties interested in the scope and specific content of network regulation: producers (major studios and independents), talent, unions, advertisers and advertising agencies, and television stations (affiliates and independents) not to mention the viewing public.[103/] In Docket 12782, for example, public hearings produced a record of over 11,000 pages of transcript in 70 volumes, with nearly 500 exhibits. The Commission received testimony from approximately 250 witnesses representing nearly 200 organizations[104/]

Experience with other regulatory decrees confirms this forecast For example, in litigation under the Paramount

102/ 15 U S.C § 16(f)(Supp 1976).

103/ See generally National Ass'n of Independent Television Producers and Distribs. v. FCC, 502 F 2d 249, 258 (2d Cir. 1974)

104/ See generally Responsibility for Broadcast Matter, First Interim Report by The Office of Network Study (1960) and Television Network Program Procurement, Second Interim Report by The Office of Network Study pt I (1962) both reprinted in H R Rep No 281, 88th Cong , 1st Sess (1963); Television Network Program Procurement, Second Interim Report by The Office of Network Study pt. II (1965).

decrees,[105] the district court which administered the decrees found it had to consider the comments of all interested parties. Although it formally treated the interested parties as amici curiae, the court allowed them to introduce evidence and acted upon the evidence. "As a result each acquisition case in which amici are active has become a private antitrust suit in miniature. . . ."[106]

The FCC's experience with the prime time acess rule provides further indication that there will be frequent petitions for modification or waiver should this decree be entered. The production limitations in the proposed decree impose constraints on the amount of network-produced programming a network may offer during each day part. The FCC's prime time access rule in effect imposes similar constraints on the total amount of programming (independently supplied as well as network produced) that a network offers during prime time. As originally adopted in 1970, the rule basically prohibited television stations in the top 50 markets from carrying more than 3 hours of network

105/ The decrees were entered after the Supreme Court decision in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). United States v. Paramount Pictures, Inc., 1948-49 Trade Cas. ¶ 62,063 (S.D.N.Y. 1948) (the RKO Decree); United States v. Paramount Pictures, Inc., 1948-49 Trade Cas. ¶ 62,009 (S.D.N.Y. 1949) (the Paramount Decree); United States v. Loew's, Inc., 1950-51 Trade Cas. ¶ 64,544 (S.D.N.Y. 1951) (the Twentieth Century-Fox Decree); The Warner Bros. Decree, 1950-51 Trade Cas. ¶ 64,264 (S.D.N.Y. 1951); The Loew's Decree, 1952-53 Trade Cas. ¶ 67,324 (S.D.N.Y. 1952).

106/ Note, An Experiment in Preventive Anti-trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees, 74 Yale L.J. 1041, 1092 (1965) (hereinafter cited as "Experiment").

programming during prime time.[107] To date, the FCC has issued almost one hundred orders disposing of petitions for waivers or exemptions from the rule. The sheer number and difficulty of these petitions left the FCC, as the Second Circuit observed, with a "sense of uncertainty and frustration."[108] To stem the stream of petitions and to correct other deficiencies in the rule, the Commission modified the prime time access rule on three separate occasions.[109]

Moreover the proposed decree resembles the Paramount decrees in extent and intimacy of judicial regulation of ongoing business practices.[110] The Paramount decrees provoked an avalanche of litigation. Between January 20, 1949, and January 27, 1975, the Paramount docket of the Southern District of New York recorded 2,932 entries.[111] This massive and still continu-

107/ Report and Order, Docket No. 12782, 23 F.C.C.2d 382 (1970).

108/ National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 537 (2d Cir. 1975).

109/ Report and Order, Docket No. 19622, 44 F.C.C.2d 1081 (1974); Second Report and Order, Docket No. 19622, 50 F.C.C.2d 829 (1975); Third Report and Order, Docket No. 19622, 33 R.R.2d 1089 (1975). See also Memorandum Opinion and Order and Notice of Proposed Rule Making, Docket No. 21115 (Changes in Prime Time Access Rule Top-50 Market Standard Proposed), February 10, 1977.

110/ See generally, Experiment, supra note 106.

111/ See Equity Docket No. 87-273 (S.D.N.Y.). Even though the various consent decrees are reported under separate captions, the district court has recorded under one docket number every paper filed and order entered in connection with any of the decrees. Many of the petitions presented the court with significant and difficult questions. In 1970 and 1972, for example, RKO, Stanley Warner Theatres, and National General all sought, despite the clear prohibitions of the decrees, to enter motion picture production.

ing litigation has consumed the time and energy of the Department of Justice and the courts as well as the resources of the defendants and the interested parties who participated. Indeed, to insure that its views were fully represented, the Department of Justice assigned one attorney full time to this litigation He became the Government's "motion picture attorney."[112/] Contemplating this commitment of resources, Donald F. Turner, while Assistant Attorney General in charge of the Antitrust Division, warned that regulatory provisions in consent decrees "should be looked at with great care," and that regulatory decrees are ordinarily not "the proper business of antitrust."[113/]

C. Accommodation of Antitrust Policies to FCC Policies Requires the Court to at Least Await the Outcome of FCC Docket No. 21049 Before Undertaking to Determine Whether the Decree Is in the "Public Interest."

The above discussion makes it clear that this is not the type of case in which the Court is asked to examine the antitrust implications of a discrete transaction or event and render antitrust relief apart from and without regard to the FCC's pervasive regulatory scheme, as was the case in United States v. Radio Corp. of America.[114/] Rather, this Court is asked to approve the imposition of judicially administered ongoing regu-

112/ See Maurice Silverman's Long Tenure Ends, Variety, July 23, 1975, at 5, Col. 2 Mr. Silverman had been assigned to the Paramount decrees since the late 1940's.

113/ An Interview With the Honorable Donald F. Turner, 30 Antitrust L.J. 100, 108 (1966).

114/ 358 U.S. 334 (1959).

latory provisions which in some respects duplicate and in other respects conflict with the FCC's comprehensive scheme of regulations.

In United States v. Radio Corp. of America,[115/] the district court, upon entering the final decree on remand from the Supreme Court, expressly disavowed any intent to substitute its equitable powers for the supervisory and regulatory role of the FCC The final judgment in RCA explicitly states that the Court will not entertain challenges to, or pass upon the validity of, future conduct; that is; the validity of any acquisition, or undertaking of national spot representation, other than those directly related to particular transactions expressly enjoined by the decree

> Nothing contained in this Final Judgment shall be construed to require this Court to pass upon any transaction of acquisition or exchange by the defendants or any undertaking by them of national spot representation except to the extent expressly stated in subsections (B) [covering acquisitions in seven specific metropolitan market areas] and (C) of Section IV [limiting national spot representation by NBC other than in six specified markets] and in Section V [ordering divestment of a television and radio station] of this Final Judgment. 116/

By contrast, the essential effect of the proposed decree in this case would be to enmesh the Court deeply in the affairs of the broadcast industry well into the future by requiring the Court (1) to render endless interpretations and judge innumerable applications of the complex and far-reaching provisions of

115/ 1959 Trade Cas. ¶ 69,459 (E.D. Pa. 1959).

116/ Id. at 75,755.

the decree, (2) to consider frequent changes in the decree to render it compatible with ofttimes duplicative rules and regulations of the Federal Communications Commission, and (3) to consider changes aimed at maintaining harmony between the decree and the needs of an industry in which flexibility is vitally important in dealing with constant changes in technology, public tastes and advertiser marketing strategies.

The FCC, aware of the pending antitrust actions and the proposed consent decree in the NBC case, nevertheless observes in its Notice of Inquiry in Docket 21049, that "the Department of Justice has a direct responsibility for the enforcement of the Sherman Act, whereas the Commission's inquiry will focus on public interest questions affecting communications policy pursuant to our responsibilities under the Communications Act of 1934."[117/] The FCC states that it has "neither the power nor the desire to foreclose the Department in its antitrust action."[118/] That however, is no longer the issue, if it ever was. The proposed decree shows there is nothing "antitrust" left in the antitrust action.[119/] The questions now raised by the impending collision of these two regulatory regimes are whether the proposed decree in fact duplicates and conflicts with FCC

117/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4992.

118/ Id.

119/ The proposed decree does not declare an antitrust violation. See supra note 8.

regulation; whether the Court is the proper forum for this type of continuing and changing regulation; and whether the entry of the proposed decree may hinder or prevent the FCC, after completing its new inquiry, from implementing and molding its regulatory scheme for television broadcasting to that which it deems best to serve the public interest.[120/]

To be sure, the FCC has not indicated any formal objection to Court approval of the proposed consent settlement, despite the absence of any factual basis establishing that its provisions are in the public interest.[121/] Nevertheless, it must be observed that even with its intimate knowledge of the industry and expertise in the field, the FCC estimates that it will need a year to complete the investigation recently announced in its Notice of Inquiry in Docket 21049. This time is required by the

120/ The Court has recognized that "maintenance of this action could possibly disrupt the FCC's regulatory efforts. . . ." United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK, slip op. at 10 (C.D. Cal. February 16, 1977). Such disruption is inevitable. Suppose, for example, the FCC, upon ending its inquiry, finds that the public interest requires a change in the rules regarding exclusivity vis-a-vis pay cable. If some other rule has been set in the cement of a court decree, the FCC's efforts will have been meaningless. The FCC will have been effectively ousted from jurisdiction over the area.

121/ The fact that the FCC has indicated in its Notice of Inquiry that its action should not preclude the Department from prosecuting these cases or seeking a settlement is essentially irrelevant. In Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963), the Civil Aeronautics Board took the position that it had no authority over practices challenged in an antitrust suit, and it filed a brief as amicus curiae supporting the Department's antitrust suit. The Supreme Court held, nevertheless, that the conduct was immunized from antitrust scrutiny by the Federal Aviation Act. 371 U.S. at 327-28. Similarly, in United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1975), the Supreme Court dismissed

[continued]

FCC to provide "information necessary to a thorough understanding of television networking"[122] and thus insure that any regulations it may adopt are in the public interest The fact that Congress' chosen agency, expert in the field, feels the need to conduct such an investigation before formulating new regulations affecting the subjects of this litigation, should at the very least be sufficient to make the Court pause and refer these questions to that agency for initial resolution The Court's observation in its decision on defendant's original primary jurisdiction motion is particularly apt and merits repeating in view of this new development

> [A]ccommodation of antitrust policies to F C C. policy in terms of remedies will be a real and substantial problem Accordingly, the court will give great weight to the F.C.C. rules in the event that it becomes necessary to afford to plaintiff a remedy. 123/

III.

The Primary Administrative Jurisdiction of the FCC Cannot Be Defeated by a Stipulation of the Parties Purporting to Transfer Prospective Regulatory Authority to the Court

Shortly after the commencement of this litigation, NBC (as well as ABC and CBS in their companion cases) moved for an

121/ [Footnote continued from preceding page]

Count I of the complaint notwithstanding the fact that the SEC was not opposed (as it was with respect to the remaining Counts) to the maintenance of a Department challenge to the conduct involved

122/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4992.

123/ United States v. National Broadcasting Co., 1974 Trade Cas ¶ 74,885 at 95,992 (C.D Cal. 1973).

order staying or dismissing the case without prejudice on the grounds that primary jurisdiction resided in the FCC, and that comity between court and agency required deference to the FCC, lest the Court, by its actions, run afoul of the agency's pervasive regulatory scheme

The Department of Justice resisted the motion, arguing that the FCC had completed its inquiry and that the issues involved were not the subject of ongoing regulatory activity Except for a minor re-examination of the prime time access rule, it was argued, the FCC had closed its inquiry into network practices While that proceeding had resulted in the financial interest, syndication and prime time access rules, the Department contended that it was seeking affirmative relief going beyond those rules, and that there was no ongoing FCC proceeding likely to result in such expanded relief.[124] In short, while conceding that the FCC could regulate all matters covered by its complaint, the Department argued the Commission had done all it was going to do[125] As counsel for the Department put it: "So it gets to be a never-never land, we are talking about an ongoing proceeding that doesn't exist "[126]

The Department also opposed these motions on the ground that the FCC had no power to make a determination or finding of antitrust violation, that the Department was entitled to such an

124/ Transcript of December 4, 1972, at 20, 25-27, 84-85, 95

125/ Id. at 73, 115.

126/ Id. at 66

adjudication and that this was something that could be resolved only by the Court. As counsel for the Department stated,

> [s]ince it is the courts, and not the Commission, which must apply the Sherman Act here, it is obvious that defendants' motions must be denied.
>
> Only this court, your Honor, can decide whether the combination and conspiracies in restraint of trade that we charge have violated the Sherman Act . . 127/

The Court denied the motions, holding that deferral to the agency was not required because FCC rulemaking proceedings "provide for future conduct" and "do not determine the propriety of past conduct" and because "the F.C.C. is not empowered to adjudicate alleged antitrust violations."128/

In view of the Supreme Court's decision in United States v. National Ass'n of Securities Dealers,129/ in November 1975

127/ Id. at 108. See also, id. at 18; Memorandum of the United States in Opposition to Defendants' Motions to Dismiss or Stay These Actions, October 16, 1972, at 9-11, 22.

> The plaintiff seeks an adjudication that the actions of each defendant be declared violative of Sections 1 and 2 of the Sherman Act. The Commission is without power to make a Sherman Act determination.

Id. at 22.

128/ United States v. National Broadcasting Co., 1974 Trade Cas. ¶ 74,885, at 95,992 (C.D. Cal. 1973). The Court also observed: "Nevertheless, assuming antitrust violations are proven, accommodation of antitrust policies to F.C.C. policy in terms of remedies will be a real and substantial problem." Id. This case was dismissed without prejudice on grounds not pertinent to these Comments and was refiled as the instant case United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK (C.D. Cal., filed December 10, 1974).

129/ 422 U.S. 694 (1975).

the three network defendants each separately moved to dismiss the actions on the ground that the Court lacked subject matter jurisdiction.130/ The networks argued that because of the FCC's pervasive regulatory scheme, exclusive jurisdiction resided in the FCC.131/

In opposition, the Department repeated its earlier contention that the FCC was not then actively engaged in or considering any rulemaking related to the principal issues in the antitrust cases.132/ The Department also urged, as it had previously, that only the courts, and not the FCC, had authority to find violations of the antitrust laws.133/

In a Memorandum of Decision and Order filed February 16, 1977, the Court denied defendants' motions, declining "to find that with respect to television programming activities Congress intended to displace the Sherman Act with the regulatory scheme of the Communications Act."134/ However, in so holding the Court

130/ Motions to Dismiss the Complaints With Prejudice for Lack of Subject Matter Jurisdiction, November 19, 1975.

131/ Id.

132/ Plaintiff's Supplemental Reply Memorandum in Opposition to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction, July 14, 1976, at 8-10.

133/ Memorandum of the United States in Opposition to Defendants' Motions to Dismiss the Complaints With Prejudice for Lack of Subject Matter Jurisdiction, January 13, 1976, at 11-12.

134/ United States v. American Broadcasting Co., Civil Action No. 74-3600-RJK slip op. at 10 (C.D. Cal. February 16, 1977).

noted that the FCC's regulatory scheme "can be considered nothing less than 'pervasive,'" and that "the FCC has been active in exercising its regulatory powers with respect to the subject matter of this suit."[135/] The Court further observed that although the Government "seeks an adjudication" of antitrust violation, "[t]he Commission's obligation to regulate for the public interest can, and should offer sufficient assurance that antitrust policy and concerns will be considered in the course of regulating the telecommunications industry."[136/]

It is now evident that the two reasons put forward by the Department of Justice as grounds for denying the network defendants' primary jurisdiction and exclusive jurisdiction motions have vanished First, as we have shown the FCC has commenced a proceeding that covers precisely the issues before the Court[137/] Indeed, this was done over the objections of the Department, which advised the Commission that its comments "should not be construed as suggesting that the inquiry encompass those issues now being litigated in the Federal District Court in California "[138/]

135/ Id at 9.

136/ Id at 7, 13-14 Compare United States v. Columbia Broadcasting System, Civ 3762 (N.D Ill 1941) and United States v. Radio Corp. of America, Civ 3763 (N D Ill 1941) which were dismissed on the Government's motion after it became apparent the FCC had authority to eliminate the challenged practices. See CCH, The Federal Antitrust Laws with Summary of Cases 1890-1951, at 274-275 (1952)

137/ Notice of Inquiry in Docket No. 21049, supra note 11

138/ Letter, Donald I. Baker, Assistant Attorney General, Antitrust Division, to Honorable Richard E. Wiley, Chairman, Federal Communications Commission (December 3, 1976).

Second, it is apparent that the Department's assertion that only a federal court may adjudicate antitrust violations, and that the FCC is without power to determine that issue,[139/] is nothing more than a makeweight argument By agreeing to a consent decree, the Department of Justice no longer seeks a judicial determination of antitrust violation.[140/] The proposed consent decree does not find an antitrust violation Nor does it "determine the propriety of past conduct " It only "provide[s] for future conduct "[141/] Thus, the mere assertion of a right to pursue an antitrust adjudication can no longer be viewed as a serious prosecutorial objective and should not be taken as an insuperable impediment to allowing the FCC to exercise its primary administrative jurisdiction over the subject matter of this litigation

Although the parties to the proposed judgment have stipulated the Court has jurisdiction to enter the decree, it is well settled that the "jurisdiction of the federal courts -- their power to adjudicate -- is a grant of authority to them by Congress and thus beyond the scope of litigants to confer "[142/] The

139/ United States v. American Broadcasting Cos , Civil Action No. 74-3600-RJK slip op at 7 (C D Cal February 16, 1977); United States v. National Broadcasting Co , 1974 Trade Cas. ¶ 74,885 at 95,888 (C D Cal 1973)

140/ See supra note 8

141/ See supra p 47 at note 128.

142/ Neirbo Co v. Bethlehem Shipbuilding Corp , 308 U.S. 165, 167-68 (1939). See also American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951); People's Bank of Belleville v. Calhoun, 102 U.S. 256, 260-61 (1880); Beach v. KDI Corp., 490 F.2d

parties may not by stipulation oust the FCC from its primary role in this area. Thus, because there are substantial jurisdictional as well as practical conflicts between the proposed decree and the FCC's exercise of authority, the Court should reject the proposed decree.

At the very least, the Court should delay consideration of the proposed decree until the FCC has completed its new inquiry. The Notice of Inquiry in Docket 21049 makes it clear that the FCC believes that further consideration of the matters encompassed by the proposed decree is required. By deferring action on the proposed decree, the Court will afford the FCC, as well as other parties, including the Department, the opportunity to develop the necessary factual record on which to base a reasoned determination as to whether the proposed regulations are in the "public interest."

CONCLUSION

For all the above reasons, ABC urges the Department to withdraw its consent to the proposed decree. The decree disserves the public interest. Its entry would rob the FCC of its congressionally mandated administrative role in the telecommunications industry. If, upon consideration of these comments, the

142/ [Footnote continued from preceding page]

1312, 1318 (3d Cir. 1974); Mayor Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 771 (7th Cir. 1974); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 540 (8th Cir. 1970); Barnhorn v. Adlib Assoc., Inc., 345 F.2d 173, 174 (9th Cir. 1965); California Welfare Rights Organization v. Richardson, 348 F. Supp. 491, 493 (N.D. Cal. 1972); Olympic Capital Corp. v. Newman, 276 F. Supp. 646 (C.D. Cal. 1967).

Department nonetheless refuses to withdraw its consent, we request the Court to reject the decree or at least stay consideration of it. Indeed, whatever position the Department takes, ABC will ask the Court to dismiss or stay the action against it on grounds of primary jurisdiction.

Dated: February 25, 1977

Respectfully submitted,

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Response to Comments of American Broadcasting Companies, Inc. ("ABC") on the Proposed NBC Consent Decree

Introduction

In essence, ABC's comments assert that this Court has no guidelines, independent of the Communications Act of 1934 1/, for determining the public interest under the Antitrust Procedures and Penalties Act ("APPA") [15 U.S.C. §16(b)-(h)], and that the proposed Consent Judgment should not be entered because the Federal Communications Commission ("FCC") has either exclusive jurisdiction, primary jurisdiction or both ABC is in error on both scores As discussed below, the proper determination of public interest under Section 2(e) of the APPA [15 U.S.C §16(e)] involves an antitrust standard, rather than one based on the Communications Act, and since the Court has already decided that the FCC has neither primary nor exclusive jurisdiction over this case 2/, this response will address only those ABC comments which relate to (1) the proper standard of judicial review to be applied in considering the proposed Judgment and (2) the substance of the proposed Judgment 3/

1/ 47 U.S.C. §301 et seq. (1976).

2/ United States v. National Broadcasting Co., Inc., 1974-1 Trade Cas. ¶74,885 (C.D Cal., 1973); United States v. CBS Inc., 1977 Trade Cas. ¶61,327 (C.D. Cal. 1977).

3/ The jurisdictional issues are treated in the Memorandum of the United States in Opposition to ABC's Motion for Reconsideration of its Motion to Dismiss or Stay, filed March 25, 1977.

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I. The Procedure and the Standard of Review Established Under the Antitrust Procedures and Penalties Act.

Pursuant to the APPA, the Court must find that entry of a proposed Judgment is in the public interest. [15 U S.C. §16(e)] While such a requirement is not new [United States v Carter Products, 211 F.Supp. 144, 147-48 (S.D N.Y 1962)], the procedure for arriving at such a finding has been altered dramatically under the Act.

The APPA sets forth explicit requirements which must be satisfied by the Department of Justice before the Court can enter a judgment. The Act requires that notice be given to the public, and a Competitive Impact Statement ["CIS"] be filed with the Court and published in the Federal Register [15 U.S.C §16(b)], that the public have a period of at least 60 days from publication within which to file comments to the proposed Judgment, and that the comments and the Government responses thereto be filed with the Court and published in the Federal Register [15 U.S.C. §16(d)]

Once this procedure has been completed, the Court has broad discretion in deciding what further to consider The APPA suggests that the Court consider the matters addressed in the CIS, including the competitive impact of the judgment, the provisions for enforcement or modification, the alternatives considered, and the impact on the public generally [15 U.S.C. §16(e)(1) and (2)].

While there is broad discretion in the Court in deciding what issues to consider and what steps to take to insure a complete ventilation of the consent process, the cases in

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which the public interest standard has been considered and the legislative history both strongly suggest that the standard to be met in deciding whether entry is in the public interest, is whether the Judgment is consistent with the allegations of the complaint and the enforcement of the antitrust laws. United States v. Associated Milk Producers, Inc., 394 F.Supp. 29 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, U.S. , 97 S.Ct. 355 (1976); United States v. Gillette Co., 406 F.Supp. 713 (D. Mass. 1975); United States v. Morgan Drive Away, Inc., 1976-1 Trade Cas. §60,949 (D.D.C. 1976); see United States v. Carter Products, Inc., 211 F.Supp. 144, 148 (S.D.N.Y. 1962). This determination must include a recognition that antitrust consent settlements are an appropriate and beneficial enforcement tool, that compromise may be involved, and that the Attorney General has broad discretion as to the terms of such settlements.

In United States v. Associated Milk Producers, Inc., supra, the District Court entered a consent decree after finding the Government's resolution of dissolution or divestiture relief to be "well within the discretionary power of the Attorney General under existing law." [394 F.Supp. at 45]. The Eighth Circuit, in affirming, noted:

> It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. [534 F.2d at 117].

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In United States v. Gillette Co., supra, the Court, in approving a consent decree, explained:

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest. Basically I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass. [406 F.Supp. at 716].

In United States v. Morgan Drive Away, Inc., supra, the Court also imposed a limited standard of review in determining whether entry of the decree was in the public interest. Judge Flannery stated that:

> The result of the bargaining toward settlement should not be measured against what concessions the Government might have succeeded in exacting from the defendants had it bargained somewhat harder, or even against the probable outcome had the case gone to trial. [1976-1 Trade Cas. at p. 69,191]

The Court went on to rule, after considering comments in opposition, that the comments "have not undermined the conclusion of the United States that the proposed Judgment is in the public interest. . . ." [1976-1 Trade Cas. at p. 69,193].

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These decisions are consistent with the Congressional intent that consent decrees must remain a viable enforcement option. Such an option would not long remain viable were it necessary for a Court to conduct a de novo determination of the factual issues relevant to the adequacy of the proposed decree. 4/ In fact, the Senate Report advises that, "[o]nly where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so." [S. Rep. No. 298, 93d Cong., 1st Sess. 1, 6 (1973)]. 5/

4/ The Senate Report states:

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time consuming means possible . . . .

[S. Rep. No. 298, 93d Cong. 1st Sess. 6 (1973)].

5/ The competitive impact statement required by the APPA is similar to the environmental impact statement required by the National Environmental Policy Act of 1969

Moreover, Congressional intent is clear that the applicable public interest standard is one of judicial construction based on the antitrust laws and antitrust precedents. The original bill included a provision 6/ which stated that the entry of a consent decree must be found to be "in the public interest as defined by law " The phrase "as defined by law" was deleted from the bill according to the House Report,

> . as a recognition that the content of the phrase, "public interest," is a product of judicial construction in the context of particular statutes . . and to provide

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5/ continued

("NEPA"), 42 U.S.C. §4321, [119 Cong. Rec. 24599 (1973)]. NEPA, like the APPA, does not call for a de novo review of governmental action. Upper W. Fork River Watershed Ass'n. v. Corps of Engineers, 414 F.Supp. 908, 915 (N.D. W.Va. 1976). Cf. Camp v. Pitts, 411 U.S. 138 (1973). Further, the Court is neither empowered to substitute its own judgment for that of the Government, Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), nor required to make findings of ultimate fact or resolve conflicts between the economic theory and data relied on by the Government and that presented by those objecting to the Government's action. Environmental Defense Fund, Inc. v. Froehlke, 368 F.Supp. 231, 240-41 (W.D. Mo. 1973), aff'd sub nom. Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974).

6/ In Section 2(e).

illumination and consistency in the usage of the phrase, the "public interest" . . . Preservation of antitrust precedent rather than innovation in the usage of the phrase, "public interest," is, therefore, unambiguous. 7/

Thus, based upon the Act itself, upon the interpretive Court decisions to date, and upon the Congressional intent as expressed in the legislative history, the Court must decide, after taking into consideration all evidence in support of the proposed Judgment and all opposition to it, whether the Government made a clear error in judgment or abused its discretion. If, based upon its review, the Court finds that the entry of the decree would be consistent with the allegations of the Complaint and the enforcement of the antitrust laws, then the Court should enter this Judgment in order to provide expeditious relief by eliminating anti-competitive restraints. See United States v. Carter Products, Inc., 211 F.Supp. at 148.

II. ABC's Comments on Specific Provisions of the Proposed Judgment.

ABC has commented adversely on the production limitation of Section V, the option term limitation of Section VI(E)(i), and the limitation on exclusivity against pay cable television in Section VI(E)(iii)(a) of the proposed Judgment.

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7/ H.R. Rep. No. 1463, 93d Cong., 2d Sess. 1, 11 (1974).

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A. The Production Limitation in Section V of the Judgment is an Appropriate Restraint on NBC's Monopoly Power.

As discussed in the CIS, Section V, which would limit for 10 years the entertainment programming which could be produced by NBC for use on its network, should enhance competition in the entertainment program production market, "by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers " [CIS at 8]. ABC's contention that the continued production of entertainment programming by the networks was approved by the FCC [ABC Comments, at 22], is disingenuous. ABC would have the Court believe that the FCC sanctioned in-house program production by the networks. However, the FCC language quoted by ABC for this proposition, in fact reflects the FCC's concern in 1965 with "continuing dominance by network corporations of the television program production and procurement process. . . ." 8/

8/ The Notice of Proposed Rulemaking, Docket 12782, 45 F.C.C. 2146, 2162 (1965), states:

> Strict adherence to the principle of free competition would perhaps suggest the total elimination of network corporations from production and financial and proprietary control of television programming. However, the record of the Program Inquiry and our general knowledge of the situation as it currently exists in network television leads us to the view that the public interest

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Moreover, the FCC concluded that network program production should be limited. 9/ This is precisely what Section V of the proposed Judgment would accomplish

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8/ continued

in a nationwide television structure sustained by network program service would not be furthered by eliminating network corporations entirely from the program production and procurement process. We are persuaded that, in order reasonably to insure the quantity and quality of television programming necessary to maintain adequate community service, network corporations should be permitted to engage to a substantial but limited degree in program production, procurement and financing. On the other hand, it is our tentative view that to permit continuing dominance by network corporations of the television program production and procurement processes as disclosed by the record of our Inquiry not only would injure the public interest in a competitive national television structure but also would act as a stricture on the "larger and more effective" use of television channels in the public interest.

9/ The FCC considered prohibiting each network from producing, procuring or financing entertainment programs during 50% of all prime time hours, something quite different than ABC's characterization. Ultimately, in 1970, the FCC prohibited each network from originating any entertainment

Significantly, the FCC has not objected to the proposed production limitation of Section V, but merely sought comment on that provision among others in its recently instituted inquiry into commercial television network practices. In fact, the FCC stated explicitly that its Notice of Inquiry was not intended to preclude the litigation of these network cases or the arrangement of an appropriate settlement. 10/

ABC also argues that the production limitation, when viewed from an economic and competitive standpoint, is unnecessary because the natural forces of the market limit each network's ability to produce and exhibit its own

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9/ continued

program during one hour of prime time, prohibited network acquisition of subsidiary interests or profit shares and prohibited each network from engaging in domestic syndication of television programming. These prohibitions are commonly referred to as the Prime Time Access, Financial Interest and Syndication Rules, 47 C.F.R. §73.658(j) (1975). [Report and Order, Docket No. 12782, 23 F.C.C. 2d 382, 384 (1970), aff'd sub nom. Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 482 (2d Cir. 1971)].

10/ See Notice of Inquiry, Docket No. 21049 (In The Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest), par. 5, 42 Fed. Reg. 4992 (January 14, 1977); see also the FCC Memorandum to the Court in this litigation, January 11, 1973.

programs. 11/ [ABC Comments at 26]. However, while the FCC rules severely limit the rights and interests which NBC can now acquire in independently produced programs, they permit the retention of certain rights in programs produced by NBC itself This provides an added incentive for increased internal production by a network, which must be curbed if competition is to be maintained in television programming. Further, a central allegation of the case against NBC was that its "unrestricted ability to produce prime time television entertainment programming, together with its domination and control over access to its combined and affiliated group of television stations and its course of conduct, constitutes an unreasonable restraint of non-network program producers' ability to produce and negotiate for distribution and exhibition of their programming." 12/ The production limitation of Section V, together with the prohibitions of Sections IV(A) and (B) and VI(A), are designed to

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11/ ABC erroneously contends that since the consent decree permits NBC some entertainment production, the issue is no longer whether program production violates the antitrust laws. Lest ABC be misled in its own case, the Government notes that it will seek to have an absolute production ban imposed on ABC, should its case go to trial. The fact that the NBC case is settled for less, is no bar to such a position since the proposed Judgment is not an "adjudication of any issue of fact or law." [Proposed Final Judgment, at p. 1].

12/ Government's Supplemental Statement of Genuine Issues, filed May 21, 1976, Issue I(G).

insure that NBC will not again abuse its market power to gain an unfair competitive advantage over independent program suppliers.

ABC's contention that the production limitation will inhibit NBC's scheduling of programming during periods of short supply [ABC Comments at 23] is based on sheer speculation. There is no shortage of supply in the industry, and no likelihood that one will develop. 13/ Further, insofar as this Judgment holds out the possibility that independent producers might share in the success of highly rated programs while on the network, and would permit such producers to retain rights and interests in programs after network exhibition, it should discourage any future shortage of supply by encouraging entry into the production of television programming.

ABC misstates the law when it argues that the production limitation is unnecessary because "[v]ertical integration through internal expansion is prima facie lawful under the antitrust laws." [ABC Comments at 26]. 14/ While vertical integration is not per se illegal,

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13/ Many more program pilots are produced for each network every year than are ever used. See discussion of Section VI(F), CIS at 12.

14/ None of the cases which ABC cites for this proposition holds that vertical integration is prima facie lawful. While some of them assume that vertical integration may bring a new competitor into the market, that is not the issue in this case, where the contention is that the vertical

> . . . a vertical enterprise, like other aggregations of business units (United States v. Aluminum Co. of America, 148 F.2d 416), will constitute monopoly which though unexercised, violates the Sherman Act, provided a power to exclude competition is coupled with a purpose or intent to do so. [Paramount Pictures, 334 U.S. at 174.]

The three complaints charge that each network excludes competition from program production through the exercise of monopoly power derived, in part, from the ability of each to produce, distribute and exhibit its own product nationwide. However, these actions are not based solely on vertical integration Central to each charge is abuse of the monopoly power which derives from each network's combination with its owned and operated and affiliated television stations A combination or conspiracy violates Section 2 of the Sherman Act whenever an appreciable part of interstate commerce is monopolized. 15/

14/ continued

integration is used for the purpose and with the effect of controlling or eliminating competition. United States v Paramount Pictures, Inc., 334 U S 131, 174 (1948); see also United States v. Griffith, 334 U.S. 100, 108 (1948).

15/ United States v. Yellow Cab Co., 332 U.S. 218 (1947); United States v. Lehigh Valley R.R. Co., 254 U.S.

Although the proposed Judgment will, of course, provide no final determination as to the legality of NBC's internal production of entertainment programming for use on its own network of stations, this activity by a network poses serious antitrust questions which are the proper subject of a consent decree. 16/ If ABC believes that the Government will not prevail on the merits, it can proceed to trial in its own case, but its contentions should not interfere with NBC's decision to settle this litigation.

B. The Limitation on the Number of Years of Options which NBC Can Acquire for Program Series is Pro-Competitive.

ABC also objects to Section VI(E)(i), which limits to four the number of yearly options NBC may initially acquire

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15/ continued

255 (1920) See Memorandum of the United States in Opposition to Defendants' Motions for Summary Judgment on the Sherman Act Claims, at 12-27 (filed January 19, 1976).

16/ In that connection; ABC also seeks [Comments at 27-28] to twist the court's decision on a motion for a preliminary injunction in Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., 1974 Trade Cas ¶74,912 at 96,095 (S D N Y. 1974), aff'd, 501 F.2d 894 (2d Cir. 1974), into a finding that ABC's internal production is permissible under the antitrust laws. Actually the Court recognized "that there are 'substantial, serious, difficult and doubtful' questions. . . ." concerning ABC's production and exhibition of feature films on its own network. [501 F.2d at 897].

for a program series, and permits an additional fifth year option only if the parties renegotiate the agreement. This provision would restrict NBC's present ability to initially obtain exclusive rights to programs for as long as 5-7 years and to renegotiate for even longer periods of time [CIS at 11]. This limitation seeks to increase competition for program series among the networks and with television stations at an earlier point in the life of a successful program. By permitting producers to share earlier in their programs' successes, this provision should encourage increased program production and attract new entrants into the field.

ABC contends that the FCC, by assuming that the networks would obtain longer options on program series, has sanctioned such options. [ABC Comments, at 28-29]. However, the FCC has never addressed itself to the contractual options granted to networks by producers, and even if it had, this could not immunize network conduct which violated the antitrust laws. More significantly, the FCC has not indicated that this or any other provision of the proposed Judgment is, in any fashion, inconsistent with its position. To the contrary, it states that its current Notice of Inquiry is in no way intended to interfere with the entry of this Judgment. 17/

C. The Provision on Pay Cable Exclusivity Has Been Withdrawn.

ABC also commented adversely about Section VI(E)(iii)(e), which would have limited NBC's right to acquire exclusivity

17/ Notice of Inquiry, at Paragraph 5. See also the FCC Memorandum to the Court in this litigation, January 11, 1973.

for theatrical feature films against their use on pay cable television The relief proposed in this provision was simply intended to establish an upper limit on terms obtained by NBC, at a level lower than the current practice, rather than a determination of what period of network exclusivity would be reasonable under the Sherman Act. Because of strong adverse comment by numerous public interest and Congressional entities, and by pay cable television operators, asserting that the provision would establish a standard which would adversely affect the pay cable industry, the Government became convinced that it would not provide meaningful relief. And, since no agreement on a more limited period for this type of exclusivity could be reached with NBC, the Government seriously considered withdrawing its consent to entry of the Judgment. However, in a recent decision the District of Columbia Court of Appeals, citing "antitrust questions," ordered the FCC to consider and resolve this problem within 180 days. 18/ Consequently, it was decided that outright removal of this provision would be appropriate and desirable as well, because its deletion would permit entry of the remainder of

18/ Home Box Office, Inc. v. FCC, No. 75-1280 (D.C. Cir. March 25, 1977). In addition, since the Court vacated the FCC rules which limited pay cable's access to feature films during the third through the tenth year after their theatrical release, all of ABC's comments on this provision reflect a situation which is no longer in existence and are, therefore, obsolete.

the Judgment. The parties have stipulated that removal of this provision does not preclude any possible future action in this area against NBC, and does not in any way prejudice any person. 19/ It is our belief that this deletion from the NBC Judgment does not eliminate the issue from the pending litigation against CBS and ABC

19/ The Stipulation, in pertinent part, provides:

> . the original inclusion and subsequent deletion of Section VI(E)(iii)(e) from the proposed Final Judgment, shall not estop plaintiff or defendant, or any person, in this or any other action or proceeding, from asserting any issue of fact or law as to the subject matter of Section VI(E)(iii)(e) or as to the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, nor shall they constitute any evidence or admission as to any such issue.

Bernard M. Hollander

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Attorney for the United States

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3706 Mr. Hollander
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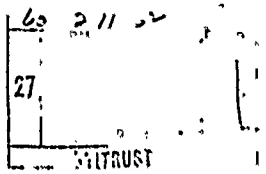
January 19, 1977

Bernard M. Hollander, Esq.
Chief
Judgment and Judgment
Enforcement Section
Antitrust Division
Department of Justice
Room 3706
Washington, D.C. 20530

Dear Mr. Hollander:

These comments are submitted by the Institute for Public Interest Representation ("Institute") pursuant to the Antitrust Procedures and Penalties Act (hereinafter "APPA") (15 U.S.C. § 16(b)(1974)) relating to the proposed consent judgment entered against National Broadcasting Company, Inc. (hereinafter "NBC") in United States v. National Broadcasting Company, Inc. (Civil Action No. 74-3601-RJK)(C.D. Cal.).



The Interest Of The Institute

The Institute is a public interest law firm operated by Georgetown University Law Center. The work of the Institute is centered around activities of federal agencies. Through written reports, participation in rulemaking proceedings and litigation undertaken when administrative remedies have been exhausted, the Institute strives to assist agencies of our government in carrying out their responsibilities to promote and protect the various public policies entrusted to them. The Institute, as a public interest law firm, is especially interested in the APPA. That Act embodies a Congressional intent to encourage participation by the public in the antitrust consent decree process by affording an opportunity to interested persons to comment on such decrees. In order to facilitate public comment, the Act requires the Antitrust Division to publish a competitive impact statement (hereinafter sometimes "CIS"). The Act requires each such statement to explain the nature and purpose of the case proposed to be settled and the estimated effect on competition of the proposed decree. The APPA also requires in subsection (b) that written comments from the public on proposed antitrust decrees

be forwarded by the Division to the district court which is considering the proposed decree.

In view of the Congressional interest in permitting informed public comment, the Institute, as a public interest law firm specializing in agency procedures, endeavors to insure that competitive impact statements filed by the Antitrust Division adhere to the requirements of the APPA. We believe we serve an important public interest in seeking to have the Division adhere to the Act's requirements in the NBC case and in asking the District Judge presiding in the case to consider our comments in the light of the purposes of the APPA.

Summary

Our comments undertake to demonstrate that the competitive impact statement in the NBC case fails to meet the requirements of the APPA in three important and distinct respects. First, it contains, we submit, a misstatement as to the relief provided. Second, it fails to explain adequately why the unusual provisions set out in sections VII and IX of the proposed decree were adopted. We submit that these provisions constitute an "unusual circumstance" within the

meaning of subsection (b)(3) of the APPA and therefore require an "explanation," which the Justice Department has failed to provide. Third, the competitive impact statement does not comport with the requirements of subsection (b)(3) insofar as it fails to explain the "anticipated effects on competition" of the relief that actually will be forthcoming in the event that similar injunctive relief is not obtained in final decrees entered against CBS and ABC. We seek to show below that the relief that the government will in fact obtain is largely dependent on the outcome of two other pending lawsuits; that the Division has entirely omitted in its discussion of the competitive impact statement the effects the decree will have on competition should the other lawsuits be lost or yield a substantially less restrictive final decree; and that the failure to submit such an alternative analysis violates the APPA and makes unnecessarily difficult public critical scrutiny of the proposed decree.

In our comments we do not consider whether the relief sought in the complaint is in the public interest. Nor do we consider the difficult question whether elimination of the anti-competitive evils alleged in the complaint would better be achieved by resort to the administrative remedies

provided at the Federal Communications Commission. Cf. CIS(2) (FCC rules govern certain relationships between major networks and independent producers). Nor do we consider whether or not it is wise for a final judgment in a Sherman Act case to be filled with injunctions of a "regulatory nature" as is the case here. See CIS(3), Section VI. The competitive impact statement filed by the Antitrust Division offers an inadequate basis for public comment on these questions.

Specific Comments

1. Subsection (b)(3) of the APPA (15 U.S.C. § 16(b)(3)(1974)) provides that " . . . the United States shall file with the district court . . . a competitive impact statement which shall recite --

* * *

> (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief."

The competitive impact statement in section (1) describes the relief sought by the Government in the complaint

and then states that the consent decree "provides relief similar and substantially equivalent to that requested in the complaint." See CIS(1); see also CIS(6). That statement is, we submit, not correct. */ The complaint (prayer 5) sought to have NBC enjoined from producing any entertainment programs for broadcast over any commercial television network. Instead of a flat prohibition, the decree limits "the amount of television entertainment programming which may be produced by NBC." CIS(3), Section V.

2. Many of the more important provisions of the consent decree do not take effect unless and until similar injunctive relief is obtained in separate civil actions against CBS and ABC. See CIS(3), Section VII. Moreover, Section IX of the decree provides that if the Division loses either the case against CBS or that against ABC, the decree against NBC may be nullified, on motion of NBC, to the extent "necessary to prevent [NBC] from being placed at a competitive disadvantage." With respect to Section IX,

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*/ We wish to emphasize that we have no evidence indicating, nor do we believe, that the Antitrust Division or its counsel acted in bad faith in this matter.

the competitive impact statement contains this cryptic sentence:

> While this type of provision is unusual in an antitrust judgment, it is warranted by the unique nature of this industry, and the pendency of the companion actions.

CIS(3), Section IX.

This conclusory and unilluminating statement hardly qualifies as an "explanation of any unusual circumstances giving rise to such proposal" as required by subsection (b)(3) of the APPA. Why does the Antitrust Division propose to enter into a consent decree containing such "unusual" provisions? What are the relevant "unique" aspects of "this industry?" Why is this provision "warranted" in view "of the pendency of the companion actions?" The competitive impact statement neither asks nor answers any of these questions.

We submit that the Antitrust Division has an obligation under the APPA to disclose and explain, fully and fairly, all of the circumstances that gave rise to these unusual provisions. To be sure the APPA by its terms requires an explanation of "unusual circumstances," not "unusual" provisions. Thus it might be argued that usual "circumstances" could give rise to "unusual" provisions, and that in such a

situation no explanation is required by the APPA. But this would ignore one of the principal objectives of the APPA: to inform the public and the Court of any non-routine situation giving rise to any provision in any proposed antitrust consent decree. Interested persons would thereby be placed in a position to comment intelligently on such a decree.

In the words of Congresswoman Jordan on the floor of the House while the APPA was under consideration: The "simple purpose [of the APPA is] to ventilate the consent decree process . . . [The APPA] would pierce the secrecy with a requirement that the Justice Department file a competitive impact statement . . . The public will [then] have 60 days to comment . . ." 120 Cong. Rec. 36343-44 (1974).

If the Antitrust Division is not required to reveal in its competitive impact statement the reasons for adopting unusual provisions in consent decrees, the public is left to the mercy of the Division. It must trust the Division to decide what circumstances are unusual. It was the revelations surrounding the ITT case that provided a major impetus for adoption of the APPA. The drafters of that Act

intended to require the Division to reveal anything about any proposed antitrust consent decree that is "unusual." Thus a sensible construction of the Act, and one that comports with its broad remedial purposes, is to read it as establishing a requirement that the Division explain any unusual provisions in order that the Court and the public may be made aware of the circumstances that led the Division to propose them.

In brief, once a provision in a consent decree is admitted to be "unusual" as the Division does in the CIS in the NBC case, it can be inferred that "unusual circumstances" produced it. At the very least, it is incumbent upon the Division to explain the circumstances that lead to unusual provisions in order that the public and the courts may assess for themselves whether the circumstances warranted such unusual provisions. We ask, and we submit the APPA requires, that the Division describe and justify those circumstances in its CIS, whatever they were.

3. The relief the Division has obtained in the proposed NBC decree is almost entirely dependant on the outcome of the pending cases against CBS and ABC. This is demonstrated by close analysis of Sections VII and IX of the

decree itself. Section VII provides that six specific sections or subsections of the decree "shall not take effect until similar injunctive relief is obtained . . . against CBS [and] ABC." */ Section IX provides that NBC may have the remainder of the injunctive relief in the decree nullified if the Government loses either its case against ABC or CBS, or if the Government obtains against CBS or ABC "injunctions different . . than those required by this Final Judgment . . . NBC . . . shall be granted a modification of . . . any terms set forth herein as may be necessary to prevent NBC from being placed at a competitive disadvantage . . ."

Subsection (3) of the competitive impact statement is captioned "The proposed consent judgment and its anticipated effect on competition." Nowhere in this section of the CIS is there discussed the "anticipated effect on competition" if similar relief is not obtained in the cases against CBS and ABC.

We submit that the CIS should have discussed separately (a) the likelihood that the Government will obtain relief against both CBS and ABC of the types that will take effect against NBC upon entry of the proposed decree; (b) the

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*/ Sections V, VI(c), VI(E)(i), VI(F), VI(G) and VI(H).

likelihood that it will obtain relief against both CBS and ABC of the types contained in those parts of the proposed decree against NBC which do not go into effect until similar relief is obtained against both CBS and ABC; and (c) the anticipated effect on competition of that part of the decree against NBC which goes into effect immediately but would remain in effect only until the cases against CBS and/or ABC are finally concluded by entry of a decree containing no relief or different relief than that obtained in the proposed decree against NBC.

If the Division is unwilling or unable to make categorical predictions as to the outcome of the cases against CBS and NBC, then the competitive impact statement, we submit, should have evaluated the relief against NBC in the alternative. In other words, the competitive impact of the NBC decree should have been evaluated, first, on the assumption that similar relief will be obtained against both CBS and ABC, and second, on the assumption that such relief will not be obtained against both. Only if this is done can interested members of the public have a basis on which to judge whether the decree will have any significant "effects on competition" (APPA, subsection (b)(3)). The

failure to discuss these questions would be all the more serious if, as we are informed, both CBS and ABC separately advised the Antitrust Division before it filed its CIS that each would not consent to relief similar to that obtained against NBC.

Conclusion

We recognize that considerations of trial strategy may have made the Division hesitate to reveal the circumstances that caused it to enter into this unusual decree while the companion cases against CBS and ABC are pending. But the APPA, by mandating full disclosure of all unusual circumstances, requires the Division to assume the risk, if risk there be, of disclosure.

Our objection to the competitive impact statement filed in this case is not that the Division has been mistaken or misguided in its decision to enter into the decree against NBC. Rather, it is our position that the Division has failed to comply with the dictates of the APPA. That Act, we repeat, was intended -- quite literally -- to compel the Antitrust Division to disclose and justify any unusual circumstances surrounding acceptance of any unusual antitrust consent decree. The purpose of Congress in adopting this novel legislation was to open up the circumstances surrounding adoption of consent decrees to public scrutiny so that

interested members of the public could intelligently comment on them. We submit that the Division has not adhered to the legislative command in the APPA in its competitive impact statement filed in this case. Accordingly informed comment by the public on the question whether the proposed decree against NBC is in the public interest has been rendered very difficult, if not impossible.

We urge the Division either to withdraw its consent to the proposed decree, or to file an amended competitive impact statement correcting its deficiencies. If any amended CIS is filed, interested members of the public should be given sixty days after its publication to comment on the proposed NBC decree.

If the Antitrust Division should consider these comments to be substantially without merit, we respectfully urge the District Court */ to consider our comments and, if they are found to be sound, to direct the Antitrust

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*/ Subsection 2(b) of the APPA requires the Division to file these comments and its response with the Court. See supra, pp. 2-3.

Division to file an amended competitive impact statement, correcting the deficiencies herein noted.

Respectfully submitted,

Victor H. Kramer
Director

Thomas Krattenmaker
Thomas Krattenmaker
Consultant

Response to the Institute For Public Interest Representation, Georgetown University Law Center

The Institute contends that the Competitive Impact Statement ("CIS") filed with respect to this proposed Judgment does not satisfy the requirements of the Antitrust Procedures and Penalties Act ("APPA") (15 U.S.C. §16(b)-(h) (1974)), because it is inaccurate in characterizing the relief obtained; because it does not explain the unusual circumstances leading to the provisions in Sections VII and IX; and because it does not explain the effects on competition, if similar relief is not obtained from CBS and ABC. While the Department shares the Institute's desire to improve and upgrade the process for entry of consent Judgments and the quality of Competitive Impact Statements, we disagree with its contentions here

The CIS correctly states that the proposed Judgment provides relief which is similar and substantially equivalent to that requested in the complaint [CIS at 2-3]. The Institute points out that the proposed limitation on NBC's production of television entertainment programs is not substantially equivalent to the complete ban originally sought. The CIS, however, carefully and fully explains the differences between the Judgment provisions and the relief prayed for in the complaint, stating, with respect to the production limitation:

> A provision permanently prohibiting NBC from producing any television entertainment program for network exhibition was sought in the complaint. The compromise reached in Section V of the judgment would limit for ten years NBC's production of television entertainment for its network use, not only during prime time, but also during daytime or fringe hours. . . . While the Government at trial would have sought a complete prohibition of television entertainment program production by NBC, this judgment provides substantial relief which will prevent NBC from foreclosing significant amounts of independently produced programming from its television network. [CIS at 16-17].

While some may differ subjectively as to whether this is substantial and equivalent relief with respect to internal production, the CIS fully explains the relief sought and that obtained In any event, the "similar and substantially equivalent" language of the CIS refers not to the relief provided by any section standing alone, but to the relief obtained in the Judgment as a whole. That relief, when viewed en toto, is substantially equivalent to that requested in the complaint.

These actions were not brought to eliminate the three networks, but to limit their use of market power and encourage as much competition as possible within this three program buyer market structure. By opening up the stripping and syndication markets, by limiting network production, and by reducing program renewal options, the Judgment seeks to encourage competition in television entertainment program production, both among networks and between networks and other broadcasters. Moreover,

the injunctions in Sections IV and VI(A)-(C) should prevent NBC from abusing its market power when acquiring network exhibition rights.

Further, the Government does not believe that the CIS falls short in its discussion of the provisions of Sections VII or IX, or in its discussion of the anticipated effects on competition, if similar injunctive relief is not obtained from ABC or CBS. As explained, this is an unusual industry [CIS at 14], in that the three networks are the only purchasers of commercial television programming for simultaneous nationwide broadcasting. Each network as a purchaser has enormous market power, not subject to meaningful competition from the other two networks or from non-network television stations. This Judgment seeks to limit NBC's use of its power in purchasing television entertainment programs. If, however, the Court were to decide after a trial not to prohibit or limit the use of similar market practices by CBS or ABC, then it might be appropriate for NBC to seek relief from any portions of this Judgment which place it at a competitive disadvantage vis-a-vis CBS and ABC. For example, while Section VI(E)(ii) of the Judgment would limit to three years the period during which a prime time program series could be exclusive to NBC (as against syndication in other day parts), the present network practice is to require such exclusivity for the length of the initial 5-7 year contract, plus extensions which may run substantially longer. Should the Court after trial fail to award similar relief against CBS and ABC, then NBC should be free to seek modification of this provision,

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upon a showing that it had been placed at a competitive disadvantage.

The same analysis is valid with respect to those other portions of the Judgment, which pursuant to Section VII will not become effective until similar injunctive relief is obtained against CBS and ABC. For example, Section V of the Judgment would enjoin NBC from producing for its own use more than 2-1/2 hours of prime time entertainment programming per week, plus 2 additional special programs every six months. Were the Court to rule after trial that CBS's or ABC's unlimited power to produce entertainment programming should not be curtailed, then NBC, because of the peculiar structure of the market, should not be subject to such a prohibition. 1/

The provisions of the decree which go into effect immediately, or within 30 days after entry of the Judgment, would have the procompetitive effect ascribed to them in the CIS. Section IV tracks the Federal Communications Commission Financial Interest and Syndication Rules (47 C.F.R. §73.658(j)), which are already in effect, and have increased competition for syndication rights and allowed program producers to retain more ownership rights in their programs.

1/ See CIS at 5-6. It should be noted, however, that the Government has not conceded that each provision which does not become effective until similar relief is obtained against CBS and ABC would place NBC at a competitive disadvantage if it were applicable to NBC alone.

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Section VI(A) is a general injunction against abuse by NBC of its market power through acquiring more control over programs and producers than is necessary to permit network exhibition. Section VI(B) prevents NBC from conditioning access to its chain of stations on the producer's agreement to use NBC's production facilities in producing his program. This provision seeks to assure that a producer's decision on facility use will be made on a competitive basis and not to increase the chance that NBC would accept his program. Sections VI(E)(ii) and (iii) would limit the exclusivity rights which may be obtained by NBC in connection with its licensing of a program series or a motion picture, and should increase the amount of such programming available in the syndication and other media markets. All of these provisions would become effective upon entry of the Judgment, even if no injunctive relief were obtained against CBS or ABC

In sum, we believe that the CIS satisfies the requirements of the APPA in every respect, and that entry of the Judgment against NBC would be in the public interest.

Bernard M Hollander

Attorney for the United States

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[FR Doc.77-13517 Filed 5-13-77;8:45 am]