FCC 67-1143
11 RR 2d 1571

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF THE RULES WITH RESPECT TO HOURS OF OPERATION OF STANDARD BROADCAST STATIONS	Docket No. 14419 RM-268

MEMORANDUM OPINION AND ORDER

(Adopted October 11, 1967)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND WADSWORTH ABSENT; COMMISSIONER COX CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission here has under consideration 23 petitions for reconsideration of the report and order and new rules adopted in the longstanding "presunrise" proceeding (8 FCC 2d 698, 10 R.R. 2d 1580, adopted June 28 and released July 13, 1967). Briefly, in that decision we abandoned the "permissive" use of daytime facilities before local sunrise by class III stations (those on regional channels) and many class II stations, both those licensed for daytime-only operation and unlimited-time stations having different day and night facilities, which had prevailed under former section 73.87 since 1941. Under that arrangement, such stations could use their full daytime facilities before local sunrise, as early as 4 a.m. local standard time, unless and until such operation was terminated as a source of objectionable interference to an unlimited-time station's licensed operation.[1] The decision substituted a licensing concept, contained in new section 73.99, under which such operation is specifically authorized under a presunrise operating authority (PSA) from the Commission. PSA's are limited to 6 a.m. (local standard time) and after (with other restrictions on time as to class II stations), and, regardless of the power authorized for daytime use, are limited to either 500 w or whatever lesser power must be used to afford the required degree of protection to cochannel foreign stations. Domestic interference is not evaluated, it being minimized by the across-the-board 500-w limitation.

2. The petitioning parties are listed in the appendix hereto. They include Association on Broadcasting Standards, Inc. (ABS, a group

[1] The permissive provisions of sec. 73.87 did not extend to class III and class II facilities authorized after January 1962, which were specifically conditioned against presunrise operation during the pendency of this proceeding.
Although 73.87 did not specifically so state, as it was administered Commission orders terminating a station's presunrise operation were issued only on the basis of complaints by full-time stations of interference to their licensed nighttime operations, after such complaints were examined by the staff and found to be well-founded under conventional nighttime propagation standards.

106-514—67——1

of full-time class II and class III stations);[2] Daytime Broadcasters Association (DBA, a group of daytime-only stations); Clear Channel Broadcasting Service (CCBS, a group of 11 class I–A clear channel stations); A. Earl Cullum, Jr., & Associates (a consulting engineering firm seeking only a modification or waiver of the remote control rule requirements); and numerous individual licensees (including class III daytimers, class II daytime-only or limited-time stations, and full-time class III stations). As discussed below, except for ABS, CCBS, and Cullum (and to a very limited extent full-time station KMA, Shenandoah, Iowa), the basis for the opposition to the new provisions is that they involve restrictions on presunrise use of daytime facilities compared to what these stations have done in the past under 73.87, without being the subject of complaint. ABS is concerned about this and also about the effects of interference from presunrise operations; CCBS is concerned about interference to the service of I–A stations.[3]

3. Before discussing the pleadings in detail, we note one point raised in some of them, as well as in numerous informal objections to the new rule and requests for waiver. This is that, for daytimers, the rule provides for sign-on at 6 a.m. local standard time (i.e., what is sometimes called "nonadvanced" time, without the 1-hour advancement during the "daylight-saving time" period). This is 7 a.m. local time during half of the year, since, following adoption of the Uniform Time Act of 1966, "advanced" time has become all but universal in the conterminous 48 States.[4] This is not usually a significant problem in May, June, and July, when local sunrise is generally 5 a.m. (nonadvanced time, or 6 a.m. advanced time) or earlier; but it is an important matter in October, when, in general, it means that daytimers cannot sign on before 7 a.m. local time during most of the month, and to a lesser extent in September, August, and late April. This, it is urged, is simply too late in terms of the listening habits of the community.

4. We recognize this problem, and are attempting to deal with it. As we stated in the decision (report and order, appendix A, par. 28), a 7 a.m. sign-on does not appear sufficiently early to meet the need for local informational services which this proceeding has demonstrated. While the months involved are perhaps not those in which presunrise operation is most valuable to the public or to the station (as valuable, for example, as winter months of adverse weather con-

[2] The ABS petition, which is 55 pp. long, does not comply with sec. 1.106(f) of the rules, which limits petitions for reconsideration to 25 pp. On Aug. 31, 1967, ABS filed a request asking that its petition be considered despite its length, stating that this request was inadvertently omitted when the petition was filed. This statement was served on all other petitioners and has not been opposed. Considering the wide-ranging character of the decision, and also the fact that much of the petition consists of quotations and other historical material which could have been put in an appendix and would have been accepted as such, grant of the request appears appropriate.

[3] Oppositions and other responses to the petitions were filed by CCBS, KFI (Los Angeles class I–A), Storer Broadcasting Co. (participating herein on behalf of WSPD, Toledo, and KGMS, Los Angeles), and KFAX, San Francisco. Replies to oppositions were filed by four daytime-only stations opposing Storer, and by two class II stations (KOWH and WHLO). These pleadings relate chiefly to the class I–A clear channels.

The Commission has also received a large number of informal petitions for reconsideration, formal and informal requests for waiver, objections, protests, etc., in relation to the new rule. These are not specifically dealt with herein, but the general guidelines for dealing with them are set forth. By and large, they involve the same arguments and situations as did the formal petitions for reconsideration.

[4] Although there seems to be some misunderstanding on the point, licensees may, of course, sign on at local sunrise when that is earlier than 6 a.m., as it is during a substantial part of the year. PSA's are only intended to afford relief during other months when sunrise occurs later.

ditions and the high commercial activity of the pre-Christmas period), we recognize the desirability of a uniform 6 a.m. sign-on. In keeping with traditional methods of expressing "sun time," the agreement with Canada concerning presunrise operation (TIAS 6268, formalized June 12, 1967) specifies 6 a.m. local standard time. We cannot unilaterally depart from it. However, steps are under way to explore with Canada the possibility of redefining the agreement in terms of prevailing local time.[5] Overall, it is not believed that this would result in conditions of materially increased interference, since (as some parties point out), during the "advanced time" months (except for October), 6 a.m. local time is at least as close to local sunrise as is 6 a.m. standard time in winter. We propose to explore this matter with Canada in the near future.

5. *DBA Petition.*—DBA, while approving what it characterizes as our recognition for the first time that engineering yardsticks are merely one tool for, and the servant and not the master of, public-interest determinations, urges that we did not go far enough, and that, while adopting the philosophy of the House of Representatives in enacting H.R. 4749 [6] in 1962, in the interest of "compromise" we failed to carry this philosophy to a logical result. Its objection is to what is described as the "disastrous consequences of such rules on the public," through the reduction in existing presunrise operations they require. It is asserted that, while recognizing the necessity for and value of presunrise operation by daytimers, we failed to give it enough weight. It is said that consistency requires that if interference among U.S. regional stations is to be of no concern, reduction in time and power used for years without complaint is not necessary, and, a fortiori, interference to the service of very distant clear-channel stations should be similarly treated. It is stated that the cutback in power to 500 w will cause loss of vital services in surrounding areas and even stations' own communities, and that the limitation to 6 a.m. will affect "a great preponderance" of daytime stations (particularly in rural areas having no full-time local service) which have been signing on at 4 or 5 a.m. It is also asserted that the reduction in power will be costly (sometimes requiring a new transmitter) and that many stations will have to reduce power to a level so far below 500 w that presunrise operation will be useless, both economically and in terms of service. Only two groups of stations, it is said, would benefit from the new rules: Those ordered

[5] This would, of course, expose full-time stations (both domestic and foreign) to some additional skywave interference during certain months of the year, varying widely from station to station and channel to channel.

[6] H.R. 4749 passed the House but was not acted on by the Senate and, therefore, died with the 87th Congress. Pars. (a) and (b) of the bill provided that (subject to international considerations), stations could use their daytime facilities starting at 6 a.m. (local standard time), or 4 a.m. if they had done so before, but not where a full-time station in the same community, operating with licensed nighttime facilities, served the same area; a full-time station showing harmful interference from such operation (a fairly substantial showing was required) could get a hearing, but the offending operation could be modified or terminated only after a showing in the hearing of such interference and that the action would serve the public interest. Under other paragraphs, daytime-only stations not eligible under the above could apply for presunrise operation and get it if the Commission determines that harmful interference to a substantial portion of another station's service area would not be caused; and the Commission was authorized to permit, by rule, daytime-only stations to operate presunrise and postsunset (with or without application). The bill's language probably did, as DBA asserts, represent a relaxation of existing standards as to what is objectionable interference; it did not require reduction in power of presunrise operations, and it made no distinction between regional stations and class II stations on clear channels.

terminated because of complaint, and those granted in recent years and automatically conditioned against presunrise operation.

6. Claiming that the Commission acted without sufficient information (particularly as to the prevalence of operation before 6 a.m.),[7] DBA asks that: (1) The Commission adopt the approach taken in H.R. 4749 (see footnote 6, above), except that its benefits not be limited to stations in communities without a full-time station (a distinction we found to present too many anomalies to be desirable); or (2) to stay the rules for 6 months insofar as they would require any reduction in existing presunrise operations by daytimers or full-timers, and in the meantime conduct a searching inquiry, by questionnaire of all stations, as to the extent of presunrise operation, nature of the programing presented and reliance on it, the losses therein entailed by the curtailments required by the rules, the extent to which full-time stations received "objectionable interference" from such operation programed for the "loss" areas and the extent to which listeners therein have complained, and the effect of the rules on the economic ability of daytimers to compete with full-timers and to provide local programing in the public interest. A similar inquiry of clear-channel stations is requested as to their programing aimed at potential interference "loss" areas. DBA asks that the rules be allowed to stand as to stations which have not operated presunrise recently (the two groups mentioned above). As to the Canadian question, DBA notes that the July 1, 1967, effective date specified in the agreement has already been waived, and asserts that, since Canada has acquiesced in nationwide U.S. presunrise operation for so many years, "it is inconceivable that Canada would refuse to agree to maintenance of the status quo for the period of the requested stay."[8]

7. *ABS Petition.*—ABS attacks the decision herein on a number of grounds, including matters of both law and policy. Its chief concern, although by no means the only one, is the alleged failure to afford full-time class II and class III stations protection from interference from presunrise operations. Its chief points may be summarized as follows (where appropriate they are discussed in more detail below): (1) The decision represents a reversal of sound technical views and concepts expressed by the Commission in earlier considerations of extended hours for daytimers (and in testifying on proposed legislation to the same effect); (2) the decision departs from the further notice (1962) proposal—which represented a compromise between scientific realities and the demands of daytimers—in a number of respects and, thus, the balance is defeated (most important, presunrise operation is permitted for daytimers without restriction as to whether there is a full-time station in the community, and instead of a diurnal curve for determining possible radiation, the only protection to full-time service is an inadequate limitation to 500 w); (3) the decision represents a yielding of the Commission's traditional position as an expert agency in the face of a dubious concept of "congressional intent," which ABS

[7] It is asserted that daytimers do not have the resources to present information in formal filings to the Commission, and, also, that some of them were not aware of the proposal for class II stations.

[8] Roughly half of the presunrise operations conducted under former sec. 73.87 are not in accordance with NARBA protection standards. This is the crucial defect of the "permissive" concept of early morning operation, to which DBA does not fully address itself.

asserts does not in fact exist (it is said that the real "will of Congress" is that we should use the expertise for which the Commission was created); (4) affording adequate protection to licensed service is not an insupportable administrative burden (this is what we were created for), especially since we are prepared to do it in connection with processing the new PSA requests with respect to interference to foreign stations (a disparity of treatment labeled as "arbitrary and capricious"); (5) our judgment, essentially that nontechnical factors outweigh the technical considerations which indicate greater losses than gains, is unsupported and wrong; (6) we erroneously rejected its scientific evidence, particularly its submissions in 1966 and 1967 of the results of skywave measurements (this was 3 years after the record was closed herein); (7) the new agreement with Canada is not what it purports to be—a supplement to NARBA as contemplated by section A, subsection 6, of annex 2 to that treaty—but is a completely new agreement and, thus, of no effect until ratified by the Senate (ABS also expresses concern about the "secrecy" of the negotiations and the asserted "bypassing" of the Administrative Procedure Act); and (8) our legal position, that interference from presunrise operations (authorized without opportunity for hearing) does not infringe licensed rights, is wrong (ABS goes further and asserts that it is an infringement even after the full-time station's license has expired and been renewed).

8. In connection with the first point mentioned, ABS calls attention to our decisions in the late 1950's in dockets 1274 and 12729, where we pointed out the losses in services resulting from presunrise operation and stated that daytime-only stations were intended to utilize spectrum space available after accommodating full-time stations. In connection with the third point, ABS refers to the failure of Congress to pass presunrise legislation despite a number of bills introduced, and to testimony on behalf of the Commission in opposition to H.R. 4749 (in its original form) and other similar bills, opposing them in part on the ground that the Commission had the expertise to deal with such matters, which do not lend themselves to the "broad brush" of legislative handling (ABS states that the Commission is also ignoring the statutory mandate of sec. 303(f) of the act, failing to adopt rules to prevent interference between stations). With respect to the fifth point, ABS asserts that we attached erroneous importance to the daytimers' showings as to the value of service rendered, did not take into account the limited coverage daytimers have during these hours because of interference, overlooked ABS' showings as to the valuable wide-coverage service rendered by some of its members (said to be only examples), and, in general, emphasized the provision of community-limited service at the expense of service to outlying areas, with respect to weather and otherwise. As to the sixth point—rejection of its skywave measurement data—ABS calls this arbitrary and capricious, asserting that in the skywave measurement proceeding (docket 10492, 10 R.R. 1562 (1954)) we rejected skywave measurements for adjudicatory purposes, stating that they would be considered "only in a general rulemaking proceeding." It is asserted that this is such a proceeding, especially since the further notice proposed a diurnal curve and called

for comments on it, thus placing the matter in issue. If as a matter of policy we are not going to consider such measurements at all in a proceeding where they are relevant, this is said to be arbitrary, capricious, and violative of section 4 of the APA. Recognizing that the measurement showings are not "definitive," ABS asserts that it has done what it could with its limited resources and the results should be considered; that a scientific solution is feasible and should be sought, rather than adopting a mechanical approach.[9]

9. The argument as to the validity of the Canadian agreement rests upon the language of the provision of the North American Regional Broadcasting Agreement (NARBA), which is cited in the argreement as authority for its adoption, and on the background of that provision. That section (subsec. 6 of sec. A of annex 2) defines "daytime operation" as being, in general, operation between local sunrise and local sunset at the transmitting station; however, "in particular cases" other daytime hours may be established "either in the present Agreement or in bilateral agreements, between the respective Contracting Governments, taking into account the location of the station it is intended to protect." ABS argues that this means agreements relating to particular stations, not whole classes of stations as dealt with here; and, also, that the "legislative history" shows that it was intended to permit agreements for restrictions on class II stations after sunrise and before sunset ("critical hours") to protect class I stations in other countries[10] (a subject later taken up between the United States and Canada in 1953, in docket 10453). It is also asserted that during the late 1950's, when possible impact on the operating hours of daytime stations was one of the chief issues in connection with Senate ratification of NARBA, none of the many witnesses—many of them knowledgeable in this area—ever suggested that this provision could be used to modify NARBA in the present fashion. ABS' other legal arguments will be discussed later, in the conclusions herein.

10. ABS urges that our decision and the rule adopted be set aside, and renews its proposal, advanced during the proceeding, that a Government-industry committee be set up to derive, from existing or new data, a suitable set of diurnal curves for evaluating operation during the transitional presunrise period. This, it is said, is the only way new daytimer presunrise operations can be permitted, and such operations by full-timers maintained, with a minimum of destructive interfer-

[9] The data advanced in 1966 and 1967 consisted of results of measurements made over three relatively short paths for a period of about 4 months, plus West German vertical incidence measurements made over about a 7-month period. ABS asserts that these measurements not only establish the inaccuracy of the diurnal curves proposed herein, but indicate the great potential for destructive skywave interference during the presunrise period.

[10] This argument is based on certain documents prepared in connection with the negotiations leading to NARBA (Montreal 1949). The United States proposed a definition of "daytime" and "nighttime" which specified local sunrise and local sunset, without the additional language quoted above. Canada had no proposed definition; it did propose a change in the language of the previous NARBA (1937) provision concerning class II stations, which defined "nighttime" as "from sunset to sunrise at the location of the class II station." Canada proposed to delete this language, giving as its reason that it would be burdensome to either the class I or the class II station depending on the latter's location to the west or east, and to leave the definition of "nighttime operation" to the government concerned. These two proposals were considered together by a subcommittee, and one of the members from another nation suggested the idea of "critical hours" restriction on class II stations. All three matters were summarized together in the subcommittee's report, ABS gathers from this material the view that the qualifying clause in this section of NARBA relates only to possible "critical hours" restrictions on class II stations.

ence. In the alternative, if the decision is permitted to stand, it asks certain specific relief for full-time stations which will now be using their directionalized nighttime facilities during presunrise hours (it anticipates that many will, rather than taking the 500-w daytime-facility option). These specific requests are: (1) Relaxation of the remote-control and first-class operator rules, discussed below; (2) permitting such directionalized operations to radiate up to 124 mv/m in their "null" directions during the presunrise period rather than adhering to the lower values specified in their nighttime authorizations (this is the equivalent of 500 w nondirectional radiation); (3) further rulemaking looking toward appropriate standards and procedures by which full-time class II and class III stations using daytime facilities presunrise before January 1962 could do so again (subject to the requirement of protecting foreign and class I stations).

11. *Petitions Relating to the Regional Channels; Unlimited-Time Stations.*—Eleven full-time regional stations were represented in petitions seeking reconsideration, all objecting to the restriction on full use of their daytime facilities before sunrise.[11] The only one making any specific showing was KMA, Shenandoah, Iowa, which operates with 5 kw, directionalized at night, and for many years has used its nondirectional daytime facilities starting at 5 a.m. It objects to the requirement that it discontinue such operation.[12] It stresses the importance of its long-standing and extensive farm programing, and also of early-morning weather information in connection with agriculture and school and school-bus schedules, road conditions, etc., a service said to be of great importance to its widespread, largely rural audience, and not provided by other stations. It is asserted that, because of the four deep nulls in its nighttime pattern, directional operation during these hours will mean loss of its present service to all or parts of nine counties (in three States), including areas quite close to its community and including 24 of the 111 school districts which rely on it for school-closing information. It is stated that operation under the "emergency" rule (sec. 73.98) is not a substitute, because its listeners depend on and look for its daily service, and their needs would not be met by "now and then" broadcasts. It is asserted that FM is no substitute either, since there is no channel available at Shenandoah in the FM Table of Assignments. KMA urges that this disruption of service, and "white areas" which will result, simply makes no sense; and that the need for early-morning service in rural areas, which we recognized in 1940 when we changed sign-on time for daytime-only stations from local sunrise to 4 a.m.,[13] still exists (it is asserted that in this area, unlike some parts of the country where stations have

[11] Ten of these stations filed two very brief petitions, simply questioning the legal effect and validity of the Canadian agreement (described as an important element in our decision) in the same manner as ABS, above, and asked that we reconsider and either "grandfather" existing presunrise operations, or, at least, provide for full use of such facilities rather than imposing a 500-w limitation not required by the agreement. We note that nine of these are FM licensees (all but one on a wide-coverage class B or class C channel); the other is in a large city with multiple full-time AM and FM services.

[12] KMA asserts the value of its early-morning service and states that it signs on at 5 a.m. However, in comments in this proceeding (now incorporated by reference) it suggested a 6 a.m. starting time for presunrise operation, and it appears from the general tenor of the present petition that its chief complaint is against restriction on nondirectional operation, rather than the matter of time.

[13] On Oct. 14, 1941, this rule was modified into the provisions of sec. 73.87, which remained substantially unchanged until our recent decision herein.

proliferated since, there are still few stations). KMA, while recognizing the enormous task confronting the Commission in this matter, asserts that, nonetheless, across-the-board "go-no-go" rules, of the type adopted, are simply not the answer to the differing needs of the various parts of the country (differing needs which licensees themselves are expected to ascertain and meet) and are not consistent with the mandate of section 307(b). It is asserted that "pioneer" stations such as KMA unfairly bear the brunt of the resolution of this proceeding, being hurt in two ways—by the drastic reduction in facilities they will be required to undergo, and by increased interference from daytimer presunrise operation; and in both respects its "316 rights" are violated (its argument is elaborated in the conclusions herein). KMA asks that we "grandfather" existing 5-kw regional operations to provide continued service in rural areas. It is pointed out that we have recently applied a "grandfather" approach in CATV matters with respect to the top 100 TV markets (not proceeding toward the removal of "distant" signals received before February 15, 1966, even though off-air service in these markets is generally plentiful, almost by definition), and we should take the same approach here.

12. *Petitions by Daytime-Only Regional Stations.*—Eleven formal petitions were filed on behalf of 20 regional daytime stations. Four of these stations make only the point about "6 a.m. local time," already discussed, and an argument concerning the language of section 73.99 (f), which describes the PSA as "secondary" and terminable without notice or hearing if circumstances require. This is discussed below. The remaining 15 stations—as well as a large number of other daytimers who have filed informal petitions for reconsideration, requests for waiver, objections, protests, etc.—oppose the reduction in operating power or hours, or both, which the new rule will require as compared to their present presunrise operation, often of long standing. The arguments advanced are much the same as those detailed above. Except for two (WHUN and WXLW), the presunrise operations of these stations have not been the subject of an interference complaint, and it is asserted that such operation with full daytime facilities should be permitted to continue, at least until a complaint is received. The types of service emphasized are the same as those mentioned earlier—service to farmers and ranchers, weather information of importance to agricultural interests, schools, and the public, school-closing information, information for workers starting work at an early hour, etc.—and also matters such as Spanish-language programing for Mexican workers in the area from 5 to 6 a.m. (KGNB, New Braunfels, Tex.). Several of the stations submitted letters from school officials, agricultural officials, and similar persons asserting the value of their service. WXLW, Indianapolis, calls attention to the 8,800 letters from listeners submitted earlier in the proceeding. Seven of the stations make specific mention of programing earlier than 6 a.m. (KXXX, Colby, Kans., as early as 4:30 a.m.). Some assert that they will lose substantial revenues (the hours in question are said to be those most valued by advertisers); KXXX asserts that the 25 percent of its revenue which comes from "farm" accounts will be jeopardized, since such advertisers would not be interested in a station which can-

not reach the wide rural audience which KXXX serves, during hours which are most important for farm listening.[14]

13. Some claim that this loss will impair their ability to present public-service and other programing in the public interest; KGNB asserts it will probably have to give up its Spanish programing. It is urged that a licensee takes each license renewal subject to the interference then existing and with the operating privileges it has had, and we are violating daytimers' licensed presunrise rights in order to reduce the interference which full-time stations took their renewals subject to. It is asserted that this restrictive action is taken with no showing as to what losses are actually caused by the interference from more extensive operation, and that we are acting too much from considerations of administrative convenience. In one case (WHUN, Huntingdon, Pa.), it is asserted that the reduction necessary under the Canadian agreement for that station, to 125 w, is so drastic that, with the interference prevailing on the channel, the station can probably not even serve the city and it would hardly be worth while. The cost of reducing power is also mentioned. Not all of these parties have specific suggestions as to resolution of this matter except that the restrictions in the rules not apply to them; KXXX suggests (as did KMA) "grandfathering" all 5-kw regional stations and KGNB suggests a general "grandfathering" or, at least, maintaining the status quo while the impact is studied and a suitable basis for continuing full-power operation is evolved.

14. For the most part, the 20 communities in which these stations are located have no full-time AM stations (Indianapolis and El Paso have multiple such services; there is a full-time regional (1 kw) at Watertown, N.Y.; three other places have class IV stations; and one is very close to a city with full-time AM and FM service (Braddock Heights, Md.)). As to FM, nine of the 20 stations are FM licensees or permittees, and three others are in cities where there are unoccupied assignments available for them to apply for. In three of the communities (including Braddock Heights), there is no other station and no FM channels are assigned.

15. *Other Pleadings Concerning the Regional Channels.*—Most of the responsive pleadings filed with respect to the petitions for reconsideration concerned class II stations on U.S. I–A and I–B channels, and are discussed below under that topic. Storer Broadcasting Co., participating in the proceeding with respect to its stations WSPD (full-time regional), Toledo, and KGBS, Los Angeles, filed a response in which it opposed DBA. Generally supporting our decision as against DBA's objections, Storer states its belief that the compromise

[14] KXXX also makes the point that, with most of its audience located in the central time zone, although it is in the mountain time zone, 6 a.m. for it means 7 a.m. for most of its audience in the winter months and (under "advanced" time) 8 a.m. in the daylight-saving portion of the year. This, it is said, represents a tremendous loss in operating hours. This station makes many of the same arguments advanced by KMA, above, including the inadequacy of weather broadcasting under the "emergency" rule (it is asserted that, with its tremendous service area, the station's staff at Colby, might not even be aware of real emergency conditions in another part of that area, and that the station cannot afford to maintain a "weather watch"). KXXX also stresses its great coverage, presenting announcements of livestock auctions in 69 counties in four States, school closing announcements for schools in 29 counties in three States, and official weather information for school districts in 21 counties.

106-514—67——2

reached leans too far away from engineering considerations in rejecting various proposals advanced by Storer, such as restricting presunrise operation to 250 w rather than 500 w and avoiding additional interference losses by confining presunrise authority to those stations which had previously engaged in it and whose listeners had come to rely on it (a position taken by Commissioner Cox in partial dissent from the decision). Storer concludes this portion of its response by asserting that, on reconsideration, we should limit the privilege to stations which have operated presunrise in the past, and limit it to 250 w.

16. A joint reply to this pleading was filed by four daytimers (three regional and one class II) authorized since January 1962 and thus conditioned against presunrise operation pending the decision in this proceeding. These stations oppose Storer's suggestion, asserting that their communities have the same needs for presunrise service as those where stations have been so operating, and that it would be highly unfair to place these newer stations—which need the economic benefit during the initial stages of their operation—at such a disadvantage compared to older stations. It is also asserted that Storer's suggestion should be rejected, because it is an affirmative request for revision of the decision and, thus, should have been filed as a petition; treated as a petition it is obviously not timely. Of the four stations, two have no other AM stations or FM assignments, although one (Hyde Park, N.Y.) is close to a larger city which does; one is in a city with a class IV and FM station, and one is in a city with full-time regional and FM service.

17. *Petitions and Pleadings Concerning Class II Stations.*—Five class II stations petitioned for reconsideration, as did Clear Channel Broadcasting Service (CCBS), an association of 11 class I–A licensees. One of the five is station WTPR, Paris, Tenn., a daytime-only station on 710 kc/s. Authorized for 250-w power, this station is far enough away so that, operating presunrise, it does not cause interference (using nighttime standards) to the class I–B station to the west (at Seattle), and, therefore, it has been signing on, under section 73.87, at sunrise New York City or shortly thereafter. Its very brief petition simply raises the same arguments questioning the validity of the Canadian agreement mentioned above for certain full-time stations, and asks that its present presunrise hours of operation be "grandfathered," and permitted to begin at sunrise New York City even when that is earlier than 6 a.m. local time (it does not specify what its actual hours have been). WTPR is the only AM station in Paris; it is a class A FM licensee.

18. Two petitions by limited-time class II stations on U.S. I–A channels (located west of the cochannel I–A's), as well as Storer's responsive pleading insofar as it relates to KGBS, raise the question of the time limitation, 6 a.m., applied to these channels. The Canadian agreement specifies "6 a.m., local standard time" as the earliest starting time for class II, as well as class III, presunrise operation, without any exception for U.S. I–A channels. However, as these parties point out, there are no Canadian stations on these U.S. I–A channels (660, 750, and 1020 kc/s), or, indeed, on any U.S. I–A channels. KOWH,

Omaha (660 kc/s), seeks a sign-on time of 6 a.m. local time (which it now uses), and raises the point already dealt with in this connection. It also urges that, if necessary, stations in its situation should be notified internationally as "specified hours" operations, starting at sunrise at the class I station or, at least, at 6 a.m. local "advanced" time when that is later than sunrise at the dominant station.[15] KMMJ, Grand Island (750 kc/s), which emphasizes farm programing and signs on at 5:15 a.m. when sunrise at Atlanta permits it to do so, makes much the same arguments as KMA, including those concerning the validity of the Canadian agreement and its rights under its license previously mentioned under KMA. It also asserts that the adoption of this restriction is illegal, because the further notice herein, of November 1962, proposed to permit full use of daytime facilities by class II's on U.S. I–A's, located west of the dominant station, without any restriction as to time; therefore, relying on this, it did not comment in the proceeding. It is also asserted that with KMMJ directionalized to the west so as to protect the Atlanta I–A station, and over 900 miles away, it in all probability does not cause any interference to that station after sunrise at Atlanta. It emphasizes its extensive and assertedly unique farm programing, and claims that hours before 6 a.m. are highly important to give the farmer needed information before he starts work. It is asserted that the other Grand Island full-time station (a class IV) is so limited in coverage at night that it scarcely covers the city and cannot begin to reach KMMJ's wide rural audience, and it is said that FM service in the area is almost nonexistent, with few receivers, so that people could simply not get the same service, and economic considerations preclude KMMJ's attempting to build an FM market. It is urged that the decision be set aside or at least modified to give "grandfather rights" to class II stations west of cochannel U.S. I–A stations.

19. Storer's pleading on behalf of KGBS makes some of the same points concerning the absence of Canadian stations on these channels and lack of Canadian interest in any restriction on U.S. class II stations on them. Storer also alleges what it considers the special status of "limited-time" stations such as KGBS (KMMJ is so licensed also). It is asserted that the Canadian agreement's reference to use of "daytime facilities" only after 6 a.m. obviously refers to either daytime-only stations or full-time stations authorized different facilities day and night, and not to "limited-time" stations, which (under sec. 73.23(b) of the rules) are authorized to operate not only daytime but during nighttime hours not used by the dominant station (where located east of the I–A station they may operate until sunset at the dominant station's location). Calling attention to our observation in the notice of proposed rulemaking in docket 17562 (power limitation on class II presunrise operation) that conditions on U.S. I–A channels are somewhat different from those on other frequencies, Storer states that this should apply to time as well as power, and asks us to declare that the 6 a.m. limit does not apply to these channels and adopt the rule proposed in the 1962 further notice herein.

[15] The request is in the alternative, for reconsideration or waiver.

20. The other two class II petitions are from class II stations located east of the dominant cochannel I–A stations and are precluded under the new rule from any operation before local sunrise—WHCU, Ithaca, N.Y., and WHLO, Arkron, Ohio (both also have waiver requests pending). These stations have been engaging in presunrise operation, starting at 6 a.m. or shortly thereafter, for some years, WHCU on the basis of an agreement with the cochannel I–A station (WWL, New Orleans)[16] and WHLO on the basis that, so operating, it does not cause interference within the 0.5-mv/m 50-percent skywave contour of the cochannel I–A station, KFI, Los Angeles, and, therefore, under its interpretation of former section 73.87, such operation was permitted.

21. WHCU asserts that our action adopting a rule precluding presunrise operation by stations in its situation is essentially illegal, because the matter did not receive much specific attention in the 1962 further notice (the text of the rule concerning class II's was set forth in a footnote); it was not covered in the record in this proceeding; and our decision contained only brief references to the problem of protecting the skywave service of class I–A stations.[17] Noting the fluctuating nature of skywave service with respect to time of year, and the small portion of total nighttime hours which are involved here, WHCU asserts that no order terminating existing presunrise service on the basis of interference to I–A skywave service can be adopted before certain questions are answered, as to whether the class I–A's skywave service during this period merely duplicates what it has presented during earlier hours, the extent to which it is actually relied on (in view of its seasonally varying character) and is intended specifically for distant audiences who would lose its service through interference, whether destructive interference is actually caused, and the need for the presunrise operation in question. It is also asserted that our treatment of stations in this category differs arbitrarily from that of class II stations to the west of cochannel dominant stations, since we are allowing operations by the latter even though recognizing that it may cause some skywave interference to the dominant station to the east (report and order, appendix A, footnote 9). Making the same argument mentioned above under ABS and others concerning the need for flexibility in administrative-agency determinations, WHCU asserts that, perhaps unlike the regional channels where a broad approach is required by the number of stations and situations involved, here there are only a few stations to be considered, and ad hoc evaluation is necessary before existing presunrise operations are terminated. WHCU, in this petition and its waiver request, asserts the value of its presunrise service (farm information, weather, etc., with special emphasis on the latter because Ithaca is in a "snow belt"), and submits some 30 letters from farm officials, school authorities, and others (e.g., Red Cross officials concerning emergency blood requests). It asks that we amend the rules to make class II stations

[16] The first agreement was entered into in 1956. It has not been renewed for some years; therefore, it is probably more accurate to say that the operation takes place in the absence of objection by WWL which has knowledge thereof.

[17] Report and order, footnote 8a; appendix A thereto, footnote 16.

located east of cochannel U.S. I–A stations eligible for PSA's where they so operated before July 1967. We note that WHCU is a class B FM licensee.

22. WHLO, Akron, bases its argument chiefly on the fact that a 500-w presunrise operation would not cause interference within the skywave service area of KFI, Los Angeles; therefore, it is asserted, it was permissible under former section 73.87 and should be permitted to continue without disruption. It asserts that ad hoc consideration must be given to situations such as that of WHLO before existing operations are terminated. It is asserted that it has no impact on the service of KFI (which apparently did not know it existed) and that, even if termination would add to that station's service area, it would merely be a new service, for which no need has been shown, at the expense of an existing and relied-on service.[18] WHLO's petition and its waiver request emphasize its position as the only Akron AM station not permitted full-time operation but having a wider presunrise service area than the others (it claims coverage of 18 counties in northeastern Ohio). WHLO is not an FM licensee; there are multiple full-time AM and FM services in Akron and close-by communities.[19]

23. *Filings on Behalf of Class I–A Stations.*—CCBS sought reconsideration on behalf of its 11 I–A licensee members, agreeing with our decision to terminate presunrise operation by class II stations on these channels to the east of the dominant station (noting its showings in earlier proceedings as to the losses from such operations to the wide-area service of class I stations), and urging that the same principle be applied to those to the west, or, at least, that they be limited to 500 w (or daytime power if less), a matter at issue in docket 17562. It was also urged that such operation be only on the basis of a PSA duly sought and issued (none are required under the note to sec. 73.99(b)(1)). CBS, in a supporting statement, asserts that the class I–A stations must be relied on to cover the new "zones of interference" which we recognized might occur as a result of our decision, and called attention to its complaint against class II's operating after sunrise New York (but before their own local sunrise), which we recognized in the decision (appendix A, footnote 9), as a potential source of interference to WCBS. CBS also objects to termination of what it believes to be the right of class I–A stations to protection from undue interference under former section 73.87(b), asserting that this was never contemplated in the proceeding and, therefore, adoption thereof is a violation of the Administrative Procedure Act.

24. CCBS also filed an opposition to the four petitions by class II stations on I–A clear channels, described above.[20] As to KMMJ and its claim of public injury through the preclusion of early-morning farm service, CCBS (one of whose members is WSB, the dominant

[18] The sign-on hours would, of course, have to be keyed to sunrise at class I–B station CBN, St. John's, Newfoundland, under new sec. 73.99 and the Canadian agreement.

[19] WHLO also asserts that KFI's service area is already limited by a Cuban cochannel station to a point closer to Los Angeles than WHLO's presunrise operation limits it; and that the absence of objection by KFI up to now to its operation cannot be explained by the 6 a.m. operation of WOI, Ames, Iowa, under special service authority, since WHLO's operation occurs earlier (the WOI operation is the subject of a hearing concerning its continuation).

[20] KFI filed an opposition to the WHLO petition substantially similar to that of CCBS, stating it will oppose a waiver request by that station.

station on that channel at Atlanta) asserts that this is a balance between local service and interference which our decision considered and reached; that KMMJ has not shown how many farmers actually rely on its service earlier than the hours of sign-on permitted by the new rules; and that, while many class II stations do not maintain farm departments, all of its I–A members maintain extensive farm operations and specialize in programing for small-town and rural America; that any extension of class II operating hours beyond those permitted by the new rules would destroy the vital skywave and groundwave services of class I stations; and, indeed, the best solution to providing farm and weather service to rural America would be to eliminate all presunrise operation by class II stations on U.S. class I–A channels. With respect to WHCU's argument based on lack of objection by the dominant station, CCBS urges that it is not in the public interest—and, indeed, may well be an impermissible delegation of the Commission's duties under section 303 (c) and (f)—to have rules which permit licensees to agree on operation which causes destructive interference contrary to the public interest. With respect to the "6 a.m. local time" argument, CCBS urges that, since standard (nonadvanced) time is in accord with the pertinent physical facts relative to interference, it should prevail as the rule now provides. As to WHLO, CCBS urges that we should adhere to "a sound, long-standing Commission policy" prohibiting presunrise operation by easterly class II's on I–A channels, and that this single situation should be considered on a waiver basis if at all. It is asserted that permitting presunrise operation by eastern class II's will cause a large part of the country to lose all AM service because of interference; it is asserted that, since 6 a.m. Akron is 3 a.m. Los Angeles, this is nighttime, not transitional operation in wintertime, and would result in an "intolerable" loss of skywave service and illegal modification of KFI's license from class I–A to class I–B status. Referring to our earlier statements stressing the importance of clear-channel service and of allowing it to be received wherever it can be, free of interference, CCBS asserts that neither KFI nor the I–A station at Salt Lake City should be "duplicated" in any fashion, since they are the only I–A stations in the West, where the bulk of the "white area" is, and provide early morning skywave service beyond their 0.5-mv/m 50-percent skywave contours. The fact that WHLO has been engaging in such operation "in violation of the Commission's rules" is no reason to continue to deprive listeners in the "white area" of this skywave service.

25. Storer, in its pleading labeled CCBS' suggested prohibition of presunrise operation by western class II's as without foundation, since such operation has historically taken place. KOWH and WHLO replied to CCBS' opposition to their petitions; the former merely repeated the allegations in its petition concerning the desirability and significance of 6 a.m. "local time" sign-on, and asserting that CCBS has not refuted them. WHLO asserts that the "interference" caused to KFI by its presunrise operation is of little significance; considerably less than that permitted on the decision for stations on regional channels, since it is not within KFI's "secondary service area"; and the listeners affected, if any, would be affected in the dead of night (3 a.m. Pacific time and after).

CONCLUSIONS

26. *The Regional Channels.*—After careful consideration of the pleadings discussed above, it is our view that, with respect to the regional channels, our decision herein of June 28, 1967, and new section 73.99 of the rules adopted therein, should be affirmed without change, with the understanding that an effort will be made to redefine the 6 a.m. sign-on in terms of prevailing local time. In reaching this determination, it is appropriate to make some observations concerning this proceeding and the nature of the decision reached before.

27. Former section 73.87, the long-standing "permissive" rule, was adopted in October 1941, when there were a relative handful of AM stations compared to the present number—882 altogether compared to some 4,250 today, and, in particular, 60 daytime-only stations compared to some 2,180 today, 1,214 of them on regional channels. The rule worked reasonably well for a number of years, permitting presunrise use of daytime facilities without generating a substantial number of interference complaints. It appears that the vast majority of regional daytimers, and many full-timers, took advantage of the rule. However, by the late 1950's, this had ceased to be true. The number of complaints was markedly increasing (in part, at least, because of the increased number of stations), and, under the procedure then used, these generally led to automatic, and summary, termination of the operation complained of, to the annoyance of the station and often of its public who had come to rely on it.[21] The uncertain status of operation under section 73.87 was underlined in 1961 by the decision of the U.S. Court of Appeals for the District of Columbia in *WBEN, Inc.* v. *FCC*, 290 F. 2d 743, which held, in effect, that, unless we were prepared to condition a grant of improved daytime facilities against use thereof before local sunrise, an unlimited-time licensee able to show that such use would cause it interference under our regular nighttime standards had standing to object to the grant and a right to a hearing on the question of interference.

28. There were also international considerations. The language of the 1937 NARBA was somewhat ambiguous, but its successor, the 1950 NARBA, contained the very precise language, in paragraphs (a) and (b) of subsection 6 of section A of annex 2, that "Daytime in general means operation between the times of local sunrise and local sunset at the transmitter location of the station" (subject to possible supplemental agreements discussed below) and "Nighttime is operation at any other time." The agreement also provided, of course, for notification procedure. Therefore, when this treaty entered into force in 1960 (after ratification by the U.S. Senate), this country was faced with the necessity, in compliance with its international undertakings, of bringing presunrise operation—which is operation during nighttime hours—into conformity with the new agreement, including notification. As ABS showed in its comments in the proceeding, observance of NARBA requirements with respect to Canada would have required

[21] As we pointed out in the decision, by 1967 there had been complaints filed by and against stations on 25 regional channels, compared to only 15 3 years before.

a large number of existing presunrise operations to be terminated or, if lesser powers could be used, sharply curtailed in power.

29. Both of the developments made it considerably less than certain that, just because a particular presunrise operation had been conducted without complaint in the past, it would continue to take place without complaint or international problems. Also, in 1961, Storer Broadcasting Co. (licensee of WSPD, Toledo, on behalf of which it had filed a number of presunrise complaints) filed a petition asking for certain changes in the procedures followed under section 73.87, some of which were proposed in the original notice herein in December 1961. A number of daytimers opposed the petition and the notice proposals because it was believed they would make easier the filing and perfecting of presunrise complaints by daytime-only stations, which, indeed, did appear to be one of the purposes of the petition.

30. With all of the domestic and international uncertainties and anomalies that had developed by 1962, it appeared highly desirable, if not imperative, that whatever presunrise operation was to be allowed in the future should be on a more orderly basis. Also, there were developments of a more substantive nature. The increase in presunrise complaints appeared to indicate a feeling that general presunrise interference conditions on the channels were becoming worse, just as we observed them to be in the nighttime AM service generally.[22] In July 1962, the House of Representatives passed H.R. 4749, which appeared to indicate that body's belief that the rather strict nighttime engineering standards which had been used in evaluating presunrise service and interference, both in general "extended hours" rulemaking proceedings in the late 1950's and in passing on presunrise complaints, should be applied somewhat less rigidly and automatically (see footnote 6, above). In light of these developments, we restudied the situation during that year, and in November 1962 issued the proposal contained in the further notice herein, which appeared to us to represent a suitable balance between two conflicting considerations—on the one hand, the fact that daytimers often render valuable locally oriented service during these hours, with respect to news, weather, etc., and, on the other hand, the fact that such operation, taking place during nondaytime hours, does cause substantial interference. The solution finally adopted differs somewhat from that proposal, in light of the record, but it still, nonetheless, represents—as it must—a compromise.

31. As noted, almost the sole ground of complaint of the regional channel petitioners (other than ABS) is the restriction on their operation compared to what they have used up to now with respect to power (they have been using full daytime facilities, and most are authorized more than 500 w) or time (some have been operating earlier than 6 a.m. local time) or both. With two exceptions, the stations have been operating without interference complaints, and the question is asked as to why such curtailment, and disruption of relied-on service, should, therefore, be required. The answer lies in the necessity for reaching a balanced compromise of conflicting

[22] In May 1962, we imposed a "freeze" on the acceptance and grant of most AM applications.

interests within the framework of this country's international obligations concerning the notification to foreign countries of standard broadcast operations, and proscribing such operations when they cause objectionable interference to foreign cochannel stations. Both in the further notice proposal and in the decision adopted, we set forth an arrangement which would preclude full-time regional stations from the right which they had hitherto had of filing interference complaints where they believed the matter serious enough to warrant the effort (which included reversion to their own nighttime facilities). This had been one means of affording a measure of protection to licensed unlimited-time services. With its removal, some other method of providing a degree of protection was required. This was achieved by limiting all presunrise use of daytime modes of operation to 500 w, or lesser power if necessary to afford foreign protection.[23]

32. This reduction may result in some loss of existing presunrise service (particularly, perhaps, in the case of 5-kw operations now restricted to 500 w) but it is necessary if the compromise and balance are to be maintained. We also point out that the general power cutback means a reduction in interference; and, as we observed in appendix A to the report and order (par. 26), interference conditions on many channels may well be improved, so that a given amount of power will produce usable service over an area as great or greater than that served now with a higher power. The same general considerations apply in the case of KMA, Shenandoah, Iowa, which seeks to use full daytime facilities instead of nighttime directional facilities. It may be that there will be some loss in service presently provided to those areas which are in the "nulls" of the nighttime pattern, but overall service may well be improved. If KMA wishes to concentrate on the "null" areas, it has an option of using 500 w nondirectionally.[24] We also point out that, while the overall power restriction is not required by the Canadian agreement, many regional stations would be limited to power of this level, or only slightly more, by the requirement of protecting Canadian and other foreign stations, which we are not in a position to waive.

33. We cannot accept the contention of DBA that—in order to "grandfather" existing operations, particularly daytimers—we should treat engineering standards of protection to licensed service any more lightly than we have in the decision. To do so would be to take too lightly the apprehension expressed by ABS—that local presunrise service by daytimers is being accommodated at the expense of wide-area coverage by full-time regional stations to rural areas which have no stations at all. DBA alleges inconsistency in our deciding that interference on the regional channels is "of no concern" and then imposing a 500-w limit on existing operations. Interference is not "of no concern"; it is simply that, in our judgment, a limitation to 500 w is a

[23] Two of the petitioning daytimers complain specifically of the low power they will be required to use to meet the requirements of the Canadian agreement with respect to cochannel Canadian stations. Such complaints cannot, of course, be considered. We point out in this connection that the provisions of the agreement, and fig. 12 adopted in the new rules, are substantially less restrictive than NARBA; if these stations were required to conform to NARBA requirements they would be limited to even lower power if permitted to operate at all.

[24] Station KFNF, full time, is licensed to provide nondirectional 500-w service at night at Shenandoah.

106-514—67——3

reasonable and easily administered interference control device. Possible consideration of greater power, on a waiver basis, is discussed below.[25]

34. With respect to operation before 6 a.m., as mentioned, some of the contentions on this subject concern only changing the rule from 6 a.m. standard time to 6 a.m. "local" time (i.e., advanced time). As mentioned above and in the notice of proposed rulemaking adopted herein, we are presently of the view that, at least for the regional channels, this is appropriate, and propose to amend the rule in this respect if it can be accomplished internationally. As to operation earlier than that, such operation is precluded by the Canadian agreement unless, of course, the operation would be free from foreign interference considerations so as to be capable of being considered on a regular application and notification basis (it is believed that few are thus susceptible). This is discussed below in connection with possible waivers. Moreover, this was also a term of the further notice proposal, and is one we would likely adopt for domestic purposes also, even in the absence of foreign considerations. As we mentioned in the decision (appendix A to report and order, par. 27), we are not persuaded that, in general, earlier operation has enough public interest to warrant the extensive interference entailed during the pre-6 a.m. period, when interference conditions more closely approach, or equal, full nighttime conditions.[26] Like the matter of power, this is part of the balance and compromise which must be reached.

35. One thing we note in connection with our decision, although not necessarily a determining factor in it, is the general availability of the FM service. As pointed out above, of all daytime regional stations filing formal petitions, almost half are FM licensees or permittees; in most of the communities there is FM service; and in all but three there are FM channels assigned (one of these probably could get an assignment, two could not).[27] An FM assignment could be found for Shenandoah, Iowa, and, as mentioned, all but one of the other petitioning full-time regional stations are FM licensees or permittees (the one is in a city with multiple FM services). The same is true, although perhaps to a lesser extent, of stations filing informal petitions or formal or informal waiver requests, objections, etc. We will shortly institute rulemaking looking toward making assignments available in their communities, if none is there now, and it appears that an assignment is warranted. In this connection, two plains-area stations (KXXX, Colby, and class II station KMMJ, Grand Island) assert that this simply is not the answer in their areas, where there is little or

[25] In this connection, it should be observed that the difference in service area between 500 w and a higher power is not necessarily as great as might appear. One informal waiver request stated that the reduction from 1 kw to 500 w would cut the station's service radius in half. This is not the case. In one formal waiver request, supported by engineering (KLIK, Jefferson City, Mo.), it is shown that with 500 w the interference-free presunrise contour would extend about 10 miles from the transmitter, compared to about 16 miles with 2.18 kw and 20 miles with 5 kw.

[26] As mentioned in footnote 12, above, KMA, which is one of the stations stressing its farm programing, signs on at 5 a.m.; but in its earlier comments in this proceeding it appeared satisfied with a 6 a.m. sign-on.

[27] Caruthersville, Mo., can receive an assignment; the two communities which cannot are Braddock Heights, Md., and New Braunfels, Tex. The former is almost adjacent to Frederick, Md., as noted above; the latter is about 30 miles from San Antonio, and thus within the service range of clear-channel station WOAI and numerous San Antonio FM stations.

no FM service and, therefore, very few receivers. We note, however, that at Colby another party recently foresaw enough interest to petition for assignment of a wide-coverage class C channel there (which was done), and another class II station in Nebraska (WJAG, Norfolk, a town smaller than Grand Island) is an FM permittee. But, whether or not FM is available or viable in a particular case, we believe the limitations previously adopted, and affirmed herein, must be applied if the balance struck—which appears to be the best available—is to be maintained.

36. As indicated above, in general the parties commenting concerning the regional channels seek "grandfathering" of existing operations—their own, their general class of station, or all existing presunrise operations. DBA requests (if we do not adopt its sweeping suggestion for resolution of the proceeding) that we undertake an elaborate survey, by questionnaire, into programing and other matters concerning all stations involved in this proceeding, meanwhile staying the rules for 6 months except permitting stations not hitherto authorized presunrise operation (or terminated on complaint) to operate under the new rules. ABS asks that the decision and rules be set aside pending study of transition-period propagation conditions, and development of a suitable diurnal curve, by an industry-Government effort.

37. For reasons set forth above, we do not consider "grandfathering," as such, a possible solution, because it is not consistent with the balance arrived at herein, which we believe to be an appropriate one. Also, to the extent it would permit the continuance of operations causing objectionable interference to foreign stations (which many would), it would be inconsistent with this country's international obligations. Moreover, "grandfathering" would almost necessarily involve withholding of presunrise privileges from new stations, a course we considered in the decision and decided not to adopt (appendix A to report and order, par. 25). As to suggestions that, essentially, we withhold the decision herein pending studies of various types, this too cannot be considered seriously. For one thing, continuation of operations which do not comply with treaty obligations is precluded by the manifest need for international reciprocity in frequency management.

DBA's suggestion (par. 6) that Canada would, or should be asked to, agree to maintenance of the status quo pending the 6 month's study requested is hardly appropriate for consideration at this juncture. Moreover, in connection with this request, it seems hardly likely that the survey requested by DBA—involving thousands of stations and a vast and somewhat amorphous amount of information—could be completed in 6 months, or indeed satisfactorily at any time in the near future. Our experience with other questionnaire surveys, involving fewer respondents and narrower and more specific points, is to the contrary. ABS' suggested study also is not one which could be completed in a short time, nor is it likely that the data yielded would be more than cumulative.

While we will consider specific proposals for the gathering of meaningful information in either of these areas, and indeed welcome them, they cannot be the basis for not deciding this proceeding now.

38. Conceivably, international considerations aside (i.e., with respect to operations conforming or made to conform to all pertinent international requirements), we could consider one of two alternatives to the decision reached. The first of these is a complete return to the 73.87 status quo, with the rough, though not happy, balance reached thereunder. This would necessarily mean honoring interference complaints, including more than 60 filed and not acted on prior to our decision, on a summary basis; otherwise, in our view, there would not really be a balance and full-timer service would be subject to undue interference overall. It might well mean that all, or most, applications for new or increased facility daytime-only stations would have to be the subject of hearings, under the *WBEN* case, supra, since virtually all regional daytimer presunrise operations cause objectionable interference, under our nighttime interference rules, to one, or usually more, full-time stations. This "permissive" system has proved considerably less than satisfactory during the last years of its existence, and we see no reason to return to it (interference complaints, of course, might well be even more numerous because, for international reasons, the Commission would have to have information, not easily available at present, as to the exact extent of the presunrise operations of various stations).

39. Alternatively, the other possible course would be to proceed on what might be called a modified "grandfather" basis, such as, perhaps, reducing power on a proportionate basis (5-kw operations to 2.5 kw, etc.) or using 1 kw instead of 500 w as the ceiling. However, this has not been suggested by any party on reconsideration, and we believe it would necessarily involve withholding presunrise rights from stations which have not so operated before, if the balance is to be even roughly approximated. This we have rejected before and do again (see appendix A to report and order, par. 25).[28]

40. ABS and DBA present a number of related, but opposite arguments against various aspects of our decision. DBA asserts that we failed to carry out the philosophy of H.R. 4749 to a logical conclusion in the public interest; ABS asserts, on the other hand, that there is no "will of Congress" in this area, except that we use our expertise, and that we mistakenly thought there was and abandoned our expert judgment in favor of a "broad brush" approach. The answer to both is that one House of Congress, in 1962, passed a bill, and in connection with deliberations leading to it we expressed our willingness to restudy the matter. The result of that restudy was a tentative view that daytimer presunrise operation rendered a more significant service, placed in comparison to the losses it causes, than strict evaluation by traditional nighttime engineering standards would indicate, a view much the same as that of the House at that time.[29] As the ensuing proceeding developed, this view appeared to be justified, and was adopted

[28] As the four stations filing in opposition to Storer point out (par. 17), communities with new stations have the same needs as those with older stations. We, likewise, agree that the withholding of presunrise privileges from new stations was not properly raised by Storer (the only party mentioning it) in a timely petition for reconsideration; and, in any event, it was raised only in connection with restricting presunrise operation, not as a means of permitting greater presunrise operation by older stations.

[29] Clearly, the restudy of 1962 was prompted in part by congressional sentiment on the subject. However, the result, as set forth in the further notice and later in the decision made in the light of the record, reflects our best judgment of the matter.

in the decision, which, as mentioned, struck what we believed, and still believe, to be an appropriate balance. ABS asserts that we wrongly did not adhere to sound engineering principles; DBA apparently would have us dispense with them entirely as far as protection of full-time regional service is concerned. Again, we have struck what we believe to be the most appropriate balance between these positions, in light of our restudy and the ensuing record made in this proceeding. ABS also criticizes our action as departing from the further notice proposal (which itself represented a balance), in permitting presunrise operation by all daytimers rather than just those in communities without a full-time station, and employing only a flat 500-w limit (said to be inadequate) as a protection from interference. The reasons for this were discussed in the report and order (par. 19) and appendix A thereto (pars. 24 and 40) and do not need repetition here; we believe the balance arrived at is a sound one. ABS also asserts that we attached too much weight to the "nontechnical" aspects of daytimer service showings and too little to those of full-timers (mostly its members), while DBA insists that we acted with too little information as to the value of existing presunrise service by daytimers. We had the benefit of submissions by numerous stations on both sides, and gave it appropriate weight. As noted in the decision (appendix A, pars. 1, 6, 11, 16, 17), the daytimers made somewhat more persuasive showings as to the extent to which listeners rely on their service.

41. ABS also attacks our exclusion of its late-submitted skywave measurement data. Our rejection of this material was because—being limited in nature (see footnote 9, above) it did not materially help as a tool in the resolution of this proceeding. We did not say in the decision and certainly do not say now, that skywave measurements will never be considered in rulemaking; but these, limited as they were, did not appear either to serve as a useful tool for evaluating transition-period conditions or to afford reason to postpone decision of this long-standing and important proceeding any longer.[30] As we stated (appendix A to report and order, footnote 17), the protections against interference adopted appear adequate and reasonably simple, and, also of some importance, they afford the basis for a decision now.

42. We are also criticized—both by ABS and by parties stressing maintenance of their present operations—of adopting a too general and sweeping treatment (after having said Congress should not do so in this area), without proper regard for the need of maintaining existing service, or of avoiding undue interference, in particular situations, in the interest of "administrative convenience." These contentions are without merit. We pointed out in the decision (appendix A to report and order, par. 30) that case-by-case consideration in this area would involve unbelievably staggering burdens, and create cases of extreme complexity. This is true because skywave interference—which is involved here—is of a long-distance character; a single station may affect, or be affected by, many station in various directions. This discussion in the paragraph cited covers the point. With respect to ABS'

[30] For a discussion of the Commission's position on the subject of skywave measurements, see the decision in the *Skywave Measurement* proceeding, docket 10492, 10 R.R. 1562 (1964).

contention that this is in arbitrarily sharp contrast without individual analysis of foreign interference problems in connection with PSA requests, the two subjects are not of the same magnitude at all. A fairly high percentage of PSA requests can be evaluated almost automatically, in view of the great distances of most U.S. stations from foreign stations, a situation which would seldom prevail in domestic situations on the crowded regional channels. Also, there are usually only two or three foreign stations in each country on each channel to be considered and there is a fixed standard (fig. 12 for Canada; the U.S./Mexican agreement for Mexico) against which each proposal is evaluated. Domestic analysis would be completely different, and, no doubt, would have to take in the "nontechnical" factors mentioned. Even so, the staff is currently spending more time on the PSA review than could be devoted on a continuing basis. As to ABS' contention that we have ignored the mandate of section 303(g) of the act, directing us to make rules to prevent interference between stations, such a rule has been adopted, by virtue of the time and power limitations imposed on presunrise operation.

43. *The Canadian Agreement.*—As mentioned, ABS and a number of other parties attack, or at least question, the validity of the Canadian agreement referred to and incorporated in our decision and the new rules. It is asserted that it was negotiated in secrecy, without the opportunity for public analysis and participation (in contrast, for example, to the *Canadian Daytime Skywave* proceeding of 1953, docket 10453); that it is a bypassing of the Administrative Procedure Act's rulemaking provisions; and that it is not yet valid because—not in fact being (although purporting to be) a supplemental agreement to NARBA—it is not in effect until ratified by the Senate.

44. The first two contentions merit little discussion. As to the APA argument, that act specifically exempts matters which are "a military or foreign affairs function" from its rulemaking provisions. This is clearly a "foreign affairs function." As to the conduct of the negotiations, the manner of conducting these is a matter for the pertinent agencies of the governments involved. In some cases, public participation may be in the general interest of all concerned; in others, not, and in this case the latter appeared to be true.

45. As to the status of the agreement, despite the argument (set forth earlier) that it is not a "bilaterial agreement between the respective Contracting Governments," as contemplated by subsection 6, section A, annex 2 of NARBA, we believe that it is. This view has been and is shared by the Department of State (which was involved in the negotiations) and by the counterpart Canadian agencies. In our view, the language "particular cases" mentioned by ABS and above (together with the later language concerning "taking into account the location of the station it is intended to protect") does not limit that subsection's meaning to agreements involving only one or a few stations, but permits agreements covering classes of stations such as the one here. The "legislative history" cited by ABS may indicate, although certainly not conclusively, that the intent of the NARBA conferees was to provide for further understandings concerning skywave protection during "critical hours" to class I stations in the other

country; but there is no reason why, later, if the governments involved agree to something else which is within the scope of the language, such agreement does not fall within the pertinent language. We hold the Canadian agreement to be a valid "bilateral agreement" within the meaning of the section cited, and, therefore, valid when executed by an exchange of notes, without Senate ratification.

46. However, a decision on this point is not necessary to the present consideration. We point out, first, that the agreement and associated standards (fig. 12 of the rules) are substantially less restrictive than the nighttime standards of NARBA which would otherwise apply; if the latter were applicable instead, it might be necessary to impose further cutback, or termination, on a large number of presunrise operations, both daytime and full time. The general reduction of 500 w is, of course, not a term of the agreement; this rests on our own consideration of domestic interference conditions and means of dealing with them. As far as the 6 a.m. restriction is concerned, we will endeavor to get the agreement clarified or modified to specify 6 a.m. "local time"; as far as operation before 6 a.m. is concerned, this restriction was a proposal in the further notice, set forth and later adopted for domestic reasons already discussed, and would probably be considered appropriate for adoption irrespective of the agreement. The agreement followed efforts on our part, which began in 1964 and developed with reasonable satisfaction, to obtain the necessary approval for a "presunrise" arrangement along lines which seemed to us (after considering the record in docket 14419) to be most in the public interest.

47. *Legal Considerations.*—The legal arguments raised by various parties are, essentially, the same as those advanced earlier and considered in the decision (report and order, pars. 20, 22; appendix A, pars. 32–33). It is urged by ABS and KMA that the condoning of additional interference without hearing violates section 316 rights, and, also, by KMA and other parties wishing to retain their existing presunrise operations with full facilities, that their licenses are being modified in violation of that section if this operation is curtailed. ABS takes the position that permitting additional interference entails reduction in a station's service area and, therefore, in effect, its power, a reduction which cannot be accomplished without going through proper hearing procedures. It regards the situation as quite different from those in *American Airlines* v. *CAB*. 359 F. 2d 624 (1966), and *California Citizens Band Association, Inc.* v. *U.S.*, 375 F. 2d 43 (1967), which are, thus, said not to be applicable. It is also said that the *American Airlines* principle, carried to its logical extreme, would permit the Commission, by general rulemaking, to wipe out a station's entire service area, which demonstrates the principle's inapplicability here. Other parties assert that presunrise operation is a term of the license and cannot be taken away without hearing, at least in the absence of complaint; it is asserted that the existence of interference sufficient to warrant termination of it is an "adjudicative fact," requiring determination in a hearing, and the necessity of establishing this fact is not met by our statement that "virtually" all presunrise operations cause such interference when evaluated by

conventional nighttime standards. Some of these parties would also distinguish *American Airlines* as prospective in nature and, therefore, inapplicable here.

48. As we observed in the decision, this agency cannot conclusively determine the extent of its regulatory authority with respect to its licensees; this is for the courts. We adhere to the view that the *American Airlines* case, supra, establishes our authority to take the action taken herein, on the basis of a general rulemaking proceeding and without individual adjudicatory proceedings. Certainly there was nothing any more "prospective" in that decision than is the case here; it involved imposition of a new condition (in effect, a prohibition against competing for business of a certain character with carriers of a different class) upon airlines whose certificates were of long standing. ABS' assertions that by this means we could wipe out a station's service entirely, and are in effect reducing its power, are inapposite; the action taken herein does not have that effect when viewed in the light of the existing full-facility "presunrise" operations. As to the contention concerning a licensed right to such presunrise operation, we likewise adhere to our earlier view that this is not, and never has been, a licensed right, even in the absence of a specific complaint. *Music Broadcasting Co.* v. *FCC*, 217 F. 2d 339 (1954). As discussed below, we are willing to consider PSA proposals in excess of 500 w which, in addition to meeting foreign protection requirements, provide conventional domestic nighttime protection.

Class II Stations

49. As mentioned above (pars. 18–19), two class II stations on U.S. I–A channels, to the west of the dominant stations, raise the question of the 6 a.m. starting time. One seeks only 6 a.m. "local time"—a matter we will take up with Canada and which is discussed in a notice of proposed rulemaking adopted today—and the other seeks operation earlier than 6 a.m., contending, inter alia, that our action in this respect was improper because this restriction was not contained in the notice. With respect to these two stations, this matter need not now be decided, because sunrise at the dominant station to the east is now too late to permit operation earlier than 6 a.m. at the western location, and will be at least until the end of February. We will discuss with Canadian authorities the question of the applicability of the Canadian agreement to the U.S. I–A channels, Canada having no stations thereon, and some modification in this respect may be in order even beyond the 6 a.m. "local time" adjustment.

50. Storer's similar request, on behalf of station KGBS, Los Angeles (made in a responsive pleading rather than in a petition), is in a different posture, because sunrise at Pittsburgh (location of the I–A station) is always earlier than 6 a.m. at Los Angeles, and KGBS, therefore, operates before that hour. We do not now consider the relief requested, both because such operation would not be in compliance with the Canadian agreement and because the request was not timely advanced, being an affirmative request for modification of the decision.

and rules advanced in an opposition to CCBS rather than in a petition. As mentioned, this subject will be discussed with Canada. Possible relief in this respect may be forthcoming later; for the time being we must adhere to the decision reached, and after October 28 operation by KGBS may commence only at 6 a.m. Pacific standard time.[31]

51. The other two petitions for reconsideration by class II limited-time stations (WHCU, Ithaca, N.Y., and WHLO, Akron, Ohio) on I–A channels—both east of the dominant station and, therefore, precluded from presunrise operation under the new rules—both present highly individualized situations and, therefore (as CCBS asserts), do not warrant reconsideration in this proceeding. Both have also requested waiver of the eligibility provisions of the new rules.

52. Former section 73.87(a)(2) of the rules was ambiguous as to their presunrise privileges but, in any event, called for protection of the dominant station's 0.5-mv/m 50-percent skywave contour or consent by the dominant station. The only class II stations in this category known to be signing on prior to local sunrise are WHCU and WHLO. Both have been operating presunrise, and both seek to continue presunrise operation on the basis of 6 a.m./500 w. WHCU (Cornell University) operates on 870 kc/s, to which WWL, New Orleans, holds the I–A nighttime priority. WWL is aware of the operation and thus far has not objected thereto. Because of the northward directionalization of WWL's signal, WHCU would have to reduce power to less than 5 w in order to afford 0.5-mv/m 50-percent skywave protection. In the case of WHLO, the dominant station is 2,000 miles away (KFI, Los Angeles, Calif.); WHLO could sign on at 6 a.m. (or sunrise, Newfoundland, whichever is later, to protect the Canadian I–B cochannel assignment there) with a power of 500 w, without infringing KFI's 0.5-mv/m 50-percent skywave contour. WHLO's situation is further complicated, however, by adjudicatory proceedings in docket No. 11290, in which radio station WOI is seeking a special service authorization (SSA) for early morning operation at Ames, Iowa.

53. Under the circumstances, it is believed that a further notice of proposed rulemaking should be issued in docket No. 17562 (presunrise operation by class II stations assigned to U.S. I–A clear channels) to deal specifically with the question of class II daytime and limited-time stations located east of a cochannel U.S. I–A. Among other things, the further notice will explore the degree protection which should be afforded to class I–A stations under these circumstances—at present, their basic protection derives from the exclusivity of the I–A nighttime priority within the North American region. The public-interest factors inherent in agreements by class I–A stations to permit presunrise usages of this type would also have to be explored. Until these matters are resolved by further rulemaking, we are withholding action on the WHCU/WHLO presunrise proposals and hold that their existing operations must, in line with the June 28 report and order, be terminated on October 28, 1967, along with other nonconforming operations. It is noted that Cornell University operates a class B

[31] Presunrise operation by KGBS must be viewed in the light of its impact on class II–A station KSWS, Roswell, N. Mex., especially since class II–A stations are especially designed to serve wide areas not having other nighttime primary service.

106-514—67——4

FM broadcast station at Ithaca, on which the deleted early morning AM programing could be carried, and, in the case of Akron, that there are two full-time standard broadcast stations there authorized for 5-kw operation, day and night (WSLR and WAKR).

54. The remaining class II petition is that of WTPR, Paris, Tenn. Whether treated as a petition for reconsideration or waiver, we do not believe favorable consideration is justified. Conditions on the I–B channels (like the regional channels) are considerably different from the I–A channels, due partly to their geographic distribution throughout North America. We note in this connection that WTPR has a class A FM authorization.

Other Matters

55. *Language of Section 73.99(f)*.—Section 73.99(f) states that a PSA is "secondary" and subject to modification, suspension, or termination without notice or hearing, "if necessary to resolve interference conflicts, to implement agreements with foreign governments, or in other circumstances warranting such action." DBA and a number of petitioning daytimers object to this provision, regarding it as, in effect, giving them little more than the "permissive" privilege they had before. It is urged that a PSA is, in effect, a license, and the Commission cannot, consistent with the Administrative Procedure Act and section 316 of the Communications Act, create a license on such uncertain terms.

56. We do not accept the legal argument; in our view, considering the nature of the PSA and the circumstances giving rise to it, it is entirely within our authority to condition it in any fashion which appears appropriate.[32] However, it was not intended to be used in any wholesale fashion such as that to which these parties express concern. It was intended to take into account certain types of situations: (1) Where a new station is authorized in a foreign country, particularly Canada, which is closer to a given U.S. station than previous assignments in the foreign country on the frequency, and, therefore, an additional degree of protection is required; (2) where, in the issuance of the PSA initially, a too-high or too-low power level is authorized and must be adjusted to meet the requirements of international agreements or protection of U.S. class I stations; or (3) changes in operation, such as changes in antenna efficiency, requiring a different power to be specified. Finally, legal uncertainties (such as that posed by the stay order entered October 2, 1967, by the U.S. Court of Appeals in New York against the grant of interfering PSA's on 930 kc/s—*WBEN, Inc.* v. *USA & FCC*) require that the maximum administrative flexibility be retained. We are, therefore, not adopting the suggested changes in section 73.99(f).

57. *Waiver of the First-Class Operator and Remote Control Rules*.—Some petitioners representing full-time interests ask for a relaxation of the first-class operator and remote control requirements in connection with PSA presunrise operation. The operator rule (sec. 73.93)

[32] The situation is somewhat analogous to program test authorizations issued under pt. 73 of the rules—see *CBS of California* v. *FCC*, 10 R.R. 2021 (1954).

requires, among other things, the attendance of a radiotelephone first-class operator during all periods of directional operation; section 73.67(a)(6)—remote control operation—provides that, during periods of directional operation, the indications at the transmitter of common point current, base currents, phase monitor sample loop currents, and phase indications, be read and entered in the operating log once each day for each pattern within 2 hours after the commencement of operation for each pattern.

58. With respect to the first-class operator requirement for AM directional operation, we concluded in 1964 (in reconsideration of rulemaking in docket No. 14746) that the state of the art had not progressed to the point that the attendance of a first-class operator could be dispensed with. We do not know whether the situation has changed sufficiently in the last 3 years to warrant a different conclusion at this time, but in any event we are of the view that this issue should be dealt with, if at all, in a separate proceeding and should not be injected into the presunrise proceeding. As to the observation and logging of the required indications, at the transmitter, the problem of repetitive visits to the transmitter site arises mainly where the station is authorized for directional daytime operation and the PSA time spread runs beyond 2 hours. This problem will be dealt with administratively in the processing of PSA proposals and associated waiver requests. We are, therefore, not amending the rules to recognize these comparatively rare situations.

59. *Request To Operate With 124-mv/m in Directional "Nulls."*—As mentioned above, ABS asks that full-time stations now operating directionally during the presunrise period be permitted to radiate up to 124 mv/m (the minimum equivalent of 500 w nondirectionally), rather than suppressing radiation to the degree required by their licenses. We cannot agree with this in principle, since such nulls are normally designed to protect other full-time stations. Moreover, this proposal would entail a third mode of operation, whereas the solution contained in our June 28 report and order was based on the use of daytime facilities, adjusted in accordance with the agreement with Canada. This proposal must, therefore, be rejected.

60. *Waiver Requests.*—In addition to the 23 petitions discussed, 1,200-odd PSA proposals had been received by the close of business October 4, 1967. Approximately 3 percent of these are accompanied by waiver requests. The majority of the waiver requests are by daytime-only stations seeking PSA sign-on times earlier than 6 a.m. standard time. Most of these will achieve substantial satisfaction of their requirements if we are successful in redefining the 6 a.m. PSA sign-on in terms of prevailing local time, rather than standard time. In a lesser but significant number of cases, waivers of the 500-w PSA power ceiling are requested. A small but undetermined number of these will benefit from our decision to permit powers in excess of 500 w on the basis of full domestic nighttime protection (in addition to foreign).

61. Roughly half of the requests for waiver of the time and/or power limitations laid down in the June 28 report and order were specifically premised on farm area coverage, or program services designed

for foreign language or other minority groups. Apart from the legal, engineering, and administrative impediments already discussed, we are of the view that the granting waivers on showings of this sort would be unsound as a matter of policy. Since all programing is unique in one way or another, it is obvious that official preferences (expressed by way of selective waiver criteria or otherwise) would be a highly subjective matter and of doubtful validity. Moreover, waiver decisions based on programing would, in the long run, be undermined by changes in station ownership and resulting changes in programing. Obviously, these are matters which defy prediction and regulation in the context of presunrise operating privileges. These arguments must, therefore, be rejected.

62. Several waiver requests are predicated on inability to obtain suitable equipment; at least one licensee (KGAY, Salem, Oreg.) requests a 90-day extension of the October 28 deadline on existing operations, based on inability to obtain a used auxiliary transmitter before that date. Inasmuch as there is no objection to improvised methods of power reduction to meet the new requirements until suitable equipment can be acquired, we find these requests to be without merit. For example, there would be no objection to the installation of a series dropping resistor in the transmission line on the transmitter side of the antenna ammeter, as a temporary means of achieving compliance with the rules. While this and similar methods may result in unnecessary power consumption, this fact alone does not warrant the issuance of temporary waivers.

63. In at least one case (WPDM, Potsdam, N.Y.), the PSA applicant is only 81 miles (site-to-site) from a Canadian cochannel full-timer (CFOX, Pointe Claire, Quebec). Although the new figure 12 curves cut off at 100 miles, the consultant obtained a 126-w permissible radiation value by extrapolation of the applicable curve. Although not contemplated by the agreement with Canada, we propose that this and similar situations involving short spacings be referred to Canada for ad hoc consideration.

64. In accordance with the foregoing, waiver requests accompanying PSA proposals will be dealt with under the following guidelines:

(*a*) Waiver requests for times or powers in excess of the 6 a.m./500-w formula laid down in the June 28 report and order will be denied, except that as to power, proposals in excess of 500 w (into the daytime antenna system) will be considered and granted on the basis of conventional domestic nighttime protection (in addition to the usual foreign protection showings).

(*b*) Waiver requests premised on equipment considerations will be denied, but improvised methods of power reduction may be used on a temporary basis if promptly reported to the Commission.

(*c*) Waiver requests beyond the scope of rulemaking in dockets Nos. 14419 and 17562, for example, waiver requests by class IV stations and class II stations assigned to foreign I–A clear channels, will be denied.

(*d*) Action on PSA proposals by class II stations located east of a cochannel U.S. I–A dominant will be withheld, pending outcome of the further notice of proposed rulemaking, adopted this day in docket No. 17562.

(*e*) Action on PSA proposals involving Canadian cochannel separations of less than 100 miles will be withheld, awaiting ad hoc clearance with Canada.

(*f*) Action on all PSA proposals for 930 kc/s which are potential sources of new interference to WBEN's licensed nighttime operation will be withheld, until the New York Court of Appeals has ruled on the merits of *WBEN, Inc.* v. *USA and FCC*, case No. 31688.

65. In view of the foregoing, *It is ordered*, That:

(*a*) The June 28, 1967, report and order in docket No. 14419, together with sections 73.87 and 73.99 of the Commission's rules, as amended and adopted therein, *Is affirmed.*

(*b*) Except as indicated hereinabove, the petitions for stay and reconsideration listed in the appendix *Are denied.*

(*c*) Existing presunrise operations on 930 kc/s by stations having PSA proposals on file (but not presently grantable because of the outstanding stay order involving this frequency) may continue beyond October 28, 1967, pending final outcome of *WBEN, Inc.* v. *USA & FCC* (case No. 31688, U.S. Court of Appeals, Second Circuit), but such operations shall be adjusted in accordance with the agreement with Canada respecting time and permissible power.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

A. Earl Cullum, Jr.
American Broadcasting Co., Inc., on behalf of: KABC, Los Angeles, Calif.; KQV, Pittsburgh, Pa.; WXYZ, Detroit, Mich.
Association on Broadcasting Standards, Inc. (ABS).
Clear Channel Broadcasting Service (CCBS): KFI, Los Angeles, Calif.; WSM, Nashville, Tenn.; WLW, Cincinnati, Ohio; WGN, Chicago, Ill.; WSB, Atlanta, Ga.; WJR, Detroit, Mich.; WFAA, Dallas, Tex.; WBAP, Fort Worth, Tex.; WHAS, Louisville, Ky.; WHO, Des Moines, Iowa; KSL, Salt Lake City, Utah.
Comal Broadcasting Co. (KGNB).
Cornell University (WHCU).
Daytime Broadcasters Association (DBA).
Garden Spot Broadcasters, Inc. (WGSA).
Golden Plains, Inc. (KXXX).
Greater Indianapolis Broadcasting Co., Inc. (WXLW).
Group One Broadcasting Co. of Texas (KBOX).
Hudson Broadcasting Corp. (WCMB).
Inquirer Printing Co. (WBFD).
Kimball Broadcasting Inc. (WNAM).
May Broadcasting Co. (KMA).
McQueen & Co., Inc. (WTRO).
Minneapolis-St. Paul Radio Broadcasters (KQRS).
Musical Heights, Inc. (WHMI).
Paris Broadcasting Co. (WTPR).
Pemiscot Broadcasters (KCRV).
Radio Akron, Inc. (WHLO).
Radio Athens, Inc. (WATH).
Radio Jax, Inc. (WZOK).
Radio Station KXYZ, Inc. (KXYZ).
Richard C. Brandt (KCOB).
RMC Productions, Inc. (WALY).
Starr Broadcasting Group, Inc. (KOWH).
Sunland Broadcasting Co., Inc. (KIZZ).
Town & Farm Co., Inc. (KMMJ).
Union Lake Broadcasters, Inc. (WMVB).
VIP Broadcasting Corp. (WVIP).

Westport Broadcasting Co. (WMMM).
Whitcom, Inc. (WGHQ).
WHUT Broadcasting Co. (WHUT).
Wisconsin Valley Television Corp. (WSAU).

STATEMENT OF COMMISSIONER KENNETH A. COX CONCURRING IN PART AND DISSENTING IN PART

I concur in the denial of the petitions for reconsideration except that I would grant reconsideration to the extent necessary to bar daytime-only stations which have never operated before sunrise from taking advantage of the new rules. There are a substantial number of these stations which have been authorized subject to the condition that they not operate presunrise until this proceeding is concluded. Since they have never provided a service upon which the public has come to rely, and since they sought their authorizations with full knowledge that they might not be permitted to operate before sunrise, I would bar them from such operation in order to cut off the continued increase in interference, which will be caused by constantly expanding presunrise service, to the licensed operation of full-time stations. I, therefore, dissent to this action, insofar as it contemplates that every daytime station licensed in the future—although its engineering qualifications are measured by daytime standards—is to be allowed to operate presunrise as well.