F.C.C. 75-1359

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AGREEMENTS BETWEEN BROADCAST LICENSEES AND THE PUBLIC	Docket No. 20495

REPORT AND ORDER

(Adopted: December 10, 1975; Released: December 19, 1975)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE RESULT.

1. On June 10, 1975, the Commission released a *Proposed Policy Statement and Notice of Proposed Rulemaking Re: Agreements Between Broadcast Licensees and the Public.* Docket 20495, FCC 75-633, 40 Fed. Reg. 25689. Twenty comments and four reply comments were filed by a variety of licensees and public interest groups.[1] The background of this proceeding is sketched below, followed by a summary of the comments received and a statement of policy.

Background

2. For many years the Commission has encouraged affirmative dialogue between broadcast licensees and the public they serve, for "[t]he principal ingredient of [the licensee's obligation to serve the public interest, convenience, and necessity] consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area." *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 7294 (1960). More recently, we observed that the increase in petitions to deny broadcast applications—based on the alleged failure of licensees to respond adequately to the problems and needs of significant portions of the public—"re-emphasized the need both to ensure that licensees remain conversant with and attentive to community problems throughout the license period, and citizens are encouraged to engage in more continuous dialogue with licensees in order to promote local resolutions of complaints as they arise." *Final Report and Order*, Docket 19153, 43 FCC 2d 1, 8 (1973).

3. One outgrowth of increased contact between licensees and their audiences has been informal negotiations and, in some cases formal agreements about aspects of station operations of concern to the community. However, we have found that some agreements attempt to yield licensee control to essentially private interests, contrary to the scheme of the Communications Act, which requires that the licensee alone must assume responsibility for ensuring that its station operates

[1] See Appendix A. The period for comments expired July 25, 1975, and for reply comments August 11, 1975. We accept the late-filed comments of Mrs. Elaine Donnelly, NAACP Legal Defense and Educational Fund, Inc., National Black Media Coalition, National Citizens Committee for Broadcasting, Office of Communication of the United Church of Christ, and the St. Louis Broadcast Coalition.

in the public interest. In order to clarify licensee and citizen obligations respecting agreements, we opened this proceeding.

The Commission Proposal

4. The agreements policy we proposed[2] was based on an assumption that licensees and members of the public proceed from good faith in their discussions, and on the principles of (a) the value of local dialogue, (b) the purely voluntary nature of agreements, (c) the preservation of the licensee's nondelegable responsibility to serve the public, and (d) the advantage of minimal government presence in local discussion. Recognizing that our oversight was required, but should be limited, we proposed to take cognizance of citizen agreements only to the following extent:

(a) If asked to determine whether the agreement is contrary to applicable statutes, rules, or policies, we would review it in conformity with the policies expressed in our policy statement.
(b) Substantive agreement terms incorporated in a broadcast application would assume the status of representations to the Commission, and would be treated as are all promises of future performance.

5. We proposed not to take cognizance of oral agreements, because of likely difficulties in establishing their terms. We proposed amending Section 1.526 of our rules to require local filing of agreements. And we advised that the policies we proposed would apply on an interim basis to any agreements entered into or submitted for Commission review after issuance of the Proposed Policy Statement, that earlier agreements would be interpreted consistent with these policies, and that the policies would apply to any pending complaint concerning a licensee's implementation of a previously filed agreement. Since the chief ground on which we proposed to reject agreements was the delegation of nondelegable licensee discretion, we set out a few examples of such improper agreement terms.

Summary of Comments

6. *Local Dialogue.* The commenters (fully identified in Appendix A) unanimously endorse the importance of dialogue between broadcasters and local citizens, and most see value in citizen agreements. None would ban them. However, CBS complains that "more often than not the 'citizens' group' is neither representative of the public at large, nor even typical of the needs and desires of the very minority interest which the group purports to represent," and that demands of some groups are often contrary to the public interest. Mrs. Donnelly opposes the proliferation of agreements with activist groups "who represent no one but themselves." And Worldvision suggests that an agreement "should not bind the licensee to present programming to satisfy only a vocal, non-representative group."

[2] We decided to state policies about citizen agreements rather than adopt specific rules because of the licensee's inherent discretion to agree or not, as it chooses, and to change an agreement, once made. Moreover, we were concerned that any rules which might be devised would be so detailed and cumbersome as to distract the parties from focusing their efforts on resolving their legitimate differences.

7. Several broadcasters urge a clear statement that licensees are not under any obligation or duty to negotiate toward or conclude an agreement. Storer also suggests a statement "that the areas of non-delegable duties which may not be restricted . . . may also not be negotiated." Orion asks us to state that licensees "have no duty to respond to citizen group demands to 'negotiate' or 'consummate an agreement.' " The National Black Media Coalition (NBMC) contends that "a broadcaster's refusal to meet [citizen groups] without explanation . . . should raise an issue of an inadequate ascertainment," and that "the failure to engage meaningfully in discussions of station performance should be an issue cognizable by [the] Commission."

8. *Filing of Agreements.* There was no dispute with the proposed amendment of Section 1.526 of our rules to require local filing of citizen agreements, but considerable comment about what additional measures, if any, should be required. NBMC would require that all "agreements with commercial parties that have any substantial effect on the broadcaster's public service obligations" also be made public. The United Church of Christ (UCC) would include contracts with "networks, program syndicators, advertisers, management and programming consultants and others who provide program matter or otherwise control program content," and union agreements. ABC feels citizen agreements should be filed with the Commission (as well as locally) "for orderliness and convenience of reference." The National Organization for Women (NOW) proposes that "all citizens agreement[s] constitute representations upon which the Commission can rely and should be made part of the most recent license application." No commenter objects to filing agreements with the Commission. CBS and Worldvision oppose the suggestion that we require local publication of citizen agreements, CBS claiming that such a requirement is "burdensome and unnecessary." On the other hand, Mrs. Donnelly asks for wide disclosure of citizen agreements, and an obligation "to seek out opposing groups if [a licensee is] considering the signing of an exclusive contract with a particular group."

9. *Terms of Agreements.* Several commenters object to limitations on a licensee's voluntary delegation of discretion in citizen agreements. The National Citizens Committee for Broadcasting (NCCB) distinguishes *responsibility* for making operating decisions from *accountability* for them; points to the common practice of delegating responsibility to employees, program suppliers, and others; and concludes the Commission "must either attempt to prevent broadcaster delegation at all levels . . . or . . . abandon this view as unworkable" and permit delegation of responsibility by means of citizen agreements. NBMC submits that "the Commission's policies and interpretation cannot discriminate in favor of commercial contracts and against citizen agreements," claiming that various common trade agreements (network affiliation and syndication contracts, for example) "give much of the discretion of station operation and programming content in fact to parties other than the licensee." Several commenters argue that any proposal that would be acceptable in a broadcast application should not be offensive simply because it is based on a citizen agreement. The Public Interest Research Group (PIRG) urges adoption of a policy permitting extensive licensee discretion to "bind its discretion," but

with flexibility to deviate from commitments "where compliance with the agreement would be commercially impracticable or no longer in the public interest," or under other circumstances expressly stated in the agreement. UCC says that "the licensee should be free to make changes in its programming which are necessary to keep abreast of changing community needs and problems," and commends agreement terms requiring "advance [licensee] consultation with the affected groups in the service area and advance notice to the Federal Communications Commission stating the reasons for the departure," as a means of making agreements meaningful to the parties.

10. Five of the broadcast commenters call for requirement of an express agreement term reserving to the licensee flexibility to deviate from agreement commitments when in its judgment the public interest requires, with several stating that such provisions are the practice in trade agreements. Some would apply such a provision to any existing agreements which do not so provide. NCCB prefers that such a savings clause be an implicit part of every agreement, rather than a required express term. A number of commenters request a fuller explanation of what would constitute a "fixed determination, binding and unchangeable," contrary to the proposed policy. Several encourage us to provide additional, more specific examples than those set out in paragraph 15 of the Proposed Policy Statement. NOW contends that, "contrary to the Commission's implication, specificity in a citizen agreement is not to be condemned as an impermissible delegation of responsibility." Metromedia objects to our proposal to interpret "existing agreements in a manner consistent with . . . the fundamental principle that the licensee has a non-delegable responsibility over the programming and operation of its station," in light of our note elsewhere in the Proposed Policy Statement that "in cases where the licensee improperly has abdicated its responsibility, it will be our obligation to consider the licensee's fitness to serve as a public trustee."

11. Metromedia asks us to require that agreements indicate expressly how they are consistent with the public interest, either by a showing that the citizen group is reasonably representative of the station's service area, or by a statement "that the racial, sexual or interest group involved was entitled to privileged treatment (for specifically enumerated reasons) and that such special treatment would not disadvantage the other elements of the community (again listing specific reasons)." Metromedia also would require that the subject matter of the agreement relate to the grievances of the group involved. Worldvision asks us to state that licensees cannot inflexibly bind themselves not to present certain programs. Orion contends that EEOC conciliation agreements can inflexibly limit a licensee's operating discretion (by a hiring schedule, for example), just as citizen agreements can, and should be subject to the same Commission restrictions recognizing final licensee discretion. NOW argues that the Commission "does not have the authority to dictate to the EEOC the contents of its conciliation agreements with licensees."

12. *Review and Enforcement.* There was little reaction to our proposal to take cognizance of citizen agreements only when incorporated in a licensee's renewal or other application (see paragraph 4, above). Three commenters agree that the Commission should not review every citizen agreement. The National Association of Broadcasters (NAB)

observes that the proposal may not effectively limit the number of agreements considered, since review occurs under conditions determined by the parties, but it suggests no method for limiting their submission for review.

13. Our proposal not to take cognizance of oral agreements also received little comment. NBC says:

> [T]here is the problem of identifying from among the totality of licensee-community dialogue, those discussions which constitute "agreements" which have to be filed. A licensee may talk to an individual or group and state it expects to continue to carry a particular program or series, thereby satisfying the group. Or a group may request a licensee to carry a new series or adjust its employment recruiting procedures and the licensee may agree to do so or to explore that possibility, thereby satisfying the group. The Notice itself recognizes that these discussions and exchanges are often not precisely recorded in writing.
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> NBC believes that any rules adopted by the Commission should not be worded in terms of *requiring* the filing of all such agreements, but rather in terms of not giving *recognition* to agreements except insofar as they or their substantive provisions to which the station is committed have been filed with the Commission and placed in the station's public information file. This approach will take care of the more usual situation where the group's request or complaint has been accommodated in the application itself or in an amendment thereto.

Mrs. Donnelly opposes "allowing *unwritten* agreements, which cannot be scrutinized by the general public . . . The F.C.C. has an affirmative duty to prevent such secrecy and undisclosed bias in a society where the free and unfettered transmission of ideas is a necessity."

14. Many more comments were received on the subject of enforcement of the policy statement and terms of any agreements. With respect to the former, most commenters urge us to defer as much as possible to the discretion of licensees as to what agreement terms are in the public interest. PIRG would reject an agreement "only if its terms are clearly not in the public interest." Worldvision suggests the following standards for evaluating agreements:

(1) Whether [agreement terms affecting programming constitute] an egregious abdication of the licensee's responsibility to make continuing program judgments; and
(2) Whether the licensee has taken reasonably sufficient steps to assure that the programming proposed pursuant to the agreement will serve the needs and interests of a citizens group that is representative of a substantial segment of the public within the licensee's service area.

15. With respect to Commission enforcement of the terms of citizen agreements, CBS suggests "a procedure whereby a 'citizens' group' would be prohibited from bringing an alleged breach of an agreement to the Commission for resolution before making a good faith effort to resolve the group's differences with the licensee." Once a complaint is before the Commission, CBS urges us to "limit review, as in fairness doctrine complaints, to the reasonableness of a licensee's judgment in implementing programming or other activities pursuant to agreements and . . . not substitute [our] judgment for that of the licensee as to the appropriateness or relevance of specific programming," thus not making "a qualitative program judgment." A more rigorous standard, CBS argues, "would constitute an encroachment on the licensee's First Amendment rights and would be tantamount to censorship . . ." NBMC

urges application of the same promise-versus-performance standard used in reviewing other licensee representations to the Commission.

16. On the question of sanctions in the event of violation of the terms of an agreement, NBMC says the same action should be taken as in other cases of breach of promises: "designation for hearing and the possible denial of the license renewal." PIRG suggests using forfeiture proceedings based on misrepresentations to the Commission in the case of a licensee "whose breach is intentional or whose rationale for nonperformance is so transparent that it indicates bad faith." Says PIRG: "Less severe penalties are more likely to be meted out than drastic ones and thus become realistic deterrents to bad faith conduct."

17. *Procedural Matters.* The impact of citizen agreements on the Commission's procedures for handling challenged applications generated considerable comment. Several broadcasters contend that the threat of delayed application processing is sometimes used to wring unreasonable concessions from licensees, contrary to the public interest. They urge speedier Commission processing of challenged applications to minimize this danger, especially in the case of applications for transfer of control or assignment of license. Some suggest that the problems of delay in transfer and assignment applications be considered in a separate proceeding. NOW counters that a separate proceeding is unnecessary because the same public interest determination must be made in transfer and assignment applications as others, and because the danger of improper agreements is minimized by Commission review of them. With respect to petitions to deny, Storer urges strict enforcement of present procedural rules, and Metromedia asks for a revision of Commission policies for considering petitions to deny, which would tend to limit them. ABC and KBOX propose restricting consideration of informal objections by establishing time deadlines for their submission. NOW opposes any change in present procedures. CBS would bar citizens from filing petitions to deny applications of stations with which they have signed agreements. NBC would permit agreements to contain clauses barring petitions to deny. NOW would not have the signing of an agreement bar the filing of a petition to deny, since "the agreement may cover only certain of the issues with which the group is concerned . . ." Both NBC and NAACP suggest the free withdrawal of petitions to deny.

Discussion and Statement of Policy

18. *Basic Considerations.* In accordance with the legislative design for broadcasting set out in the Communications Act, licensees alone must assume and bear ultimate responsibility for the planning, execution, and supervision of programming and station operation. This responsibility cannot be delegated, and a licensee cannot (even unilaterally) foreclose its discretion and continuous duty to determine the public interest and to operate in accordance with that determination.

19. We have long held that it is responsibility, and not just accountability, that is nondelegable. In *United States Broadcasting Corporation*, 2 FCC 208, 225 (1935), we said:

> Complete supervision of and control over programs, including careful examination of their content, directly affects the rendition of a public service. The right to determine, select, supervise, and control programs is inherently incident to the privilege of holding a station license. In fact, the right becomes a responsibility of a licensee, as he must be held to strict accountability for the service rendered.

In *National Broadcasting Co., Inc.*, v. *United States*, 319 U.S. 190 (1943), the Court noted with approval the following statements in our 1941 *Report on Chain Broadcasting*:

> It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory. [*Ibid.*, at 205-6]
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> If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. [*Ibid.*, at 218]

We have thus uniformly rejected agreements which would operate to restrict the right of a licensee to make and implement decisions respecting station operations.[3] It is on this foundation, then, that we adopt the following policies.

20. *Local Dialogue.* We can state a licensee's obligations with respect to local dialogue simply. We require community ascertainment, and we evaluate thereby the adequacy of a licensee's operating proposals to serve the public interest. Beyond this, a licensee is not obliged to negotiate toward or conclude an agreement.[4] Thus, while we encourage extensive local dialogue, we leave determination of whether or not to discuss or to enter agreements to the discretion of each licensee. We therefore reject NBMC's contention that the Commission should penalize a licensee for failing to meet with a particular group or to discuss station performance.

21. If a licensee is presented with proposals by *any* group that it feels are not in the public interest, it should reject the proposals. On the other hand, even a group whose individual membership appears nonrepresentative may raise views, concerns, or problems that should be dealt with.[5] It is the proposals themselves—rather than their proponents—which the licensee ought to consider in relation to its public interest duties. We repeat, though, that "consideration" need not take the form of "negotiation" or "agreement."

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[3] For example, we have proscribed network agreements which unduly restrict the carriage of programs of other networks [Section 73.658(a) and (b)], and trade agreements which impair a licensee's obligation to retain control over program matter at all times [*Filing of Agreements*, 33 FCC 2d 653 (1972); *WGOK, Inc.*, 2 FCC 2d 245 (1965); and *United Broadcasting Company of New York, Inc.*, 40 FCC 224 (1965)]. We have also pointed out that "private agreements cannot be construed to limit a broadcaster's responsibilities and obligations imposed by the Communications Act . . ." *Golden West Broadcasters*, 8 FCC 2d 987, 988 (1967). We have acted to prevent the possible improper delegation of licensee responsibility in connection with subscription agreements between radio stations and musical format service companies. *Report and Policy Statement*, FCC 75-1234, released November 7, 1975. See also *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 7295, 20 RR 1901, 1912-3 (1960); and *Fairness Report* in Docket 19260, 48 FCC 2d 1, 10 (1974). There is, of course, no rule of law or policy which prohibits a licensee in the exercise of its discretion, from determining not to broadcast certain programs or to broadcast other programs which it believes better serve the public interest. It is the fixed determination, binding and unchangeable, which runs afoul of the requirement of licensee responsibility.

[4] See *Great Western Broadcasting Corp.*, 53 FCC 2d 1147 (1975).

[5] Of course a licensee should not feel compelled to yield to demands from one interest group to the extent of disregarding other legitimate interests which must be served. Part of the licensee's function of addressing community needs with responsive practices consists of reasonably balancing those responses.

22. *Filing of Agreements.* The significance of and public interest in citizen agreements require that they be placed in the public files of broadcast stations that enter them, and we will so amend Section 1.526 of our rules. (See Appendix B.) We believe that the public interest is fully served by local filing, and will not require that agreements be published locally or filed with the Commission. Should parties desire to file an agreement with us, we suggest its submission as an amendment to the station's most recent renewal or other broadcast application.[6] However, we are not prepared to require local filing of routine commercial contracts as suggested by some commenters, for that lies outside the scope of this proceeding.

23. *Terms of Agreements.* We believe suggestions that we permit licensees to delegate responsibility conflict with basic requirements of the Communications Act, as we discussed in paragraphs 18 and 19, above. Commenters' examples of alleged delegations of responsibility are not persuasive. The employer-employee relationship contains ample opportunity for the direction of employees and the supervision of their work, and the employer retains flexibility to change or end the warrant of authority to act in its behalf.[7] Attempted delegations to other commercial interests would constitute unlawful transfers of control of the stations involved, in violation of Section 310(b) of the Communications Act, just as attempted delegations to networks were held improper in the *Report on Chain Broadcasting.*

24. Some of the comments indicate that our examples of agreements that inflexibly bind licensees confused rather than clarified the thrust of our proposed policy. The principle underlying this aspect of the policy is that in areas where licensees have public interest duties cognizable by the Commission— for example, programming and employment practices[8]—a licensee is obliged to modify any prior practice or proposal when in the reasonable exercise of its good faith judgment it believes that the public interest so requires. The consequence of this principle is that no proposal in such an area can be immutable, whether presented unilaterally in an application or undertaken pursuant to a commercial or citizen agreement.

25. Wherever possible, we will construe the provisions of citizen agreements in a manner favorable to their implementation. Even where understandings are susceptible to different interpretations, we generally will decline to have parties redraft their agreements. We do not wish, by dispelling ambiguities in language, to inhibit development of the local discussion process. We cannot, however, approve agree-

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[6] If parties so request, we will place an agreement in the station file maintained at the Commission for public reference. This alone would not constitute an incorporation of the agreement into an application, however, and would not affect its review or enforcement by the Commission. (See paragraph 29, below.) However, we would not generally expect agreements to be filed with us unless incorporated in an application or submitted with a complaint or other request for specific and formal action.

[7] We recognized these differences in *International Good Music*, FCC 60-1340 (1960) and *WSKP, Incorporated*, 2 RR 2d 1103 (1964). In the latter case we said arrangements where station operators were not station employees presented a "fundamental question . . . as to whether such relationships lead to abdication of licensee responsibility, in violation of the control requirements of the Communications Act . . ."

[8] As we have pointed out elsewhere, there are activities which are clearly extraneous to the Commission's regulatory function. See *Black Identity Association*, FCC 21-378, 21 RR 2d 746 (1971). However laudable such activities may be, we prefer neither to approve nor to disapprove agreement terms about them.

ments which contain "fixed determinations, binding and unchangeable," in areas where flexibility to serve the public interest is required. To the extent that any agreement surrenders this discretion to others, it cannot be considered by this Commission as having any force or effect. We agree with NOW that specificity *per se* is not improper,[9] but caution that detail may give rise to *expectations* of inflexibility which, if imposed, would be improper.

26. With respect to suggestions for specific agreement terms, we are not willing to specify how citizen agreements should ensure that licensee responsibilities are not abridged, preferring to leave citizens and licensees free to work out whatever arrangements they believe appropriate in their circumstances. We will therefore not require express savings clauses, nor will we imply a "blanket" savings clause. We will not strain the plain language of agreements to construe away provisions inflexibly binding licensees, nor to strengthen inadequate savings clauses, since these are matters for the parties.[10] We cannot allow ourselves to be cast in the role of a local mediator, resolving differences and recommending agreement terms. We have neither the staff nor the financial resources to assume such a burden, and are neither authorized nor willing to become a censor with respect to program disputes. We reject Metromedia's suggestions (paragraph 11, above) which would unnecessarily limit the scope of possible agreements, since we intend to avoid any nonessential restrictions on citizen agreements. We agree with NOW that it would not be appropriate for us to attempt any limitation of the EEOC conciliation process. See *National Broadcasting Company, Inc.* (WRC-TV), 52 FCC 2d 273, 293 (1975).

27. Metromedia's fears that we will use our newly stated policies to punish licensees who entered improper agreements in the past is unfounded. With respect to agreements made prior to release of our Proposed Policy Statement (June 10, 1975) we said:

> [P]ending agreements which have been submitted as the *quid pro quo* for the withdrawal of an unresolved petition to deny will . . . be evaluated in accordance with [the policies and practices expressed here]. Agreements, heretofore either implicitly accepted or explicitly considered by the Commission in disposing of a petition to deny or similar protest, need not be revised by the parties or re-examined by the Commission. Instead, we will interpret these existing agreements in a manner consistent with our announced role and with the fundamental principle that the licensee has a non-delegable responsibility over the programming and operation of its station. Of course, provisions of existing agreements which may operate to improperly curtail this fundamental responsibility, will have no force or effect before this Commission. Finally, we believe that our announced course of action can and should be applied to any pending complaint concerning the licensee's implementation of a previously filed agreement.

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[9] In the *Proposed Policy Statement* we did not intend to imply that specificity is improper. The examples given in paragraph 15 were intended to illustrate improper binding of the licensee rather than improper content of those hypothetical agreements. As we stated immediately thereafter, in paragraph 16, "we have specifically declined to limit these accords by defining the *matters* that can be discussed and assented to by licensees and members of the public." (Emphasis supplied.)

[10] It was our unwillingness to evaluate a subordinate savings clause that led to our disapproval of the citizen agreement in the case of WAUD, *Letter to Ellen S. Agress*, FCC 75-781, adopted July 1, 1975. There, we found that the savings clause was overridden by "the apparent binding nature of the terms of the agreement in light of the specific and clear language regarding the licensee's intention to be bound by the commitments set forth in the agreement." Indeed, even if a savings clause could be read as "coordinate" with a binding clause—rather than subordinate—we do not feel it is our place to choose which shall govern. That is for the parties to make plain.

Our consistent policy has been to call attention to deficiencies so that parties can take whatever remedial steps they believe appropriate. We do not believe that application of these policies to existing agreements as described above will "punish" any licensee. As to agreements entered into after release of this Report and Order, we would expect to continue an essentially remedial approach, but feel we must reserve the right to question the basic fitness of a licensee who—being fully on notice of our policy—engages in conduct clearly antithetical to that policy.

28. To reiterate, final responsibility (as well as accountability) for operating decisions of the type we are concerned with must remain with the licensee. We intend to give considerable weight to licensee determinations of what serves the public interest, just as we always have. We believe these standards are clear, and that examples of their application are unnecessary. We think the continued examination of agreements in accord with these standards offers the greatest promise of a reasonable balance between maximum licensee-citizen flexibility and effective performance of our duty to ensure compliance with applicable statutes, rules, and policies.

29. *Review and Enforcement.* Balancing our concern for preserving the broadcaster's nondelegable accountability to the whole public against our determination not to cast the shadow of government over the process of local discussion—and in light of the Commission's limited resources—we will take cognizance of citizen agreements only to the following extent:

(a) If asked to determine whether an agreement is contrary to applicable statutes, rules, or policies, we will review it in conformity with the policies expressed here.
(b) Substantive agreement terms incorporated in an application will assume the status of representations to the Commission, and will be treated as are all promises of future performance.[11]

We prefer not to impose any restrictions on the submission of agreements to us under these terms unless experience indicates we must.

30. We think NBC correctly states that oral agreements present unusual difficulties calling for different treatment than written agreements. As noted, a licensee may have difficulty drawing a line between formal oral "agreements" and those informal status reports or comments to listeners which are essential to efficient station operations. Extending filing and other requirements to oral agreements, therefore, may inhibit informal dialogue, contrary to our policy of encouraging it. Further, we continue to believe that we should not become embroiled in disputes as to the existence or terms of oral agreements, and will give no consideration whatever to those understandings. As we said in our Proposed Policy Statement, "the best evidence of any commitments alleged to rest upon a broadcaster-citizen agreement will be the licensee's understanding of that accord as reflected in his application representing it to the Commission." Nor will we require licensees to

[11] As with other representations, the licensee would be free to modify them, though we would ask to be informed if the modifications are significant. Upon our own motion, we may ask for explanation of any deviations that appear to be substantial.

place notations or summaries of oral agreements in their public files. As for Mrs. Donnelly's fear of secret agreements: We believe, first, that citizen groups and licensees will generally prefer the certainty of written agreements to the vagueness of oral ones; and, second, that violations of a licensee's duty to serve the public interest are determined by its performance, not necessarily by the mere existence of a particular agreement. Since we believe the advantages of oral agreements far outweigh their possible disadvantages, we will not prohibit them. We will not, however, take cognizance of oral agreements.

31. In reviewing complaints that a licensee has breached promises made in a citizen agreement, we will judge its performance with our promise-versus-performance test—whether the licensee has made reasonable and good faith efforts to effectuate its proposals.[12] We strongly disagree with the CBS suggestion that alleged breaches of agreement terms incorporated in a broadcast application should be treated differently than deviations from other application proposals. We concur with CBS that aggrieved citizen groups should try to work out their differences with licensees before bringing their complaints to the Commission. This is consistent with our philosophy of encouraging local dialogue, and lessens our burden by resolving at least some disputes locally. Then too, since on receiving a complaint we generally ask for licensee comment, bringing a complaint to the Commission before discussing it with the station may only delay its resolution. However, we are not inclined to foreclose the possibility of direct complaints to us, and we decline to adopt any rigid complaint procedure absent a strong showing that one is necessary.

32. The appropriate remedy for specific allegations raising substantial questions of unsatisfactory performance is that mandated by Section 309(e) of the Communications Act: designation for hearing of the station's application for license renewal. 47 U.S.C. 309(e). PIRG's suggestion that we enforce agreements with forfeitures cannot be implemented, since forfeitures cannot be imposed for violations of Commission policy alone. 47 U.S.C. 503(b).

33. *Procedural Matters.* We recognize licensees' concerns that delay in disposing of applications is unfair to all parties. For that reason we are working to speed the processing of all applications, both contested and uncontested. However, the dramatic procedural changes some suggest would not facilitate determination of whether grant of an application would be in the public interest, and we believe their adoption would not be appropriate in the limited context of this proceeding. However, it is appropriate for us to consider the relationship between citizen agreements and petitions to deny. We do not believe we can, consistent with our own public interest obligation, restrict the right of any individual or group to file a petition to deny, as some commenters suggest. An agreement properly should be based on an honest acceptance of the merits of a proposal and not on any desire on the part of the licensee to further his own private interests or to avoid Commission scrutiny of his trusteeship. Thus, clauses in agreements barring petitions to deny would be improper, though we would accept a state-

[12] We will not enforce agreement terms not incorporated in an application. And of course we will not enforce agreement terms in areas not cognizable by the Commission (see note 8, above), even if incorporated in an application.

ment that the agreement satisfies objections which otherwise might have generated a petition to deny. We therefore caution parties against viewing an agreement as protection or insulation against future challenge. For the same public interest reasons, we also believe we must consider the allegations of petitions to deny, once filed, even if the petitioners request their withdrawal.[13] Allegations of past misconduct would of course receive close scrutiny. On the other hand, complaints that a licensee's operating proposals are inadequate might well be mooted by agreement undertakings, and could be resolved more easily.

34. Finally, the key assumption in successful dialogue and possible agreement is the good faith of the parties. We reiterate our recognition of the danger that "broadcasters may feel compelled to yield to organized pressure groups without regard to the merits of their complaints." *Final Report and Order*, Docket 19153, 38 Fed. Reg. 28762, 28764. There is no way for the government to eliminate such threats entirely, without becoming so heavily involved in the business and the freedoms of broadcaster and citizen as to constitute, itself, a greater threat. However, on a showing that either party has abused the process of community dialogue, we will seek to ascertain whether Commission action would be appropriate.[14]

Summary of Policy

35. Our consideration of the comments in this docket, as well as examples of citizen agreements that have come before us, has led us to the following conclusions. Citizens in a station's service area can make valuable contributions to broadcasting by communicating to the station licensee their perceptions of what the public interest requires. Licensees, for their part, have an obligation to seek out citizens' views, weigh them, and propose programming and operating practices to serve the public interest. The Commission's role is to establish procedures to facilitate these processes, and to determine whether licensees have, in fact, reasonably served the public.

36. One recent result of the dialogue between citizens and broadcasters has been more or less formal agreements, in which licensees undertake to operate in certain ways perceived by the parties to the agreement as serving the public interest. While we encourage community dialogue, a licensee is not obliged to undertake negotiations or agreements. However, if a licensee does enter an agreement, the following policies will apply.

37. The obligation to determine how to serve the public interest is personal to each licensee and may not be delegated, even if the licensee wishes to. Therefore, agreements must not take responsibility for making public interest decisions out of the hands of a licensee. Nor may they prevent it from changing the way the station serves the public interest as the licensee's perceptions change. The Commission, however, does not want to intrude unnecessarily into the processes of local dialogue and the exercise of licensee discretion. Therefore, considerable deference will be given a licensee's determinations of how to

[13] This is not to preclude petitioners from withdrawing themselves and their pleadings at any time they choose. *WAUD*, note 10, above. But the "issues" raised in such pleadings may not readily disappear.

[14] See *Northwestern Indiana Broadcasting Corporation*, FCC 75-1085 (1975).

serve the public interest, and the Commission will not prescribe or prohibit any particular agreement terms, so long as they are not unlawful or violative of particular Commission rules.

38. To avoid unnecessary government interference, we will examine only written agreements, which either are incorporated in the licensee's renewal or other application, or which come to us upon complaint or request for formal ruling or review. Such agreements will be considered to the following extent:

(a) We will review them to determine whether they improperly delegate nondelegable licensee responsibilities, whether they improperly bind future exercise of the licensee's nondelegable discretion, and whether they otherwise comply with applicable statutes, rules, and policies.

(b) Substantive agreement terms constituting proposals of future performance will assume the status of representations to the Commission, if made in an application submitted to us, and will be treated by the Commission as are all promises of future performance. The licensee will be free to modify the representations later, but we would ask to be informed if the changes are significant. We may ask for explanation of any deviations that appear to be substantial.

39. If the Commission finds an agreement improper, it will so advise the parties, who may wish to correct the defects. Provisions of any agreement that rely on invalid terms will have no force and effect before the Commission. Serious abdications of licensee responsibility will raise a question about the licensee's basic fitness.

40. The success of the dialogue and agreement processes depends on the good faith of citizens and licensees. The Commission will consider appropriate action if there is evidence any party abused the processes or acted in bad faith.

41. Because citizen agreements may be of interest to members of the public in the station's service area, written citizen agreements must be placed in the station's public file, as specified by the amendment to Section 1.526 set forth in Appendix B.

42. The Commission recognizes that oral understandings and agreements may be a common practice. However, because of inherent problems in establishing the existence and terms of such agreements, the Commission will not consider them. (Of course, if an oral agreement is the basis for a license application representation, the Commission would treat that representation like any other, without reaching the underlying agreement.) The Commission, likewise, will not require that station public files contain information about oral agreements.

43. Finally, the Commission will accept a statement that an agreement satisfies objections which otherwise might have generated a petition to deny, but we cannot give effect to an agreement purporting to preclude the filing of a petition to deny. The parties' basis for their agreement should be a good faith determination that it promises to serve the public interest.

44. Once a petition to deny is filed, the Commission is bound to consider its merits, even if the petitioner requests its dismissal. A petitioner is free to withdraw his challenge at any time, but such an action would not necessarily dispose of the issues raised.

45. For the foregoing reasons, the policy set forth above IS

ADOPTED; and Section 1.526 of our Rules IS AMENDED as shown in Appendix B. Authority for these actions is found in Sections 4(i), 303 and 307 of the Communications Act of 1934, as amended, effective January 22, 1976.

46. IT IS FURTHER ORDERED, That the proceedings in Docket 20495 are terminated.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

PARTIES FILING COMMENTS

(* Indicates Reply Comments Also Filed)

American Broadcasting Companies, Inc. * (ABC)
CBS Inc. (CBS)
Corinthian Broadcasting Corporation
Mrs. Elaine Donnelly, Michigan Chairman, STOP E.R.A. Committee
General Electric Broadcasting Company, Inc. * (GE)
KBOX Radio, *et al.* * (KBOX)
- KBOX, Dallas, Texas
- KFAB, Omaha, Nebraska
- KGOR (FM), Omaha, Nebraska
- KLZ (AM & FM), Denver, Colorado
- KTLC(FM), Dallas, Texas
- KVGB, Great Bend, Kansas
- WAEZ(FM), Akron, Ohio
- WAFB-FM, Baton Rouge, Louisiana
- WAKR, Akron, Ohio
- WBIP, Booneville, Mississippi
- WBMJ, San Juan, Puerto Rico
- WBOP (AM & FM), Pensacola, Florida
- WDXN, Clarksville, Tennessee
- WFDF, Flint, Michigan
- WGCM, Gulfport, Mississippi
- WIFC(FM), Wausau, Wisconsin
- WKAU (AM & FM), Kaukauna, Wisconsin
- WKRG (AM & FM), Mobile, Alabama
- WLOI (AM & FM), La Porte, Indiana
- KMA, Shenandoah, Iowa
- WOKJ, Jackson, Mississippi
- WONE, Dayton, Ohio
- WSAU, Wausau, Wisconsin
- WTAM(FM), Gulfport, Mississippi
- WTRF(FM), Wheeling, West Virginia
- WTUE(FM), Dayton, Ohio
- WTUG, Tuscaloosa, Alabama
- WTUP, Tupelo, Mississippi
- WVOJ, Jacksonville, Florida
- WWCA, Gary, Indiana
- KCAU-TV, Sioux City, Iowa
- KGUN-TV, Tuscon, Arizona
- KIVI(TV), Nampa, Idaho
- KLTV, Tyler, Texas
- KMTV, Omaha, Nebraska
- KOAA-TV, Pueblo, Colorado
- KOSA-TV, Odessa, Texas
- KPVI(TV), Pocatello, Idaho
- KFSM-TV, Fort Smith, Arkansas
- KTRE-TV, Lufkin, Texas
- KXON-TV, Mitchell, South Dakota
- WAFB-TV, Baton Rouge, Louisiana
- WAKR-TV, Akron, Ohio
- WCTV, Thomasville, Georgia

WHNB-TV, New Britain, Connecticut
WICS(TV), Springfield, Illinois
WKRG-TV, Mobile, Alabama
WMTV, Madison, Wisconsin
WRAU-TV, Peoria, Illinois
WSAU-TV, Wausau, Wisconsin
WSAV-TV, Savannah, Georgia
WTRF-TV, Wheeling, West Virginia
WTVO(TV), Rockford, Illinois
Metromedia, Inc. (Metromedia)
NAACP Legal Defense and Educational Fund, Inc. (NAACP)
National Association of Broadcasters (NAB)
National Black Media Coalition (NBMC)
National Broadcasting Company, Inc. (NBC)
National Citizens Committee for Broadcasting (NCCB)
National Organization for Women * (NOW)
Office of Communication, United Church of Christ (UCC)
Orion Broadcasting, Inc., *et al.* (Orion)
Orion Broadcasting, Inc.
Donrey, Inc.
Community Television of Southern California
Public Interest Research Group, *et al.* (PIRG)
Public Interest Research Group
Connecticut Citizen Action Group
Massachusetts Public Interest Research Group
Missouri Public Interest Research Group
New Jersey Public Interest Research Group
New York Public Interest Research Group
Rio Grande Valley Coalition on the Media, committee of
La Federacion de Organizaciones del Valle
St. Louis Broadcast Coalition
Storer Broadcast Company (Storer)
Worldvision Enterprises, Inc. (Worldvision)

APPENDIX B

Part I of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

In § 1.526(a)(1) a sentence is added, the Note designated Note 1, and a new Note 2 added; and in paragraph (e)(2) a sentence is added to read as follows:

§ § 1.526 Records to be maintained locally for public inspection by applicants, permittees, and licensees.

(a) * * *

(1) * * *

* * *The file shall also contain a copy of every written citizen agreement.

NOTE 1: * * *

NOTE 2: For purposes of this section, a citizen agreement is a written agreement between a broadcast applicant, permittee, or licensee, and one or more citizens or citizen groups, entered for primarily noncommercial purposes. This definition includes those agreements that deal with goals or proposed practices directly or indirectly affecting station operation in the public interest, in areas such as—but not limited to—community ascertainment, programming, and employment. It excludes common commercial agreements such as advertising contracts; union, employment and personal services contracts; network affiliation, syndication, and program supply contracts; and so on. However, the mere inclusion of commercial terms in a primarily noncommercial agreement—such as a provision for payment of fees for future services of the citizen-parties [see *Report and Order*, Docket 19518, —— FCC 2d —— (1975)]—would not cause the agreement to be considered commercial for purposes of this section.

* * * * * * *

(e) * * *

(2) * * *

* * *If a written agreement is not incorporated in an application tendered for filing with the Commission, the starting date of the retention period for that agreement is the date the agreement is executed.

* * * * * * *