

Educational Noncommercial Broadcast Service  
Stay Pending Outcome of Other Proceeding

Motion for Stay pending reconsideration of *Second Report and Order*, 86 FCC 2d 141, regarding the noncommercial nature of educational broadcast stations denied. Applying the standard established in *Holiday Tours*, 559 F. 2d 841 (D.C. Cir. 1977), the Commission found no basis to justify granting the requested stay. Docket No. 21136

FCC 81-401

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Commission Policy Concerning the Non-  
commercial Nature of Educational Broadcast  
Stations

Docket No. 21136

MEMORANDUM OPINION AND ORDER

(Adopted: August 18, 1981; Released August 21, 1981)

BY THE COMMISSION: COMMISSIONERS DAWSON AND RIVERA NOT  
PARTICIPATING.

1. The Commission has before it a Motion for Stay Pending Reconsideration filed by The Committee to Save KQED, the Association of Independent Video and Filmmakers, Inc., The Citizens Committee on the Media, The Chicago Citizens Cable Coalition, The Public Media Center, and the Committee to Make Public Television Public ("petitioners"), of our *Second Report and Order (Order)*, 86 FCC 2d 141, 1981, regarding the noncommercial nature of educational broadcast stations.<sup>1</sup> Petitioners ask that the the Commission stay the effective date of its decision in this matter until 30 days after the release of a final Commission decision on all pending petitions for reconsideration, including its own. Responsive comments were filed by the Public Broadcasting Service ("PBS") and by the law firm Dow, Lohnes & Albertson, ("D, L & A") on behalf of various clients.<sup>2</sup>

2. In support of its request for a stay, petitioners argue that the

<sup>1</sup> On June 18, 1981, petitioners also filed a *Petition for Reconsideration of the Second Report and Order*.

<sup>2</sup> Response briefs by PBS and D, L & A stated that they were not aware of the petition for a stay until it was too late to file a timely response. Inasmuch as they are interested parties and were not served notice of the petition, we find it appropriate to accept their late filings and consider them herein.

Commission's decision lacked a thorough analysis and a rational basis.<sup>3</sup> Additionally they argue that a stay would permit public comment on the rule changes prior to their implementation. Petitioners also argue that "irreparable injury," in the form of increased program control by corporate underwriters and business interests, will result in the absence of the stay. Also, petitioners argue that the issuance of the stay would not substantially harm public broadcasting and it would be in the public interest.

3. Section 1.429(b) of the Commission's Rules and Regulations provides for issuance of a stay pending a decision on reconsideration "upon good cause shown." In making that determination we look to the courts for guidance. In *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921, 925 (D.C. Cir. 1958), the Court listed the four questions that must be asked when considering a stay request: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? (2) Has the petitioner shown that without such relief, it will be irreparably injured? (3) Would the issuance of the stay substantially harm other parties interested in the proceeding? (4) Would the stay further the public interest? In *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F. 2d 841 (D.C. Cir. 1977), the Court clarified that standard saying that:

[U]nder *Virginia Petroleum Jobbers*, a court, when confronted with a case in which the other three factors strongly favor interim relief, may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability . . . The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors. *Id.*, at 843.

4. *Prevailing on the Merits.* Petitioners argue that the rules promulgated by the *Order* constitute a departure from previous Commission policies that will be detrimental to the noncommercial character of public broadcasting. They argue that the Commission has failed to articulate the basis upon which that change was made and that the Commission failed to satisfy the notice and comment requirements of the Administrative Procedure Act.<sup>4</sup> In their oppositions, PBS and D, L & A dispute each of the arguments made by petitioners on the merits, and suggest that there is little likelihood of petitioners succeeding on the merits in their Petition for Reconsideration.

<sup>3</sup> Petitioners cite in their Petition for Reconsideration a Public Broadcasting System Manual, *National Program Funding Standards and Practices*, which warns that public television operators must strive to avoid the public perception that program funders have influenced their professional judgment.

<sup>4</sup> Standards set out in the Administrative Procedure Act, 5 U.S.C. 1553(b)-(c) include giving notice of the proposed rule making, an opportunity for interested persons to comment, and a concise general statement of the basis and purpose of the rules ultimately adopted.

ation. In posing the question on this issue, the *Petroleum Jobbers* standard indicates that a "strong showing" of likelihood of prevailing on the merits is required. "Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." *Petroleum Jobbers, supra*, at 925. However, according to *Holiday Tours*, the probability of success required under *Petroleum Jobbers* ". . . will vary according to the court's assessment of the other factors." *Holiday Tours, supra.*, at 843. In the situation here where the Commission will make the determination on the merits of these allegations on reconsideration, it seems appropriate to give the greatest possible deference to the petitioners. Thus, we will assume, *arguendo*, that petitioners have made a sufficient legal argument to support a thorough legal review on the merits. Our decision to grant a stay will be based on our consideration of the relative gravity of the other relevant factors.

5. *Irreparable Inquiry to Petitioners.* Petitioners make no argument or factual assertion that any specific harm will befall them if the stay is not granted. For purposes of analysis, we must therefore assume that as members of the listening public they have a stake in the continued viability of the public broadcast service, and would somehow be injured if the service is harmed as a result of the *Order*.

6. *Irreparable Injury to the Public Broadcast System.* Petitioners allege that the Commission's *Order* "opens the door to increased program control by corporate underwriters and business interests." They say that the independence and integrity of public broadcasting may be compromised beyond repair although the damage may be too subtle to immediately detect. No facts are presented that substantiate these claims. Petitioners demonstrate neither that a harm is inevitable nor that it would be irreparable. Instead, petitioners argue that a significant number of viewers might be led to conclude that public television have "sold its professionalism and independence to its program funders." Even if perceptions by the public were affected in this way, the assumption that this would undermine the character of public broadcasting is not clearly demonstrated. Assuming, *arguendo*, that a harm does exist as a consequence of changed public perception of public broadcasting, petitioners fail to demonstrate the permanence of that harm and thus fail to demonstrate its irreparability.

7. *Harm to Other Interested Parties.* Petitioners assert that a stay would cause no harm to other interested parties. They address only the possible pecuniary harm to public broadcasters, and dismiss that on the assumption that there will be no rescission of federal funds until fiscal year 1983. PBS, however, asserts that public broadcasting confronts immediate financial injury based on reductions from other funding sources. Likewise, D, L & A disputes the petitioners' claim that there will be no financial harm to stations, and also says that to

grant the stay would amount to a denial of the stations' First Amendment rights. Although the evidence on the financial harm issue is apparently inconclusive, the Commission believes the *Order* will allow stations to "broaden [their] sources of private support." The Commission said:

This broadened public funding should reduce the ability of any single private or public entity to affect program decisions and thus should help insure that the programming decisions of public stations are consistent with the intended status of public broadcasting.

*Order*, at 143. We continue to adhere to that view, and thus as a policy matter consider our conclusions in the *Order* important to the continued well-being of public broadcasters. On balance, the harm to public broadcasting that would ensue if we granted this stay appears to outweigh the alleged potential harm in *not* granting it.

8. *The Public Interest*. Petitioners first contend that public broadcasting, in order to fulfill its public interest mandate, must preserve its noncommercial character and avoid even the appearance of undue commercial influence. Second, they contend that the *Order* will create undue commercial influence and thus destroy the noncommercial character of the service. Although we take no position on the first contention here, we are provided no evidence substantiating the second. As the Commission fully explained in the *Order*, the actions taken therein were designed to preserve the largely noncommercial character of the service, as well as to more carefully tailor our rules to achieve other public policy objectives. Thus, we believe that the public interest would be best served by not granting the requested stay.

9. *Balance of the Equities*. According to the *Holiday Tours* case, resolution of the stay request requires ". . . an analysis under which a showing of the merits is governed by the balance of the equities as revealed through an examination of the other three factors." *Holiday Tours*, at 844. Further: "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." *Id.* Applying this standard, we find no basis to justify granting the requested stay. As distinct from the *Holiday Tours* situation where petitioners demonstrated a grave potential for immediate, irreparable injury to petitioners absent the stay, petitioners here fail to allege any personal harm and base their allegations of harm to the public broadcast service on several speculative assertions. We believe that the potential for harm to the system in granting the stay is at least as likely as the potential for harm in not granting it. Therefore, the balance of the equities and the public interest leads us to deny the petitioners' request for a stay.

10. Accordingly, IT IS ORDERED that petitioner's Motion for Stay Pending Reconsideration is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,  
WILLIAM J. TRICARICO, *Secretary*.