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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
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In the Matter of

Implementation of Section 26 of the)
Cable Television Consumer Protection)
and Competition Act of 1992)

PP Docket No. 93-21✓

Inquiry into Sports Programming)
Migration)

FURTHER NOTICE OF INQUIRY

Adopted: March 10, 1994

Released: March 11, 1994

Comment Date: April 11, 1994

Reply Comment Date: April 26, 1994

By the Commission:

I. Introduction

1. Section 26 of the Cable Act of 1992¹ directs the Federal Communications Commission to examine carriage of sports programming by television broadcast stations and by subscription media, to submit reports to Congress on or before July 1, 1993 and July 1, 1994, and to make "such legislative or regulatory recommendations as the Commission considers appropriate." The Commission issues this Further Notice of Inquiry ("Further Notice") in order to update the record in its sports programming migration docket and gather the necessary additional information to compile its Final Report to Congress, due July 1, 1994.

2. The Cable Act of 1992 directs the Commission to examine, on a sport-by-sport basis, trends in the migration of sports programming from broadcast television to cable

¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

programming networks and pay-per-view services. The analysis is to include an attempt to project future patterns of carriage and an examination of the causes and consequences of migration. Moreover, the 1992 Act instructs the Commission to "analyze the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of sporting events of local colleges for broadcast on local television stations."

3. The Commission began its sports programming investigation with a Notice of Inquiry, released February 9, 1993, and issued an Interim Report to Congress on July 1, 1993.² The Commission adopted the following operational definition of sports programming migration: "the movement of sports programming from broadcast television to a subscription medium (i.e., one for which viewers pay a fee.)," and noted that an increase in the number of games exhibited over subscription media of a particular team or league would not, in and of itself, constitute migration.³ In order to assess migration, it is necessary to track over time the number and type of games actually exhibited over broadcast television.

4. The Commission's initial inquiry emphasized four professional sports--football, basketball, baseball, and hockey--and college football and basketball. Moreover, the inquiry focused on the period since 1980, due to the limited scope and availability of subscription media in earlier years. The Interim Report found that the number of sports events shown on cable has increased since 1980, but tentatively concluded that this is not associated with a decline in broadcasts of sporting events. In some cases, broadcast exposure has also increased.

5. The Commission supplemented these general observations with specific tentative findings for each of the six sports mentioned above. (See Interim Report at para. 86.) It found no evidence of migration in the case of the National Football League (NFL) and college basketball. With regard to the other three professional sports leagues the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL), the Commission tentatively concluded that, while there had been no migration at the national level, "isolated and relatively slight" migration at the local level had occurred. The Commission also stated its belief that college football games previously available to

² Notice of Inquiry in PP Docket No. 93-21, 8 FCC Rcd 1492 (1993); Interim Report in PP Docket No. 93-21, 8 FCC Rcd 4875 (1993).

³ Notice of Inquiry at para. 2. See also Interim Report at paras. 8-11, noting, *inter alia*, that "[W]hile the optimal method of measuring sports migration would be... a comparison of the number of games and viewership of events actually shown on broadcast television with the projected number of games and viewership of events that would be broadcast absent the existence of non-broadcast video distributors, such projections are too speculative to form the basis for this study" (citation omitted). An increase in the number of games exhibited via subscription media could occur along with an increase in the number of games exhibited via broadcast media. Even if the number of games exhibited via broadcast media did not increase, subscription video exhibition could increase the total number of games available to viewers. These considerations underlie the Commission's conclusion that an increase in the number of games exhibited via subscription media would not, in and of itself, constitute migration.

broadcast television had not moved to cable, but emphasized that more information regarding preclusive contracts was needed before reaching a firm conclusion regarding whether the supply of games to local television stations has been "artificially and unfairly restricted." (1992 Cable Act, Sec. 26(c)(1))

6. In the Interim Report the Commission enumerated certain topics for further investigation in the Further Notice. (See paras. 63, 66, 75-77, 87.) Moreover, the Honorable Edward Markey, Chairman of the Subcommittee on Telecommunications and Finance of the House Energy and Commerce Committee, has suggested some additional lines of inquiry.⁴ Additionally, the Commission has before it a "Petition for Clarification" of the Interim Report from Capital Cities/ABC ("CapCities/ABC Petition") and an "Opposition to Petition for Clarification of Independent Television Stations" ("INTV Opposition").⁵ After outlining the scope of this Further Notice, based on these items and events subsequent to issuance of the Interim Report, we will devote a section of this Further Notice to professional sports, a section to college sports, and a section to conclusions and administrative matters.

II. The Scope of the Further Notice

7. In the Interim Report, the Commission indicated that it would seek information about recent television and cable contracts negotiated by the NFL, the NBA, and MLB⁶ and about divisional realignments, particularly with respect to the NHL and MLB. With regard to college sports, the Commission noted the need for more data on local telecasts of college football and basketball games. Moreover, the Commission highlighted the need for additional information about contracts between college football conferences and video programming vendors, in order to determine if such contracts are, in fact, preclusive. Because the Commission found in the Interim Report that the term "video programming vendor" applies to broadcast networks as well as cable networks, we now seek additional information regarding contracts now in effect between college football conferences and ABC as well as contracts with ESPN and regional cable networks. We also wish to determine the terms of the new contracts that college conferences have signed with broadcast and cable networks. For

⁴ Letter from the Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, U.S. House of Representatives to the Honorable James H. Quello, Acting Chairman, Federal Communications Commission, July 22, 1993.

⁵ "Petition for Clarification" of Capital Cities/ABC, Inc. ("CapCities/ABC") and ESPN, Inc. in PP Docket No. 93-21, filed July 30, 1993. "Opposition to Petition for Clarification" of the Association of Independent Television Stations, Inc. ("INTV") in PP Docket No. 93-21, filed Sept. 16, 1993.

⁶ See notes 12, 14, and 16 below.

example, the Southeastern Conference and the Big East have signed with CBS and the Atlantic Coast Conference has signed with ABC and ESPN.⁷

8. In order to carry out its statutory mandate to analyze the impact of "preclusive contracts" on the availability of local college sporting events to local television broadcast stations, and, in consultation with the Attorney General, to "determine whether and to what extent such preclusive contracts are prohibited by existing statutes," (1992 Cable Act, Sec. 26(c)), the Commission stated its intention to use the "rule of reason" test applied by the United States Department of Justice to analyze some antitrust matters. (Interim Report at para. 77) Application of the "rule of reason" test entails delineating relevant product and geographic markets, assessing the degree of market power possessed by college leagues and programmers, evaluating whether contracts between video programmers and college leagues permit the achievement of efficiencies that could not be readily achieved in another manner, and determining whether these contracts limit or increase the quantity of sports programming telecast. The CapCities/ABC Petition requests the Commission not to "seek to determine whether any 'preclusive' college sports contracts violate the antitrust laws." Rather than conduct an antitrust adjudication, asserts CapCities/ABC, the Commission's statutory instructions are to determine, "as a matter of communications policy" whether preclusive contracts have artificially and unfairly restricted the supply of college sports events to local stations, and then to report to Congress, making any necessary and appropriate legislative recommendations. CapCities/ABC suggests that the Congressional instruction to the Commission to consult with the Attorney General regarding whether preclusive contracts are prohibited by existing statutes is designed to help the Commission judge whether public interest considerations other than those addressed by antitrust law suggest the need for legislation. Cap/Cities ABC urges that antitrust adjudication is a time-consuming process that could not be completed within the deadlines imposed by Congress.

9. The INTV Opposition agrees that the Commission should not attempt to "specifically adjudicate the issue of whether any particular contract violates the antitrust laws." However, INTV asserts that, in evaluating preclusive contracts with respect to fundamental communications policy objectives, the Commission can and should take notice of antitrust considerations as part of a broader communications policy analysis.

10. It is not our intention to adjudicate whether specific contracts violate the antitrust laws. Consistent with our statutory mandate, however, we will address in our report to Congress, after further consultation, if appropriate, with the Department of Justice, "whether and to what extent" preclusive contracts "are prohibited by existing statutes," including the antitrust laws. In addition, we agree with INTV that analytical tools drawn from antitrust law are an appropriate and useful component of our broader public interest examination of

⁷ See "CBS Gets Deal With Big East," New York Times, Feb. 16, 1994, p. B13. See also note 18 below. We also note that the Big Eight conference, augmented by four new members from the Southwestern conference, is negotiating about new television contracts. See Ivan Maisel, "Death of a League: Here's how SWC went from scattered to split in 11 days," Dallas Morning News, Feb. 27, 1994, p. 1B.

preclusive contracts. Cf. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978).

11. We emphasize that the public interest encompasses more than antitrust concerns and we invite comment on whether there is a public interest in government action to promote free access to sports programming. For example, INTV suggests in its Opposition and in its earlier comments that the Commission can and should adopt sports siphoning rules. Commenters who believe that sports programming migration and/or preclusive contracts on balance harm the public interest should specify what should be done to remedy the situation. Those advocating Commission rules should address the Commission's authority to adopt such rules in light of Home Box Office v. FCC⁸ and any relevant changes in circumstances since that case was decided in 1977.

12. The Commission also noted in the Interim Report the need for information regarding the cost of subscribing to the cable services that provide sports programming. We therefore seek information regarding subscription rates for regional sports channels and whether these channels are available on a tiered or a la carte basis. Such information will be useful in assessing the impact of present or future sports programming migration. That impact can be divided into two broad components, price and availability. The overwhelming majority of United States television households (more than 95 percent) are passed by cable, and many households that are not have access to direct-to-home satellite services.⁹ We recognize that some households do not have access to non-broadcast services and we seek comment on where they are located, in order to determine if access problems disproportionately affect potential viewers of certain teams' games.¹⁰ However, for most television households, the issue is price.

13. The Congressional letter cited above at para. 6 suggests that the Commission examine six topics as it moves toward a final sports programming migration report. They are: (1) why the increase since 1980 in cable exhibition of sporting events has been much greater than the increase in broadcast exhibition; (2) trends in cable and broadcast exhibition at the local as well as the national level; (3) pay-per-view exhibition of sports events and its impact on future patterns of sports programming exhibition; (4) the effect of college football contracts on local availability of sports programming; (5) the impact of expected vast increases in channel capacity for subscription media and the adoption of video-on-demand technologies on the availability of sporting events on free television; and (6) sports antitrust exemptions and their effect on the sports programming market. There is substantial

⁸ 567 F.2d 9 (D.C. Cir. 1977).

⁹ See Paul Kagan Associates, Marketing New Media, Aug. 16, 1993, p. 3 (projecting that, as of August 31, 1993, 98 percent of U.S. television households were passed by cable and four percent of U.S. television households had home satellite dish systems).

¹⁰ We also invite evaluation of the figures cited in the previous note for cable homes passed and home satellite dish households.

information in the record on these matters. We hereby invite interested parties to supplement that record with regard to these issues in response to this Further Notice.

14. With regard to the first issue, commenters responding to the Notice of Inquiry in this proceeding have suggested several factors that might explain this phenomenon. For example, there has been a significant increase in the number of channels devoted exclusively or primarily to sports programming. Also, the base level of broadcast exhibition in 1980 was far greater than the base level of cable exhibition. These factors raise the possibility that there was more "room for expansion" in cable exhibition than in broadcast exhibition. We seek comment on these and other possible explanations for the fact that most of the increase in availability of sports programming has been via pay services rather than over-the-air television.

15. The impact of new technology and capacity expansion on sports programming availability (issue five) is clearly related to the question of how PPV will develop. While we recognize that accurate predictions of these developments are difficult, we specifically request comment on the impact of these new technologies on the availability of sports events on broadcast television. In particular, we seek comment from the relevant sports leagues and teams, professional and collegiate, on any plans they might have to utilize expanded channel capacity and video-on-demand technology. We are interested not only in the direct impact of these technologies but on how they might change viewer habits and the way that viewers, sports fans in particular, might utilize subscription video media.

16. We sought comment on the antitrust exemptions (issue six) earlier in this proceeding, but few commenters addressed this issue. Those who did generally cited the Sports Broadcasting Act and concluded that it benefits viewers by assuring widespread availability of professional sporting events and suggested that shared revenues from television contracts have permitted expansion in the number of teams in professional sports leagues and thus increased the number of games telecast. We invite additional comment on the impact of the antitrust exemptions on sports programming availability.

17. While the Commission has focused its sports programming migration inquiry on particular sports and a specific time period, we do not wish to limit commenters' discretion to identify relevant matters. We therefore invite comment on any other sports (e.g., the Olympics) or relevant topics not specifically identified in the Further Notice.

III. Professional Sports

18. In this section, we seek comment on recent developments and trends in the exhibition of professional sports programming. We address the four major professional sports specifically in the following subsections, but also seek any relevant information regarding other professional sports. Several parties filed statements with the Commission after the formal comment and reply comment periods on the Notice of Inquiry in this proceeding

closed. In order to ensure as full a record as possible, we shall accept and consider these late filed pleadings (and other late filed pleadings that address college sports).

A. Professional Football

19. In the Interim Report, the Commission found that professional football has experienced no migration and noted that every NFL game is available on broadcast television, at least in the home market of the visiting team.¹¹ Since the Interim Report, the NFL has signed new exhibition agreements with several broadcast and cable television networks.¹² We request information on exhibition of NFL regular and post-season games pursuant to those contracts. In particular, we seek comment on whether the movement of National Football Conference games from CBS to Fox will affect the availability of games via broadcast television. We also note that the NFL has announced plans to scramble its satellite feeds and sell packages of games to home satellite dish owners and to commercial establishments such as sports bars.¹³ We request information on the schedule for scrambling and the terms (including cost) under which games will be made available to sports bars and dish owners. Additionally, we seek comment on whether this development has any implications for future offering of NFL games to other audiences on a subscription basis.

B. Professional Basketball

20. The Interim Report found that there has not been significant migration of professional basketball telecasts from broadcast to cable television, either at the national or the local level. The record contains some discussion of declines over time in local exhibition of New York Knicks and Philadelphia 76ers games, and we understand that the Portland Trailblazers have offered some regular season and playoff games via PPV. We invite commenters to supplement the record on these matters if additional relevant information is available, as well as to offer any other information relevant to sports programming migration in the NBA context. Specifically, with regard to the 76ers, we understand that the current local television broadcast contract expires after the 1993-1994 season. We seek comment on whether a new contract has been negotiated, and if it has, on the terms thereof, in order to resolve speculation in the record about the number of 76ers games that will be on broadcast television during the 1994-95 season.

¹¹ Games are also available on broadcast television in the market of the home team, provided that the game is sold out at least 72 hours in advance of the game. See Comments of the National Football League in PP Docket No. 93-21 (filed March 29, 1993) at 8.

¹² See Richard Sandomir, "Fox Network's Bid Beats CBS for Rights to N.F.C. Football," New York Times, Dec. 18, 1993, p. 1; Mark Asher, "ABC, ESPN, TNT Retain NFL Rights," Washington Post, Dec. 19, 1993, p. D1; Leonard Shapiro and Mark Asher, "NBC Retains AFC Rights," Washington Post, Dec. 21, 1993, p. E1.

¹³ See "NFL Confirms Scrambling, Sales Plans," Satellite Business News, Jan. 12, 1994, pp. 1, 25.

21. We also seek comment on the new contracts that the NBA has recently signed with NBC and TNT for national exhibition of league games.¹⁴ In a late-filed submission, the NBA explained that its new contract contains certain limitations on superstation telecasts of league games and that these limitations were the subject of litigation. We seek comment on these limitations and on the status of the relevant litigation.

C. Professional Baseball

22. The Interim Report found that, since 1980, there has been a significant decline in the number of national, regular season television broadcasts of Major League Baseball games. However, the drop appears to be a function of declining ratings rather than migration to cable. At the local level, the record is slightly more ambiguous, with some teams experiencing a decrease in the number of games broadcast over local television. Some information on these matters is already in the record. We invite interested parties to update and supplement this material as appropriate and to comment on these and other local MLB broadcast and cable television exhibition schedules, including any actual or planned pay-per-view exhibitions. We note that Madison Square Garden Network and WPIX-TV have reached an agreement for over-the-air carriage of 50 New York Yankees games per year for the next three years.¹⁵ We request that the parties to the contract provide us with information on its terms.

23. The Interim Report quoted press reports regarding a new contract with ABC and NBC about to be approved by MLB. Moreover, we understand that MLB has also reached agreement with ESPN on a new national cable contract.¹⁶ We seek information and comment on the relevant terms of these agreements. In particular, what are the provisions for broadcasting of regular season and post-season games? How will the number of post-season games change, and how will this number be affected by the new divisional alignments recently adopted by MLB? What are the exclusivity provisions of these contracts, in particular that with ESPN? What will be the impact of these provisions on local telecasts and on superstation telecasts of MLB games?

24. We also seek comment on the negotiations over sharing revenue from local telecasts of MLB games between the two opposing teams.¹⁷ What effect, if any, will this have on local telecasts? Additionally, we seek comment on any other MLB topics relevant to our sports programming migration inquiry.

¹⁴ See Steve McClellan, "NBC-NBA deal: \$750 million + revenue sharing," Broadcasting and Cable, May 3, 1993, p. 14; and "Turner gets four more years of roundball," Broadcasting and Cable, Sept. 27, 1993, p. 28.

¹⁵ See Communications Daily, Mar. 3, 1994 at 7.

¹⁶ See Steve McClellan, "Baseball approves deal with ABC, NBC," Broadcasting and Cable, May 31, 1993, p. 11; Rich Brown, "More post-season games for MLB," Broadcasting and Cable, Sept. 13, 1993, p. 15.

¹⁷ See, e.g., Broadcasting and Cable, Jan. 10, 1994, p. 15.

D. Professional Hockey

25. The Interim Report found that, with the exception of the NHL All Star games since 1990 and a few Stanley Cup games in 1993, there was no national broadcast television carriage of NHL games after 1980. It appears that cable has provided the national outlet for hockey during 1980-93, but that there are limited prospects for increased national television coverage of a limited number of post-season games. The Interim Report noted a 14 percent decline in local games broadcast between 1981-82 and 1992-93, but it was not possible to establish a single cause for the decline. The Commission indicated that NHL broadcasts could have declined due to the increase in cable availability or to weakening demand, possibly caused by increased popularity of some or all of the several other fall and winter sports.

26. While there is some information already in the record on these matters, we invite additional comments. We seek comment on any aspects of actual or potential sports programming migration of NHL games. Particular areas of interest include PPV exhibition of playoff games by the Chicago Blackhawks and the (former) Minnesota North Stars, and the decline in the number of New York Rangers games on broadcast television. We also explicitly include in our request information on "reverse migration" and ask whether any decision has been made regarding additional national television broadcast exhibition of NHL games (postseason or regular season) for the current season.

IV. College Sports

27. As noted above at para. 7, we seek comment on local telecasts of college basketball and football games. The Interim Report found no evidence of migration of college basketball games to subscription media. Moreover, the Commission found that concerns with respect to preclusive contracts arose almost exclusively in the college football context. Thus, while we seek any additional information available regarding possible examples of migration or preclusive contracts in the college basketball context, we place a higher priority on obtaining supplementary information on local telecasts of college football games. Our analysis of college sports will emphasize football.

A. College Football and Preclusive Contracts

28. The Interim Report tentatively concluded that college football games previously available to broadcast television had not migrated to cable, but noted the need for additional information regarding local telecasts of college football games and preclusive contracts between video programming vendors and college football conferences. We hereby request comment on these matters. We are especially interested in comments from regional cable sports networks and the college football conferences with which they have contracts and comments from local broadcasters detailing any difficulties that they have had in obtaining rights to broadcast games of their local colleges, home games in particular.

29. With respect to local broadcasters' attempts to secure television exhibition rights, we seek comment on the impact of the provisions in the ABC and ESPN contracts that permit the networks to make telecasting decisions on 12 days notice (six days notice in a limited number of cases). Also, for games not nationally televised, does the provision permitting local telecast within the ADI markets of the participating teams make such telecasts economically viable? If not, what sort of larger "local" territory might make these telecasts profitable?

30. There is a substantial amount of information in the record regarding the national contracts between ABC/ESPN and the College Football Association (CFA) and the Big Ten/Pacific 10. However, we note that several CFA conferences have signed separate contracts with ABC or CBS for carriage of their games beginning in 1996.¹⁸ We invite the relevant parties to provide more complete explanations of the exclusivity provisions of their contracts, along the lines outlined at para. 75 of the Interim Report.

31. In order to "determine whether and to what extent ...preclusive contracts are prohibited by existing statutes" (1992 Cable Act, Section 26(c)(1)), we seek comment on the relevant product and geographic markets for college football telecasts, the magnitude of market power possessed by college leagues and programmers, and the extent and magnitude of any efficiencies that the contracts between college football conferences and video programming vendors might permit. One relevant issue here is the possible tradeoff between increased national exposure for teams in important games versus the limitations on local telecasts imposed by the 12 day rule. Broadly speaking, the question that we draw from antitrust analysis in examining preclusive contracts is whether such contracts increase or decrease output, *i.e.*, the quantity and/or quality of sports programming telecast. As noted above at para. 10, we are not attempting to make a specific adjudication regarding violations of the antitrust laws, although, after further consultation with the Department of Justice as appropriate, we will comply with the statutory mandate regarding whether and to what extent preclusive contracts are prohibited by existing statutes, including the antitrust laws. Moreover, as part of our broader review, we are drawing on competition law principles in order to make a public interest determination as to whether "preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations."¹⁹ Based on that determination, we will make legislative recommendations if appropriate, and, if convinced of the need and our authority (see para. 11 above) to do so, we may propose new Commission regulations regarding sports programming.

¹⁸ See "Football rights up for grabs," Broadcasting and Cable, Feb. 21, 1994, p. 15.

¹⁹ 1992 Cable Act, Section 26(c)(1). As stated earlier, in the Interim Report at paras. 73-74, we concluded that "video programming vendors" includes broadcast networks as well as cable networks.

32. We also seek comment on the following specific issues relating to college football. What is the role of PPV in delivering college football telecasts? In particular, we would like to obtain data on the PPV programs of the University of Tennessee, the University of Arkansas, the University of Miami, Louisiana State University, and Notre Dame University. We also ask for information on ABC's plans to deliver out-of-market college football games via PPV. Additionally, we seek comment on how and to what extent PPV offerings of college football and other college sports are likely to evolve. Commenters are also invited to submit information on any other college sports matter relevant to the Commission's sports programming migration investigation.

VI. Conclusions and Administrative Matters

33. We encourage comments from the sports leagues and teams, from players' organizations, from universities and college athletic conferences, from broadcast, cable, and other delivery media, from sports programmers, from relevant government agencies, and from other interested parties. Should any party wish to submit confidential information, the Commission has procedures for protecting it.²⁰

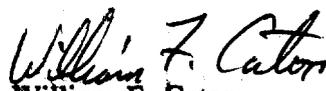
34. This Further Notice is issued pursuant to authority contained in the Cable Television Consumer Protection and Competition Act of 1992, Section 26, and Sections 4(i), and 403 of the Communications Act of 1934, as amended. 47 U.S.C. 154(i), and 403. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before April 11, 1994, and reply comments on or before April 26, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

35. Accordingly, the CapCities/ABC Petition is GRANTED to the extent specified herein and otherwise DENIED.

²⁰ See 47 C.F.R. §§ 0.457(d), 459, and 461. But cf. 47 C.F.R. § 0.442.

36. For further information concerning this proceeding, contact Jonathan D. Levy,
Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary