

# KYES

**ANCHORAGE**

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FCC MAIL ROOM

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

July 15, 1994

RE: MD Docket No. 94-19 Fireweed Petition for  
Reconsideration

Dear Mr. Caton:

Enclosed find an original plus twelve copies of Fireweed Communication Corporation's Petition for Reconsideration in the above captioned proceeding.

You will also find enclosed an addressed and stamped return envelope, addressed to Fireweed. Please stamp one copy as received by the Commission, and mail back to Fireweed in the enclosed envelope.

Yours truly,

Jeremy Lansman

No. of Copies rec'd 0+11  
List A B C D E

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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APR 18 1994  
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In the Matter of )  
 )  
Implementation of Section 9 )  
of the Communications Act )  
 )  
Assessment and Collection of )  
Regulatory Fees for the 1994 )  
Fiscal Year )

MD DOCKET No. 94-19

TO: The Commission

**PETITION FOR RECONSIDERATION  
Fireweed Communications Corp.  
KYES (TV), ANCHORAGE, AK.**

Pursuant to 47 C.F.R. § 1.429 Fireweed Communications Corporation ("Fireweed"), licensee of television station KYES, translator station K06LY, and Broadcast Auxiliary stations WMG-298, WMG-300, WMG-299, and KC-24192, hereby requests the Commission to reconsider its June 16, 1994 Report and Order in the above captioned matter setting forth final rules on the collection of Regulatory Fees for the 1994 fiscal year.

The Commission issued a Notice of Proposed Rulemaking on March 11, 1994. Learning of this proceeding on the comment deadline of April 7, 1994, Fireweed requested and was denied an Emergency Stay on the deadline to April 18, 1994. Nevertheless, Fireweed submitted comments on the "Reply" comment date of April 18, 1994.

Therein, some arguments Fireweed set forth were:

- a. The proposed rules have significant economic impact on small entities.
- b. The FCC gave improper public notice, which would affect Commission decision making.
- c. The adopted rules have anticompetitive effects.
- d. This Regulatory Fee is not consistent with First Amendment and other Constitutional rights, especially with respect to Fireweed.
- e. The public, not Fireweed, is principal beneficiary of FCC services.<sup>1</sup>
- f. Even if Fireweed is a beneficiary of FCC regulation, KYES is a secondary service on its channel, does not operate on an Exclusive Use channel, and cannot be charged as much as Exclusive Use stations since the benefit conferred is substantially different from that conferred on other broadcast stations.

Of the issues Fireweed raised, only (1) deposit of a fee along with a request for waiver of the fee, and (2) public notice issues were addressed in the Report and Order.<sup>2</sup>

Herein Fireweed requests re-opening the rulemaking as it applies to small entities, recognition of KYES's anomalous status as a secondary service, and any other issue not fully addressed in Fireweed's original comments.

1. Did the Commission comply with 5 U.S.C. § 609? The statute is fully quoted below.

When any rule is promulgated which will have a significant economic impact on a substantial number of small entities,

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<sup>1</sup> Federal Power Commission v. New England Power Co., 415 U.S. 345, 39 L.Ed 2d 383.(1974)

<sup>2</sup> Although Fireweed is not mentioned, this significant alternative was requested and adopted. See Report and Order paragraph 34.

the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through such techniques as-

- (1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
- (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
- (3) the direct notification of interested small entities;
- (4) the conduct of open conferences or public hearings concerning the rule of small entities; and
- (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

Fireweed respectfully requests the Commission to show that it has met the requirements of any of 5 U.S.C. § 609 above. In its March 4th Notice of Proposed Rulemaking the Commission states in APPENDIX B that

"... the collection of regulatory fees will affect permittees, licensees and other regulatees in the cable, common carrier, mass media and private radio services. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis."

This statement does not appear to meet statutory requirements. A statement that the "rule may have a significant economic effect on a substantial number of small entities." was not included in the NPRM.

In its final action, the Commission stated:

"The NPRM was published and distributed pursuant to section 1.412 of our rules and was distributed to over 100 members

of the trade press, newspapers, wire services, broadcasters and magazines, including those dealing with consumer, minority and small business issues." <sup>3</sup>

Fireweed fails to understand how the passive act of handing out over 100 copies of the NPRM complies with the Statute. Handing out copies to publishers does not in itself cause publication. In addition, the Report and Order failed to identify any actual publication of information required by the Statute.

The Commission further explained:

In addition, the Commission's Daily Digest, which included notice of the NPRM, was published in internet."

However, each Daily Digest itself states, on the masthead, "These are unofficial announcements of Commission actions. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 2d 385 [sic] (D.C. Circ. 1974)." If the Commission has any information that small entities are likely to download Daily Digests by way of the internet, it should share this information with us.

In addition, we found no indication of an attempt to meet the requirements of Section 609, Subsection (3) (4) or (5).

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<sup>3</sup> See Report and Order, footnote 6. Even the not so small entity, MCI, was caught off guard by this unusually swift proceeding.

Fireweed is concerned that apparent lack of compliance with Section 609 has significantly attenuated comment by other small entities,<sup>4</sup> thereby prejudicing the Commission's deliberations in favor of large entities.<sup>5</sup>

Although the Commission may have been reluctant to publish and contact small entities when doing so may have resulted in diminished fee collection, two days after adoption of the Final Report and Order the Commission has no trouble mass mailing notices directly to regulatees telling them they had better pay up. And when it comes to auctions, the Commission had no problem buying advertisements in newspapers. It appears the Commission gives better public notice when it expects to collect money rather than comment.<sup>6</sup>

Fireweed believes that, although this Commission rulemaking is flawed, the problem could be cured by re-opening the rulemaking with respect to, and principally for comment by small entities, and by following Statutory requirements in the course

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<sup>4</sup> See Attachment A, Declaration of Lawrence Rogow

<sup>5</sup> In addition § 603 (b), the Initial Regulatory Flexibility Analysis requires the Commission to describe and estimate the number of small entities to which the proposed rule will apply, describe the projected reporting, and recordkeeping requirements for small entities, and the type of skills that might be required to prepare the report of record. Not only were these provisions ignored, but as we argue below, the rules as adopted places a special burden of reporting and recordkeeping squarely upon the smallest regulatees.

<sup>6</sup> See Attachment B, a copy of a paid FCC advertisement.

of that proceeding. We request the Commission to open such a proceeding.

2. KYES operates on a Shared Channel. As pointed out in its comments, under 73.603 (b) of the Commission rules, KYES is a secondary service and shares its channel with other users. In the Report and Order, Paragraph 70, the Commission defines a shared use channel by saying "... shared channel assignments require licensees to be licensed for the same channel for the same geographic area." KYES is in an even more restrictive situation, in that it is clearly a secondary user of the channel.

Fireweed has identified one fixed station, WNPG234, operating at 76.96 MHz, with 106 watts E.R.P. at 1,445 feet above Mean Sea Level, from a site in a residential part of metropolitan Anchorage. Television channel 5 is from 76 to 82 MHz.<sup>7</sup> There may be other stations, including government stations sharing the channel with KYES.

If Fireweed must pay a fee, it must be at a rate which reasonably reflects the cost of the service performed and the value conferred upon the payor.<sup>8</sup> It is difficult to understand

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<sup>7</sup> See attachment C, License and License Renewal application for WNPG234 and attachment D, affidavit of Richard Zook.

<sup>8</sup> Public Service Co. of Colorado v. Andrus, 433 F. Supp 144 (D.C. Co.1977); National Association of Broadcasters v. F.C.C., 554 F.2d 1118, (1976).

how a secondary Alaskan TV broadcast license which must protect fixed stations from interference, and be subject to interference from fixed stations, can have the same cost and value as a primary service, fully protected, exclusive use, TV broadcast license.

Assuming any fee is appropriate, as KYES falls between the statutory cracks, we again request the Commission take notice of the special situation, by reducing the fee accordingly. The Commission should adopt a rule, or policy charging broadcast stations on shared use channels no more than other shared channel users.

3. Impact of new section 1.1165 on Fireweed. Under this rule KYES must submit a waiver request each and every year. The request must disclose financial information, and show public interest justification. In case we petition for deferment of payment we must show the "... exceptional instance in which requiring payment of the regulatory fee along with a waiver or reduction request could result in the reduction of service to a community or other financial hardship."

Since non payment of the regulatory fee can result in loss of operating authority, KYES and other small entities will be subjected to an annual de-facto license renewal process considerably more burdensome than regular license renewal. The

rules place a special paperwork burden, and public financial disclosure, squarely upon the smallest entities. Surely this is not the intent of the Commission, nor Congress.

4. Anticompetitive effects. In its Comments, Fireweed discussed the costs and conditions of founding a new broadcast service in a sparsely populated area. We argued that the FCC should acknowledge that the Regulatory Fee can present, in itself, a significant barrier to entry into the business of broadcasting. The Report and Order did not discuss this issue. We believe the Commission should consider the fee as an unacceptable barrier to entry, and eliminate it in circumstances when it will have this effect.

5. User fees and the First Amendment. Although Federal Agency User Fees have been litigated and found constitutional, we would argue a substantial fee that may limit entry into the business of broadcasting will limit robustness of competition in the media marketplace, will significantly diminish diversity of media ownership, and should be found unconstitutional.

Licensing of broadcasting is considered a necessary evil. To limit access to channels of communications to a limited class of wealthy or larger entities would be a danger to our democracy.

Protecting diversity of ownership of broadcast media is one of the Commission's mandates. To ignore the effect of the Regulatory Fee on small entities is to disregard that charge.

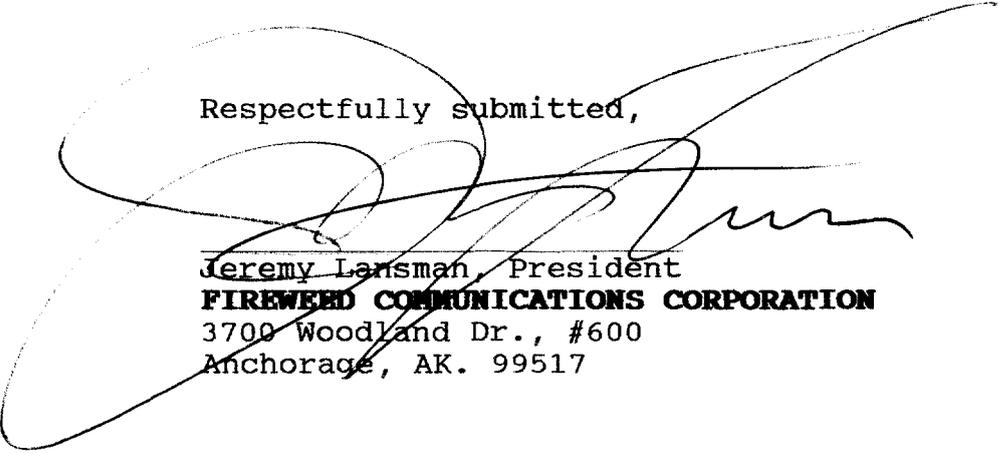
6. Shared channel broadcast stations are not on the statutory schedule. The March 4, 1994 NPRM in MD Docket No. 94-19 at the footnote on Page 26 explains that the omission of FM translators and boosters from the statutory schedule means licensees in those services do not have to pay regulatory fees for the 1994 fiscal year. As shared use broadcast stations, KYES and K06LY are also regulatees not listed in the schedule. Therefore, no fee is applicable.

In summation, Fireweed has set forth specific reasons that no licensee in its unique situation, can, or should be required to pay any regulatory fee. But even if the Commission agrees with this contention, and assesses no fee against Fireweed, we respectfully request that the overall approach of the Report and Order, in respect to small entities, be reconsidered, and reformulated, to be consistent with the Public Interest.

Therefore, for the reasons given above, Fireweed wishes the Commission to reconsider the rules implementing Section 9 of the Communications Act.

Submitted this 16 day of July by Jeremy Lansman, President,  
Fireweed Communications Corporation.

Respectfully submitted,



Jeremy Lansman, President

**FIREWEED COMMUNICATIONS CORPORATION**

3700 Woodland Dr., #600

Anchorage, AK. 99517

ATTACHMENT A

Declaration of Lawrence Rogow

City of Los Angeles            )  
   )  
 County of Los Angeles         )        SS:

I, Lawrence Rogow, hereby state:

I am the owner of Atrium Broadcasting Company, licensee of LPTV stations in Phoenix, Arizona; and Los Angeles, California.

I am a partner in Channel 29 Associates, licensee of an LPTV station in Pittsburgh, Pennsylvania.

I am a principal in Calavision, a small cable television MSO based in Calabasas, California.

All of these entities are individually and collectively a small business.

I did not know of the rulemaking at the Federal Communications Commission that led regulatory fees for these and other stations until the issuance of Public Notice 43537 on June 20, 1994.

If I had been aware of notice of rulemaking, with a comment period, at the Federal Communications Commission regarding the establishment of and the fee structure of the regulatory fees, I would have filed comments on such a rulemaking.

The comments I would file would strongly be in favor of regulatory fees based on percentage of revenues earned as opposed to those based on class of service.

All the statements made in this declaration are true and correct to the best of my knowledge and belief.



Date: 13 July 1994



ATTACHMENT C

RENEWAL OF PRIVATE RADIO LICENSE

License Name: NCI INC

Radio Service: IB BUSINESS

License Issue Date: 890501

Call Sign: WNP234

File Number: 8903151979

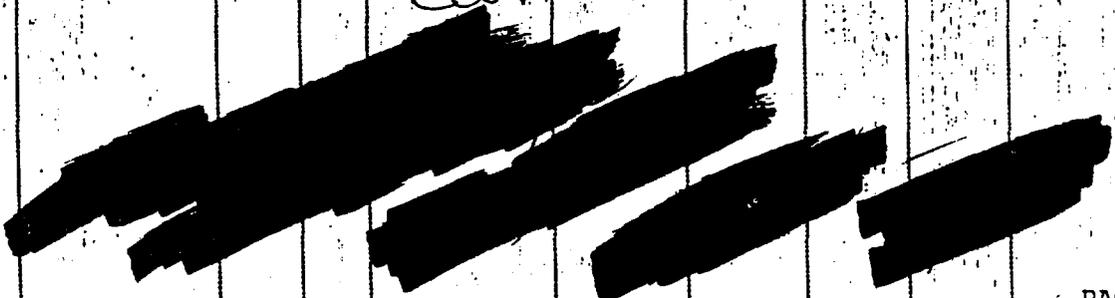
License Expiration Date: 940501

Frequency Advisory No:

Number of Mobiles by Category: Vehicular - \*\*\*\*\* Portable - \*\*\*\*\* Aircraft - \*\*\*\*\* Marine - \*\*\*\*\* Pagers \*\*\*\*\*

NCI INC  
2440 E TUDOR RD 240  
ANCHORAGE AK 99507

Station Technical Specifications

FCC ID	Frequencies (MHz)	Station Class	No. of Units	Emission Designator	Output Power (Watts)	E.R.P. (Watts)	Ground Elevation	Ant. Hgt. To Tip	Antenna Latitude	Antenna Longitude
1:	72.20000	FX2	1	20K0F3E	100.000	160.000	298	20	61-26-19	150-07-14
2:	76.96000	FX1	1	20K0F3E	100.000	106.000	1425	20	61-07-34	149-42-50
	TRANSMITTER STREET ADDRESS					CITY			COUNTY	STATE
1:	TRACT 30 PT MC KENZIE AGRICULTURAL PROJECT STATE LAND SURVEY 80-111									AK
2:	10701 STROGANOFF ST									AK
PAINTING AND LIGHTING SPECIFICATIONS										
SITE 1: SEE ATTACHED FORM 715/715A PARAGRAPHS: 1 3 11 21										
CONTROL POINTS: 10701 STROGANOFF ANCHORAGE AK										
CONTROL POINT PHONE: 907-345-6500										
SPECIAL COND: SEE ATTACHED #38										
<p><i>FCC License Anch To Pt. McK</i></p> <p><i>Came to NCI</i></p> 										

Public reporting burden for this collection of information is estimated to average ten minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden to Federal Communications Commission, Records and Management Division, AMD-PIRS, Washington, DC 20534, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Paperwork Reduction Project (3060-0134), Washington, DC 20503.

NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT OF 1974 AND THE PAPERWORK REDUCTION ACT OF 1980

The solicitation of personal information requested in this form is authorized by the Communications Act of 1934, as amended. The Commission will use the information provided in this form to determine whether grant of this application is in the public interest. In reaching that determination, or for enforcement purposes, it may become necessary to refer personal information contained in this form to another government agency. In addition, information provided in this form, as well as the form itself, will be available for public inspection. If information requested on the form is not provided, processing of the application may be delayed or the application may be returned without action pursuant to Commission Rules. The foregoing



FEDERAL COMMUNICATIONS COMMISSION

FOR FCC USE ONLY

ATTACHMENT C

# APPLICATION FOR RENEWAL OF PRIVATE RADIO STATION LICENSE

NCI INC  
2440 E TUDOR RD 240  
ANCHORAGE, AK 99507

869 1S 1 2

**FILE EARLY FEES WILL INCREASE 4/1/94**

1. Call Sign	2. Fee Type Code	3. Fee Multiple	4. Fee Due	5. FCC Use Only
WNRG234	PAL	1	\$35.00	(c)890501 N

6. PURPOSE OF APPLICATION: Place an "X" in applicable box(es)

- RENEWAL     
  CHANGE OF MAILING ADDRESS     
  CHANGE OF LICENSEE NAME (Without change of ownership, corporate structure or control)     
  CHANGE IN MOBILE UNITS (Land Mobile only)     
  CANCELLATION OF LICENSE (No fee required)

7. By checking "YES", the applicant certifies that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits, that includes FCC benefits, pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 USC, Section 882, or, in the case of a non-individual applicant (e.g. corporation, partnership, or other unincorporated association), no party to the application is subject to a denial of federal benefits, that includes FCC benefits, pursuant to that section. For the definition of a "party" for these purposes, see 47 CFR Section 1.2002(b).

DOES APPLICANT SO CERTIFY?  YES  NO Failure to check "YES" may cause dismissal of your application.

YOUR APPLICATION FOR RENEWAL MUST BE ACCOMPANIED BY A SINGLE CHECK OR MONEY ORDER FOR \$35.00, MADE PAYABLE TO FCC. DO NOT SEND CASH. MAIL YOUR COMPLETED APPLICATION, WITH PAYMENT, TO:

FEDERAL COMMUNICATIONS COMMISSION  
574R LAND MOBILE RENEWAL  
P.O. BOX 358245  
PITTSBURGH, PA 15251-5245

### INSTRUCTIONS

The radio station represented on this form will expire as indicated on the reverse side. This form may be used to file for renewal, change of name (without change of legal entity), change of mailing address, or change in the number and categories of mobile units for Land Mobile licensees. You may make these changes on the reverse of this form. This form may also be used to request license cancellation.

Check the information on the reverse side, you may correct misspelled or incomplete data, and modify as noted above. If any other changes are necessary, do not file this form. You must apply for modification of your license by filing FCC Form 574. GENERAL MOBILE RADIO SERVICE LICENSEES: Effective January 1, 1989, a non-individual may not make a major modification to their license. It is suggested that you contact a radio equipment dealer for assistance and if eligible, apply for a license in one of the Land Mobile Radio Services.

If all the technical information on this form is correct, place an "X" in the appropriate box(es) in item 6, complete item 7, and have the application signed and dated by an authorized person.

If the station is no longer in operation, you may file for CANCELLATION of the license in item 6. No fee required. Mail your signed application to Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

- CERTIFICATION:**
- 1) Applicant certifies to possession of current FCC Rules for the requested radio service, if required.
  - 2) Applicant waives any claim to the use of any particular frequency regardless of prior use by license or otherwise.
  - 3) Applicant will have unlimited access to the radio equipment and will control access to exclude unauthorized persons.
  - 4) Neither applicant nor any member thereof is a foreign government or representative thereof.
  - 5) Applicant certifies that all statements made in this application are true, complete and made in good faith.

Willful false statements made on this form are punishable by fine and/or imprisonment (U.S.C. Title 18, Sec. 1001), and/or revocation of any station license or construction permit (U.S.C., Title 47, Sec. 312(a)(1)), and/or forfeiture (U.S.C., Title 47, Sec. 503).

TYPED/PRINTED NAME: Ellwood W. Sannell TELEPHONE: (907) 345-3670

SIGNATURE: [Signature] DATE: 3/11/94

**FAILURE TO SIGN THIS APPLICATION MAY RESULT IN DISMISSAL OF THE APPLICATION AND FORFEITURE OF ANY FEES PAID**

APPLICANT CLASSIFICATION (Select one)

- Authorized Employee of Applicant Corporation     
  General Partner of Applicant Partnership     
  Individual Applicant     
  Officer who is also a Member of Applicant Association     
  Official of Governmental Entity

**SEE REVERSE**

ATTACHMENT D

AFFIDAVIT  
RICHARD M. ZOOK

ENGINEERING CONSULTANT

I, Richard M. Zook, currently reside at 1710 E.27th Ave., Anchorage, Alaska, 99508, and do hereby state:

That I am currently a consultant to Alaska Broadcasting Network, (Owner of TV stations KIMO, Anchorage, KATN Fairbanks, and KJUD, Juneau), and I am a consultant to the Alaska Radio Network, which until recently owned radio stations in the Alaskan communities of Valdez, Kodiak, Cordova, Seward, Kenai, and Anchorage. I have also done consulting work for KTBV (TV) in Anchorage, in which I completely replumbed the RF system and rebuilt their aural transmitter.

Prior to that I have held positions as owner, technical director, and chief engineer, and also originally constructed KIMO (TV) in 1968 (as KHAR TV). Prior to that I was chief engineer in 1960 for KHAR radio, which I constructed, as well as KHAR FM.

Prior to that, I was a free lance engineer, working on various projects and at that time was employed by the Department of Defense, where I worked on HF, Armed Forces radio, radar and aircraft instrumentation.

My commercial Radio License was P1-23-97. I also hold radio amateur license KL7BDG.

As a habit, in the evening before going to bed, I check the local TV stations, usually somewhere between 10 and 11 o'clock in the evening. And, those nights which I have been working on the KIMO transmitter I repeat the process at about 5 am.

On numerous occasions, I have observed, on channel 5, interference that falls into two different categories. One is a signal that causes video to lose color and almost look negative. The other thing that is more prevalent, is a moire pattern and this appears to be an audio interference. I checked into channel 6 and find that there are three audio carriers superimposed into each other that appear to be the signal causing the moire.

One interference problem I have observed is caused to channel 11 by KBFX (FM). To correct this problem I installed an FM trap in my receiver line.

The main interference to channel 5, the intermittent interference that causes the picture to be unviewable, in my opinion, would be consistent with a transmitter carrier in the video bandpass of channel 5. It does not appear to be caused by the mixture to what I believe to be FM signals that I found in channel 6.

I swear that the above is true and correct to the best of my knowledge and belief.

Richard M. Zook      July 14 94  
Richard M. Zook      DATE