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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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APR 24 1990

Federal Communications Commission
Office of the Secretary

In the Matter of:	)	
	)	
Request of A.C. Nielsen Co. for Permissive Use of Line 22 of the Active Portion of the Television Video Signal	)	DA 89-1060

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To: The Commission

REPLY TO OPPOSITION OF VIDCODE, INC.

A.C. Nielsen Company ("Nielsen"), through its attorneys, hereby responds to the "Opposition to Request for Permissive Authority" ("Opposition") filed April 17, 1990 by Vidcode, Inc.[1/] For the reasons stated in Nielsen's Request for Permissive Authority ("Request") and hereinbelow, Vidcode's Opposition should be rejected and Nielsen's Request should be granted.

Vidcode's Opposition Is Untimely and Should Be Rejected

1. Vidcode makes the novel argument that the time for filing its Opposition to Nielsen's Request does not begin to

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1/ Although the copy of the Opposition served on Nielsen is neither dated nor date-stamped by the Commission, the Certificate of Service accompanying the Opposition suggests that the Opposition was filed on April 17, 1990.

run until the Commission issues a Public Notice requesting the filing of comments on Nielsen's proposal. The authority cited by Vidcode in support of its position 47 C.F.R. § 1.4(b)(1)(example 3) and 47 C.F.R. § 1.4(d)(example 10), addresses the time for filing comments in notice-and-comment rulemaking proceedings. This proceeding is not a notice-and-comment rulemaking proceeding and thus the authority relied upon by Vidcode is inapplicable.[2/] Indeed, because the purpose of such proceedings is to make rules of general applicability, not to determine the rights of a single entity, Nielsen's Request could not properly be resolved in a notice-and-comment rulemaking proceeding. See Administrative Procedure Act, 5 U.S.C. § 551(4), (5) (defining rulemaking); Pacific Coast European Conference v. Federal Maritime Commission, 376 F.2d 785 (D.C. Cir. 1967) (essence of administrative rulemaking is generality of application).

2. Because this is not a rulemaking proceeding, and thus there are no other specifically applicable procedural

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2/ The only Public Notices that have been issued in connection with Nielsen's Request were: a) in connection with the special circumstances surrounding Nielsen's request for special temporary authority; and b) establishing the ex parte contact restrictions for these related proceedings. Vidcode apparently violated these restrictions when it communicated with Commission staff regarding its opposition to Nielsen's Request, Vidcode Opposition at 2, n.1, without complying with the ex parte contact disclosure requirements articulated in the Commission's Rules and cited in the Public Notice.

rules,[3/] the deadlines established in Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, govern the time for filing oppositions to Nielsen's request. Oppositions to Nielsen's Request accordingly were due within ten days of the filing of Nielsen's Request, with additional time, if appropriate, as provided in Section 1.4 of the Commission's Rules, 47 C.F.R. § 1.4 (1990). See 47 C.F.R. § 1.45 (1990).

3. Nevertheless, even though Vidcode was well aware of these proceedings (as evidenced by its earlier filings), and even after Nielsen's repeated requests for expeditious action on behalf of the syndicated programming industry,[4/] Vidcode's Opposition was filed over one month after Nielsen's Request, and only a few weeks before Nielsen's Temporary Authorization was due to expire. It is apparent that Vidcode, like Nielsen's other competitor, Airtrax, is simply attempting to delay and inhibit the issuance to Nielsen of the same authority Vidcode has received while Vidcode attempts to exploit that Authority in the marketplace to Nielsen's disadvantage. Such a blatant

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3/ The procedural rules applicable to hearings do not apply to this matter, as this matter has not been designated for hearing.

4/ See Nielsen's Reply to Airtrax Opposition to Nielsen's Request, filed April 16, 1990 at ¶¶ 2-4.

misuse of the Commission's processes cannot be tolerated and Vidcode's Opposition must be rejected.[5/]

The Merits of Vidcode's Opposition

4. As demonstrated below, Vidcode's arguments on the merits are made of thin air. The frailty of Vidcode's arguments exposes Vidcode's true motive in opposing Nielsen's Request: to thwart competition from Nielsen in the market for program lineup verification services. Vidcode, like Airtrax, recognizes the marketplace reality that only one party can use line 22 of a particular broadcast at any given time, and that the relative demand for Vidcode's and Nielsen's services will determine which entity will use line 22 to provide its services. Rather than competing on an even playing field, Vidcode and Airtrax seek to have the Commission limit substantially Nielsen's authority to use line 22 in order to improve their own relative comparative strengths in the

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5/ Vidcode makes at least two other patently false contentions in its Opposition. First, Vidcode claims that it "was forced to modify" its technology to use line 22 because of Nielsen's "practical exclusivity" on line 20. Opposition at 2. Nowhere in Vidcode's, or its predecessors-in-interest's, request for authority to use line 22 was such a contention made. See Nielsen's Reply Comments in this Docket at n.16.

Second, Vidcode perpetuates the false perception that it has developed "innovative technology." Opposition at 5. In fact, as Nielsen has established repeatedly, it was Nielsen that first developed the idea and technology to implement the encoding of lines in the video signal. See Nielsen's Reply Comments at ¶ 5. Vidcode's "innovation" is nothing more but a rehash of Nielsen's established technology.

market. If Nielsen's ability to use line 22 is seriously constrained, as advocated by these parties, Airtrax and Vidcode will be able to compete unfairly with Nielsen. Such a result would retard technological development by artificially restraining competition -- the engine that drives technological innovation -- and thereby harm the public interest which the Commission is duty-bound to protect.[6/]

No Putative Competitor of Nielsen Has Claimed Even One Instance of Interference by Nielsen

5. One fact has emerged plainly from the three Oppositions that have been filed in response to Nielsen's Request[7/]: None of Nielsen's opponents has claimed even a single instance of interference to its alleged operations by Nielsen or any other source, and each of these parties thus has been forced to rely solely upon speculation that such interference might occur. Since these parties have experienced no interference whatsoever with their alleged transmission on line 22 notwithstanding the fact that they have had their respective authority for years (assuming that they even

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6/ In substance and effect, Vidcode (and Airtrax) would have the Commission establish under the guise of FCC authorization a de facto monopoly or near monopoly in their favor, in which the marketplace cannot choose Nielsen's service but must decide between Vidcode (or Airtrax) or nothing.

7/ Oppositions to Nielsen's Request have been filed by Airtrax (April 9, 1990), and by Southwest Cable TV, Inc. (April 9, 1990).

transmit codes on that line in markets, on programming, or under other circumstances which even potentially would conflict with Nielsen's use of the line), that fact alone demonstrates beyond reasonable doubt that no interference with their alleged use of line 22 has occurred, or necessarily will occur.[8/]

6. Nielsen's tests were successful even if the reason no interference occurred was that the material Nielsen encoded during its tests was not previously encoded, since, under such circumstances, the marketplace will have protected against such interference in exactly the manner that Nielsen predicted: No conflicting user of line 22 was given permission to encode the material Nielsen received permission to encode. In the same fashion, Nielsen's Codes would not have been written on programming or advertising material if another party had already received such permission from the program producer, advertisers, or other appropriate party. Thus, the marketplace has worked and will work in this manner to assure that conflicting uses of line 22 will not be encountered in the normal course of business. The Commission's interference in the working of the marketplace is thus unnecessary as well as

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8/ Vidcode's argument that Nielsen's tests were flawed because Vidcode was not notified in advance about the tests, Opposition at 6, is nothing more than a red herring meant to divert the Commission's attention from the glaring fact that <u>no interference to Vidcode's codes occurred, even though Vidcode alleges to be operating in three major markets!</u> It is only logical that if any interference occurred -- none has been claimed -- Vidcode would know about it and would contend it to be attributable to Nielsen.

inappropriate. See Nielsen's Reply Comments, filed on October 22, 1989 at Paras 6-11.

7. In any case, even if such marketplace protections prove to be inadequate, Nielsen repeatedly has established that, if the technology can be developed to address conflicts problems. See, e.g., Affidavit of Ronald G. Schlameuss, President, Valley Stream Group (January 15, 1990) (Attachment to Nielsen's Opposition to Airtrax's Application for Review, filed January 19, 1990). As stated above, since only one party will receive permission from the owner of programming or advertising to write code on that material, this technology is unnecessary; however, if and when the need for such developments is established -- i.e., after it is established that such interference will occur without such developments -- there are a variety of steps that might be taken to address such a theoretical problem.[9/] See Nielsen's Reply Comments at Paras. 28-29. The issuance to Nielsen of the authority already issued to other parties should not be delayed in the meantime based upon unsupported speculation that has been shown to be false.

9/ It plainly does not make sense from an economic or business perspective to devote substantial resources to the perfection of technology which will resolve problems that have not been shown to exist.

Nielsen's Tests Were Reliable and Produced Verifiable Results

8. Vidcode, like Airtrax, argues that Nielsen's tests were unreliable. Opposition at 7-9. Ignoring for the moment its predictability,[10/] Vidcode's argument essentially is that Nielsen's tests were not publicly known, not supervised by any party other than Nielsen, and not reflective of ordinary commercial application. Vidcode's argument is wrong on all counts.

9. First, Nielsen deliberately avoided publicly announcing the dates and times of its tests to prevent any variation in its results from what would be expected under ordinary business circumstances.[11/] Other than the notice required to be given to licensees, Nielsen would not publicly announce each and every time its codes would be written on line 22, as the public announcement of such encoding during the test phase could only serve to skew the results. Nielsen sought to prevent any actions by others that would undermine the

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10/ No matter how Nielsen conducted its tests, it would not satisfy Nielsen's competitors, who improperly place the burden on Nielsen to prove that no interference can possibly result from Nielsen's use of line 22. The burden should be on Nielsen's opponents to prove that interference will occur. See Nielsen's Replay to Airtrax's Opposition at ¶¶ 5-6. Since the competitors cannot carry their burden -- no interference resulted from Nielsen's tests -- they have resorted to the tactic of shifting the burden of proof to Nielsen.

11/ Nielsen did, however, notify licensees who broadcast the encoded programs in advance of the broadcast, pursuant to the Commission's direction in the November 22, 1989 grant of Temporary Authority.

reliability of its tests, and to avoid circumstances in which others might claim that Nielsen's tests were not accurately predictive of what would happen during commercial implementation of Nielsen's encoding.

10. Second, the tests were supervised by Nielsen and the syndicators that cooperated with Nielsen in conducting the tests. Nielsen itself supervised the tests with particular care to ensure that the encoding and decoding process would operate satisfactorily for its own business purposes as well as to comply with the Commission's directive.

11. Third, although the initial round of tests occupied only a twelve-day period, Nielsen has conducted four subsequent rounds of tests involving both network-affiliated stations and independents, and including two test phases in cooperation with programmers other than Paramount. These subsequent tests involved the encoding of many hours of programming that was broadcast in hundreds of markets in an aggregated period of several weeks over the course of five months. As is clearly established by the fact that no complaints of interference have been heard even though Nielsen has now broadcast its line 22 codes in hundreds of markets for many weeks, the results obtained from the tests are reliable indicators that Nielsen's AMOL system will not interfere with other uses of line 22.

12. Like so many of its other claims, Vidcode's allegation that Nielsen is seeking to protect its "Monitor Plus" service from competition is baseless and absurd. The "Monitor Plus" service is not an advertising verification service at all, and

does not now compete (and never has competed) with Vidcode's or Airtrax's proposed services. The "Monitor Plus" service cannot was not designed, intended, or offered to verify the transmission of programs or commercials, nor does it utilize any codes, the VBI or active signal associated with programming. The purpose of the "Monitor Plus" service is not to verify that commercials or programs were broadcast, but to provide information for use as one component of Nielsen's market and media research services.

Nielsen Has Conclusively Demonstrated The Need to Use Line 22

13. Vidcode in its Opposition seeks to re-raise matters that have been resolved by the Commission many times in this proceeding. Specifically, Vidcode claims that Nielsen has not established a need to use line 22. Opposition at 3. This argument is patently incorrect. First, in the earlier related proceeding, Nielsen conclusively established the existence of a need for the more reliable ratings that can be obtained with line 22 and the benefits to the public interest of employing line 22 for such purposes. See e.g., Nielsen's Comments filed in this docket on September 22, 1989 at Paras. 5-12. The Commission has already twice determined that Nielsen's proposed use is necessary and in the public interest, Public Notice, DA-89-1060, released September 1, 1989 at 1, Letter to Grier C. Raclin from Roy J. Stewart, dated November 22, 1989 at 2-3 ("...we find Nielsen has justified the proposed use of line

22"), and even Airtrax, the principal protestant in this matter, has conceded this point. See Airtrax's Petition for Rulemaking, filed April 9, 1990 at 2. There simply is no legitimate question at this point that Nielsen has justified its proposed use of line 22 and Vidcode's effort to raise these issues again must be rejected.

14. Vidcode, like Airtrax, would have the Commission believe that Nielsen is seeking unprecedented carte blanche authority to use line 22. As all the filings to date have established, this has never been Nielsen's position. Since the inception of these proceedings, Nielsen's position has been simply that it wants the same authority to use line 22 as other authorized users -- no more, no less. This Request is neither unprecedented nor unreasonable; yet Vidcode, Airtrax and Southwest Missouri Cable seek to divert the Commission's attention from this fundamental fact and to portray Nielsen's Request as something requiring extreme scrutiny never before applied to any similar request. This tactic apparently has succeeded, to the detriment of Nielsen as well as the programmers, syndicators, broadcast licensees, and advertisers who will benefit from Nielsen's proposed service -- in other words, to the detriment of the public interest. What is most ludicrous about the position taken by Vidcode and Airtrax is that they have failed to demonstrate a single instance of interference from Nielsen's encoding; that they are encoding material in a manner that even potentially could conflict with

Nielsen's encoding; or that any real interference in the market for their services has occurred. Under these circumstances, there is no basis for the Commission to delay further a grant of Nielsen's Request.

Respectfully submitted,

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Dated: April 24, 1990

Certificate of Service

I, Kimberly A. Smith, a secretary in the law firm of Gardner, Carton & Douglas, hereby certify that copies of the foregoing Reply of A.C. Nielsen were served this 24th day of April, 1990, by hand or by first-class mail, postage prepaid, on the following:

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