DKT 95-42

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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

OPPOSITION TO REQUEST FOR PERMISSIVE AUTHORITY

Vidcode Inc. ("Vidcode"), by its attorneys, hereby requests that the Commission deny the request of A.C. Nielsen Company ("Nielsen") for the grant of permanent, unconditional authority to transmit Nielsen's Automated Measurement of Lineup ("AMOL") Signal Identification codes on line 22 of the active video signal.[1]

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1. Nielsen has asserted that the filing of comments by interested parties is time barred by Sections 1.4 and 1.45 of the Commission's Rules, 47 C.F.R. §§ 1.4, 1.45. These rules do not support Nielsen's assertion. As Nielsen's filings herein concede, this matter is a continuation of and part of the docket DA 89-1060, which was initiated by Commission Public Notice and request for comments. Under the rules of the Commission, for matters such as this which have been initiated by Public Notice and request for comments, no time period begins to run until the public notice for further comments has been published in the Federal Register, see, e.g., §§ 1.4(b)(1)(example 3); 1.4(d)(example 10). The Commission has yet to issue any Public Notice requesting comments in response to Nielsen's renewed request, and therefore no deadline for filing has yet been triggered under the Commission rules.

(continued...)

I. BACKGROUND

A. Commission Authorization for Use of Lines 20 and 22

For nearly a decade, the Commission has authorized the transmission of Nielsen's AMOL signal broadcast on line 20 of the television signal to identify programming as part of Nielsen's ratings service. To the best of Vidcode's knowledge, as a practical matter Nielsen has exclusive use of line 20.

Beginning in 1985, the Commission authorized Vidcode's predecessor and other potential competitors of another Nielsen service, the "Monitor Plus" commercial verification service, to use line 22 for the transmission of commercial identification signals. Vidcode's service had originally been designed for use on line 20, but Vidcode had been forced to modify its technology to use line 22 in light of Nielsen's practical exclusivity on line 20.

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1. (...continued)

On March 30, 1990, Vidcode's attorneys advised Commission staff of Vidcode's intention to file an opposition to Nielsen's request and requested information regarding the deadlines for filing comments. Commission staff indicated that, under the circumstances of this proceeding as of that date, the Commission's rules provided no explicit deadlines and that a filing by Vidcode in mid to late April would not be untimely.

B. Nielsen's Request to Use Line 22 as well as Line 20

Now that Vidcode and other potential competitors of Nielsen's "Monitor Plus" system are (or soon will be) operative and available to Nielsen's clients, Nielsen has asserted that, for some reason -- previously unidentified by Nielsen or deemed by Nielsen to be unimportant -- Nielsen's AMOL system must not only remain on line 20, but it should also be allowed to operate on Line 22 without Commission regulation of its interference with other currently authorized Line 22 signals. In support of this claim, Nielsen asserted that it must be able to use line 22 as well as line 20 to broadcast signals to verify broadcasts of syndicated programming, claiming that some locally operated equipment "strips" line 20 but somehow does not interfere with line 22. At no time did Nielsen submit any documentary or other credible evidence that this "line 20 but not line 22" problem was in fact a widespread phenomenon.[2]

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2. Vidcode has attempted to investigate this alleged phenomenon. To the extent we can confirm the possibility that some transmission and receiving machinery may strip line 20, it is our understanding that such machinery also tends to affect adversely line 22. Thus, Vidcode believes that the originally asserted justification for Nielsen's request to also use Line 22 may not withstand scrutiny.

C. The Commission's Grant of Temporary Authority

By letter dated November 22, 1989, the Commission's staff (acting pursuant to its delegated authority) denied Nielsen's request for permanent authority, but granted Nielsen special temporary authority to operate on line 22 for a six month period ending May 1, 1990, subject to several specified conditions. The Commission expressly specified that this temporary authority was subject to revocation if any interference with existing line 22 users was shown and that the grant of permanent authority would be entertained only if Nielsen demonstrated that its proposed line 22 operations were compatible with existing systems.

The Commission's decision to grant only temporary authority on strictly defined conditions reflected the Commission's conclusion that some aspects of Nielsen's proposed mode of operating "would not be a legitimate use of the active video line" and would not serve the public interest. In particular, this conclusion related to Nielsen's continuing request for the elimination of any restriction on its discretion to overwrite the signals of other line 22 users.

The Commission's conclusion is clearly correct. As Vidcode demonstrated in its previous filings in this

matter, Nielsen's proposal is inconsistent with the public interest represented by the federal antitrust laws, since it would allow Nielsen to employ its monopoly market position for AMOL services to predate on competitors of its "Monitor Plus" services. The grant of Nielsen's proposal would also be inconsistent with Commission's mandate to promote innovative technology (such as Vidcode's) and not to allow the entrenchment of obsolete technology (such as Nielsen's AMOL).

Thus, in allowing Nielsen to operate temporarily while prohibiting Nielsen from embedding AMOL on commercial or other broadcast materials Nielsen was not monitoring, the Commission properly acted in the public interest. It also required no more of Nielsen than Nielsen had demanded be required of Vidcode, when during the 1985 proceedings to authorize Vidcode's use of line 22, Nielsen demanded that the Commission require that Vidcode "cease operation pending resolution" of any alleged interferences with Nielsen's signals.[3]

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3. See Nielsen's July 5, 1985 comments filed with the Commission in the Telescan docket and discussed in Vidcode's Reply Comments filed in this matter on October 2, 1989.

D. Nielsen's Request for Permanent, Unrestricted Authority

Nielsen has now asserted that it has carried out a test which proves the feasibility of the operation of AMOL on Line 22 without interfering with the signals of other users. In support of this claim Nielsen has tendered to the Commission only the briefest description of its unannounced, uncontrolled, unsupervised, and inherently suspect test of its Line 22 AMOL system. By Nielsen's own description,

-- the test was not for the full period provided by the Commission, but only 12 days;

-- was not announced to Vidcode or other line 22 users, who therefore did not know where or when to monitor Nielsen's use of line 22;

-- indeed, was not even announced to the Commission, whose engineers were not able to monitor the test;

-- did not involve the system Nielsen actually intends to use commercially, but only one "as similar as possible to a commercial setting;"

-- involved an undetermined number of markets ("in up to 190 television markets"), and therefore may or may not have occurred in markets or on broadcast licensees for which Nielsen knew other line 22 operators were broadcasting signals; and

-- may or may not have involved programs on which other line 22 signals were present since it involved only one source of programming (Paramount), an unknown number of programs, an unknown number of commercials, broadcast in an unknown number of locations.

Most importantly, Nielsen does not even claim that the system it actually used did not and could not overwrite

commercials and the broadcast space left for commercials. As the Commission had previously noted in its November 22, 1989 letter,

> Nielsen must ensure that its AMOL encoding of Line 22 is wholly confined to the program material which it legitimately seeks to track and does not adversely affect AirTrax's or others' authorized use of that line for other legitimate purposes.

Vidcode submits that Nielsen has failed to demonstrate it has met the conditions established by the Commission in its November 22, 1989 letter and that it has therefore failed to demonstrate any basis for the grant of permanent authority on this record.

II. ARGUMENT

Nielsen asserts, in effect, that it qualifies for the grant of permanent authority simply by announcing that it has met the Commission's criteria as set out in the November 22, 1989 letter. As even the most cursory review indicates, Nielsen has failed to meet the standards which the Commission has established.

A. The Commission Must Carefully Scrutinize Nielsen's Claims

Nothing in the November 22, 1989 letter suggests that a mere short-term, limited-scope test was contemplated by the Commission. To the contrary, the Commission granted Nielsen the temporary right to "general" use, and to this end granted an extended period for operation on all

broadcast licensees. It did so against the background of Nielsen's assertions that a vast number of syndicators were clamoring for its line 22 services and that its system was ready for immediate implementation in September 1989.

Having now been provided approximately 180 days to prove its system works without interfering with existing signals, Nielsen chose to "test" for only 12 days (or less than 10 percent of the available time), servicing only one program source (Paramount), and (apparently) choosing not to operate simultaneously on competing licensees.

This is far from the operation which Nielsen claimed it was prepared to implement 9 months ago and far from that authorized and contemplated by the Commission's November 22, 1989 letter. Nielsen's decision to restrict the scope of its "test" suggests a lack of confidence on Nielsen's part that its AMOL technology could be encoded and broadcast on a continuing, global basis consistent with the restrictions imposed by the Commission. In this light and in light of its prior assessment of the public interest, the Commission must carefully scrutinize Nielsen's self-serving announcement that its "test" was "successful."

B. <u>The Test was Inherently Insufficient</u>

In any event, a "test" of the type which Nielsen claims to have carried out simply does not provide a

reasonable basis on which the Commission can evaluate "the compatibility of Nielsen's use." For all the reasons enumerated at page 6 above, the methodology used by Nielsen for this "test" is inherently suspect and unreliable. Nielsen on its own decided to carry out the "test" over a restricted time frame selected by Nielsen, unannounced to and unmonitored by any interested party or the Commission. Apparently, the "test" did not even involve the system Nielsen actually intends to use commercially. And it may have been structured to avoid markets or programming on which Nielsen knew other line 22 operators were broadcasting signals.

The "results" of such a self-defined, self-controlled "test" fail to provide any basis for concluding that Nielsen can operate over an extended period of time over the full range of programs broadcast by the full range of licensee stations without interfering with other line 22 users. At a minimum, the Commission should reject any request for permanent authority until Nielsen submits sufficient details of a properly structured, properly executed test.[4]

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4. Should the Commission determine that an appropriately structured controlled test should be carried out by Commission personnel, Vidcode would be prepared to participate in and cooperate with such a test.

C. Nielsen Has Failed to Show Non-Interference

Despite the shortcomings of its "test" methodology, Nielsen now claims to have proven that its system can operate compatibly with other line 22 systems. This, Nielsen asserts, is shown by the absence of any complaints of interference during the short-term, limited-scope "test."

This assertion is illogical and unsupportable, particularly in light of the fact that the "test" was unannounced to the Commission and existing line 22 users, who were therefore unable to monitor it. Vidcode, for example, is currently operating in three major markets and will shortly increase its coverage to a number of additional markets. Unless Vidcode knows where and when to look for interference from AMOL signals, we cannot fairly attribute interference to Nielsen, and therefore cannot fairly file complaints about AMOL with the Commission.

Thus, the Commission cannot reasonably accept Nielsen's non-sequitur that the lack of Vidcode complaints of interference during the unannounced 12 day "test" proves that no interference with the Vidcode signal occurred.

D. Nielsen Must Ensure Non-Interference

Finally, in describing its "test," Nielsen has failed to address the Commission's explicit directive that

it utilize a system which ensures that its encoding does not intrude in any manner on line 22 of commercial material. As the Commission stated in its November 22, 1989 letter,

> Nielsen's incidental and unintended use of line 22 during commercial material, however, in which Nielsen has no asserted interest on behalf of broadcast licensee clients, would not qualify as a legitimate use of the active video line, particularly where it would preclude an authorized, broadcast-related use of that line by AirTrax or others. Accordingly, Nielsen must ensure that its AMOL encoding of line 22 is wholly confined to the program material which it legitimately seeks to track and does not adversely affect AirTrax's or others' authorized use of that line for other legitimate purposes.

Nowhere in Nielsen's request for permanent authority does Nielsen certify (or even claim) that the system used in this "test" did not intrude on the commercial space associated with the broadcast material. Apparently, Nielsen is unable to so certify the system it actually "tested" or the system it intends to use commercially. Otherwise, there would be no reason for Nielsen to now request that "these burdensome requirements" be lifted permanently. Nor would there be any reason for Nielsen to demand that the Commission forego the exercise of its informed discretion in the public interest and substitute in its place "the decision of the marketplace" (in which Nielsen's AMOL market power provides it with the ability to

overwhelm Vidcode, AirTrax and any other line 22 competitor of Monitor Plus).

The Commission has already determined that, until Nielsen demonstrates that the system it intends to use commercially does not overwrite commercial material, it does not qualify for permanent authority. Nielsen has not shown any reason for the Commission to change this fair, equitable, and pro-competitive standard.

CONCLUSION

For these reasons, Vidcode submits that Nielsen has failed to demonstrate it has met the conditions established by the Commission in its November 22, 1989 letter. As such, Nielsen has failed to demonstrate any basis for the Commission to grant its request for permanent, unconditional authority to broadcast AMOL on line 22. The request should be denied.

Respectfully submitted,

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Certificate of Service

I, Ronald W. Kleinman, an attorney in the law firm of Weil, Gotshal & Manges, hereby certify that the foregoing Opposition To Request For Permissive Authority was served this seventeenth day of April, 1990, by hand on the following:

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