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August 23, 1989

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Mass Media Bureau  
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AUG 23 1989

Federal Communications Commission  
Office of the Secretary

Dear Mr. Holmes:

This letter is filed on behalf of A.C. Nielsen Company ("Nielsen"), in response to a letter filed by Airtrax on August 22, 1989. In its further attempt delay the granting of Nielsen's Request for Permissive Authority, Airtrax claims that Nielsen "intentionally" and "wantonly" violated the Commission's ex parte Rules by responding on August 11, 1989 to your letter of July 28, 1989, and by requesting, on August 14, 1989, Special Temporary Authority to test Nielsen's Line 22/AMOL system. As is set forth below, Nielsen did not violate -- willfully or otherwise -- the Commission's ex parte Rules by making these submissions to the Commission.

Nielsen's August 14, 1989 STA Request was filed as an entirely separate matter from Nielsen's Request for Permissive Authority, was publicly available in the Commission's files, and was referred to in Nielsen's "Reply" to Airtrax's "Opposition," which was filed and served upon Airtrax on August 21, 1989. Airtrax has not filed an opposition to Nielsen's STA request.<sup>1/</sup> As Airtrax concedes, a proceeding does not become "restricted"

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<sup>1/</sup>Airtrax apparently chosen not to waste further time filing an opposition to that Request, a correct decision given that Nielsen only sought temporary authority to test Nielsen's line 22/AMOL system on a limited number of broadcast stations.

Bradley P. Holmes, Esq.  
August 23, 1989  
Page 2

until after a "formal opposition" is filed, 47 C.F.R. § 1.1208(c)(1)(ii) (1989). Thus, the ex parte Rules do not apply to the filing of Nielsen's STA Request. 47 C.F.R. § 1.1208(a) (1989).

With regard to Nielsen's August 11th letter to you, that letter was not subject to the Commission's ex parte requirements for a variety of reasons. First and foremost, the Commission's ex parte Rules specifically exempt from their reach letters, such as Nielsen's, which are filed in response to a request "by the Commission ... for the clarification of issues ... and the proceeding is [either] a restricted proceeding which has not been designated for hearing, a non-restricted proceeding or an exempt proceeding." 47 C.F.R. § 1.1204(b)(7) (1989).<sup>2/</sup>

Second, Nielsen's August 11th letter was not filed in connection with an "adjudicative" or "restricted" proceeding. Contrary to Airtrax's contention, Nielsen's request was neither a "petition for special relief" nor a "pleading that involves the determination of rights and responsibility of specific parties," 47 C.F.R. § 1.1202(d) (1989), as those terms have been defined by the Commission. Nielsen's Request didn't request any "relief" whatsoever, and a "pleading involving a determination of rights ... of specific parties" are those filed in connection with the Commission's deciding between or among competing demands to the same scarce resource. Ex Parte Rules, 62 R.R.2d 1755, 1767-68 (1987). As Airtrax's authority to use line 22 has already been granted by the Commission, and will not be adversely affected by the granting of similar authority to Nielsen, Nielsen's Request for Permissive Authority is not such a "pleading" and thus the proceeding that is addressing Nielsen's Request is not "adjudicative."

Even if it were to be assumed arguendo that Nielsen's Request initiated a "adjudicative proceeding," Airtrax has acknowledged that the proceeding would have become a "restricted proceeding" only after a "formal opposition" had been filed. 47

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<sup>2/</sup>Airtrax's claim that they should have been served with Nielsen's August 11th letter also is incorrect for the reasons set forth in the text, infra, to wit: Nielsen's Request for Permissive Authority did not institute either an "adjudicative" or "restricted proceeding," and thus Airtrax is not a "party" to any such proceeding, as is required for the Commission's service rules to apply. See Note to Section 1.1204(b) of the Commission's Rules, 47 C.F.R. § 1.1204(b) (1989). In any case, the August 11th letter did not provide any material information to the Commission that was not contained in Nielsen's Reply to Airtrax's "Opposition," which was served upon Airtrax.

Bradley P. Holmes, Esq.  
August 23, 1989  
Page 3

C.F.R. § 1.1208(c)(1)(ii) (1989). In order for an opposition to be deemed "formal," it must, among other things, be "filed within the time period...prescribed for such a pleading." 47 C.F.R. § 1.1202(e) 1989. Section 1.45 of the Commission's Rules required opposition to Nielsen's Request to have been filed within 10 days after the filing of that Request, or no later than July 28, 1989, 47 C.F.R. § 1.45(a) (1989). Airtrax's self-styled "Opposition," however, was not filed until August 8th, or at least 20 days after the filing of Nielsen's Request, and thus was not a "formal" opposition triggering the Commission's ex parte Rules.<sup>3/</sup>

In any case, Airtrax's scurrilous accusations that Nielsen "conscious[ly], elective[ly], and intentional[ly] violated the Commission's ex parte Rules" are intellectually dishonest. Airtrax claims that Nielsen should have known that the ex parte Rules applied to this proceeding. However, Airtrax itself has recognized that the application of the Commission's ex parte Rules to this proceeding is, at least, questionable. In its July 28th letter, as well as its August 8th Opposition and even its August 22nd letter, Airtrax has explicitly requested the Commission to designate this proceeding as "restricted," recognizing implicitly that the proceeding may not be, by its nature, "restricted" without that designation.<sup>4/</sup>

Nielsen has at all times manifested its openness and good faith compliance with the Commission's policies by filing any and all documents regarding this matter publicly and by noting the

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<sup>3/</sup>Airtrax cannot claim that its August 28th, informal letter to the Commission properly constituted a "formal" opposition. By its own admission, a formal opposition must make it "unmistakenly clear that the pleading is intended to be a formal opposition." 47 C.F.R. § 1.1202(e)(i) (1989). Airtrax informal letter simply requested the Commission to "defer" consideration of Nielsen's Request while Airtrax attempted to prepare and present further information."

Nor can Airtrax claim that its August 28th letter constituted a request to extend the time in which it must have filed a formal opposition. The letter never explicitly requested such extension authority, nor did it comply with Section 1.46 of the Rules, which requires such extension requests to be orally communicated to Nielsen. 47 C.F.R. § 1.46(c) (1989).

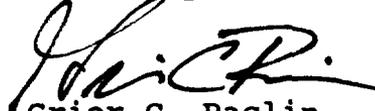
<sup>4/</sup>Similar disingenuousness is manifested in the fact that Airtrax would have the proceeding designated "informal" for the purpose of having its untimely-filed "Opposition" considered, but labeled "formal" for the purpose of applying the ex parte Rules to Nielsen's Request.

Bradley P. Holmes, Esq.  
August 23, 1989  
Page 4

filing of the documents objected-to by Airtrax in the Reply that was served upon Airtrax by hand. In these circumstances and for the reasons set forth above, Nielsen respectfully requests the Commission to reject Airtrax's request that extraordinary sanctions be imposed upon Nielsen, especially insofar as Airtrax has requested that Nielsen's Request for Permissive Authority be denied. Nielsen does join in Airtrax's request, however, that the merits of Nielsen's Request for Permissive Authority and for the issuance of an STA be addressed and resolved by the Commission as expeditiously as possible.

As always, any questions regarding this matter may be referred to the undersigned.

Sincerely,



Grier C. Raclin  
Counsel to A.C. Nielsen  
Company

cc: Mr. James McNally  
Mr. Bernard Gorden  
Roy J. Stewart, Esq.  
Stephen F. Sewell, Esq.  
Clay C. Pendarvis, Esq.  
Mr. Gordon Godfrey  
Mr. John G. Johnson, Jr., Esq.