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September 1, 1989

JOHN G JOHNSON JR

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Federal Communications Commission
Office of the Secretary

Bradley P. Holmes, Esquire
Chief
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, Northwest
Room 8010
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DOCKET FILE COPY ORIGINAL

In re: **Violation by A. C. Nielsen Company of the Commission's *Ex Parte* Rules in Connection with Nielsen's Request for Permissive Authority to Use Line 22 of the Active Portion of the Television Video Signal to Broadcast Encoded Transmission Identification and Verification Signals.**

Dear Mr. Holmes:

This law firm represents Airtrax, a general partnership organized under the laws of the State of California ("Airtrax").

This letter responds to the letter to you dated August 23, 1989 that was filed by communications legal counsel to A. C. Nielsen Company ("Nielsen").

Nielsen's counsel's August 23 letter to you defended Nielsen's conduct against the charges made in the letter to you from Airtrax's undersigned communications legal counsel, dated

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August 22, 1989, that Nielsen had on at least two (2) known occasions willfully and deliberately violated the Commission's *ex parte* rules.

Nielsen's defense of its conduct may be summarized as follows:

1. Copies of Nielsen's counsel's letters to the Commission's staff dated August 11, 1989 and August 14, 1989, respectively, although not served upon Airtrax's counsel of record, were publicly available for inspection by Airtrax or by its counsel, and thus no harm was done (the "Public Availability Defense");
2. Nielsen's counsel's August 11 letter to the Commission's staff was filed in direct response to a request from the staff to Nielsen for additional information, and therefore was specifically exempt from the *ex parte* rules (the "Rule Exemption Defense");
3. Nielsen's counsel's August 14 letter to the Commission's staff, a request for the Commission's special temporary authorization ("STA") to encode, on a supposedly-limited, "trial"-type basis, Line 22 of the active portion of the video signal of certain unspecified television broadcast stations for the purpose of identifying and verifying their transmissions (the "STA Request"), was an "entirely separate matter" from Nielsen's counsel's July 19, 1989 letter to the Commission's staff (the "Request"), which had requested a permissive authorization to encode Line 22 for the same purpose, and thus the STA Request was not subject to the *ex parte* rules by virtue of the filing of Airtrax's formal Opposition to the Request (the "Opposition") on August 8, 1989 (the "Separate Matter Defense");
4. Nielsen's August 21, 1989 Reply to Airtrax's Opposition (the "Reply") was served upon Airtrax's counsel of record, and incorporated essentially all of the points made in Nielsen's

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counsel's August 11 and August 14 letters to the Commission's staff, thus rendering Nielsen's failure to serve copies of the letters upon Airtrax's counsel harmless (the "Partial Compliance Defense");

5. Nielsen's Request did not seek any "relief" from the Commission and did not initiate an "adjudicative proceeding," as that term is defined in the Commission's *ex parte* rules, since the proceeding initiated by Nielsen's Request and by Airtrax's Opposition thereto does not involve "competing demands to the same scarce resource" (the "Definitional Defense");
6. Airtrax's Opposition was not timely filed, and therefore does not constitute a "formal opposition" sufficient to trigger application of the Commission's *ex parte* rules to this case (the "Timeliness Defense"); and
7. Airtrax has manifested its own doubt that the Commission's *ex parte* rules apply to this proceeding in the absence of an explicit Commission designation of this proceeding as a "restricted proceeding," since Airtrax has specifically requested such a designation (the "Formal Designation Defense").

Airtrax will address Nielsen's defenses *seriatim*.

1. The Public Availability Defense.

Nielsen's contention that a party's violation of the Commission's *ex parte* rules is automatically excused if the Commission or its staff shall subsequently make the offending written presentation available for public inspection exposes a fundamental misapprehension on Nielsen's part with respect to the responsibilities of the regulator and the regulated.

All parties appearing before the Commission, including Nielsen, are expected to comply with the Commission's rules of practice and procedure, including the *ex parte* rules. No

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subsequent action, nor any subsequent failure to act, on the part of the Commission or its staff will serve to excuse rule-violative conduct on the part of such a party.

Moreover, the *ex parte* rules are designed to serve a purpose different from that served by the Commission's general practice of making documents filed with the agency available for public inspection.

Service of a copy of a written presentation upon an interested party, as required by the *ex parte* rules, gives that party notice of, and an opportunity to participate with respect to, such presentation.

Failure to serve a copy of a written presentation upon an interested party--even if the Commission or its staff shall later elect to make a copy available for public inspection--places the burden upon that interested party to search the Commission's publicly-available files in order to protect that party's interests. The *ex parte* rules are designed to relieve interested parties of that burden.

Furthermore, Nielsen has not denied that it or its representatives have engaged in oral *ex parte* presentations to the Commission or to its staff in support of the Request, as suggested in Airtrax's counsel's August 22 letter to you.

The harm done by any such rule-offending oral *ex parte* presentations would not have been cured by making copies of the August 11 and August 14 written presentations available for public inspection.

Nielsen's Public Availability Defense fails as a matter of law, inasmuch as it addresses concerns other than those that are sought to be addressed by the *ex parte* rules which Nielsen has violated.

2. The Rule Exemption Defense.

Nielsen contends, in its counsel's August 23 letter to you, that its counsel's August 11 letter to the Commission's staff was exempt from the *ex parte* rules because that letter was filed in direct response to a Commission inquiry, dated July 28, 1989, to Nielsen concerning the Request.

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In that connection, Nielsen cites Section 1.1204(b)(7) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1204(b)(7) (1988), which exempts from the *ex parte* rules a presentation that is

. . . requested by the Commission or staff for the clarification or adduction of evidence or for resolution of issues, and the proceeding is a restricted proceeding which has not been designated for hearing, a non-restricted proceeding or an exempt proceeding.

Nielsen's Rule Exemption Defense neglects, however, to point out that in the Note that immediately follows the above-quoted language of Section 1.1204(b)(7), the Commission goes on to state:

NOTE: In a restricted proceeding, any new written information elicited from such a request and a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding. . . .

Nielsen's Rule Exemption Defense fails as a matter of law. Nielsen's disingenuous reliance upon selected excerpts from the Commission's Rules and Regulations, without full disclosure thereof, must be discredited. See Section 5, *infra*, The Definitional Defense, for another example of Nielsen's misrendering of applicable law.

3. The Separate Matter Defense.

In its counsel's August 23 letter to you, Nielsen argues that its August 14 STA Request was filed as "an entirely separate matter" from the July 19 Request. Accordingly, concludes Nielsen, any obligation on Nielsen's part to comply with the *ex parte* rules in connection with the Request, from and after the filing of Airtrax's August 8 Opposition, did not extend to the STA Request.

Nielsen's Separate Matter Defense is unavailing. A party whose underlying request for substantive relief has been formally opposed and is therefore governed by the *ex parte* rules cannot circumvent those rules merely by framing a

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parallel request in the form of a prayer for temporary or interim relief and then filing such parallel request and advocating its grant without compliance with those rules.

Were the law otherwise, the opportunities for circumvention and abuse of the Commission's carefully-crafted *ex parte* regulations would be limited only by the ingenuity and creativity of counsel; parties inclined to do so would evade the regulations simply by framing and re-framing their contested requests in a potentially-endless sequence of variations of ancillary but parallel prayers for relief.

4. The Partial Compliance Defense.

Nielsen's counsel's August 23 letter to you defends its counsel's August 11 and August 14 letters to the Commission's staff, copies of which were not served upon Airtrax's counsel, on the ground that the contents of the August 11 and 14 letters were largely recapitulated in the August 21 Reply, a copy of which was served upon Airtrax's counsel.

It is apparently Nielsen's view that if compliance with the *ex parte* rule requirements is partially achieved, any remaining violations of those requirements are to be excused.

Nielsen's argument must be rejected as a matter of law and policy. Just as it is no defense to a charge of shoplifting that the defendant may have paid for some of the purloined merchandise, the Commission's functions cannot be discharged if its regulatees can engage with impunity in multiple rule violations so long as they can demonstrate compliance on at least one (1) occasion.

In addition, Nielsen has not refuted Airtrax's earlier-expressed concern that oral *ex parte* presentations may have been made to the Commission or to its staff by Nielsen or by its representatives, the substance of which may or may not have been contained in Nielsen's Reply.

Under the foregoing circumstances, Nielsen's service of a copy of its August 21 Reply upon Airtrax's counsel does not exculpate Nielsen from its other conduct in violation of the *ex parte* rules.

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5. The Definitional Defense.

Nielsen also contends in its counsel's letter of August 23 to you that the proceeding initiated by its July 19 Request does not meet the Commission's definitional requirement for an "adjudicative proceeding," and therefore does not fall within the ambit of the *ex parte* rules.

In support of that contention, Nielsen makes two (2) assertions, one (1) of which is startlingly adverse to Nielsen's posture in this case, and the other of which is simply wrong as a matter of settled law.

First, Nielsen claims that "Nielsen's Request didn't request any 'relief' whatsoever,"

Second, Nielsen claims that the Commission's definition of an "adjudicative proceeding" in Section 1.1202(d) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1202(d) (1988), confines such a proceeding to one in which the Commission must decide ". . . between or among competing demands to the same scarce resource. . . ." (emphasis in original), citing *In the Matter of Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, Report and Order in Gen. Docket No. 86-225, 2 F.C.C. Rec'd. 3011, on reconsideration, 2 F.C.C. Rec'd. 6053 (1987), on further reconsideration, 3 F.C.C. Rec'd. 3995 (1988) ("Ex Parte Report and Order")*.

Nielsen argues that since a Commission grant of Nielsen's Request for permissive authority to use Line 22 would not negate Airtrax's earlier-granted authority to use Line 22, the Commission is not being asked to decide "between or among competing demands to the same scarce resource." According to Nielsen, therefore, the definitional requirement for an "adjudicative proceeding" has not been met in this case.

In the first place, Nielsen's statement that its Request did not ask for ". . . any 'relief' whatsoever, . . ." is in itself astonishing. If not a request for relief in the form of the Commission's permissive authority to use Line 22, Nielsen's Request is nothing. Surely Nielsen does not wish to be taken at its own word, and have its Request dismissed by the Commission as a self-confessed nullity.

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In the second place, Nielsen has substantially misrepresented the Commission's current definition of an "adjudicative proceeding."

The portion of the *Ex Parte Report and Order* cited in Nielsen's counsel's August 23 letter to you is devoid of reference to the "competing demands to the same scarce resource" phrase that constitutes Nielsen's rendition of the Commission's definition of an "adjudicative proceeding."

On the other hand, and in fairness to Nielsen, the *Ex Parte Report and Order* did define an "adjudicative proceeding as". . . one that 'involves the determination of rights and responsibilities as between specific parties.' . . ." (emphasis supplied). *Ex Parte Report and Order*, 2 F.C.C. Rec'd. at 3015.

That formulation suggests that there must be some adversity "as between" specific parties in order to qualify a proceeding as an "adjudicative proceeding," and is consistent with, although broader than, Nielsen's statement in its counsel's August 23 letter to you that in order to be considered an "adjudicative proceeding" for purposes of the *ex parte* rules, a proceeding must involve "competing demands to the same scarce resource."

Nielsen fails to apprise the Commission, however, that in a *Memorandum Opinion and Order* on reconsideration of the *Ex Parte Report and Order*, 2 F.C.C. Rec'd. 6053 (1987), the Commission revised the above-quoted definition of an "adjudicative proceeding" by replacing the words "as between" with the word "of." *Id.*, Appendix at Para. 3, 2 F.C.C. Rec'd at 6056.

By this revision, the Commission deleted the requirement of adversity "as between" specific parties, and broadened the "adjudicative proceeding" definition to include any proceeding involving the "determination of rights and responsibilities of specific parties." See Section 1.1202(d).

Nielsen is clearly a specific party, and just as clearly Nielsen's Request involves a determination of its rights (to use Line 22).

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Accordingly, while Nielsen's Request and Airtrax's Opposition thereto may or may not involve a determination of the rights and responsibilities "as between" specific parties, that is no longer the relevant legal standard (Nielsen's "competing demands to the same scarce resource" never having been the relevant legal standard).

Nielsen's Request qualifies as an "adjudicative proceeding" under the current Commission definitional formulation in Section 1.1202(d), and Nielsen's misrendering of the governing law in this case should not occasion a different result.

6. The Timeliness Defense.

Nielsen's counsel's August 23 letter to you goes on to argue that Airtrax's August 8 Opposition does not qualify as a "formal opposition" for purposes of Section 1.1202(e) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1202(e) (1988), because the Opposition was not filed within ten (10) days of the filing of Nielsen's July 19 Request.

In support of that argument, Nielsen cites Section 1.45(a) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.45(a) (1988).

Airtrax submits respectfully that Section 1.45(a) has no applicability in the premises.

Nielsen's July 19 Request was filed with the Commission's staff on an *ex parte* basis, without copies thereof having been served upon Airtrax at the time of filing and without any subsequent Commission public notice or other document having been issued that would have given Airtrax actual or constructive notice of the filing of the Request.

Under those circumstances, Section 1.45(a)'s ten-day requirement for the filing of oppositional pleadings is inapposite. Section 1.45(a)'s time constraint necessarily presupposes that some form of service upon or other notice to the opposing party with respect to the filing of the original motion, petition, or request for relief will have triggered the running of the ten-day period.

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Airtrax trusts that the Commission is not prepared to hold as a matter of law in this case that parties are at risk of untimeliness if they fail to visit the Commission's many offices each day in order to locate from among the hundreds of daily filings those that may be of interest and that were neither served upon such parties nor otherwise made the subject of duly-issued Commission public notices, especially where--as here--there was no pre-existing controversy or other proceeding that would have placed such a party on notice of a duty to inquire.

Nothing in the Communications Act of 1934, as amended, requires or justifies such a proposition, and Airtrax candidly doubts whether such a proposition would survive judicial scrutiny.

In the absence of timely service upon Airtrax of a copy of the Request, or the issuance by the Commission of a notice alerting the public at large to the Commission's receipt of the Request, or some other ground for charging Airtrax with actual or constructive knowledge of the filing of the Request, there is no basis for enforcing a ten-day period, running from the date of Nielsen's *ex parte* filing of its Request, for the submission of Airtrax's Opposition thereto.

Airtrax frankly doubts Nielsen's sincerity in citing Section 1.45(a) as supposedly governing the timing of the filing of Airtrax's Opposition. Had Section 1.45(a) governed the timing of the filing of Airtrax's Opposition, then it follows that Section 1.45(b) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.45(b) (1988), would have governed the timing of the filing of Nielsen's Reply.

However, since Section 1.45(b) would have afforded Nielsen only five (5) days in which to file its Reply, and since in fact Nielsen's Reply was filed thirteen (13) days after the filing and service upon Nielsen's counsel of Airtrax's Opposition, Nielsen would not have complied with Section 1.45(b).

Nielsen's reliance upon Section 1.45(a) to assail the timeliness of the filing of Airtrax's Opposition therefore appears to be disingenuous.

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In this case, Airtrax's Opposition was filed on August 8, as promptly as possible after Airtrax had first learned of the *ex parte* filing of Nielsen's Request, and in conformance with letters to the Commission's staff from Airtrax's counsel dated July 28, 1989 and August 7, 1989 that had duly alerted Nielsen and the Commission's staff to the imminent filing of the Opposition.

This case is governed by the last sentence in Footnote 21 of the *Ex Parte Report and Order*, which states in pertinent part that ". . . the timeliness requirement [in Section 1.1202(e)(iii) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1202(e)(iii) (1988)] is inapplicable in instances where the rules do not specify a period of time within which that particular type of pleading must be filed." *Ex Parte Report and Order*, 2 F.C.C. Rec'd. 3011, 3030, n. 21 (1987).

7. The Formal Designation Defense.

Nielsen's last defense borrows from Airtrax's own pleas, in its counsel's July 28 letter to the Commission's staff and in the August 8 Opposition, that the Commission formally designate this proceeding as a "restricted proceeding," pursuant to Section 1.1208(c)(5) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1208(c)(5) (1988).

Nielsen's counsel's August 23 letter to you suggests that Airtrax's request for such formal designation signifies Airtrax's own doubt that the Commission's *ex parte* rules apply to this case in the absence of such designation. No such designation having been made to date, Nielsen concludes that the *ex parte* rules therefore do not apply.

Nielsen is mistaken. While Airtrax has requested formal designation by the Commission that this proceeding is "restricted," pursuant to Section 1.1208(c)(5), that request does not and could not have the effect of suspending the applicability of the remainder of the *ex parte* rules.

Stated differently, if the proceeding initiated by Nielsen's July 19 Request and Airtrax's August 8 Opposition otherwise qualifies as a "restricted proceeding" by operation

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of the *ex parte* rules, without reference to Section 1.1208(c)(5), nothing that Airtrax (or Nielsen, for that matter) has filed or could file with respect to Section 1.1208(c)(5) would alter that fact.

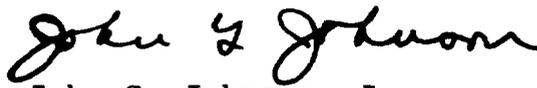
Nielsen's attempt to excuse its otherwise-established violation of the *ex parte* rules by relying upon a strained inference from Airtrax's Section 1.1208(c)(5) plea must, as with Nielsen's other defenses, fail as a matter of law.

Based upon the foregoing and upon the matters set forth in the undersigned's letter to you of August 22, Airtrax submits respectfully that Nielsen has engaged in a pattern of willful violation of the Commission's *ex parte* rules.

The Commission must redress those violations by instituting the remedial measures specified in Section 1.1212 of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1212 (1988), and by imposing upon Nielsen sanctions as set forth in Section 1.1216 of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1216 (1988).

In the event that the Commission or its staff should have any questions concerning this matter, kindly direct them to the undersigned communications legal counsel to Airtrax.

Very truly yours,



John G. Johnson, Jr.

cc: The Honorable Alfred C. Sikes (by hand)
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The Honorable James H. Quello (by hand)
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