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

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Bidding for Commercial Broadcast and Instructional Television Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

PETITION FOR RECONSIDERATION

Gene A. Bechtel

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October 13, 1998

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I.
Summary

1. Bechtel & Cole, Chartered, petitions the Commission to reconsider its First Report and Order (Decision) insofar as the Commission has determined not to consider the entry-level qualifications of applicants before setting in motion the auction process with regard to mutually-exclusive applications for new broadcast licenses.

2. Principals of the petitioner have practiced communications law before the Commission dating back to 1958. The petitioner represents clients who have pending applications that are scheduled for auctions under the Commission's determination in question. The petitioner also has clients who have interests adverse to those of North American Broadcasting Company and KM Communications, Inc., identified as two case

histories in the argument set forth below.

II.

The case for pre-auction resolution of entry level qualifications is persuasive; common carrier auction procedures do not apply to broadcast auctions in this regard

3. The case for pre-auction resolution of entry level qualifications questions is a persuasive one. While that will take some initial time, the questions can be resolved across the board with regard to challenged parties having applications in more than one comparative proceeding, and legitimate applicants can marshal their assets and participate in the auction with knowledge that only other bona fide parties will be competing against them. Otherwise, FCC application mills and/or other applicants having potential disqualification problems can contaminate the auction process, in both the preliminary settlement-of-interests stages and in the auction itself, at the risk of driving out the bona fide parties and gaining a merged interest or even prevailing in the auction bid without ever being subjected to any determination of their eligibility to do so.

4. A number of parties familiar with the comparative broadcast selection process urged the Commission to adopt a processing rule to resolve disqualifications issues at the outset, i.e., John W. Barger, Batesville Broadcasting Co., Inc., John Anthony Bulmer, Thomas W. Fells, Michael Ferrigno, Linear Research Associates, Donald James Noordyk, Todd Stuart Noordyk, Positive Alternative Radio, Inc., Throckmorton Broadcasting, Inc., United Broadcasters Company and Williams Broadcasting Co. Decision at ¶84, n. 76, and ¶90, n. 82. Only commentors have

questioned such a procedure, i.e., J. McCarthy Miller & Biltmore Forest Broadcasting FM, Inc. and Columbia FM Limited Partnership. Id.

5. The Commission's adverse Decision on this point is based on its experience with auction procedures pertaining common carrier telephone and telecommunications licensing, for which the public interest in the credentials of the applicant is not comparable to the public interest in the credentials of broadcast licensees serving as trustees with plenary power to determine the composition of programming over the public airwaves.

III.
Congress has condemned the pernicious practice of filing broadcast applications for the purpose of entering into settlement agreements

6. Section 311 of the Communications Act, entitled Special Requirements with Respect to Certain Applications in the Broadcasting Service, provides that if two or more applications for permit to construct a broadcast station are pending and the parties wish to settle their conflict, the Commission may approve that settlement on a finding that to do so is consistent with the public interest. This legislative reference to the public interest is general with one exception. Section 311(c)(3) requires that "no party to the agreement filed its application for the purpose of reaching or carrying out such agreement." Thus, Congress generally has empowered the Commission to adopt its own regulations governing various public interest aspects of settlement of broadcast proceedings, including the important issue of whether monetary payments must be limited to expenses or

may include an element of profit to a dismissing applicant. But Congress has mandated that the pernicious filing of an application with an intent to settle out with a competing applicant cannot be allowed.

IV.

Illustrative case history of FCC Application Mill No. 1: North American Broadcasting Company

7. Consider the facts of record in two illustrative cases in point; first, with regard to North American Broadcasting Company (North American). In September 1995, the Commission opened a window of opportunity to settle frozen comparative cases for which a limit on the amount of the payment to reimbursement of expenses was waived. A number of settlements were filed in which the dismissing applicants received profits, in some instances, very substantial sums of money. This was a major development well known to applicants, counsel and existing broadcasters interested in participating in the settlement process under FCC policies then extant relative to funding of settlements by so-called "white knight" investors.

8. By this point in time, the Commission's freeze on processing comparative applications had been in existence for a year and a half (since February 1994), with no immediate end in sight, and the prospect of further settlement incentives to alleviate the impasse was a favorable one. Having the opportunity to observe the sums being paid out in the first settlement window, which concluded in December 1995, North American began in early 1996, in concert with its principals,

filing 16 applications for broadcast construction permits (Exhibit 1).

9. North American is a newly-formed corporation. Its principals consist of a practicing attorney, a professional basketball coach, a circuit court judge and a cable operator, apparently brought together for this play (Exhibit 1). The 16 applications were for seven new radio stations and nine new television stations having no geographic or business strategy relationship demonstrating an intent to build and operate a station group. The seven FM applications were filed for Karnes City, Texas; Sun Valley, Nevada; Winona,Texas; Healdsburg, California; Grants, New Mexico; Farmersville, Texas; and Faribault, Minnesota (Exhibit 1). The nine television applications were filed for Norman, Oklahoma; Tallahassee, Florida; Kailua, Hawaii; Walla Walla, Washington; Price, Utah; Virginia Beach, Virginia; Houston, Mississippi; Eureka Springs, Arkansas; and Grand Forks, North Dakota (Exhibit 1).

10. North American knew or should have known that the applications in fact involved conflicts, or were likely to involve conflicts, with other competing applicants. These were cookie-cutter applications with a brief canned statement concerning proposed programming service that did not differentiate between the 16 widely divergent and different communities. One of the two canned statements employed by North American included a recurring typographical error, i.e., mispelling "public affairs," in each of the applications in which

it was used (both canned statements are attached as Exhibit 2).

11. The Balanced Budget Act of 1997 established a new 180-day window ending February 1, 1998 for settlement of broadcast cases without any limit on the amount of payment to dismissing applicants. During that window, North American entered into settlements of six of its 16 applications. In one instance, it has taken a one-third interest in an FM radio station in Farmersville, Texas (BPH-970401MN). In the other five instances, North American has dismissed its application under agreements in which it was paid an aggregate of approximately $1 million cash, for dismissal of radio applications for Winona, Texas (BPH-960222MH): Sun Valley, Nevada (BPH-960930MK); and Faribault, Minnesota (BPH-961118M6); and for dismissal of television applications for Houston, Mississippi (BPCT-961001KY) and Eureka Springs, Arkansas (BPCT-961001LT).

12. For all of these settlements, the only activity required was to file the application and wait for developments under the freeze to take place. They were settled within 12 to 18 months of the filing. In one instance, Farmersville, Texas, the application was filed in April 1997 (BPH-970401MN) and the settlement agreement was entered into only six months later, on October 1, 1997 (Joint Request for Approval of Agreement, filed October 14, 1997).

13. As a result, for its efforts to date, North American has gained a million dollars and can play the game with the remaining ten applications using the house's money. And for

these ten applications, further opportunities for settlements exist under the new auction rules. To say the least:

(a) Until such time as a short form application is filed indicating an intent to participate in the auction, applicants for the same facility can enter into merger agreements. Section 1.2105(c)(1) of the Rules.

(b) After the filing of the short form application, the Commission by public notices to be issued will open a window of opportunity to resolve conflicting applications by settlement. Section 73.5002(d) of the Rules.

(c) After the filing of the short form application, applicants may merge and acquire a non-controlling interest in other applications which are not MXed with the application in question. Section 1.2105(c)(2) of the Rules.

(d) After the filing of the short form application, applicants may enter into agreements to make joint bids with respect to other applications which are not MXed with the application in question. Section 1.2105(c)(3) of the Rules.

(e) After the filing of the short form application, parties with noncontrolling interests in an application may even merge with another applicant in the same MXed proceeding. Section 1.2105(c)(4) of the Rules.

V.
Illustrative case history of FCC Application Mill No. 2: KM Communications, Inc.

14. The second illustrative case in point is KM Communications, Inc., a low power television operator. Since

1994, KM Communications has filed applications for 32 new full service television stations. Since 1995, KM Communications has filed applications for 15 new FM radio stations. Exhibit 3.

15. As in the case of North American, KM Communications knew or should have known that the applications in fact involved conflicts, or were likely to involve conflicts, with other competing applicants. Also like North American, these were cookie-cutter applications with a brief canned statement concerning proposed programming service that did not distinguish between some 47 different communities (Exhibit 4).

16. The 32 television applications were filed by KM Communications for: Iowa City, Iowa; Flagstaff, Arizona; Boise, Idaho; Salt Lake City, Utah; Ames, Iowa; Jackson, Wyoming; Albuquerque, New Mexico; Muskogee, Oklahoma; Greenville, North Carolina; Crandon, Wisconsin; Holbrook, Arizona; Arcade, New York; Gosnell, Arkansas; Provo, Utah; Spokane, Washington; Omaha, Nebraska; Walla Walla, Washington; Bismarck, North Dakota; Minot, North Dakota; Marianna, Florida; El Dorado, Arkansas; Roswell, New Mexico; Jackson, Mississippi; Virginia Beach, Virginia; Selma, Alabama; Pocatello, Idaho; Shawnee, Oklahoma; Sierra Vista, Arizona; Batavia, New York; Pendleton, Oregon; Hutchinson, Kansas; Newton, Iowa; and Syracuse, New York (Exhibit 3). Provo and Salt Lake City, Utah, are in the same television market and KM Communications could not have successfully prosecuted both of those applications.

17. The 15 radio applications were filed by KM

Communications for: Pearson, Georgia; St. Johns, Arizona; Merced, California; Parkersburg, Iowa; Breese, Illinois; Neillsvile, Wisconsin; Brigham City, Utah; New Holstein, Wisconsin; Willard, Ohio; Atlanta, Illinois; Mesquite, Nevada; Faribault, Minnesota; Clovis, New Mexico; Agana, Guam; and Fairbury, Illinois (Exhibit 3).

18. We do not have up-to-date information concerning all of the settlements that KM Communications has entered into, notably missing information concerning settlements filed during the 180-day window which closed February 1, 1998. However, as of August 1997, KM Communications had entered into settlements of nine of the television applications (Exhibit 3). In four cases, through settlements, it acquired interests in the proposed station either by merger or payments to dismissing applicants (Boise, Idaho; Greenville, North Carolina; Holbrook, Arizona; and Shawnee, Oklahoma). In five cases, KM Communications dismissed its application as a part of a universal settlement (Salt Lake City, Utah; Batavia, New York; Pendleton, Oregon; Hutchinson, Kansas; and Syracuse, New York). In a single uncontested application, KM Communications was awarded a permit without any settlement (Sierra Vista, Arizona).[1]

19. By our count, the scorecard as of August 1997 was 32 applications for new television stations filed, one unopposed and granted, nine settled, two dismissed and 20 remain pending. If

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[1] Two of the 32 television applications were dismissed (Omaha, Nebraska and Newton, Iowa) (Exhibit 3).

and to the extent those 20 pending applications weren't settled during the 180-day window which closed February 1, 1998, they are available for further settlement opportunities before and after the short form application date under the auction procedures summarized in ¶13 above.[2]

VI.

Applications filed for the purpose of entering into settlements should be weeded out prior to the auctions

20. In the North American and KM Communications settlements, the parties of course filed declarations that their applications were not filed for the purpose of entering into a settlement. These declarations are routinely filed and routinely accepted by the Commission. However, in the case of North American, KM Communications and other FCC application mills, nothing could be further from the truth. The modus operandi of FCC application mills is to file multiple applications, occasionally even get an uncontested grant, but with the intent and expectation that in contested cases either (a) the party will settle the case by dismissing its application at a minimum for reimbursement of expenses (hence, no loss on the application) or (b) the party will settle the case by merger with other applicants to secure an interest in the proposed station or (c) the party will settle the case by paying all competing applicants for dismissing their applications.

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[2] We do not have information concerning settlement of the 15 radio applications, except to note that one of the applications was for Faribault, Minnesota, a comparative case that was settled in which North American received cash compensation, as indicated in ¶11, supra.

21. The percentages reflected in the actions of North American and KM Communications are probably typical of FCC application mills. North American filed 16 applications and has resolved six of them, entirely by the mechanism of a settlement. Its score to date is: 6 settlements and 0 prosecutions of an MXed application to the conclusion on the merits. KM Communications filed 32 television applications and as of August 1997, not counting two dismissed applications, had resolved ten of them, one by an uncontested grant and the other nine by the mechanism of a settlement. Its score to that date is 9 settlements, 0 prosecutions of an MXed application to the conclusion on the merits and 1 grant by default.

22. The unavoidable truth is that FCC application mills file applications for the very purpose of entering into settlements in the overwhelming majority of the cases, recouping their expenses if not more, and rolling the dice for an occasional permit or piece of a permit. It is unconscionable for the Commission to establish a procedure under which this utter disregard of the statute, and willingness to sign false declarations of purported compliance with the statute, is never addressed until and unless the perpetrator prevails in the auction and a bona fide applicant, who has not been driven out of the process, remains and is willing to litigate that issue in an otherwise losing cause.

23. There is another reason why the Commission should address this statutory/false declaration issue at the outset.

None of the reported cases concerning compliance with Section 311(c)(3) of the Act has involved the pattern of conduct of FCC application mills in new station applications such as North American and KM Communications.[3] While we believe the violation is clear, the matter is a case of first impression. A number of FCC application mills may be involved in the various pending comparative cases that are subject to the new auction rules. This particular threshold qualification issue will be pertinent to many of the auction proceedings, certainly any proceedings that involve the 10 pending applications of North American and the upwards to 20 pending applications of KM Communications. A ruling at the outset will cut across all affected proceedings and avoid piecemeal litigation after the conclusion of the auctions or, what is worse, the acceptance and processing of the questionable applications without ever reaching the statutory/false declaration issue at all.

VII.
Applications guilty of false financial certifications or other disqualifications should also be weeded out

24. Form 301 requires the following certification: "The applicant certifies that sufficient net liquid assets are on hand

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[3] Our research shows two principal reported cases, both involving license renewal challenges governed by a different part of Section 311 of the Act and involving specialized issues pertaining to the motivation for filing. WWOR, Inc., 70 RR2d 752 (1992) (disqualification on the facts relative to filing a fresh renewal challenge shortly after settling an earlier renewal challenge); RKO General, Inc. (WRKS-FM), 66 RR2d 851 (1989) (renewal challenges of RKO renewal applications, filed after an adverse court ruling opened the opportunity to file, on the facts not disqualified because of comparative weaknesses).

or that sufficient funds are available from committed sources to construct and operate the requested facilities for 3 months without revenue." Through many years of rule changes, form changes, agency and court case decisions, the requirements for a valid certification have become reasonably clear. The certifier must itself have net liqudity in the amount certified or it must have a meaningful commitment from a bank, for which liquidity is assumed, or other party having net liqudity in the amount certified. A bank letter that is a mere accommodation will not suffice.

25. North American made this certification in each of its 16 applications for new broadcast stations, seven radio and nine television. KM Communications, Inc. made this certification in each of its 32 applications for full service television stations and 15 applications for new radio stations. We cannot say what evidence the various competing applicants may have to raise concerning the falsity of these financial certifications. It is fair to say, it may be a lot.

26. North American's 16 applications contain dollar figures for construction and initial working capital which aggregate approximately $7 million, an average of less than a half-million dollars per station. While some radio stations may be built and initially capitalized for that, full service television stations cannot. In the real world, two full service television stations in any decent-sized market would likely deplete the entire amount. North American has filed for some decent-sized markets,

Oklahoma City (Norman, Oklahoma), Tallahassee, Florida and Norfolk, Virginia (Virginia Beach), to name three. In each instance, North American's certification is for only $700,000. The combination of all three certifications might be enough to build and commence operation of one of them. Moreover, whether the aggregate amount is $7 million or, say, two, three or even four times that for realistic cost figures, this is an awful lot of money for a newly-formed corporation to certify, whether from its four investors or by demonstrating the collateral and making other arrangements to secure a meaningful bank letter that is not a mere accommodation.

27. The foregoing analysis applies with even greater force to KM Communications, certifying funds to build and finance initial operations of no fewer than 32 television stations and no fewer than 15 radio stations. The television markets for which such funds have been certified include Salt Lake City, Tallahassee, Florida (Marianna), Norfolk, Virginia (Virginia Beach), Syracuse, New York, Jackson, Mississippi, Albuquerque, New Mexico, Oklahoma City (Shawnee, Oklahoma), Tulsa (Muskogee, Oklahoma) and Omaha, Nebraska. A realistic bankroll in the range of $50-100 million is likely involved.

28. The Commission's rationale -- that a pre-auction determination of financial qualifications need not be made because applicants in their own self-interest would not apply for an auction unless they have the funds both to support a winning bid and to construct the facility upon receipt of the permit --

do not apply to applications such as those filed by North American and KM Communications.

29. This is so for two reasons. One, the applications were filed prior to the time when Congress enacted the broadcast auction law and before the Commission has now, in the subject Decision, determined that it will employ auctions to dispose of these earlier-filed applications. Two, the Commission assumes that an applicant intends to pursue its application through the comparative process. While that assumption may follow in the case of a single applicant, as has been demonstrated it does not follow in the case of North American, KM Communications and other FCC application mills, whose strategy is to settle the vast majority of the applications rather than pursuing them through the comparative process.

30. Applicants who file false financial certifications should not be permitted to engage in the auction process, at the expense of bona fide applicants whose financial certifications are valid, any more than applicants who disregard, and submit false declarations claiming compliance with, Section 311(c)(3) of the Act. Nor should applicants subject to disqualification for any other reason be allowed to do so.

VIII.
Relief requested

31. We petition the Commission to reconsider its Decision and to adopt a pre-auction procedure under which disqualification issues are heard prior to conducting the auction and applicants

held to be disqualified are denied participation in the bidding.

Respectfully submitted

Gene A. Bechtel

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Courtesy copies of this petition are being served on counsel for North American Broadcasting Company and KM Communications, Inc.

October 13, 1998

EXHIBIT 1

RECEIVED

JUL - 3 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of:	)	
	)	
	)	
North American Broadcasting Company	)	File No. BPCT-961001LV
	)	
	)	
	)	
For A New Broadcast TV Station at Virginia Beach, Virginia	)	
	)	

AMENDMENT

The application of North American Broadcasting Company (BPCT-961001LV) for a new TV station at Virginia Beach, Virginia, is hereby amended with the attached information.

NORTH AMERICAN BROADCASTING COMPANY

By: _____
John C. Carsey
Its President

June 29, 1997

6. List the applicant, parties to the application and non-party equity owners in the applicant. Use one column for each individual or entity. Attach additional pages if necessary.

(Read carefully - The numbered items below refer to line numbers in the following table.)

a. Name and residence of the applicant and, if applicable, its officers, directors, stockholders, or partners (if other than individual also show name, address and citizenship of natural person authorized to vote the stock). List the applicant first, officers next, then directors and, thereafter, remaining stockholders and partners.

b. Citizenship.

c. Office or directorship held.

d. Number of shares or nature of partnership interests.

e. Number of votes.

f. Percentage of votes.

NOTE: Radio applicants ONLY: Radio applicants need not respond to subparts g and h of the table. Instead, proceed and respond to Questions 7, 8 and 9, Section II below.

g. Other existing attributable interests in any broadcast station, including the nature and size of such interests.

h. All other ownership interests of 5% or more (whether or not attributable), as well as any corporate officership or directorship, in broadcast, cable, or newspaper entities in the same market or with overlapping signals in the same broadcast service, as described in 47 C.F.R. Section 73.3555 and 76.501, including the nature and size of such interests and the positions held.

a.	North American Broadcasting Company 1100 Guadalupe Austin, Texas 78701	John C. Carsey 1100 Guadalupe Austin, Texas 78701	Timothy Timmerman 4903 Whitethorn Ct. Austin, Texas 78746
b.	Texas Corporation	U.S.	U.S.
c.	Not Applicable	Pres./Secy/Dir.	V.P./Treas./Dir.
d.	1,030	334	334
e.	1,000	510	245
f.	100%	51%	24.5%
g.	See Exhibit 1	See Exhibit 1	See Exhibit 1
h.	None	None	None

6. List the applicant, parties to the application and non-party equity owners in the applicant. Use one column for each individual or entity. Attach additional pages if necessary.

(Read carefully - The numbered items below refer to line numbers in the following table.)

a. Name and residence of the applicant and, if applicable, its officers, directors, stockholders, or partners (if other than individual also show name, address and citizenship of natural person authorized to vote the stock). List the applicant first, officers next, then directors and, thereafter, remaining stockholders and partners.

b. Citizenship.

c. Office or directorship held.

d. Number of shares or nature of partnership interests.

e. Number of votes.

f. Percentage of votes.

NOTE: Radio applicants ONLY: Radio applicants need not respond to subparts g and h of the table. Instead, proceed and respond to Questions 7, 8 and 9, Section II below.

g. Other existing attributable interests in any broadcast station, including the nature and size of such interests.

h. All other ownership interests of 5% or more (whether or not attributable), as well as any corporate officership or directorship, in broadcast, cable, or newspaper entities in the same market or with overlapping signals in the same broadcast service, as described in 47 C.F.R. Section 73.3555 and 76.501, including the nature and size of such interests and the positions held.

a.	Transpac Media, LLC 107 W. Wisteria McAllen, Texas 78504	Hon. Leticia Hinojosa Hidalgo County Courthouse 139th District Court 100 N. Closner Edinburg, Texas 78539	Rudy Tomjanovich 5085 Westheimer Suite 4520 Houston, Texas 77056
b.	Texas Ltd. Liability Co.	U.S.	U.S.
c.	Not Applicable	Managing Member/Dir.	- -
d.	332	-0-	30
e.	245	-0-	- 0 -
f.	24.5%	- -	- -
g.	See Exhibit 1	See Exhibit 1	See Exhibit 1
h.	None	None	None

EXHIBIT 1
Other Broadcast Interests

North American Broadcasting Company has the following pending applications on file:

• Karnes City, Texas	FM Channel 276C2	BPH-960111MX
• Healdsburg, California	FM Channel 244A	BPH-960111MY
• Winona, Texas	FM Channel 274A	BPH-960222MH
• Fairbault, Minnesota	FM Channel 298C2	BPH-961118M6
• Sun Valley, Nevada	FM Channel 233C2	BPH-960930MK
• Grants, New Mexico	FM Channel 288C	BPH-961118M5
• Farmersville, Texas	FM Channel 221A	BPH-970401MN
• Tallahassee, Florida	TV Channel 24	BPCT-961001KX
• Houston, Mississippi	TV Channel 45	BPCT-961001KY
• Norman, Oklahoma	TV Channel 46	BPCT-961001LU
• Walla Walla, Washington	TV Channel 9	BPCT-961001KZ
• Eureka Springs, Arkansas	TV Channel 34	BPCT-961001LT
• Price, Utah	TV Channel 3	BPCT-961001LK
• Kailua, Hawaii	TV Channel 50	no file no. assigned
• Grand Forks, N.D.	TV Channel 27	no file no. assigned

Timothy Timmerman is the President and sole shareholder of TCSI Huntsville, Inc. which owns and operates CATV systems in Walker and Trinity County, Texas. Mr. Timmerman has no other mass media interests.

John C. Carsey has no other mass media interests.

The Honorable Leticia Hinojosa, the managing member of Transpac Media, LLC, has no other mass media interests.

Transpac Media, LLC has no other mass media interests.

Rudy Tomjanovich has no other mass media interests.

EXHIBIT 2

Exhibit 2

The applicant intends to make the facilities of the proposed facility available to responsible members of the public as a vehicle to respond to public needs. Through continuing involvement in local affairs, the applicant will provide programming to address the ascertained needs of its service area. The applicant will regularly broadcast public affair programming, and through a traditional mix of news, public affairs, and other programming, will endeavor to provide a service to the community in accordance with all provisions of the Communications Act of 1934, as amended.