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October 20, 1998

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, D.C. 20554

**Re: Comments of Educational Information Corporation; MM Docket No. 98-93**

Dear Ms. Salas:

Transmitted herewith on behalf of Educational Information Corporation are an original and eleven (11) copies of Comments in response to the *Notice of Proposed Rule Making and Order*, FCC 98-117, released June 15, 1998, issued in MM Docket No. 98-93.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

BROOKS, PIERCE, McLENDON,  
HUMPHREY & LEONARD, L.L.P.



David Kushner  
Counsel to Educational Information Corporation

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Before the  
Federal Communications Commission  
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OCT 20 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
1998 Biennial Regulatory Review— )  
Streamlining of Radio Technical Rules in )  
Parts 73 and 74 of the Commission's Rules )

MM Docket No. 98-93

To: The Commission

**COMMENTS OF EDUCATIONAL INFORMATION CORPORATION**

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October 20, 1998

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## Summary

The Commission should use the opportunity of this rulemaking proceeding to bring the commercial and non-commercial FM services into technical and procedural parity. The Commission should therefore eliminate the inconsistency between the commercial and non-commercial station interference protection standards since, because the laws of physics do not discriminate between commercial and non-commercial stations, there is no physical or public policy reason that the two categories of stations should be treated any differently.

Negotiated interference agreements should be permitted within a relatively permissive framework. It is not the Commission's duty to "mother" stations or to protect them from their own economic folly. Even to the extent the Commission believes that negotiated interference agreements must be limited to situations where service gains outweigh service losses, the judgment of the station in question, based upon its familiarity with its local circumstances, should be given substantial weight and consideration.

Although the proposed criteria governing interference agreements should be loosened, the Commission's oversight should not be. Applicants must not be permitted to play fast and loose when it comes to acquiring additional radio spectrum. Supporting exhibits should always be required, and careful review of these materials by the Commission's staff is fully warranted. The appropriate sanction for parties who are found to have willfully provided false information to the Commission or to have willfully provided incomplete information with the intent to mislead or deceive the Commission is permanent revocation of the broadcast license.

The proposed new "Section 73.215 condition," which freezes an affected station's

authorization with regard to the applicant's proposed modification if it does not simultaneously increase its power to a full-class facility as part of the agreement with the applicant, should be rejected. Instead, the second, affected station be permitted to place a "reservation" so that it could, at a later time, unilaterally increase its facilities within the stated reservation to cause interference to the initial applicant's improved facilities.

First come/first served processing should be extended to AM and NCE FM minor change applications only. FM translators are plainly a secondary service, and the Commission must be careful not to unleash a deluge of applications. In particular, the Commission should be wary lest certain broadcasters implement a "blanket the earth" policy and, accordingly, apply for every open frequency remaining. Furthermore, the Commission must be vigilant in protecting the public interest from those who would abuse the process or attempt to "warehouse" spectrum without the financial ability to actually construct all of the facilities requested. In addition, the new policy should be applied retroactively to clean up the mess of existing conflicting applications.

As the Commission reduces intervention by its regulatory hand into the technical aspects of the radio broadcast services, it is critical that the Commission be vigilant in enforcing its remaining procedures to protect the public's interest in the fair and equitable utilization of radio spectrum.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
1998 Biennial Regulatory Review— ) MM Docket No. 98-93  
Streamlining of Radio Technical Rules in )  
Parts 73 and 74 of the Commission's Rules )

To: The Commission

**COMMENTS OF EDUCATIONAL INFORMATION CORPORATION**

Educational Information Corporation ("EIC"), by its attorneys, hereby files the following comments in response to the *Notice of Proposed Rule Making and Order* ("Notice"), FCC 98-117, released June 15, 1998, in the above-captioned proceeding. The *Notice* seeks comment on several significant proposals to streamline the Commission's technical rules governing radio broadcast stations, including permitting FM broadcasters seeking to modify their transmission facilities the opportunity to negotiate interference agreements with other broadcasters and other proposals that would give radio stations greater technical flexibility. EIC submits that the Commission should act, within the context of this rulemaking proceeding, to bring the commercial and non-commercial FM services into technical and procedural parity, including by eliminating the inconsistency between the differing interference protection standards and by extending first come/first served processing to non-commercial FM minor change applications. In addition, the Commission should permit negotiated interference agreements, within a relatively permissive framework, provided that the Commission exercises strict oversight and does not hesitate to severely sanction broadcasters that abuse the process.

## I. Statement of Interest

EIC is the licensee of non-commercial educational broadcast station WCPE-FM, Raleigh, North Carolina. Over the years, approximately 50,000 people have signed petitions that support or have otherwise asked for a full power omni-directional signal from WCPE. WCPE, however, is short-spaced with WXYC-FM, Chapel Hill, North Carolina. WCPE is thus concerned with satisfying these many individuals, and it may benefit should several of the changes proposed in the *Notice* be adopted. In addition, WCPE, WXYC, WXDU-FM, Durham, North Carolina, WKNC-FM, Raleigh, North Carolina, and WSOE-FM, Elon College, North Carolina, have, as a group, informally worked together to try to provide better service for all of their listeners. EIC is thus motivated to support any change that allows these particular stations to better serve their public.

On May 21, 1998, EIC filed a Petition for Rule Making (“Petition”) with the Commission styled “In the Matter of Grandfathered ‘Short-Spaced’ Non-Commercial Educational FM Broadcast Stations.” In the Petition, EIC advocated the adoption of a new rule that would eliminate unnecessary regulations, streamline the current method of modifying grandfathered “short-spaced” non-commercial educational (“NCE”) FM stations,<sup>1</sup> and bring the standards for commercial and NCE FM stations into parity. By a proposed new rule, EIC asked the Commission to lift restrictions that unnecessarily impede flexibility as to height above average terrain and operating power for grandfathered NCE FM stations and, for the minor number of such grandfathered stations, to delete the current second-adjacent and third-adjacent overlap standard that has proven ineffective, as has

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<sup>1</sup> While 47 C.F.R. § 73.509 does not set forth required spacings for co-channel and adjacent channel NCE stations, but instead prohibits the overlap of certain pairs of signal strength contours, such overlap is commonly referred to as “short-spacing.” See Report and Order, *Grandfathered Short-Spaced FM Stations*, FCC 97-276, 8 Comm. Reg. (P & F) 1238, 1243 n.13 (1997).

already been done for grandfathered commercial FM stations.<sup>2</sup> Although the Commission has not formally acted upon EIC's Petition, a number of the proposals in the current *Notice* are consonant with the positions EIC advanced. EIC therefore formally incorporates that Petition herein by reference as additional comments relevant to the instant proceeding.<sup>3</sup>

## **II. The Commission Should Eliminate the Inconsistency Between the Commercial and Non-Commercial Station Interference Protection Standards**

In the *Notice*, the Commission proposes to modify 47 C.F.R. § 73.509 and § 74.1204(a) to specify a 100 dBu interfering contour for second-adjacent channel NCE and FM translator stations, as exists for commercial FM stations.<sup>4</sup> EIC strongly endorses this proposal, which is similar in its principal thrust with the position advocated by EIC in its Petition.<sup>5</sup> Because the laws of physics do not discriminate between commercial and NCE stations, there is no physical or public policy reason that the two categories of stations should be treated any differently.<sup>6</sup> The proposed change, while

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<sup>2</sup> *See id.*

<sup>3</sup> EIC, however, does not withdraw that Petition and continues to seek Commission action on the Petition to whatever extent this instant proceeding does not address the issues raised in the Petition.

<sup>4</sup> *See Notice* at ¶ 56.

<sup>5</sup> EIC had originally proposed in its Petition that "short-spaced" second-adjacent and third-adjacent stations be grandfathered so that no distance separation or interference protection requirements would apply. EIC supports the Commission's current proposal or EIC's original proposal but notes that its grandfathering approach would produce fewer applications for the Commission's staff to process, for the pool of eligible NCE stations under its grandfather provision is much more limited.

<sup>6</sup> For this same reason, EIC believes the technical parity between commercial and NCE FM stations proposed by the Commission should not be limited only to second-adjacent channels but should extend as well to third-adjacent channels.

preserving or improving the integrity of the FM band, will therefore bring desirable scientific and logical equivalence to the Commission's rules as well as streamline and greatly reduce the current, unnecessary regulatory burden facing certain NCE FM stations, stations that are often the least able to afford such burdens.

EIC believes that the change will provide much needed flexibility for "short-spaced" NCE FM stations to change transmitter facilities or operating parameters, thereby permitting them to respond to changing circumstances, to reach their listening audience more efficiently and effectively while controlling interference, and to serve the public interest.

### **III. Negotiated Interference Agreements Should Be Permitted with Permissive Restrictions but with Strict Oversight and Severe Sanctions for Abuses**

The Commission proposes to permit both commercial and NCE FM stations to negotiate agreements and to file coordinated facility modifications in cases where new or increased interference would result, subject to four criteria.<sup>7</sup> EIC applauds the Commission's recognition that, due to changes in the radio industry and the Commission's own regulatory paradigm, it is not the Commission's duty to "mother" stations or to protect them "from their own [economic] folly."<sup>8</sup> In consonance with market realities and the deregulatory thrust of current communications policy, EIC believes that, in negotiating interference agreements, local stations familiar with their audience and their local environments are much more likely than the Commission or its staff to know who their audience is, where it is, and what is important to them economically. This is especially true for NCE FM stations which are funded by governmental units, school tuition fees, or corporate grants. Such

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<sup>7</sup> See Notice at ¶¶ 17 *et seq.*

<sup>8</sup> *Id.* at ¶ 19 (internal quotation marks and citation omitted).

stations do not need to rely upon external factors. Thus, to the extent the Commission believes that negotiated interference agreements must be limited to situations where service gains outweigh service losses,<sup>9</sup> the judgment of the station in question, based upon its familiarity with its local circumstances, should be given substantial weight and consideration.

Moreover, if the Commission is to permit market forces to play their duly influential role and to limit its regulatory hand where not essential, then the criteria used to determine the appropriateness of a negotiated interference agreement should not be too strict. As currently proposed, the Commission would restrict total interference received by any station from all interfering stations to be no greater than five percent of the area **and** population within each affected station's protected service contour.<sup>10</sup> EIC interprets the conjunctive use of the word "and" to maximize the restriction; EIC submits that a more permissive phraseology is more appropriate. As EIC understands the criterion, a station would be prohibited from entering into a negotiated interference agreement if 5.1% of the area within its protected service contour received interference even if only 1.0% of the population within its protected service contour received interference. This is too harsh. Instead, that station should be able to permit up to 5.0% of the population within its protected service contour to receive interference, even if that means 7.5% or 9.9% or 11.1% of the area within its protected service contour receives interference. In other words, a station should be permitted to receive interference even if more than five percent of its area **or** more than five percent of its population within the protected service contour is affected so long as both measurements do not exceed five percent. A permissive restriction of this type both furthers the Commission's goals

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<sup>9</sup> *See id.*

<sup>10</sup> *See id.* at ¶ 20.

of preventing excessive interference and gives sufficient consideration to a local station's judgment as to its own circumstances.

Similarly, the Commission's proposal requires that the "[t]otal service gain must be at least five times as great as the increase in total interference, in terms of both area and population."<sup>11</sup> Again, this is far too harsh and severely limits the local autonomy of stations to act on their knowledge of what is in their best interests. It is sufficient if the service gains merely outweigh the losses. The requirement of "five times" should be deleted from the proposal.

Although EIC believes the criteria should be loosened, the Commission's oversight should not be. The Commission should not rely on applicant certifications that do not contain supporting exhibits.<sup>12</sup> Applicants must not be permitted to play fast and loose when it comes to acquiring additional radio spectrum. Supporting exhibits should always be required, and careful review of these materials by the Commission's staff is fully warranted. In addition, the existence of such exhibits will allow competitors and the general public to help guard against intentional or inadvertent subversion of the Commission's rules.

The *Notice* further proposes to amend § 73.509 "to prohibit second and third-adjacent channel NCE FM stations from proposing transmitter sites within an affected station's 63 dBu contour" on the ground that "[t]his would prevent interference areas deep within a station's service contour, and assure minimum distance separations between stations."<sup>13</sup> As EIC understands this language, it appears to be technically illogical. The closer an interfering site is to the station's

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<sup>11</sup> *Id.*

<sup>12</sup> *See id.* at ¶ 21.

<sup>13</sup> *Id.*

transmitter, the *smaller* the area of interference is, because the desired signal is stronger closer to the transmitter, just as moving toward a speaker at a crowded cocktail party enables one to hear the speaker better. Accordingly, the best case would actually be co-located transmitters.<sup>14</sup> In any event, if the Commission is concerned that amendment of § 73.509 along these lines is necessary to prevent a deluge of modification applications, the deluge could be better prevented by only allowing NCE FM stations that are already “short-spaced” to utilize this provision. This alternative approach would effectively grandfather only a small number of eligible stations, which is what was done on the commercial side of the FM band. EIC sees no compelling reason not to provide equivalent regulatory treatment for situations that are functionally equivalent.

In certain cases where a short-spacing is proposed, the *Notice* creates a new “Section 73.215 condition” that freezes an affected station’s authorization with regard to the applicant’s proposed modification if it does not simultaneously increase its power to a full-class facility as part of the agreement with the applicant.<sup>15</sup> EIC rejects such a rigid rule. For any number of reasons, but particularly financial ones, it may not be feasible for the affected station to act simultaneously. While the affected station may be more than willing to enter into the agreement, the timing of the instigating applicant’s business needs should not be permitted to drive a business decision of the affected station. Thus EIC recommends that the second, affected station be permitted to place a “reservation” so that it could, at a later time, unilaterally increase its facilities within the stated reservation to cause interference to the initial applicant’s improved facilities. The terms of the

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<sup>14</sup> Comparison to NCE-FM/Channel 6 circumstances, where co-location allows the most transmission power, may be appropriate. *See Changes in the Rules Relating to Noncommercial, Educational FM Broadcast Stations, Third Report and Order*, FCC 84-515 (1984) at ¶¶ 10-12. 47 C.F.R. § 73.525(d).

<sup>15</sup> *See Notice* at ¶ 22.

reservation would be an integral part of the interference agreement, part of its consideration, subject only to a Commission-imposed sunset provision of five or ten years. In other words, the affected station would receive a *quid pro quo* and would be able to act within the terms of the reservation before its expiration date.

EIC believes there is no question but that the Commission should use the ratio method for determining areas of interference as adopted in the grandfathered short-spaced commercial FM station proceeding.<sup>16</sup> The ratio method is the *only* technically appropriate method for determining areas of interference because only the ratio of the desired to undesired signal, and its channel separation, determines whether interference will result.<sup>17</sup> EIC supports the proposed ratios.

The *Notice* seeks comment on specific enforcement procedures and sanctions with regard to applications for negotiated interference.<sup>18</sup> EIC submits that the appropriate sanction for parties who are found to have willfully provided false information to the Commission or to have willfully provided incomplete information with the intent to mislead or deceive the Commission is permanent revocation of all broadcast licenses.

In addition, EIC believes that the Commission should take serious and swift action against any broadcaster that presents “grey” data to the Commission or that uses regulatory loopholes to

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<sup>16</sup> *See id.* at ¶ 23.

<sup>17</sup> This is so provided the receivers are operating in a linear mode, which will be the case everywhere but directly adjacent to the transmitting antenna itself.

<sup>18</sup> *See Notice* at ¶ 26. In addition, the *Notice* states that, although most stations are built in accordance with their construction permits, the Commission has imposed severe sanctions where a broadcaster intentionally engages in unauthorized station construction. EIC believes that the Commission should likewise impose severe sanctions where a broadcaster intentionally *fails* to engage in authorized station construction. It is imperative that licensees not be permitted to “warehouse” spectrum.

“warehouse” spectrum. Spectrum “warehousing” is a disservice to the public interest and a hindrance to the legitimate growth of the radio broadcast service. This is such a serious problem that EIC recommends that the Commission go so far as to revoke the licenses and permits of those it finds taking part in this practice so that the Commission can return the spectrum to productive use by legitimate broadcasters. Furthermore, EIC is convinced, as a steward of a public resource, of the necessity of complete openness and public disclosure. All contracts, agreements, reports, and affidavits should be required public file material and should be made available for inspection and reproduction. Further, EIC believes that detailed financial data for all NCE FM stations should be included in the public file. In the case of multiple stations, complete information on all permits and licenses held should be placed in each location’s public file, and single copies should be made available through the mail to those unable to travel to the multiple sites. Public scrutiny will ensure the honest stewardship of the resources entrusted to public broadcasters.

EIC agrees that the negotiated interference proposal “would be particularly responsive to those situations where factors such as unusual terrain create anomalous service contours that block meaningful service expansions.”<sup>19</sup> For example, this is the precise situation that WKNC-FM is facing in relation to alleged interference to WSOE-FM. There is a tall and substantial mountainous area west of Chapel Hill, North Carolina, that shields WSOE from WKNC. Both stations should be able to take advantage of this terrain shielding so that both stations can make service improvements to their listeners and potential listeners.

Finally, the *Notice* seeks to develop a record on several technical and policy issues that its

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<sup>19</sup> *Notice* at ¶ 27.

negotiated interference proposals raise.<sup>20</sup> EIC responds to these issues as follows:

- \* With regard to the protection of listener and non-party interests, EIC believes that, ultimately, stations are supported by their listeners. There is, therefore, already a strong economic incentive that generally ensures protection of the interests of the listeners, irrespective of the proposed negotiated interference procedures.
- \* With regard to in-band on-channel (“IBOC”) digital radio systems, EIC believes that IBOC is likely to have a very sharp “cliff” effect and that coverage can be estimated as is being done with DTV. Similarly with interference contours. EIC suggests that appropriate power limits and injection levels for the IBOC signal can prevent interference problems before they occur.
- \* With regard to the danger of negotiated interference agreements engendering less flexibility over time, EIC agrees that the possibility exists but submits that it is more likely that the loss of a transmitter site will require a new site which would require a negotiated interference agreement. Overall, the benefits of the proposal outweigh its detriments.
- \* With regard to the concern of a general degradation of FM service, EIC interposes that, as time goes on, the quality of receivers improves. Each successive generation of receivers is better at discriminating against interference. Thus, there is unlikely to be a general degradation in FM service.
- \* With regard to certifications and compliance, EIC believes that the Commission should strictly scrutinize all applicant certifications and supporting exhibits. Compliance *must* be documented.
- \* With regard to additional procedural requirements, EIC believes that licensees should be required to maintain negotiated interference agreements in their local public inspection files and that they should be filed with the Commission.
- \* With regard to possible termination requirements, EIC submits that a negotiated interference agreement should definitely terminate if the license is sold or traded. Otherwise, some licensees will enter into interference agreements with the sole goal of enhancing the value and marketability of the license.

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<sup>20</sup> *See id.*

**IV. First Come/First Served Processing Should Be Extended to AM and NCE FM Minor Change Applications Only and the Definition of “Minor Change” Should Be Revised, Provided Financial Ability Is Clearly Documented**

EIC can fathom no coherent policy rationale for why non-reserved FM band stations should have received cut-off protection from mutually exclusive proposals but not reserved FM band stations. It appears the Commission at last recognizes that this inconsistent treatment imposes significant uncertainty and delay for reserved FM band stations since a conflicting proposal can halt further processing of the application, necessitating a technical amendment, or result in the designation of the mutually exclusive applications for comparative hearing.<sup>21</sup> Not only does this uncertainty deter reserved FM band applicants from seeking to improve service, but it permits certain unscrupulous broadcasters to game the process by cross-filing a competing application merely to impede the first broadcaster’s improvements.

EIC applauds the proposal to extend the first come/first served processing system to AM and NCE FM minor change applications.<sup>22</sup> However, this system should not apply to FM translators which are plainly a secondary service. Moreover, EIC believes the Commission should be wary lest certain broadcasters implement a “blanket the earth” policy and, accordingly, apply for every open frequency remaining. In addition, EIC recommends applying the policy retroactively to clean up the mess of existing conflicting applications.

The *Notice* further proposes to expand the definition of “minor change” for the AM, NCE

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<sup>21</sup> *See id.* at ¶ 46.

<sup>22</sup> *See id.* at ¶ 47.

FM and FM translator services to conform to the commercial FM “minor change” definition.<sup>23</sup> EIC agrees that, at a minimum, the commercial FM and NCE FM services should be treated the same. However, EIC submits that *every* applicant, whether new or existing, should be required to show “hard look” financial ability to build each and every one of the facilities requested at any given time and to operate all of the facilities requested at any given time for a period of six months without any revenue income from the new facilities. The Commission must be vigilant in protecting the public interest from those who would abuse the process or attempt to “warehouse” spectrum without the financial ability to actually construct all of the facilities requested.

Additionally, EIC recommends that the Commission recognize that the secondary service area of an FM station does extend significantly beyond the 60 dBu contour and that many listeners are in such areas. EIC suggests that the Commission should not allow translators operating on co-channels and first-adjacent channels to overlap with the 50 dBu signal of an existing station. Although translator owners technically are supposed to cure all such interference complaints, it never does happen in practice. EIC is aware of one case in which a translator operated by a religious group has been accused of sending out one of its ministers to the homes of complainants and asking them to rescind their interference complaint against the religious broadcaster. The Commission must recognize the problems that will continue to occur when translator applications are allowed in areas which otherwise receive secondary service from nearby licensed stations.

#### **V. The Classification of All Class D Facility Applications as “Minor” Is Premature**

The Commission proposes to revise certain rules concerning Class D stations, including

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<sup>23</sup> *See id.* at ¶ 50.

classifying all Class D facility applications as minor change applications to be processed under the first come/first served procedures.<sup>24</sup> EIC believes that this proposal is premature. It is likely to result in a deluge of new applications, especially with the emergence of so-called “micro-broadcasters.” What is to prevent an operator from filing for a number of Class D stations every few miles and chaining them all together? This would definitely create chaos in the FM band. At a minimum, consideration of this matter should be stayed pending a determination on the petitions for rule making that have been filed seeking the creation of a micro-broadcast license category.

Should a Class D station propose to upgrade to a Class A station, the modification must be classified as a major change. Since the initial creation of a Class A station is a major change, the modification into one must also be one.

### **Conclusion**

For the foregoing reasons, the Commission should use the opportunity of this rulemaking proceeding to bring the commercial and non-commercial FM services into technical and procedural parity. Accordingly, the Commission should act to eliminate the inconsistency between the commercial FM and NCE FM interference protection standards, and it should extend first come/first served processing to non-commercial FM, as well as AM, minor change applications. In addition, the Commission should permit negotiated interference agreements, within a relatively permissive framework, provided that the Commission exercises strict oversight and does not hesitate to severely sanction broadcasters that abuse the process. As the Commission reduces intervention by its regulatory hand into the technical aspects of the radio broadcast services, it is critical that the Commission be vigilant in enforcing its remaining procedures to protect the public’s interest in the

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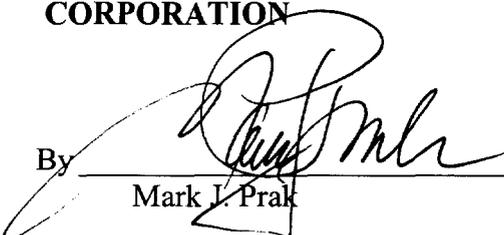
<sup>24</sup> *See id.* at ¶ 65.

fair and equitable utilization of radio spectrum.

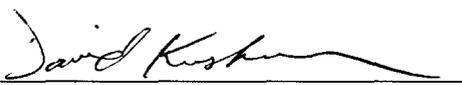
Respectfully submitted,

**EDUCATIONAL INFORMATION  
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