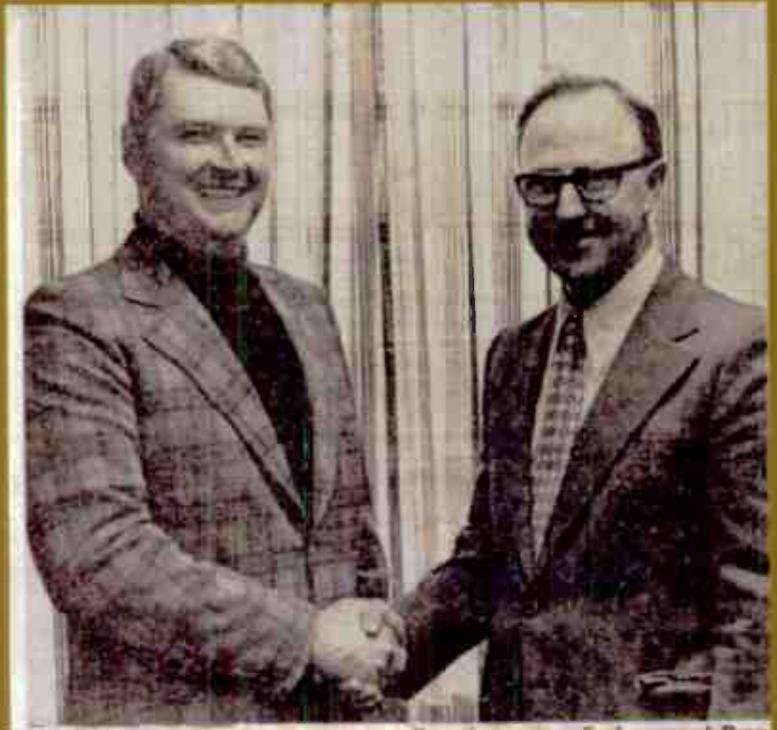


KWNS "The Mighty 1290"

"Protest Period Files 1959-1962"



By Ronald W. Detwiler

"The 1290 Frequency Contenders"



Wilmer E. Huffman



Francis C. Morgan, Jr.

Pier San, Inc. Group



***John Bozeman
"Mac Sanders"***



***Country Legend
Webb Pierce***



Jim Denny



K.W. Pyle

***No Photo Available
For Port Early***

KWNS “The Mighty 1290”
“Protest Period Files 1959-1962”

By Ronald W. Detwiler

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Library of Congress Control Number: 2015904467

Printed in the United States of America by Mennonite Press, Inc., Newton, KS,
www.mennonitepress.com

Introduction

When Bill Huffman filed for a construction permit on May 18, 1958 to build a second AM radio station in Pratt, Kansas, little did he know at the time, that the matter would not be settled until May 29, 1962. One day short of the hearing date set by the FCC on January 12, 1959, to grant approval to Bill, two other parties filed for an AM station in Larned, Kansas on 1290 kilocycles, the same frequency Bill had proposed for his station. The other parties in question were Clem Morgan, Jr. of Pratt and Pier San, Inc. composed of John Bozeman, K. W. Pyle, Port Early of Wichita, Kansas and Jim Denny, Webb Pierce of Nashville, Tennessee. Clem, Jr.'s Dad at the time owned and operated KWSK in Pratt, on the air since 1952.

My thanks to Bill Huffman for providing the legal documents of that critical time in the history of KWNS. My very special thanks to his daughter Cynthia Woods for scanning all the pages into a PDF format for me, a job I know took a lot of hours of computer time. As Fate would have it, I am glad I asked for all the documents to be scanned, so I could preserve them in the Pratt Library and Pratt Historical Museum and the State of Kansas as well. When Bill went to his attic to get them, he didn't know there was a small leak in the roof above the box. A few more months of time or less and they would have been lost forever. A few of the documents in this book very clearly show the water and mold damage. According to Bill, all comments or any underlining or highlighting that you see in the proceedings were done by his attorney, Francis X. McDonough.

Although it would have been great to combine the Hearing and KWNS history books, the total number of pages would have been too large, roughly 800 to 900 pages total. So it was decided to split the two. The history of KWNS is fully documented in the other book, "KWNS, The Mighty 1290 Radio Story", a station and story that almost did not happen.

Ronald W. Detwiler, AKA, "Rockin' Ronnie"

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Pre-Hearing Conference

FCC

September 12, 1960

9/12/1960

The above-entitled matter came on for further prehearing conference before Herbert Sharfman (the Presiding Examiner) in Room 1346, New Post Office Building, Washington, D. C., at 2:30 o'clock p.m.

APPEARANCES:

On behalf of Wilmer E. Huffman:

Francis X. McDonough, Esq.,
Dow, Lohnes & Albertson,
600 Munsey Building,
Washington, D. C.

On behalf of Francis C. Morgan, Jr.:

A. L. Stein, Esq.,
Warner Building,
Washington, D. C.

On behalf of Pier San, Inc.:

k John B. Kenkel, Esq.,
Miller & Schroeder,
218 Munsey Building,
Washington, D. C.

On behalf of Chief, Broadcast Bureau, FCC:

Ray Paul, Esq.

PROCEEDINGS

PRESIDING EXAMINER: Let us go on the record. This is a further prehearing conference called by me after some interchange of correspondence which seemed to generate disputes, and it is hoped that this prehearing conference will be instrumental in resolving those disputes. Let us have the appearances, then for today's session. For Wilmer E. Huffman?

MR. MCDONOUGH: Francis X. McDonough of Dow, Lohnes and Albertson.

PRESIDING EXAMINER: For Francis C. Morgan, Jr.?

MR. STEIN: A. L. Stein.

PRESIDING EXAMINER: For Pier San, Inc./

MR. KENKEL: John B. Kenkel of Miller and Schroeder.

PRESIDING EXAMINER: And for Chief, Broadcast Bureau?

MR. PAUL: Ray Paul.

PRESIDING EXAMINER: Now, I read with great interest the "Dear A." but "Dear Arthur" correspondence and was some-what struck by the friendly tone of it, although I don't say I quite appreciated the tenor of it entirely. That is, the responses.

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Now, there are two disputes for today's session primarily, one, relating to the logs and, two, relating to the production of the principals of Pier San. Now, apparently, whatever Mr. Stein has the answer was no. So let's first resolve if it is all right with counsel the question of the production of the principals of the applicant. The only one that Pier San is agreeable to furnishing right now is Mr. Pyle, who is the affiant. Mr. Stein, since you are the person requesting the production of those principals would you care to make a statement?

MR. STEIN: Well, I don't think there is any agreement to the effect that we would rely on any affiant who might happen to come in. Suppose they bring in an affiant or witness--Mr. X-- that had as much information concerning all these principals as Mr. Pyle, and by "information" I mean hearsay or otherwise, I don't think it was agreed he should be the person to come in. Secondly, I believe, just going over a pile of data very hurriedly, there is enough hearsay material. And even if he were here alone--and I don't say he should come here also first--that we would ask so many questions concerning hearsay that he would have to bring the other people in. I don't think we should string it out. I say bring a man in, No. 1, and if we need more bring in 2, 3, and 4. I don't think my client should sit here and wait for each round of witnesses. As I stated before, I don't think there is any such agreement that we would be bound by having only one witness. I don't think there is much else I can say.

PRESIDING EXAMINER: I noted that reference transcript 9 that Mr. Schroeder referred to in his letter, and I couldn't say that was any agreement on the part of the parties that they would rely exclusively on the affiant. It seems to me adequate cross-examination is an indispensable requirement of an examination at all and if that cross-examination is impeded in any way the direct examination must necessarily suffer. Well, Mr. Kenkel, do you have any support for your position that you will not produce those principals?

MR. KENKEL: Mr. Examiner, in light of your comments I find that I am laboring under a double burden, nonetheless, I will attempt to meet that burden and convince you of the soundness of our position.

PRESIDING EXAMINER: I wanted to state my position in advance.

MR. KENKEL: I appreciate it, because at least I see the direction I have to take. You can reach a goal by one of two roads and this one road is subject of a detour---

MR. PAUL: I don't want to interrupt but before Mr. Kenkel makes his statement I want to state for the Broadcast Bureau that we share the position with you. That Mr. Stein, if he desires to cross-examine the five stockholders in the application that these five stockholders should be submitted for cross-examination.

PRESIDING EXAMINER: Yes. I should have asked your position, Mr. Paul.

MR. PAUL: I have no reason to believe these people are being requested for harassment and therefore we have to honor--I think the Examiner should and the applicant should honor the request of other counsel in the proceeding. I might point out, first of all, most of these stockholders have past broadcasting experience. They are relying on this past broadcasting experience and Mr. Stein has a right to examine

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each of the stockholders as to his participation in other broadcast stations and to what extent was he personally responsible for the station's policies, the station's programs and the station's over-all performance. And certainly the Broadcast Bureau, if it had any adverse material against any of these witnesses, certainly we would request the applicant to produce these stockholders for cross-examination. Were it no so, an applicant could come forward with only the part of his case which was good, and put a heavy burden on the other applicants to show the other side of the coin. And we think in order for a hearing to be a full, fair hearing, conducted in an expeditious manner, that the stockholders of the applicant should be presented for cross-examination when directed by the parties.

PRESIDING EXAMINER: Mr. McDonough, do you have any position in this matter?

MR. MCDONOUGH: Sir, in view of the issues framed by the Commission in this proceeding wherein it might be construed as strictly a 307(b) case, insofar as the Pratt applicant and the Larned applicants are concerned, we would not wish to take a position with respect to the particular controversy between the two Larned applicants.

PRESIDING EXAMINER: Now, Mr. Kenkel, you know what you are up against then, a united front--I don't want to say "united front" but I will say front.

MR. KENKEL: I would like to say if we had this discussion last May 10th at the first prehearing conference and talking about the question, for instance, whether this should be a written or direct case, I would perhaps see merit in the views expressed by my brothers Stein and Paul; however, we are talking about something now that I think, forgetting for a moment the 9 of the transcript--I think we had the understanding at the May 10th conference-- it certainly was our intent and, I say this without fear of argument, the intent of the other parties at that time was to have a direct case in the most simple and expeditious manner possible. Frankly, if we are going to have all these witnesses here, why in the world did we go to all the trouble, time and bother to prepare this so-called written case? What I am going for is the rule of reason. I want to make this clear, we are not afraid of producing anyone. All we are asking for is let's have a little rule of reason applied here. Let's test the request again for a rule of reason. That is why, every frankly, we say, yes, we are more than glad to present the affiant, because that is the way we are trying our case. As Mr. Paul says, it's up to us to show two sides of the coin. I am saying now there are no two sides; both sides are good. It is not a question; that we are fearful of showing the reverse. I am saying here, we have our case, we thought we were trying a written case, we want to be cooperative, we want to be helpful, but we think it is imposing a little too much of a burden on the applicant to require all five of the stockholders to be here in Washington. We heretofore agreed to a written case and the understanding was it was to be in an expeditious and, I think,--using the word bluntly--in the least expensive manner possible, as far as the applicants are concerned. Now, I would suggest the Examiner and other counsel take a look at the exhibit and see what we have shown and notice that some of these people who have been requested are going to have little or no immediate day-to-day participation in the proposed radio station. The necessity for bringing them here, using the rule of reason, diminishes. I would like to say that in the event, in a manner of fairness and reasonableness, that some preliminary showing should be made why they want all these five stockholders.

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PRESIDING EXAMINER: I think so, too, in order to avoid any possible question of harassment. Merely dragging them across the country for the sake of visiting and making additional expenses, I am sure Mr. Stein does not have that in mind. I do think there ought to be a preliminary statement here as to the reason for calling these people. Let me say this, however, that apart from questions like the local residences are the residences of the principals to which Mr. Pyle deposes, I don't know of anything in here that he would be testifying to in writing except by way of hearsay, and it would be difficult to admit this matter in direct examination untested by any adequate cross-examination. So, as it stands then, if these people are called I would have to disregard everything that he didn't know about personally of these principals. All he would be able to say is this man, for instance, Mr. Bozeman lives in Wichita, Kansas, and maybe that he is married and has three children. Everything else in here, so far as Mr. Pyle is concerned, is hearsay.

MR. KENKEL: Mr. Examiner, if that is true then let's forfeit the written case and tear up these exhibits because we are going to go on a hearsay basis. A written case, as we understand it, comprises a certain amount of hearsay.

PRESIDING EXAMINER: Not necessarily. It doesn't mean that an affiant could make a general affidavit and that should preclude the other parties from adequately testing the testimony. I realize that this written case procedure to a certain extent is an anomaly; and it may be a snare of delusion and the people are under the impression they could avoid proper cross-examination by the other party. Now, nothing in our procedure, I don't think, is intended to preclude the other party from adequately testing the direct evidence in writing or orally. I didn't see how Mr. Stein could be stopped from calling those principals in order to introduce the direct evidence of Mr. Pyle, when Mr. Pyle would be testifying to what to me, at least, is the rankest hearsay.

MR. KENKEL: I would like to point this out: We are not trying to stop someone from cross-examination and, as I said, we are not afraid of bringing anyone here. I suggest the whole question must be tested against the rule of reason. We understood the proceeding the parties agreed to, that we were going to have this simple, inexpensive written case--

PRESIDING EXAMINER: When you say "simple case" you don't mean you should be the judge merely of how simple that case is going to be? The mere fact you chose Mr. Pyle to make an affidavit when obviously his affidavit is based merely on information and belief, to a large extent, shouldn't stop the other people from testing your case. Now, I do feel you have a point there insofar as this rule of reason is concerned. I don't want to visit unnecessary expense upon you, for example, if Mr. Bozeman comes and Mr. Stein will maybe say, "How are you?". That is just a fanciful statement, of course, but, Mr. Stein, have you any comment as to the scope of your possible examination of Mr. Bozeman, Mr. Earlu, Mr. Denny and Mr. Pierce?

MR. STEIN: Yes. I will ask them about policy problems, the radio experience they are relying on, and I want to find out about what their stations are doing.

PRESIDING EXAMINER: Do you contemplate a substantial cross-examination of all of them?

MR. STEIN: Yes. It may not be substantial. If certain questions

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are answered and you get what information you want, it's vdry quick, you complete your examination hurriedly. And there are some witnesses who are cagey and evasive and you have to keep on pressing and pressing.

PRESIDING EXAMINER: How about Mr. Bozeman? He has had radio experience, of course. Do you contemplate questioning him about that experience?

MR. STEIN: Yes, I will. He will be asked about his experience.. In fact I have already made the request for program logs of his station at Wichita and about the station in which he owns 100 per cent of the stock of the corporation as licensee.

MR. KENKEL: I would like to suggest this, since Mr. Stein has said perhaps some of the cross-examination wouldn't be extensive; even at this stage I think we ought to explore the possibility of using interrogatories. We are not afraid of questions; we are concerned about the time and expense of bringing five people here to Washington, because each of us has seen these cases where you get the man on the stand and he will be asked one question, and actually I have seen only one other question and not of a typical or true cross-examination nature, and the fellow is done. In the meantime he spends one or two days in a hotel and he disrupted his business and personal life, and I think this is a matter that should be considered, especially since the background against which it should be questioned is having a written case with all that is contemplated saving time, money and expense.

PRESIDING EXAMINER: Well, I have already stated what my idea of a written case is. It doesn't mean exclusively in writing to the extent that cross-examination is precluded, but where principals are concerned this question, of course, the matter of interrogatories may not be satisfactory. I don't know how the parties' minds are in that direction, but so far as I am concerned I would like to look these people in the eye if they are going to testify at all. Mr. Stein, do you have any comments?

MR. STEIN: I don't have any comments. I think we answered all those points earlier.

PRESIDING EXAMINER: Mr. Paul, what do you have to say?

MR. PAUL: I have no further comment, Mr. Examiner. The only point is, I think Mr. Kenkel has made a good argument on the rule of reason. Certainly, as I first stated, I have no reason to question why Mr. Stein is requesting these people for cross-examination, but it is hoped it was not for purposes of harassment. Certainly, I do not think they should be brought here for purposes of harassment, and on the basis Mr. Stein said he has substantial cross-examination of these four individuals I am of the position he has a right to cross-examination of them.

PRESIDING EXAMINER: Yes, I feel that way, too. I think he has a right to cross-examination. Our written procedures contemplate that and that has been the practice in all of these cases. The time is fixed in the schedule generally for the notification of witnesses desired for cross-examination, and I don't see how I can prevent Mr. Stein from calling these people.

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I realize that it's an expensive matter and undoubtedly onerous upon the Pier San applicant, but I don't see how I can rule otherwise than to say for an effective receipt of their evidence -- rather, of the evidence regarding these principals, they will have to be available to Mr. Stein and the other parties for cross-examination.

That, therefore, is the ruling in the matter. Mr. McDonough?

MR. McDONOUGH: I was somewhat disturbed by Mr. Kenkel's statement in the event he should be required to produce the five principals that he would feel that the original agreement for a case in writing would, in effect, be abrogated or tossed out the window.

The other parties to this proceeding did not request that I produce Mr. Wilmer Huffman for cross-examination, and if technical objections are made to the presentation of Mr. Huffman I would have considerable doubt about the method you follow from here on in.

MR. PAUL: As I view that, Mr. Examiner, we have an agreement for a case in writing and I don't think the production of these witnesses for cross-examination should affect that agreement whatsoever. The agreement was made by all the parties and accepted by the Hearing Examiner.

PRESIDING EXAMINER: I think so, too.

MR. PAUL: The case was exchanged by the parties and it still remains the affirmative presentation of all the applicants.

PRESIDING EXAMINER: I think so, too.

MR. KENKEL: I want to correct that, I did not say that our agreement of the case would be abrogated by the Examiner's ruling. However, I am stating they are going through these exhibits with the hearsay rule attached. The right shoe is put on the applicant Pier San, and the left shoe should be put on the other parties.

PRESIDING EXAMINER: I didn't say the hearsay rule is going to be enforced through this entire proceeding with all the judicial strictness. I don't say, Mr. Kenkel, anywhere in a case where a man presents an affidavit which is to testify the basis of which is obviously information as belief that that affidavit cannot preclude the other parties from calling the people involved about whom his testimony primarily is concerned.

MR. KENKEL: My thought there was, of course, if Mr. Stein wanted to call someone he certainly has a right to call anyone he pleases, and that, I think, would have been the proper procedure here.

As I understand your ruling, our exhibits as to the other four stockholders will not be accepted, or accepted in considerable abbreviated fashion unless the stockholder himself is available for cross-examination. That is the burden I see now cast upon us. If that be so, then I think a similar burden must be cast upon the other applicants.

PRESIDING EXAMINER: Maybe there are situations with regard to the other parties which are similar to use. I just can't think of it now.

MR. KENKEL: We didn't go through with the exhibits with that in mind. I think we certainly have the right and we will go through again in today's ruling in mind.

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PRESIDING EXAMINER: I want to make it clear I did not make a blanket ruling regarding hearsay as such, and that the application of the hearsay rule or its non-application will await the development. What I rule here today is as an effective requirement for the receipt of testimony in chief, adequate cross-examination is necessary, or the right of adequate cross-examination is necessary.

Now, we have then disposed of, I suppose, these four principals in addition to Mr. Pyle whom Mr. Stein has requested, and it is understood then that they will be produced?

MR. KENDEL: May I suggest, since this is a development, perhaps at this juncture we can consider the time schedule. I am sure all five certainly will not be needed on Wednesday if there are, as in all cases, things objected to from the exhibits. There are three from Kansas and two from Tennessee. I didn't expect this ruling; I was sanguine enough to believe in the merits of my position, and I have to get in touch with these five people and find out what their schedule is.

PRESIDING EXAMINER: There is the problem of -- this case is supposed to start on the 14th. What is the situation then? I have the 14th and 15th open, and so far as the 16th is concerned I will have a prehearing conference that may be confined perhaps to the morning.

MR. KENDEL: Huffman will be the first applicant, then Morgan and Pier San. Maybe we can guess at the time involved in each of the other two, or work out something else.

MR. McDONOUGH: Let me ask a question. Since the Huffman applicant is the first on the docket could I ask you, in light of your instant development, -- that is, the expression of your re-examination of our exhibit and also Mr. Stein's, of course, and Commission counsel -- do you think that it would involve a considerable amount of time?

MR. KENDEL: Mr. McDonough, the re-examination wouldn't, no. As of now, since we haven't called your principal and haven't indicated a desire for cross-examination, except for the argument on the admissibility I don't think it would take too long. I am not sitting here saying it's going to take more; I have to go through it again, in light of the Examiner's ruling, and it may or may not change my current estimate. I doubt it it will change, but there is that possibility.

MR. ~~STEIN~~ McDONOUGH: In view of the fact you are going to re-examine this, is there a possibility you might desire to have Mr. Huffman produced, even though it is beyond the so-called out-off date?

MR. KENDEL: Yes, that is a possibility. From what I recall going through the first time I will be again less stringent this time. I don't think so.

MR. STEIN: I advised Mr. McDonough we weren't going to call Mr. Huffman, and I make the same statement now. If there are any objections they would be very, very minor. I am sure they will take little time.

MR. PAUL: We have no desire to cross-examine Mr. Huffman. We have an objection to the case but it is based entirely on materiality, and we have no objections based on requiring Mr. Huffman's presence here in Washington.

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PRESIDING EXAMINER: Well, it is possible then that Mr. Huffman's case will be finished in comparatively short order, depending on what Mr. Kenekl is going to do.

MR. KENEKL: I don't think we will have to go through it and I don't recall anything that could cause us to change our mind in light of your ruling, but I do insist on leaving that crack open in case it is necessary to try to go through it.

PRESIDING EXAMINER: All right, then, that is the Huffman case. Now, how about your case, then, Mr. Stein?

MR. STEIN: Mr. Morgan arrived here and will be available.

PRESIDING EXAMINER: On what date? He will be here on the 14th?

MR. STEIN: He is here in the city already.

PRESIDING EXAMINER: There is a possibility, of course, he will be subject to cross-examination by Fier San, at least, and I suppose also to the Broadcast Bureau. I don't know if Mr. McDonough will participate in that cross-examination; it's up to him, of course. But let me ask this: How long that case takes depends on, I suppose, the cross-examination. Do you think, then, we will get to Mr. Kenekl's case on Thursday?

MR. KENEKL: I would like to have Mr. Pyle here Wednesday. He will be here Wednesday.

MR. PAUL: We can have Mr. Pyle here Wednesday and finish with Mr. Pyle and after that recess the case.

PRESIDING EXAMINER: All right, fine, we could do that.

MR. STEIN: I don't think that is quite fair to us. I had Mr. Morgan come here. I think his presence here would help me, and if it is going to be recessed that means he has to go home and come back again. I think that is an unfair burden on us.

MR. KENEKL: Since we are trying to work this out in a cooperative spirit -- and I hope the spirit of cooperativeness and reasonableness is again infused in each of us -- I can have two more of them here for Thursday. The others, I don't know anything about. That would give Mr. Stein to take two over the rack of cross-examination if he used up Thursday. The others, I possibly could get them Friday, I don't know. I haven't gotten in touch with them. I have been away myself and just now got back. If we can do that and let the question of a possible recess abide Wednesday by which date I will have more definite information.

PRESIDING EXAMINER: What shall we say then, that two of these stockholders will be here in addition to Mr. Pyle, and that so far as the other two are concerned you are not certain as yet whether you can get them by Thursday or Friday?

MR. KENEKL: I am going to try but I have no idea.

PRESIDING EXAMINER: That will depend on how the case is going along. If it is obvious we can't get to them there is no sense calling them. Unquestionably we will be able to get to two of these stockholders, I am sure, Thursday or Friday afternoon.

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MR. STEIN: Which two will that be?

MR. KENKEL: The two I am suggesting to be here Thursday are Bozeman and Port Early.

Again, there may be a slight problem with Mr. Denny, he is a practicing attorney and he has a schedule to rearrange. I am going to ask him to do his utmost to rearrange it, if it is necessary.

PRESIDING EXAMINER: Do we have to say any more about it? Mr. Stein, are you satisfied with the way it stands now?

MR. STEIN: Yes, I think so.

PRESIDING EXAMINER: All right, I won't make any further direction then. We will leave it in the record as it now stands.

Let us now consider the request by Mr. Stein for program logs and analyses. Mr. Stein, do you want to support your request?

MR. STEIN: I think this, again, is a pretty elementary thing. Mr. Paul raised the question and pointed out those people, presumably, are relying on past broadcasting experience. What they have done in the past, I presume, would be relevant.

I would like to add one qualification. I have selected certain days that are far more current than the composite week of 1959. One reason for that is we are just about ready to have the composite week of 1960. It will probably be released in a month; it's normally released September of each year.

If you think it is more desirable we would go along with the production of logs based on the composite week of 1959. And there is one other question that has come up. In some of the hearings I have been requested to break them down. At one time Mr. Schroeder thought that wasn't their duty. If you feel the mere production of the logs fulfills all the requirements by this applicant we will go along with that.

I have been requested to do this and several people had to break them down, because it's very difficult for an outsider trying to break down somebody else's logs. I have been stuck with my own client trying to break down logs working on renewal applications. If we receive the logs we will attempt to break them down and we will have to ask a number of questions. It may be all we are entitled to is the production of the logs and if we can't break them down we will ask for additional information.

PRESIDING EXAMINER: I hesitate to impose any work burden upon a party here in addition to the production of documents themselves.

Mr. Paul, have you any comment on Mr. Stein's request?

MR. PAUL: I agree with you, Mr. Examiner. I rather doubt the applicant could be required to furnish an analyses of the logs. I don't believe opposing applicants are entitled to the program logs themselves.

Let us look at this proceeding: The logs of the four stations requested, one of the stations is owned equally by five stockholders here, another station is owned 100 per cent by one of the stockholders, and two other stations are owned jointly by two additional stockholders? Is that right?

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MR. KENKEL: Approximately, yes.

MR. PAUL: And therefore there is no question, in my opinion, about materiality and relevancy. If maybe a 1 per cent or 2 per cent, an applicant may not have been a stockholder and not have an active participation, where you might reach some question of materiality or relevancy. But here where the stockholders are substantial stockholders I think then, certainly, these logs are material and relevant to the proceeding.

I don't think to state that the applicant here is not the licensee of those other stations answers the question. The fact is not the corporate applicant but the question is who are the stockholders themselves. The stockholders are individuals and as individuals they have responsibilities over these other stations, and they have the licensee's responsibility as well as the corporation, and the Commission looks through the corporate veil at all times to determine what is behind this corporate veil.

This is a matter I was trying to think of before I came down to the hearing, how many times I had this question to arise and in all comparative hearings I have had, except one, the parties have agreed to voluntarily furnish the program logs. This is the second dispute I ever had about program logs. The other dispute, without being facetious, the Examiner had refused to hear oral argument and she said as a matter of courtesy the program logs should be furnished, and directed them to furnish the program logs.

I think counsel has a right to examine this material and have the program logs and, as a courtesy to counsel, it appears to me, by agreement, the applicant should furnish the program logs to the other applicants in this proceeding.

PRESIDING EXAMINER: What do you think about the timing of the request? Pier San is raising an objection to the timing of the request, as I understand it, and saying it is too late.

MR. PAUL: I would go along with Pier San if it required a continuance of the hearing. Mr. Stein has not requested a continuance of the hearing whatsoever on the basis of his request. He merely wants the program logs present when he is examining these witnesses. Therefore, I think the timeliness is not a factor which would prevent the presentation or the bringing forward of the program logs.

PRESIDING EXAMINER: Mr. McDonough, do you want to make a statement now?

MR. McDONOUGH: I expressed no opinion on this prior to the proceeding.

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: Yes, I would like to answer one of the matters my brother Paul raised at the end of his discussion, and that is the matter of courtesy. I would ask Mr. Paul to reflect and search his memory and see if that case involving the question of courtesy did not involve the applicant's own radio station. I toss that out at this time as an answer to his question.

MR. PAUL: I can't distinguish this applicant here from KLOO. I can't distinguish this applicant from two stations which you own in Georgia. It's very hard to distinguish the two because your two stockholders here are the sole stockholders in the two Georgia stations.

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The same goes for KSIZ at Wichita, Kansas, the stockholder here has 100 per cent of the stock as the stockholder in KSIR. Because they are different corporate entities has no different effect on it.

MR. KENKEL: Not raising the question of the name or entity as much as practical, the two stockholders involved in the Georgia stations own 40 per cent of the instant application.

The Commission has, as I understand it, talked about majority and controlling stockholders. Assuming what you will about the operations of the Georgia stations, how can they be related to his new applicant controlled effectively and actually by two different parties? I think the two Georgia stations are out of it anyway.

I want to jump, if I may, to the question of materiality and relevancy -- I am prepared to make it now or later. I am talking now of the question of the duty of an applicant to respond to a request such as this. If Mr. Stein wants to obtain the logs and by the procedure open to him under the Commission's rule, then he has the logs here and then we are in a position to talk about relevancy and materiality.

I would like to say that the thing that disturbed us the most in Mr. Stein's letter is this suggestion the day before Labor Day we sit down and do a tremendous amount of work. He himself has admitted the great amount of real detailed work involved, and I submit, Mr. Examiner, no applicant has that burden cast on them.

PRESIDING EXAMINER: I have agreed with you. I am not requiring you to do that, Mr. Kenkel.

MR. KENKEL: And you know yourself -- I want to say this suggestion of discourtesy disturbs me and I want to suggest sometimes in trying to swallow an elephant it's not the tail that chokes you, it's the part that comes ~~before~~ before. You ought to know what followed, and you know what choked us when we got the request.

PRESIDING EXAMINER: Let's address our attention then to the logs themselves.

MR. KENKEL: On that the Commission, as I recall, has held that composite weeks are what normally are permitted in evidence, and it actually takes an agreement by the parties or some showing of special circumstances before a random week can be admitted. If there is any requirement it would be a composite week.

PRESIDING EXAMINER: this isn't an affirmative matter. This is by way of testing. So, that consideration might not be apt at this point but, nevertheless, let's consider that.

Mr. Stein, have you any objection to the consideration of the composite week?

MR. STEIN: No. If they want to bring the composite week for 1959 it's all right.

PRESIDING EXAMINER: I see no reason why these logs cannot be produced. I recognize that when Pier San saw the requirement they sit down before Labor Day and produce these analyses they were somewhat imagine perturbed, to put it mildly. Since that is out of the picture, I might- their inability to get these logs is not a pressing problem.

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So those logs will be produced then for the composite week of 1959 for the stations which Mr. Stein has requested?

MR. KENKEL: This is Monday and the hearing starts on Wednesday. We will certainly try to abide by your ruling, so they may be here Wednesday night or on Thursday.

MR. STEIN: I would like to say this: With respect to KLOO, Omaha, I understand this group required that station about June or July of 1960, and therefore there is no composite week. It wouldn't be of much value.

PRESIDING EXAMINER: You then suggest the week of August 21st for that station?

MR. STEIN: That is the reason I suggested otherwise.

PRESIDING EXAMINER: Can we get the week of August 21st of KLOO, Omaha?

MR. KENKEL: If it is the Examiner's ruling.

PRESIDING EXAMINER: I will rule since the composite week is not a measure of that stations let's get the week of August 21st of KLOO. Is there anything else?

MR. KENKEL: It depends on how extensive Mr. Stein goes into the logs. We then may have a case on rebuttal. Our direct case did not rely on the past operations of these stations and that is another ground, of course, to our objection on the requirement for production. However, if we go into them we certainly have a right to develop further whatever he brings up, either by way of exhibit or written testimony.

That is another reason the timing was poor. If it had only been mentioned in May we would have avoided this argument today and saved a lot of people a lot of difficulties.

MR. STEIN: I want to mention one other thing. Maybe I misunderstood counsel. I was under the impression they were relying on broadcast experience when they put in the exhibits especially by Mr. Pyle. He started back in 1924 with radio experience. Are they taking the position now they are not going to rely on radio experience?

PRESIDING EXAMINER: That wasn't it, I don't think, Mr. Stein. I don't think we need at this point to try to burden Mr. Kenkel.

MR. STEIN: I wanted to see if I misunderstood him. I thought he said they weren't relying on past operations.

PRESIDING EXAMINER: It was my understanding, Mr. Kenkel, you are relying on past broadcast experience?

MR. KENKEL: I don't want to duck your question, but in light of your ruling I think any argument is moot.

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MR. PAUL: There is one matter I would like to bring up. I called about the engineering. There seems to be a discrepancy in the engineering between Morgan and Pier San. Our engineer talked with Mr. Heffelfinger and pointed out a discrepancy, and we were of the opinion Mr. Heffelfinger is the engineer for Pier San and he told us he is, he was working out a stipulation with the engineering counsel for Morgan. And I want to find out how the stipulation is proceeding?

MR. STEIN: My recollection is now I spoke to Mr. Lorenz a day or two after he received these exhibits, which was about the 20th of the month, and he said -- this is only my recollection -- he said they hadn't worked out any stipulation as yet but something was being done. I haven't checked on it since then.

MR. PAUL: I talked with Mr. Schroeder one day last week and he said he would call his engineer and ask his engineer to get to work on it and try to have it by the hearing date, which is on Wednesday.

MR. KENZEL: I can't add very much, but my understanding is they are working on something, but where it stands I frankly don't know.

MR. PAUL: May I suggest to the parties I would appreciate it a lot if they would check on it so we can get out the engineering. I understand from my engineer this is his only problem in it. I think it's a discrepancy in the population figure in a particular contour. I think, my understanding if it is, your proposed lines are near each other and the people lying within the normal contour should be approximately the same. However, there is a discrepancy in the population figure.

MR. KENZEL: May I inquire, assuming they don't reach a stipulation where then do we stand?

MR. PAUL: We will probably have the engineers here to iron it out. I would like to have a stipulation on it. The engineers should get together and arrive at a reasonable figure for the population.

PRESIDING EXAMINER: Does that finish that, Mr. Paul?

MR. PAUL: Yes.

PRESIDING EXAMINER: Is there anything else then, gentlemen?

(No response.)

PRESIDING EXAMINER: May we adjourn then for the day? All right, this further prehearing conference is now adjourned and we will next meet on September 14, at 10:00 a.m.

(Whereupon, at 3:20 o'clock p.m., the prehearing conference was adjourned, to reconvene at 10:00 o'clock a.m., Wednesday, September 14, 1960.)

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All Parties

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PROCEEDINGS

PRESIDING EXAMINER: Let us go on the record. This is the day set for the hearing in the Pratt, Kansas case, Docket No. 13452, 70, 71. May we have the appearances for the hearing? For Wilmer Huffman?

MR. McDONOUGH: Francis L. McDonough, Dow, Lohnes and Albertson.

PRESIDING EXAMINER: And for Francis C. Morgan, Jr.?

Mr. STEIN: A. L. Stein, Warner Building.

PRESIDING EXAMINER: And for Pier San, Inc.?

MR. KENKEL: John E. Kenkel of Miller and Schroeder.

PRESIDING EXAMINER: For the Chief, Broadcast Bureau, Federal Communications Commission.

MR. PAUL: Ray Paul.

PRESIDING EXAMINER: All right. Mr. McDonough, I believe you are going to put your case on first, is that right, Sir?

MR. MC DONOUGH: Yes, I am ready to proceed.

MR. KENKEL: If I may, Mr. Examiner, I have one preliminary matter. I have just now handed Mr. Stein the logs of Radio Station KSIR for the week of August 21, that is the -- of the logs that is the only batch we have been able to get and we are going to deliver them as soon as we get them.

PRESIDING EXAMINER: All right, Sir.

MR. MC DONOUGH: Mr. Examiner, I have here three copies of the exhibits of Wilmer E. Huffman, the applicant for Pratt, Kansas, which consists of Exhibits 1 through 10 regarding the so-called lay case. The original copy of Exhibit 1 through 10, contains the original notarized affidavit of Mr. Huffman, as well as the notarized letters making up pages 2, 3, 4, 6, 7, 8, 9, 10, 11, and 12 of exhibit No. 8. I also have the original executed, sworn engineering statement of Mr. H. James, the consulting engineer for Mr. Wilmer E. Huffman, under dated July 30, 1960. I hand this material to the reporter and will proceed to identify the exhibits further. Exhibit No. 1 is entitled the history of Pratt, Kansas, and consists of ten pages. ~~XXXXXX~~ Exhibit No. 2 consists--is entitled the Government of Pratt, Kansas, and consists of two pages. Exhibit No. 3 is entitled "Churches in Pratt", and consists of three pages. Exhibit No. 4 is entitled "Schools in Pratt" and consists of one page. Exhibit No. 5 is entitled "Civic Clubs and Organizations in Pratt," consisting of five pages. Exhibit No. 6 is entitled "Major Businesses in Pratt," and consists of 13 pages. Exhibit No. 7 is entitled "Local Growth Statistics" 1950 to July 1, 1960 and consists of four pages. Exhibit No. 8 is entitled Pratt, Kansas, "Need for Unlimited Time Broadcast Facilities", and consists of 12 pages. Exhibit 9 is entitled "General Operations Policy" and consists of five pages. Exhibit No. 10 is entitled "Official Census Statistics" and consists of one page. Exhibit No. 11 consists of the Engineering statement of Mr. H. James, consulting engineer, in support of the applications. Prior to offering these exhibits, I wonder if any party has any qualifying questions.

PRESIDING EXAMINER: Are there any qualifying questions regarding Huffman Exhibits 1 through 11 for identification.

MR. STEIN: None on behalf of Morgan.

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MR. KENKEL: I have a number of qualifying questions, Mr. Examiner. I notice that Exhibit No. 1 includes a bibliography and I am asking whether the information set forth in Exhibit No. 1 has its source in one or more of the books, pamphlets and newspapers listed in the bibliography or whether in addition to the indicated source material there is some personal knowledge or other source?

MR. MC DONOUGH: I understand that the bibliography appearing at pages 9 and 10, contains the source material for all of the preceding pages 1 through 9 inclusive, and that there is no reliance in the exhibit upon personal knowledge.

MR. KENKEL: With respect to Exhibit No. 2, I see a source on page 2 of that exhibit. Is that source the sole source for Exhibit No. 2?

MR. MC DONOUGH: That is correct, sir.

MR. KENKEL: Rather than going through each of the exhibits, may I ask the same question about the other exhibits where a source is indicated?

MR. MC DONOUGH: That is correct, sir. The source indicated is the basis of the exhibit.

MR. KENKEL: So if this were an oral hearing this is the party who would have been adduced to give such testimony as is here written.

MR. MC DONOUGH: Yes, SIR. The party or parties?

MR. KENKEL: Party or parties, yes. Those are the only qualifying questions that I have.

MR. PAUL: The Broadcast Bureau has no qualifying questions.

MR. MC DONOUGH: Mr. Examiner, pursuant to a brief discussion, it has been more or less agreed among parties that the engineering showing on behalf of the respective parties will be offered in a group later in the day, so Exhibit 11 of Wilmer E. Huffman is not now offered in evidence. However, Exhibits 1 through 10 are now offered.

PRESIDING EXAMINER: Is there any objection to the receipt of Huffman exhibits 1 through 10 for identification, let us take them up one by one. Huffman exhibit 1?

MR. KENKEL: As a preliminary matter, Mr. Examiner, are you generally going to follow the procedure of having questions asked and objections made by the parties in the order they appear on the marthead of this hearing?

PRESIDING EXAMINER: Yes, I will do that. All right, I will do it in sort of round robin fashion, I guess. Starting after Huffman, Morgan, counsel for Morgan, then Mr. Stein?

MR. STEIN: Are you referring to Exhibit 1?

PRESIDING EXAMINER: I am referring to Exhibit 1. Have you any objection to its receipt?

MR. STEIN: No, sir.

PRESIDING EXAMINER: Now, Mr. Kenkel, have you any objection to its receipt?

MR. KENKEL: Yes, Mr. Examiner, I do have objections to Exhibit No. 1. The exhibit, consisting of eight pages of narrative statement, and two pages of bibliography, I find contain very extensive amounts of irrelevant and

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J. C. [unclear]

Immaterial matter. Speaking to the last two pages, I am not sure that the bibliography is a proper part of this case and I specifically object to the last two pages of Exhibit 1. A bibliography is certainly not, as I see it, within the scope of any issue here. I make a general objection to Exhibit 1 because I find it so shot through with irrelevant and immaterial matter that I think we are burdening the record by--and making an unduly difficult case for all of us if we go through and try to save perhaps two or three of four sentences that may not be quite so objectionable. If you want, I can take this line by line and go through it and point out why I think each one of, or the major part of the exhibit is improper, and I would be glad to do it. But I think--that is the basis of my initial objection because that is so shot through that we are going to have a difficult time and spend an awful lot of time arguing about the matter and I really think the applicant should be required to reform this exhibit and include in there only material that could be properly admitted.

PRESIDING EXAMINER: Let us have an example, Mr. Kenkel, of this irrelevant matter.

MR. KENKEL: Let's take page 1 of Exhibit 1, the first paragraph, I think I would not object to. The second paragraph, I would not specifically object to Paragraph 3, "the early history of Pratt reveals that A. J. (Skunk) Johnson was the first settler." I specifically object to that. I think we are just unduly burdening the record.

PRESIDING EXAMINER: We are also unduly burdening the record by objecting to that, Mr. Kenkel. I don't want to stop you from objecting, that is your perfect right. What difference does that make if that stays in there? How am I or anybody else going to be influenced by the fact that (Skunk) Johnson was the first settler?

MR. KENKEL: Mr. Examiner, I have asked myself the same question. If you go through you will find little bits of it in the initial decisions and in the final decision, and I don't think I should be importuned from drawing proper objections to that basis and that is why I suggested, Mr. Examiner, because of the difficulty, I think it will take some time and difficulty to point out specific objections, and that is why I think the exhibit should be reformed.

PRESIDING EXAMINER: If the other objections are of the same nature, I realize many of the things stated about Pratt are not the kind of things relevant to a 307 (b) determination. Whether "Skunk" Johnson is the earliest pioneer or whatever it is in the area is, of course, unimportant. But the entire purpose of this exhibit is to give some sort of a picture about Pratt. Now, often the particular matters recited are not the kind that strike the examiner's or the Commission's attention.

However, it is difficult in trying to picture a community to pick and choose the matters which may be of some cogency. I don't think that it is important enough to go through this entire exhibit to find out what is material or relevant or cogent or striking or what may be somewhat Chamber of Commerce in nature. I think you ought to leave it up to my good judgment, and perhaps you are not disposed to do that because you say that in past cases you have been amazed and astonished to find out what has crept into the initial decision.

But if it is all right with you, Mr. Kenkel, and perhaps it isn't, I request that we pass by any too acute analysis of this exhibit and just say that the exhibit will be appropriately discounted.

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MR. PAUL: Mr. Examiner, I have only one general objection to Exhibit 1, and that is to that portion of Exhibit 1, commencing with paragraph 3 there on the first page and continuing through the third paragraph on page 4, down to 1925 and 1950, Pratt, Kansas.

Of course, I don't desire to argue this objection in detail but I would just merely like to point out that in passing all of this is lumped together, and we don't think it has any materiality or relevancy to the proceeding. It is past history. It makes very good reading but we don't think --

PRESIDING EXAMINER: All right, it makes good reading, and all I can say at this point, gentlemen, is that I will discount that appropriately. I am not going to be enchanted by the man or minutia regarding the history of Pratt, Kansas, interesting though that may be to a Kansan. Is there any other objection to Exhibit No. 1?

MR. KEMMEL: If I may just a minute, Mr. Examiner, because I had this set up to go through it line by line -- in order that I may preserve a proper exception, is the examiner now ruling on my first two objections, in other words the one general objection and a request for reformation and, secondly, the first example of a specific one?

PRESIDING EXAMINER: Yes.

MR. KEMMEL: If the Examiner is overruling me I want the record to show it.

PRESIDING EXAMINER: Yes, these objections are overruled, yes. It is not necessary to take an exception on every unfavorable ruling.

MR. KEMMEL: I realize that, but when I do take an ultimate exception to the Commission to your ruling, I want to have a specific page in the transcript where I can make reference to it.

PRESIDING EXAMINER: All right.

MR. KEMMEL: In light of the examiner's two rulings and realizing any further objections that I do have to the exhibit being based on the same general ground would be overruled, I think I have preserved my position and I have no further objections.

PRESIDING EXAMINER: All right, then, with the comments that have already been made and subject to the understanding that the exhibit will be appropriately weighted, I hope, Huffman Exhibit No. 1 is received.

(THE DOCUMENT REFERRED TO, HUFFMAN EXHIBIT NO. 1 WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: Now, Huffman -- Mr. Stein?

MR. STEIN: I would like to say one other thing before you go to Exhibit 2. In most of these hearings it has been a practice to assume that the Examiner will disregard conclusions and it is hardly necessary for me to say that because it is understood by all of us that you disregard conclusory statements in all of these exhibits and base your decision solely on facts.

PRESIDING EXAMINER: Yes, I realize that. All appropriately discounted and weighed.

MR. MC DONOUGH: All exhibits, Mr. Morgan Mr. Pier San over there.

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PRESIDING EXAMINER: That's right. I hope I can appropriately weigh these matters.

MR. KENNEL: Mr. Examiner, one of the things, I think, is that the record should show in light of my previous statement I have not had a previous case before you so you were not one of the examiners included. Secondly, our problem is not so much with the Examiner as with the people along the further processes who have not had a further opportunity to participate in such discussions as we have here and that is why I really feel we must make these objections.

PRESIDING EXAMINER: Certainly, Mr. Kennel, you vigorously protect your records. I didn't take your remarks amiss, I want you to understand that. Now, Huffman Exhibit No. 1, is there any objection to that, Mr. Stein?

MR. STEIN: No, sir.

PRESIDING EXAMINER: Mr. Kennel?

MR. KENNEL: Yes, Mr. Examiner. The paragraph on page 1 of Exhibit 2, entitled "Police Department", the sentence, "The city has received any number of safety citations from the national and state Safety Councils in all classifications I submit is objectionable for lack of specificity and because of our inability to cross-examine people here, I don't believe it should be in.

PRESIDING EXAMINER: Mr. McDonough?

MR. MCDONOUGH: I really have no comment, sir. It is perhaps, if Mr. Kennel objects to such statements, I have no objection to their being stricken.

PRESIDING EXAMINER: All right, let that sentence be stricken.

MR. KENNEL: The same comment, Mr. Examiner, with reference to the last sentence under the paragraph entitled Fire Department, and this sentence appears at the top of page 2 of Exhibit 2.

MR. MCDONOUGH: O.K.

PRESIDING EXAMINER: same thing then, that sentence may be stricken, it begins "The record of the local Fire Department" to the end of the paragraph.

MR. KENNEL: That ends my objections with respect to Exhibit 2.

PRESIDING EXAMINER: All right.

MR. PAUL:

MR. PAUL: I have no objections.

PRESIDING EXAMINER: All right.
Exhibit No. 2 is received, Huffman Exhibit No. 2 is received, with the material stricken as indicated.

(HUFFMAN EXHIBIT NO. 2 WAS RECEIVED IN EVIDENCE.)

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PRESIDING EXAMINER: Huffman Exhibit No. 3.
Mr. Stein, any objection?

MR. STEIN: No, sir.

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: Commencing at the middle of page 2 of Exhibit No. 3 where it starts "Church Anniversaries", I submit, Mr. Examiner, this is wholly irrelevant and immaterial and does nothing more than burden the record. I don't think that either the parties, the Examiner or the Commission later should even be forced to go through it to read it and then discount it, as we apparently are doing with some of these things and I think it should be specifically removed and I therefore object to that part of the exhibit, to the balance of Exhibit No. 3 commencing with Church Anniversaries.

PRESIDING EXAMINER: How about the first sentence "Three of Pratt's churches have celebrated their 75 Birthdays. It has some relevance as to the age of the town and the fact it has been --

MR. KENKEL: Yes, I agree and, therefore, if I may, My objection would not encompass that first sentence.

PRESIDING EXAMINER: All right.
MR. McDonough?

MR. MCDONOUGH: I think if you want to be technical, perhaps, Mr. Kenkel is correct. But I think the remaining portion of the first paragraph is also factual in that it sets forth the dates of organization of the churches that are mentioned in the first sentence.

PRESIDING EXAMINER: That's right.
How about the rest though of that matter objected to by Mr. Kenkel?

MR. MCDONOUGH: I would have no objection to its being stricken.

PRESIDING EXAMINER: All right. Let the first paragraph remain under "Church Anniversaries", but then let the balance of the material on pages 2 and 3 of Exhibit No. 3 be stricken.

MR. MCDONOUGH: With the exception of the source?

PRESIDING EXAMINER: All right, with the exception of the source. It may remain of course.

MR. PAUL, have you any objection to Exhibit No. 3?

MR. PAUL: I have no objection.

PRESIDING EXAMINER: With that material being stricken, Huffman Exhibit 3 is received.

(HUFFMAN EXHIBIT NO. 3 WAS RECEIVED IN EVIDENCE.)

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PRESIDING EXAMINER: HUFFMAN Exhibit No. 4, Mr. Stein?

MR. STEIN: No, sir.

PRESIDING EXAMINER: No objection?

MR. STEIN: That is correct.

PRESIDING EXAMINER: Mr. Kenkel.

MR. KENKEL: I have no objection.

PRESIDING EXAMINER: All right.
Mr. Paul?

MR. PAUL: No objection.

PRESIDING EXAMINER: All right, Huffman Exhibit No. 4 is received.

(HUFFMAN EXHIBIT NO. 4 WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: Huffman Exhibit No. 5?
Mr. Stein?

MR. STEIN: No objection.

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: I have this objection to Exhibit No. 5, I really don't think the record should be encumbered with the officers, and I think very frankly, that except in perhaps one or two instances the nature and the purposes of the various organizations listed is so well known as to not be necessary. I think on the basis of hoping not to encumber the record I would ask that go out. However, I have no strong feeling about that, if the examiner and the other parties want to keep it in, but I do specifically think the officers of these several organizations are not pertinent or relevant to this hearing here.

MR. MC DONOUGH PRESIDING EXAMINER: Mr. McDonough?

MR. MC DONOUGH: Mr. Examiner, I have gone along with Mr. Kenkel, but I think perhaps while findings cannot be made in this proceeding because Delmer Riney is an immediate past president of the Chamber of Commerce, that the fact of the officers and the purposes of these organizations, even though they are well known to those who are acquainted with the Kiwanis Club and the Junior Chamber of Commerce, I think it is significant and it will not unduly burden the record, because it shows, to my way of thinking, the thoroughness and the accuracy with which we endeavored to prepare the material that we submitted in this proceeding, and while technically it may be that while we all know these things, the fact that they are there, we will have them in the record in case anyone should for any reason wish to make use of the

MR. KENKEL: Mr. Examiner, may I answer that and that is very frankly, I am not trying to re-argue matters that are perhaps moot but I think that is one of the things I pointed out in my objection at the beginning and I, frankly, didn't realize that anyone is going to make the argument because they included an awful lot of -- I am not going to use the word I have in mind, but an awful lot of immaterial stuff, they are going to say, "We prepared a better case." If that is the position then I certainly think we ought to require the applicant to reform the exhibit and so I want to answer that specifically, and I am forced to go through this with even more objections than at this time.

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PRESIDING EXAMINER: Mr. McDonough.

MR. MC DONOUGH: I didn't mean to infer we are going to say that because we put in five pages and put in the name of the officers of the Chamber of Commerce that we prepared a better case. There is no point in saying that.

PRESIDING EXAMINER: All right.

MR. MCDONOUGH: What I am saying is it is merely an indication of the method that was used in the preparation and the assimilation of the material that is submitted here.

PRESIDING EXAMINER: All right.

It is not going to be considered a point of preference certainly by the examiner.

It does indicate to me that these organizations are live and functioning organizations and for that reason, I think we can leave it in. It might have been left out, of course, but I don't see much difference of the fact that it is included.

Mr. Paul -- yes, Mr. Kenkel?

MR. KENKEL: I have just one other comment. As you know this was a written case as the material was originally prepared by the applicant and according to established procedure, it was submitted to the attorney for review, as attorneys we struck out an awful lot of our applicant's initial presentation because we felt it would be irrelevant, immaterial, hearsay and that sort of thing, and so we used our judgment as attorneys to try to keep it within the realm of competency, and that is why I most vociferously object to any thought that because the material submitted by another applicant contain incompetent and irrelevant material that any consideration would be given to the question of preparation.

PRESIDING EXAMINER: Mr. Kenkel, no consideration will be given to the question of voluminous or excessive thoroughness, if you want to call it that. The fact that these officers are mentioned is certainly not going to be a preference point, or the fact of their existence is no preference point. The only matter to which that could have any relation is with the one I mentioned, that is that these organizations are existing and functioning organizations. They have a roster of officers, that they are not merely an ornament upon the Pratt, Kansas scene.

Is there any other objection?

MR. PAUL: I have no further objection. I would probably join Mr. Kenkel in his objection to the officers and directors.

PRESIDING EXAMINER: Yes.

Anything else, Mr. Paul, I am sorry I interrupted you.

MR. PAUL: Nothing further.

PRESIDING EXAMINER: With that comment and with the understanding that the names of the officers are of no immediate consequence, the only purpose that the listing of these officers serves, so far as I am concerned, is that it indicates that these organizations are functioning organizations and Exhibit No. 5 is received.

(RUSTIAN EXHIBIT NO. 5 WAS RECEIVED IN EVIDENCE.)

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PRESIDING EXAMINER: Now, Exhibit No. 5. Mr. Stein, have you any objection?

MR. STEIN: No, sir.

PRESIDING EXAMINER: Mr. Kennel.

MR. KENNEL: Perhaps this should have been a qualifying question, if I may ask it and get the answer, I don't have any objection, the names listed under the several businesses, professions and enterprises, do they have any significance, in other words, are they going to be relied on in any way? Just grabbing one, under the attorneys, a Don E. Brown is practicing in Pratt, are we going to find his name else-where in this case?

MR. MC DONOUGH: No, sir.

MR. KENNEL: I don't think that the names and addresses of those people engaged in the several enterprises and activities listed have -- do anything more than encumber the record.

And I would object to that, that they are included there. I think the exhibit could properly list the number of them and then if there were any question, the people comprising the several numbers could be shown just show in fact those numbers were present, but I think in the first instance, coming with all these names we are going to have a difficult job going through and preparing proposed findings, if we have got to worry about do these names have any significance?

PRESIDING EXAMINER: Well, Mr. McDonough has told you the names have no significance. This is merely a less succinct method of telling you how many people there are under each heading, that is all.

MR. MC DONOUGH: It is correct, and it is ~~not~~ merely a listing of the various types of business and you might say, in effect, the number of attorneys of record practicing in Pratt, Kansas.

If we merely, for example, had put down that 7 law firms were practicing in Pratt, and you wished to challenge that, why here we give you the names. If you feel, for example, Alfred Williams is not a practicing attorney in Pratt, we said we have counted him.

MR. KENNEL: One or two other questions: Are all the addresses listed within Pratt, I see some of them with an RFD Address, I assume they are not within the town of Pratt, and I thought I had better ask the question.

Just for an example, I am turning to page 2 of Exhibit 5 under "Used Automobile Parts, Moon Salvage, RFD 12", and "Patrick Salvage, RFD 1"?

MR. MC DONOUGH: For example, "51 Auto Salvage", the salvage yard itself is located just outside the city itself; and it is so indicated.

MR. KENNEL: Let me ask this, the addresses given, for example, 501 West for the Crouch Radiator Service, is that within the city limits of Pratt, as we know it?

MR. MC DONOUGH: Yes, sir.

MR. KENNEL: Does that answer apply to every other address except the RFD

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MR. MC DONOUGH: Where it is indicated in the exhibit as RFD, the address listed is out of the city of Pratt -- the RFD, with that exception, the RFD being naturally outside the city, why all these other addresses are in the city.

PRESIDING EXAMINER: Why were the RFD's included where there is no address also within the city of Pratt?

MR. MC DONOUGH: They are right adjacent to the city, and the city limits just have not reached out and encompassed them and the street designation is not yet known and it is an RFD.

PRESIDING EXAMINER: I see, but they are within the area which will be shortly within the city limits, is that it?

A Yes, sir.

Q All right.

MR. KENNEL: Mr. Examiner --

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENNEL: I think, Mr. Examiner, I want the record to show that is not testimony.

PRESIDING EXAMINER: That is the statement of counsel, of course, McDonoug

MR. KENNEL: Yes.

PRESIDING EXAMINER: Have you any objection?

MR. KENNEL: I do, for the record, have objection to listing the names and addresses, and I do have further objection of including within any of these addresses which are not within the town of Pratt because the exhibit is entitled "City of Pratt Major Businesses."

PRESIDING EXAMINER: Do you have any objection, Mr. McDonough, to disregarding those RFD's excepting page 2 where the salvage yard also had an office within the city?

I realize it is a very acute objection, but it is one that I think may be made, of course.

MR. MC DONOUGH: If Mr. Kenkel keeps on raising all these technical questions, rather than waste time and going through these things ITEM BY ITEM, I will agree to that understanding.

PRESIDING EXAMINER: All right.

Of course as far as your objection is concerned, as to the listing of the names, I have already expressed my view of that, that is merely a less terse or succinct way of stating the number of businesses.

Mr. Paul, have you any objections?

MR. PAUL: I have no objections.

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PRESIDING EXAMINER: All right. With the understanding that the businesses outside the city of Pratt, designated by PFD numbers may be disregarded, with the exception of the one on page 2, 61 Auto Salvage which also has an office within the city of Pratt, exhibit, Huffman Exhibit No. 6 is received.

(HUFFMAN EXHIBIT NO. 6 WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: Huffman Exhibit No. 7, is there any objection to that Mr. Stein?

MR. STEIN: No, sir.

PRESIDING EXAMINER: Mr. Kerkel?

MR. KENZEL: No objection.

PRESIDING EXAMINER: All right. Mr. Paul.

MR. PAUL: No objection?

PRESIDING EXAMINER: All right, Huffman Exhibit No. 7 is received.

(HUFFMAN EXHIBIT NO. 7 WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: Huffman exhibit no. 8? Mr. Stein?

MR. STEIN: No, sir.

PRESIDING EXAMINER: Mr. Kerkel?

MR. KENZEL: Yes, I do have objections to portions of Exhibit 8. I have an objection in its proposition of the last sentence, of the first paragraph, and that is the phrase that the City of Pratt does not now receive a night time primary AM broadcast service from any existing station? I don't see that the qualifications of the witness to express that statement have been shown.

I think it is an engineering matter. I don't know whether or not it is shown in the engineering portion but I think it should be stricken from the lay exhibit.

MR. MC DONOUGH: I have no objection to its being stricken from the lay exhibit since it does appear in the engineering exhibit.

PRESIDING EXAMINER: All right. Let me just say then, Mr. Kerkel, that the portion of the last sentence of the first paragraph of Exhibit 8 which states "And in fact, does not now receive a night time primary AM broadcast service from any existing station", is stricken.

MR. KENZEL: I also object to the last paragraph of Exhibit No. 8.

PRESIDING EXAMINER: Mr. McDonough, have you any comment on that?

MR. MCDONOUGH: It is merely an explanation of what follows. Whether it is conclusory or not, why, I won't argue that point.

MR. KENZEL: I think that is the ultimate issue to be determined.

MR. MC DONOUGH: Yes.

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PRESIDING EXAMINER: Yes, that is right.

MR. MC DONOUGH: I would have no objection to that being stricken.

PRESIDING EXAMINER: All right. Then let the last paragraph of Exhibit No. 8 be stricken.

Is there any other objection to Exhibit No. 8, Mr. Kenekl?

MR. KENEKEL: No, Your Honor.

PRESIDING EXAMINER: Mr. Paul?

MR. PAUL: Yes, I have a few objections, Mr. Examiner. Following the first page there are several letters, I could go through each letter and identify each letter but I don't think it is necessary, but I would request the examiner to disregard those portions of the letters which are enforcements because that is immaterial to the proceeding.

In addition, I would request the examiner to disregard portions of the letter which relate to any matter of the proposed programming of the station. I have no objection to the letters going in to state that these organizations do, in fact, exist, and that these people would like to use a night time primary service as a means of local expression. Do you desire me to go through letter by letter, Mr. Examiner?

PRESIDING EXAMINER: No, I don't think that is necessary, Mr. Paul. I got the drift of your objection, of course, the tenor of it, I should say, and

is there any other objection than to Exhibit 8?

All right, with the understanding that the request of Mr. Paul will be accorded to, that is that the letters will be considered to show that these organizations are in existence and would make use of the services of a night time facility, and that other portions of those letters will be disregarded, of the nature of Exhibit 8, that Mr. Paul referred to, Huffman Exhibit 8 is received.

(HUFFMAN EXHIBIT NO. 8 WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: I should have asked you, Mr. McDonough, do you have any objection to Mr. Paul's request?

MR. MC DONOUGH: I would agree to have the letters, admitted, as modified by the statements made by counsel.

PRESIDING EXAMINER: Exhibit No. 9? Mr. Stein?

MR. STEIN: No objections?

PRESIDING EXAMINER: Mr. Kenekl?

MR. KENEKEL: Yes, Mr. Examiner, I do have a number of objections to Exhibit No. 9.

MR. PAUL: I have a general objection to Exhibit No. 9.

MR. KENEKEL: I have a general one: It is an attempt by the applicant to show his program proposals which the Commission has said in a 307(1) proceeding not to be proper. Even though it is entitled "General Operating Policy" it is an attempt to show this by an improper manner. I have a number of cases here.

MR. PAUL: I join in that objection of Mr. Kenekl. I don't think it is necessary to argue that in view of the fact, Mr. Examiner, of the Commission

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most recent decision in the Cookeville Case where the Commission has made it very explicit that no program and programming policy are admissible in 307(b) cases in the absence of a program issue.

PRESIDING EXAMINER: Yes, Mr. McDonough. Do you have any comment on that?

MR. MC DONOUGH: I have no objection to Exhibit No. 9 being stricken.

PRESIDING EXAMINER: All right, Exhibit No. 9 is withdrawn.

MR. MC DONOUGH: I will withdraw it then.

PRESIDING EXAMINER: All right, Huffman Exhibit No. 9 is withdrawn.

(HUFFMAN EXHIBIT NO. 9 WAS WITHDRAWN.)

PRESIDING EXAMINER: Let us get then to NO. 10. Mr. Stein, any objection to that?

MR. STEIN: No, sir.

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: No objection.

PRESIDING EXAMINER: Mr. Pual?

MR. PUAL: No objection.

PRESIDING EXAMINER: All right, Huffman Exhibit no. 10 is received.

(HUFFMAN EXHIBIT NO. 10 WAS RECEIVED IN EVIDENCE.)

MR. McDonough, is there anything more to your case, then, now?

MR. MC DONOUGH: The only remaining portion of the case will be the submission of the engineering exhibit at the proper time later in this proceeding.

PRESIDING EXAMINER: Now, Mr. Huffman, as I remember, was -- am I correct, was he requested for cross-examination?

MR. MC DONOUGH: No, sir, Mr. Huffman had the opportunity to come back to Washington and he wished to see the case and the presentation.

PRESIDING EXAMINER: I see. I just had that letter in mind before, but it was Mr. Morgan who was asked.

MR. MC DONOUGH: Yes, Mr. Huffman was not requested to be produced for cross-examination by anybody.

PRESIDING EXAMINER: All right.
Apart from the engineering exhibit there is no more to your case, at least at this time?

MR. MC DONOUGH: That is correct, sir.

PRESIDING EXAMINER: All right.
Do other counsel have any comment regarding the Huffman case, so far as putting anything else in is concerned?

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MR. PAUL: We have no comment, Mr. Examiner. We did not desire to cross-examine Mr. Huffman, and therefore, did not call him.

PRESIDING EXAMINER: All right.
Then may we proceed to the case of Francis C. Morgan, Jr.?

MR. STEIN: Yes, sir.

PRESIDING EXAMINER: All right, let us proceed to the Morgan case then.

MR. STEIN: If Your Honor please, we exchanged with opposing counsel on or about August 17, a list or set of our proposed exhibit, together with an affidavit. Mr. Morgan is present here, and I thought for the convenience of everybody I might give to everyone the exhibit numbers which we have associated with each one.

We have reserved for Exhibit No. 1 or call it Morgan Exhibit No. 1, if you wish, the engineering statement of Edward Lorentz.

(THE DOCUMENT REFERRED TO WAS MARKED MORGAN EXHIBIT NO. 1 FOR IDENTIFICATION.)

MR. STEIN: I would like to make a statement off the record for just a moment, if I might.

PRESIDING EXAMINER: All right. Sure, would you do that, Mr. Stein.

(Discussion off the record.)

PRESIDING EXAMINER: Back on the record.

MR. STEIN: We can defer the introduction of the engineering exhibit although I am ready to present it now.
Morgan Exhibit No. 2 is a statement of one sheet entitled re Larned.

(THE DOCUMENT REFERRED TO WAS MARKED MORGAN EXHIBIT NO. 2 FOR IDENTIFICATION.)

MR. STEIN: Morgan Exhibit No. 3 is a statement consisting of three sheets entitled "The Applicant".

(THE DOCUMENT REFERRED TO WAS MARKED MORGAN EXHIBIT NO. 3 FOR IDENTIFICATION.)

MR. STEIN: While I am on it, there may be a few minor changes in some of the these exhibits as originally exchanged, and Mr. Morgan when he takes the stand will describe the changes.

Exhibit No. 4 consists of four pages and it is entitled "Program Contacts".

(THE DOCUMENT REFERRED TO WAS MARKED MORGAN EXHIBIT NO. 4 FOR IDENTIFICATION.)

MR. STEIN: Exhibit No. 5 consists of five pages and is entitled "Proposed Program Schedule."

Actually it includes one schedule Monday through Saturday, one schedule for Sunday, and page 5, which has some footnotes, also.

(THE DOCUMENT REFERRED TO WAS MARKED MORGAN EXHIBIT NO. 5 FOR IDENTIFICATION.)

MR. STEIN: Exhibit No. 6 consists of four pages and it is headed "Description of Certain Programs".

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(THE DOCUMENT REFERRED TO WAS MARKED MORGAN EXHIBIT NO. 6 FOR IDENTIFICATION)

MR. STEIN: Exhibit No. 7 consists of one sheet, and it is entitled "Program Log Analysis".

(THE DOCUMENT REFERRED TO WAS MARKED MORGAN EXHIBIT NO. 7 FOR IDENTIFICATION)

MR. STEIN: Exhibit No. 8 consists of one sheet, and it is entitled "Proposed Staff and Operations of the Station".

(THE DOCUMENT REFERRED TO WAS MARKED MORGAN EXHIBIT NO. 8 FOR IDENTIFICATION)

MR. STEIN: Mr. Morgan is now ready to take the stand and give the corrections.

PRESIDING EXAMINER: I see. These exhibits are not offered at this moment, but you will offer them.

MR. STEIN: Just have them marked for identification.

PRESIDING EXAMINER: All right.

MR. STEIN: There may be some objections and I would rather defer any offer until we have them all.

Thereupon,

FRANCIS C. MORGAN

was called as a witness, and having been first duly sworn by the examiner, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEIN:

Q Please state your name and address?

A Francis C. Morgan, Jr. 1102 Champa Street, Pratt, Kansas.

Q Are you an applicant in this proceeding?

A Yes.

Q Do you have before you Morgan Exhibits 2 to 8, inclusive?

A Yes.

Q Do you recall we exchanged drafts of these exhibits with other counsel on or about August 17. Are there any corrections you wish to make in each of the exhibits, and please in making the corrections, refer to the exhibit number and page number.

A In Exhibit No. 3 the applicant --

Q What page?

A Page 3, the last sentence of paragraph 1, I would like to insert "Many of these civic activities were done by the applicant on his own time," in that sense.

Q In other words, you are substituting the sentence you have read for the

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one that is in there now.

A Yes.

Q Correct. What is the next one to which you make corrections?

A The next correction is in the proposed program schedule, Exhibit 5.

Q What page would that be on, please?

A Page 4: Add to the footnote "May also obtain some from National Association of Educational Broadcasters."

PRESIDING EXAMINER: Where was that, Mr. Morgan, did you say?

THE WITNESS: Exhibit 5 on the Proposed Program Schedule, page 4, add that to the footnote.

BY MR. STEIN:

Q All right. What is the next exhibit on which you wish to make correcti

A Upon description of program, Exhibit 6, page 2, after description of the three o'clock Farm Hour, "will carry at 6:00 a.m. until there are objectie under 3.87".

MR. KENNEL: Is that a final sentence to be added to this presently appearing paragraph?

THE WITNESS: Yes.

MR. KENNEL: ~~But~~ what was that again that is to be added?

THE WITNESS: I don't understand your question.

MR. KENNEL: What is this material to be added?

THE WITNESS: "will carry at 6:00a.m. until there are objections under Section 3.87."

BY MR. STEIN:

Q What is the next one, please?

A The next one is page 4 of Exhibit 6. At 10:55 insert "and 11:55".

PRESIDING EXAMINER: What page was that, Mr. Morgan?

THE WITNESS: That was page 4 of Exhibit 6.

PRESIDING EXAMINER: That is something I don't have, apparently. Mine ends at page 3. I thought I had that.

THE WITNESS: On page 4 after 1:45 insert, "Three o'clock World News", and after 3:30, insert "4:45, Kiddies' Hour."

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Exhibit 8, after the last word on the page, add "For example, the Farm Hour would be carried at 6:00 a.m."

MR. STEIN: Do all counsel have all the corrections?

BY MR. STEIN:

Q Mr. Morgan, were Exhibits 2 to 8, inclusive, prepared by you?

A They were.

Q Are they true and correct?

A Yes.

MR. STEIN: I will now offer in evidence Morgan Exhibits 2 to 8, inclusive

PRESIDING EXAMINER: Let's take them up one by one. Is there any objection then to Morgan Exhibit 2, Mr. McDonough?

MR. MC DONOUGH: No, sir.

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: No objection.

PRESIDING EXAMINER: Mr. Paul?

MR. PAUL: No objection.

PRESIDING EXAMINER: All right, 2 is received.

(MORGAN EXHIBIT NO. 2 WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: Morgan Exhibit 3, Mr. McDonough; any objection?

MR. MC DONOUGH: No, sir.

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: Objection to the second paragraph on page 3 of Exhibit 2 on the basis that it sets forth information after the applications were designated for hearing.

PRESIDING EXAMINER: Well, Mr. Morgan doesn't stop living, I suppose after the application was designated for hearing. Unquestionably this was before the exhibits were exchanged, by definition. Any other objection then, Mr. Paul?

MR. PAUL: I have no objection.

PRESIDING EXAMINER: All right. That objection is overruled, and Morgan Exhibit No. 3 is received.

(MORGAN EXHIBIT NO. 3 WAS RECEIVED IN EVIDENCE.)

Morgan Exhibit No. 4, Mr. McDonough?

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MR. MC DONOUGH: No objections.

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: No objections.

PRESIDING EXAMINER: Mr. Paul?

MR. PAUL: No objection.

PRESIDING EXAMINER: All right, Morgan Exhibit No. 4 is received.
(MORGAN EXHIBIT NO. 4 WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: Morgan Exhibit No. 5, Mr. McDonough?

MR. MC DONOUGH: No objection.

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: Yes, Mr. Examiner. On page 3 of Exhibit 5, what is shown as footnote 2, I object to footnote 2 as it constitutes a variance to the application here being heard.

Perhaps it may be better if we could just take a brief moment to call upstair for the application docket for this application because I have two more objections to it on the basis of variance.

PRESIDING EXAMINER: All right, let's take a recess at this point.
(Short recess)

PRESIDING EXAMINER: Let us go back on the record, Mr. Kenkel?

MR. KENKEL: Mr. Examiner, the Morgan application was amended on March 8, 1960, and the amendment included a new programming section, section IV, program schedule and program information and that then is the programming portion of the application that has been designated.

On page 3 of Hearing Exhibit No. 5, footnote 2, comparing it with the above-referenced material, programming material in the application, I find that the word "government" appears in the application after the word "county". I am referring to the phrase "also when there are controversial issues in city or county." and I say that the omission of the word "government" in the hearing exhibit constitutes a variation, the word "government" appearing after the word "county" in the application as designated for hearing.

PRESIDING EXAMINER: In other words, the footnote is broader than the application.

MR. KENKEL: The footnote is broader than the application.

PRESIDING EXAMINER: Mr. Stein, do you have any objection?

MR. STEIN: No objection to making that change at all. I am just trying to figure how we do it.

PRESIDING EXAMINER: X Let's just insert after the word "county" the word "government", is that right?

MR. KENKEL: Yes.

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PRESIDING EXAMINER: Let's do that in the record copies, Mr. Stein, if you will, insert the word "government" after the word "county".

MR. KENDEL: If that has been made, I wish to go to page 4 of this exhibit, the witness has this morning corrected it or sought to correct it by adding to the language of the footnote appearing on page 4 the following "may also obtain some from the National Association of Educational Broadcasters." I object to that offered correction on the basis that it constitutes a variance from the application. The language there in the application stops at the word "used".

PRESIDING EXAMINER: All right.
Mr. Stein?

MR. STEIN: I don't think it is a variation.

PRESIDING EXAMINER: It seems to me to be an elaboration, of course, of the first sentence "Educational Programs will be of local nature, when possible", obviously that implies,

MR. STEIN: Have other sources.

PRESIDING EXAMINER: They will not all be of a local nature but be of other sources.

MR. PAUL: Mr. Examiner?

PRESIDING EXAMINER: Mr. Paul?

MR. PAUL: The problem I have with this is whether the variation is a material variation or not, let us face it there are ~~minor~~ minor variations all the time from the application to the affirmative case but in my opinion it is objectionable only when the variation is material.

PRESIDING EXAMINER: Do you think this is a material issue?

MR. PAUL: Had Mr. Stein not dropped the footnote on the educational programs in his exhibit he could have put in all of this insert on his educational program. But the question then resolves itself to whether by dropping the footnote in his application he unduly restricted himself to use only programs of local nature and when those programs of local nature were not available, films from University of Kansas and Kansas State University. I don't think that those words should be construed that strictly, because the Commission's form itself does not require that detailed description of the programs.

PRESIDING EXAMINER: I think that your comments are well taken, Mr. Paul.

I recognize Mr. Kenkel's objection, of course. I don't think that the variation there is so striking, Mr. Kenkel, that we can't accommodate it. It is undoubtedly a departure to a certain extent, I mean literally a departure, from the application. But it does follow logically from the first sentence, and merely elaborates upon it. So I think that objection will have to be overruled.

Any other objections to Exhibit No. 57

MR. KENDEL: No other objections.

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MR. PAUL: I have just one further objection. May we go off the record for just a moment?

(Discussion off the record.)

PRESIDING EXAMINER: Back on the record.

MR. PAUL: Mr. Examiner, my objection is made to Exhibit C and I will state it at a later time.

PRESIDING EXAMINER: All right. There being no further objections to Exhibit No. 5, it is received.

(MORGAN EXHIBIT NO. 5 WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: Now, Morgan Exhibit No. 6. Mr. Mc Donough?

MR. MC DONOUGH: I have no objections?

PRESIDING EXAMINER: Mr. Kenkel?

MR. KENKEL: Yes, Mr. Examiner, I have objections to that on the basis of variance from the application, particularly with respect to the proposal which first appears, at least inferentially and perhaps somewhat more than that, concerning pre-sunrise operation. This is the first time that we see that the applicant proposes pre-sunrise operation. In his application there is nothing with respect to that. The application, section IV of the application shows that the hours will be from 8:00 to 6:00 pm and now we have an applicant coming in--with a program schedule listing a program day starting at 8 o'clock in the morning-- and now we have an applicant coming in and attempting to start at 6:00 o'clock in the morning, and I think that constitutes a variation, not only the reference to section 3.87 of the Commission's rules, but the actual attempt of the applicant now to come in and add programs at the earlier hour.

PRESIDING EXAMINER: When was that rule effective, permitting pre-sunrise operation?

MR. STEIN: How long that rule has been in effect? I guess quite a number of years. I would just roughly say at least ten years; that is again a guess, but it has been in effect for quite a number of years.

PRESIDING EXAMINER: All right.

MR. KENKEL: On that basis some of the material the applicant has here added this morning; the other appears in the exhibit as previously prepared.

PRESIDING EXAMINER: I see. All right. Mr. Stein, have you any comment on that objection?

MR. STEIN: Yes, the first thing, referring to section IV paragraph 1(b), the question there is "state minimum weekly schedule", and our minimum weekly schedule is the weekly schedule for which we will be licensed. If you look at the license of any station daytime you will find it is only sunrise to sunset. These are merely optional which you can or cannot take. Also they are subject to objections to other people. For example, I had several situations where people operated before local sunrise and within a month thereafter there were objections by regional stations who claim they were receiving interference at night and we were forced to cease operations.

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It seems to me if we proposed to operate before local sunrise and someone comes along a month later and says "You can't because you are causing interference", then really we are not giving a realistic thing of what we think we can do. In other words, if you say "I am going to operate before local sunrise," you are really taking a risk because you don't know how long you are going to be able to operate. It may be a week or two after you are on the air that someone will come in--

PRECIDING EXAMINER: You mean it is an implied condition of every statement in an application that the applicant may operate before local sunrise until there are objections. The objection that is made by other counsel is that this was not stated in the application.

MR. STEIN: I don't think you would have to state it and furthermore, I am not so sure an applicant should come and represent and say "I am going to start at 5:00 a.m." How does he know whether he is going to be able to start at 6:00 a.m.?

PRECIDING EXAMINER: How do you know it now, you don't know it now any more than when you filed your application, that is the objection.

MR. STEIN: That is correct. We never know when we can operate, in fact, I would like to say this: I have an application on file right on 930 kilocycles for change of the facilities of a station at Lynchburg, Virginia. That application has not been designated for hearing, it is in the processing line. So if you will look at that application file you will note there is an objection by WREN, Buffalo, and the objection is to the effect that these people are not licensed or should not be licensed to operate before local sunrise. They will cause us interference, here is Mr. Cullom's engineering statement: "If you make a grant to these people make it on the condition that they cannot operate before local sunrise." So every time you have a grant on these daytime stations, you are always in the same predicament. You don't know whether you can operate. You are taking a risk. And to me it is a situation where nobody knows what he can do. Suppose an applicant comes here and says "I am going to give you a farm program 6:00 to 7:00 in the morning or 7:00 to 8:00 in the morning" and half the year he can do it except before local sunrise. He goes on the air and a month later somebody comes in and says "Your are causing objectionable interference to WREN," and the company says, "Stop", so he can't come in and say "This is what I expect to do", because he can only hope to do it and that is the situation we are up against.

PRECIDING EXAMINER: Counsel says you should have expressed it.

MR. STEIN: I don't think we have to express it, because that is not a thing in the license, and secondly, what we gave there were the minimal operating hours.

PRECIDING EXAMINER: suppose you had made that minimum a lot less voluminous than you did or a smaller minimum than you have now, could you have expanded upon that at the hearing?

MR. STEIN: I don't think you could there because there you are going up to your licensed hours. Here we have taken the maximum license hours. All we are saying is this is the most we can do and our minimum operating schedule will give us the most we can do. Here is a simple situation. One applicant is going to put in a farm program at 6:00 in the morning. He says "I know I can put it on then, why should I propose to put it on at 5:00? I may not be able to put it on very long. Why should I make that kind of representation to the Commission?" The other applicant says, "Well, I am going to operate before local sunrise", so the commission makes a grant to

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this man because he represents he is going to have an operation before local sunrise. He goes on the air, let's say, for a week or a month or even for a day, and some regional station such as WREN or WRC or WREO; it is, others come in, "No soap, you can't do it."

PRESIDING EXAMINER: Then it doesn't make much difference if you make such a representation or not?

MR. PAUL: That is what I was going to say, Mr. Stein has stated a second objection to the material because it is so speculative that the Commission can place no reliance on the pre-sunrise hours.

PRESIDING EXAMINER: Yes, I think so, too.

MR. PAUL: My objection to this is this is a variance from the application. It gives him two additional hours per day if permitted. Say if Mr. Stein had proposed to go off the air at 4 o'clock in the afternoon and then during the hearing his schedule says "I have decided, since we have been designated for hearing I am going to six o'clock in the afternoon rather than the minimum number of hours, I am going to six p.m. every afternoon." I don't think that would be allowed, for that, nor should it be allowed as pre-sunrise hours.

PRESIDING EXAMINER: Yes, I think the objection is well taken, Mr. Stein, for two reasons: One, it is a speculative matter and, two, it is a variance. I don't think that much will be lost here if the pre-sunrise operation, that is the material relating to possible pre-sunrise operation, is stricken. ~~It doesn't matter~~ you are going to lose anything by way of preference upon hearing, primarily because it is speculative to ask it.

MR. STEIN: I ~~again~~ like to add one other thing too, and perhaps other counsel are aware of it. There is now a petition, I believe it is by WREO Memphis, or at least one of the stations represented by Spearman and Johnson, requesting the Commission to change the rule so they won't allow pre-sunrise operation.

Presiding Examiner: Well, that is all the more reason for striking this then if that is granted.

Mr. Stein: That is the practical problem you have.

Presiding Examiner: All right. Reference to possible pre-sunrise operation in Exhibit No. 6--

Mr. Stein: Which exhibit is that please?

Presiding examiner: That is Exhibit No. 6, at page 2, the portion that was added by Mr. Morgan during his oral testimony, is stricken.

Mr. Stein: Well, now, may I just make one other observation, your Honor? We have a similar problem with respect to Exhibit 3.

Mr. Paul: I was going to comment the same objection would obtain.

Presiding Examiner: Yes.

Mr. Stein: Now, there again, we say what everybody else would say, if possible, we would operate. But that is implicit in the rules. So I don't see why--

Presiding examiner: That is why I asked about the rule, whether the

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rule is a rule of general application that applies to all stations, all applications that were filed after the rule was passed, or is it something that has to be stated in the application? I think though, when you speak about your proposed programming, you should give it a pretty accurate description of the programming, ~~*****~~ in your application and that you can't be benefited by possible permissive portions of the rules. That is, after all, the rules are applicable to all the applications and to all stations, and you can't just rely upon the rule itself, which merely is a permissive matter. Does anyone have any comment on Mr. Stein's statement that because the rule permits this, unless there is objection, therefore, he can take advantage of it during a hearing?

Mr. Paul: Well, Mr. Examiner I still say the problem here is a problem of variance.

Presiding Examiner: That's right. I think so too.

Mr. Paul: Some channels the rules permit fulltime operation.

Presiding Examiner: Yes.

Mr. Paul: On other channels the rules limit the operation to daytime only, and it is actually the question of what the applicant actually proposed in his application.

Presiding Examiner: Yes, I think so, yes, that is right. All right, when we come to that, and anticipate somewhat that matter added in Exhibit No. 6, the matter added in Exhibit 6 is also stricken. For example the farm hour will be carried at 6 a.m.

Mr. Paul: The entire last paragraph.

Presiding Examiner: The entire last paragraph of Exhibit No. 6 is stricken, that is right, including the portion added by Mr. Morgan in his oral testimony. All right, then, if there are no other objections to Mr. Morgan's Exhibit No. 6, it is received with the portion stricken.

(Morgan Exhibit No. 6 Was Received In Evidence.)

Presiding Examiner: Morgan Exhibit No. 7, is there any objection, Mr. McDonough?

Mr. McDonough: No.

Presiding Examiner: Mr. Kenkel?

Mr. Kenkel: No.

Presiding Examiner: Mr. Paul?

Mr. Paul: No.

Presiding Examiner: That is received.

(Morgan Exhibit No. 7 Was Received In Evidence.)

Presiding Examiner: Exhibit No. 8? Some material has been stricken from that. Any objection, Mr. McDonough?

Mr. McDonough: No objection.

Presiding Examiner: Mr. Kenkel?

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Mr. Kenkel: I have one other objection, if I may just have your indulgence for a moment, I make this objection. I think the statement therein appearing that his wife will be bookkeeper does constitute a variance from the application. The application does not make this representation. I recognize the application says people will be hired but I think when you are talking about a wife that it is a matter that goes, when you specifically identify the wife it does constitute a variation.

Presiding Examiner: Well, in Knoxville case the Commission permitted a variation in staff. I don't think that this is of any real consequence. Mr. Paul have you any objection to that?

Mr. Paul: I more or less agree with the tenor of your statement, Mr. Examiner, I don't think it is a variance, a major variance? They state in the application that sufficient personnel would be hired.

Presiding Examiner: All right.

Mr. Paul: In the Knoxville case the Commission allowed the applicant to come in and hire employees for various positions, and he didn't even have to set it forth in the application, just said in the application general form, a general statement that sufficient personnel would be employed to operate the station in a manner consistent with the public interest.

Presiding Examiner: That's right, yes, all right then. Any other objection to Morgan Exhibit 2.

Mr. Kenkel: I object to the statement that students will be given an opportunity to work if it is intended to augment the applicant's staff, because under the application he proposed about five on the staff, and in the preceding portion of this hearing exhibit he totals up more than five, and now he makes reference to students and I think we are getting into a serious area of variance, if that is permitted.

Presiding Examiner: Is there any comment on that, Mr. Stein?

Mr. Stein: I don't think it is important enough to worry about.

Presiding Examiner: You mean you don't object to that being stricken?

Mr. Stein: No.

Presiding Examiner: All right, let's strike that "students will be given an opportunity".

Mr. Stein: Which part is that?

Presiding Examiner: The sentence relating to students: "students will be given an opportunity to work at the station in conjunction with the radio course." If there are no objections to Morgan Exhibit No. 2, it is received.

(Morgan Exhibit No. 2 Was Received In Evidence.)

Presiding Examiner: I suppose that that Mr. Morgan is now available for cross-examination.

Mr. Stein: Yes, are you ready for cross-examination?

The Witness: Yes.

Mr. McDonough: Mr. Examiner, in view of my statement at the earlier cross-examination, I have no cross-examination of Mr. Morgan.

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Presiding Examiner: All right. Mr. Kenkel?

Mr. Kenkel: Yes, I have seen or ss-examination and I would appreciate a short recess if I pull some things together.

Presiding Examiner: All right, let's take a short recess.

(Short Recess.)

Presiding Examiner: Back on the record. All right,

CROSS EXAMINATION
BY MR. KENKEL:

Q Mr. Morgan, when did you file your application for a new station in Larned?

A In January of 1959.

Q January of 1959. At that time you were employed?

A I was employed at the Radio Station at Pratt, Kansas.

Q That is, the station that is owned by your father?

A Yes, Sir.

Q When you filed your application was there not one on file for the same frequency in Pratt?

A There was.

Q You knew at the time, didn't you, that by filing your application for Larned that the Pratt application could not be granted without a hearing?

A I did.

Q You know that? Did you discuss your Larned application with your father who owns the existing station in Pratt?

A We had talked about that several years ago, even before the Pratt application was filed.

Q How about when you filed it, didn't you discuss with your father that your Larned application would prevent a grant of the Pratt application without a hearing?

A We were aware there would be a hearing.

Q Both you and your father were aware of that?

A Yes.

Q Your father was aware of it?

A Yes Sir.

Q Didn't you discuss it with him several times?

A That is, we had the frequency run before we filed, that is I filed an application.

A Yes, Father had the frequency run.

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A I requested that he select for me an engineering firm and counsel.

Q Whose idea was it that you sever your connections with your father's station before coming into this hearing?

A That was my own idea. There was family conflict and I just decided to leave.

Q Did you discuss it with your attorney?

A No.

Mr. Stein: What was that last question and answer? I am sorry I didn't hear it.

Mr. Kenkel: All right, read it.

(The last question and answer were read by the reporter.)

By Mr. Kenkel:

Q Where are you now, where do you now live, Mr. Morgan?

A I still reside in Pratt.

Q Do you want the examiner and Commission to believe if your application for Larned is granted you are going to move to Larned?

A That is correct, sir. We are going to move to Larned and establish residence in Larned.

Q Are you going to buy or rent?

A Well, at the time, I don't know.

Q You haven't made any exploration of the possibility?

A No.

Q You don't even know if you are going to get a house at Larned, do you?

A There are houses available.

Q You don't know yourself that you are going to get one, do you?

Presiding Examiner: I just wonder about the tenor of the examination. Obviously, he doesn't know whether he is going to get a house. No one knows what the future will bring. If this is an attempt to show or to elicit from Mr. Morgan the statement that he does not have a bona fide intention to move to Larned, that is merely a representation here, perhaps that could be brought out, but I don't believe it is going to be brought out by these recusatory statements.

Mr. Kenkel: Mr. Examiner, I seriously suggest that the questions cannot be categorized as the examiner suggests. I think we can ask the reporter to re-read them, but moving on, I think the record stands for itself, and there is an unanswered question which I think it's completely proper, and I ask that an answer be made to it.

Presiding Examiner: I was just commenting upon the fact, upon the tenor of the question. There was no occasion that may or may not have some basis,

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I don't know what the facts are, of course. But let's continue then and let's see where this leads to, could you answer that last question then, Mr. Morgan? Could you read that, Mr. Reporter, that last question then?

(The last question was read by the reporter.)

The Witness: We don't know whether we will buy or rent at this time, no.

By Mr. Kenkel:

Q Prior to filing your application for Larned, that, if anything, did you do in Larned to satisfy yourself that a radio station would be economically feasible?

A Well, we made various trips to Larned.

Q Excuse me.

A I made various trips to Larned and discussed it with several people. As a matter of fact, before I filed a coach, that is a former coach in high school; at Great Bend, in passing conversation had mentioned why he didn't submit an application for Larned-- (Good reason?)

Q Now--

A --for a station there.

Q Once or twice you stated "He" when you changed to "I". Are you referring to your Dad?

A Well, my father helped me.

Q Your father helped you put the application together, did he not, Mr. Morgan?

A He helped me simply by getting an engineering firm.

Q and he got your attorney?

A and counsel.

Q And your Counsel.

Q Who prepared the program schedule that you submitted with your application?

A I prepared the program schedule, I did.

Q Would you speak up just a bit?

A I prepared the program schedule.

Q Did anyone help you with it?

A No.

Q No one at all?

A No.

Presiding Examiner: The answer was no, no one at all.

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The Witness: No, no one did.

By Mr. Kennel:

Q That is the original program schedule that was submitted. How about the program schedule submitted with your schedule amendment?

A I prepared that myself.

Q Do you have your exhibits in front of you?

A Yes

Q Turning to your Exhibit 4, program contacts you have a statement there so contacts were made by your personally?

A The contacts listed here were made by me.

Q All of these contacts were made by you?

A All of these contacts, yes, sir.

Q Then the phrase appearing in your exhibit, made by or for you, is incorrect in that none were made for you, none of these listed were made for you?

A The contact with Mr. Ootson was made for me kby my father.

Q Who is that?

A He is the ;second one.

Q Ootson, in see, that was made for you?

A Yes.

Q That is the only one made for you? You speak to each one of these others yourself?

A Mr. Mr. Ffaloret who is not here.

Q Who is the person who made the contacts with Mr. Ootson for you, is that your Dad?

A That is correct.

Q Now the contacts shown as having been made by telephone, they were made by telephone, they were made by telephone from Larned to Pratt- excuse me, from Pratt to Larned?

A There were some made in Larned and some that I made in Pratt to Larned.

Q Do you have any idea now of those listed as having been made by telephone how many were made by local telephone calls from Larned?

Mr. Stein: I just wondered if it wouldn't be better for the witness to go over these individual calls to refresh his recollection unless he has already tabulated them in advance.

The Witness: Do I have a Question?

By Mr. Kennel:

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By Mr. Kenkel:

Q You have a question and your counsel made a statement and an answer can be made.

Presiding Examiner: It is a question of how it can be answered. If he can't answer it without specific reference to particular contacts, why, we will have to make that reference.

Mr. Kenkel: Has the witness said that he can't. I don't know. I am a part of following colloquy here between his counsel and witness and I don't know where he stands. May I ask the reporter to read the pending question and if the witness has a comment, we can go on from there?

Presiding Examiner: All right.

(The question was read by the reporter.)

The Witness: The only call I recall making from Pratt was to Mr. Maney, C Cliff Maney, the county agent. That call was from Pratt to Larned.

By Mr. Kenkel:

Q Now on page 4 of that exhibit, a telephone call to Jack Feather.

A That was long distance from Pratt to Colorado.

Q There also as I see it are one or two contacts in Pratt, Kansas, and I am referring now to page 4. Was that a call within the city limits of Pratt? In other words you, in Pratt, called this number in Pratt, from Valley?

A Yes.

Q Where were you when these calls emanating from Pratt were made? Let me ask you this, I will withdraw that other question. Where all of these calls listed made during business hours, that is, say, from about 8:30 a.m. to 5:00 or 5:30 p.m.?

A Possibly some of them were, yes.

Q Wouldn't you say that the majority of them were?

A There are calls that were not.

A The majority of them, of the telephone calls were made during those hours.

A Yes.

Q Were the majority of them made from the radio station at Pratt? Your Father's Station?

A

A Most of the long distance calls were made on my personal phone at home.

Q Most of the long distance calls were made what?

A Long distance phone at home.

Q But some of them were made from the radio station of your father?

A I recall making efforts to reach people via the radio station phone

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when it was working.

Q Up to July 2, 1950, you were working at the radio station?

A That is right.

Q And that was your fulltime employment?

A Yes.

Q Turning now to Exhibit 6 for general reference your first program starting at 8 o'clock in the morning, news and civic topics, you say will include news and announcements, of events, weather and so forth in the Larned area. Is that going to be news from a news wire or do you have some other source in mind?

A We will have United Press service.

Q You plan to have United Press service?

A Plan to have United Press Service.

Q And the 8 o'clock news will be from the United Press Wire?

A Most of it will be of a local nature.

A I beg pardon?

A Most of it will be of a local nature.

Q How many news men will you have?

A One fulltime news director?

Q One full time newsmen?

A That is correct.

Q Is he going to have any announcing duties?

A Yes.

Q Is he going to have any other staff duties, writing, continuity, selling?

A If it can be avoided he won't.

Q But he may, if necessary?

A He may.

Q Now on page 2 of Exhibit 4 I see you have a farm hour at three o'clock. Do you contemplate that the farm hour will be directed to your farm and agriculture audience? We can take another exhibit and find it perhaps easier. If we take Exhibit 3 on page 2 midway down 3:30 p.m., Farm Hour, it will be easier to find it on that page, and that is Exhibit 5.

A Exhibit 5

Q Exhibit 5, page 2,--

A, What was the question?

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Q First I see you have a farm hour at 3 o'clock in the afternoon.

A Yes.

Q Do you contemplate that will be addressed primarily to your farm and agriculture listeners? Let me ask you this-- go ahead if you can answer that, if not, I will rephrase it.

A Go ahead.

Q Whom did you design the program for?

A When I submitted the application I was uncertain as to the hours of operation in the morning. Naturally--

Mr. Kenkel: You are not responsive to my question. Mr. Examiner, I direct that you ask the witness to be responsive.

Presiding Examiner: Yes. Would you respond to the question, Mr. Morgan? The question is whom did you design this program for and then you can elaborate of course.

By Mr. Kenkel:

Q The one you have three o'clock Mondays through Saturdays?

A It was designed for the rural area.

Q For the rural area?

A Yes.

Q How many farmers and agricultural workers will, in your view, be able to listen to a farm program at 3 o'clock in the afternoon?

A There will be some. I don't know how many.

Q The majority of them will be in the fields and at their job in the field, will they not?

A That is right.

Q How about 3:30 p.m.? Don't you agree that the majority of the farmers and rural workers will not have a radio available to them at that time?

A Most of them probably will not.

Q Now turning to Exhibit No. 7, I see you have listed there that you propose to have five hundred commercial spot announcements per week?

A Yes.

Q Is that right? On what did you make that--how did you arrive at this figure of five hundred?

A Five hundred commercial spot announcements?

Q Yes.

A Well, at the rates I had in mind, 500 announcements, would be sufficient, 500 a week and that is how I arrived at that figure, I believe.

Q Can you sell 500 spots in a week?

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Mr. Paul: I object to the question, Mr. Examiner. I think it is immaterial and irrelevant as to whether he can sell the 500 spot announcements in Larned, Kansas.

Presiding Examiner: Yes, what is the purpose of the question?

Mr. Kenkel: This, Mr. Examiner, is merely following up the witness' answer as to how he arrived at this. I want to test the witness as to how he arrived at 500 and that sort of thing and I think it is perfectly proper within the scope of the cross-examination. I am not getting into the economics the financial issue or trying to raise the financial issue or trying to raise the financial issue if that is what worries counsel.

Presiding Examiner: All right. Objection is overruled.

By Mr. Kenkel:

Q Can you sell 500 in Larned?

A I wouldn't know at this time.

Q If you could sell more than 500 would you carry them?

A Yes, I think so.

Q And would you place any limit on the number you would carry?

A There will be a limit, but if you are referring to specific time segment--

Q No, I am speaking of the overall total per week.

A Well, we would operate by the NAB Code of Standards with regard to that.

Q How about the figure 54 non-commercial spot announcements? How did you arrive at that figure? What did you use as a basis? Do you understand the question or are you trying to bluff?

A How did I arrive at the figure 50--

Q Yes.

A --non-commercial spot announcements?

Q Yes.

A Well, those announcements will be announcements for public service organizations, such as your Red Cross and so forth, and I don't believe you can get any more than that in a week.

Q You mentioned the red cross as an example of a group for whom you would carry spot announcements. What other groups did you consider that you would carry one for?

A The red cross. I spoke to several people that who were concerned with several other civic organizations, like Kiwanis, Rotary, if they have events taking place that are in the public interest, they will be run.

Q There is a Kiwanis Club in Larned and a Rotary.

A Yes.

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Q That is the Rotary, Kiwanis and the Red Cross? Do you have any other organizations that are operating in the public interest that you would be announcing for?

A Any other organizations that are operating in the public interest they would be made.

Q I am not seeking to test your memory completely. But can you think of any others other than the three that you have mentioned?

A Well, there is the bloodmobile, the free TB x-ray Clinic.

Q Are they run by Larned groups, TB and the Bloodmobile?

A There is a chairman appointed in Larned.

Q Is that what you had reference to when you mentioned Red Cross before?

A Yes.

Q So actually these two examples you gave me are a further--subgroup actually of the first one you mentioned, that is the Red Cross, isn't it?

A Yes.

Q Now I am not seeking to press the issue but I don't want you to feel that you haven't had an opportunity to answer me as well as you may. Can you think of any other groups that you would give spot announcements to?

A I would have to refer to my personal contacts on these. Well the law enforcement agencies would be one, that is promoting safety.

Q I am going to have to ask you to repeat it.

A The law enforcement agencies, would be one, for promoting safety, and I think too there would be times that the State Mental Hospital would benefit from such announcements. The National Guard and others listed in the personal contacts.

Q You are referring now to those listed in Exhibit 14, program contacts?

A Yes, sir.

Q When you talked to the contacts, did you mention public service spot announcements or did you discuss programs?

A Both.

Q You discussed both. Mr. Morgan, have you read the Commission's document entitled "Report and statement of notice on Programming Inquiry" released by the Federal Communications Commission on July 29, 1960?

A July 29-- no, I have not read it.

Q You have not read it? Are you familiar or have you ever heard the term the Blue Book?

A I have heard the term, I am not familiar--

Q You are not familiar. You have not read it, I take it?

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Q No, what is the Blue Book?

Q Do you know, let me ask this question?

A Is it operative procedure?

Q Do you know what the Blue Book is, by that name I am referring to what is commonly referred to as the Blue Book.

A No.

Q Does that have any meaning to you?

A No it does not.

Mr. Kenkel: I have no further questions.

Presiding examiner: Mr. Paul?

By Mr. Paul:

Q Mr. Morgan what are the facilities of the station which your father owns at Pratt, Kansas?

A It is 1570 kilocycles, is that what you have reference to?

Q Yes 1570 kilocycles and power.

A 250 watts.

Q Daytime only.

A Daytime

Q Directional or non-directional array?

A Non-directional.

Q Prior to July 1, 1960, what were your duties at your father's station at Pratt, Kansas?

A Well, I had various duties, I wrote copy, announced, sold advertising, gathered news and did some news writing. And it was just kind of general you might say.

Q Were you the chief engineer?

A Yes.

Q By the way, for the record, what are the call letters of that station.

A KWCK

Q ZWCK

A Yes.

Q Was your father there on a day to day basis?

A Yes he was.

Q Was he the general manager of the station?

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Q Did you assume the duties of general manager of the station in his absence?

A Well, I would act in his absence, yes.

Q Did you have the authority to hire or fire employees?

A No.

Presiding examiner: The question was did you and the answer was as I remember you could act in his absence. The answer I guess was you did act in his absence, that is correct?

The Witness: Yes.

By Mr. Paul:

Q Did you have the authority to sign contracts on behalf of the station for your father.

A That is advertising contracts?

Q Advertising contracts, and operation of the station, such as--well, let's limit it to advertising contracts.

A Yes, I did have authority.

Q Did you have the authority to sign checks--

A No.

Q For the station? You left your employment on July 1, 1960

A Yes sir.

Q You said you left because of a family conflict?

A Yes.

Q Would you care to employ that further?

A Well in Feb. 57 my mother passed away and my father remarried and there was just disagreement on that point.

Q Do you remember on what date the application of Wilmer E. Huffman was filed at Pratt, Kansas?

A If I recall, was it in April of 1958?

Mr. Paul: May we have a stipulation now as to the date when that was filed? Do you have that Mr. McDonough? Mr. Examiner, we would like to enter into a stipulation, subject to agreement of all the parties or at least I would like to propose a stipulation, that the application of Wilmer E. Huffman was filed with the Commission and dated May 18, 1958, and was received in the office of the Commission during the later part of May, 1958.

Presiding Examiner: In that stipulation, proposed stipulation, agreed.

Mr. Stein: I would like to make a suggestion. I will go along with him, there is no argument, let's put there in the stipulation the dates of all the applications and have it--

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Mr. Paul: We will request the Examiner to take official notice of the dates all applications were received by the commission.

Presiding Examiner: Will you furnish the dates to me?

Mr. Paul: I will furnish them this afternoon, Mr. Examiner. I am sorry, I don't have the file on Mr. Huffman.

Presiding Examiner: All right. Official notice will be taken of the dates of filing of all the applications in this case.

By Mr. Paul:

If that application of Mr. Huffman's was filed in the latter part of May, 1958, when did you first have knowledge of the filing of that application?

A To the best that I can recall, I believe there was a story in the newspaper there that he has sent it in. It had not actually been filed and I believe that was some time in April, the latter part of April.

Q Was when?

A The latter part of April or the 1st of May.

Q The latter part of April of the 1st of May of 1958?

A Yes.

Q When did you first discuss with your father the possibility of filing your application at Larned, Kansas?

A We had discussed that quite a few years back even while I was in the service, that is filing an application.

Q What steps did you take at that time or did you take any steps, if any at that time?

A On filing the application?

Q Yes.

A Well, at that time, while I was in the service My wife and my father didn't have the funds to submit an application.

Q When did you first, if you can answer it, make a determination to file your application at Larned of the instant application at Larned?

A We decided on that in, as near as I can recall, about the middle of -- about midway in 1958.

Q Midway of 1958.

How you say we. Who do you mean by we?

A My wife and I.

Q Your wife and you. What was the first concrete step that you took in filing this application?

A I requested that my father get counsel and an engineering firm for me because he was-- he had done that before.

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Q And your father obtained you both legal counsel and engineering counsel?

A That is right.

Q Did your father make all the arrangements with your engineering counsel and legal counsel?

A He requested the frequency search, you.

Q He requested the frequency search?

A For Larned on my behalf.

Q Was that the engineer that you have previously retained, Mr. Edward Lorentz?

A Yes.

Q I take it Mr. Lorentz ran a frequency search?

A Yes.

Q When did you first talk with Mr. Lorentz pertaining to the application?

A I spoke with him I believe the first time by telephone when we had to make the amendment on shortening the antenna.

Q You talked with him the first time after the amendment, pertaining to the amendment?

A That is correct.

Q In other words, I take it then you did not talk to him at any time prior to the time the application was filed?

A No.

Presiding Examiner: The answer is you did not talk with him. You got a negative answer to a negative question. Some months from now, somebody may get the wrong impression. I understand what you meant, Mr. Morgan, but somebody just reading the record may misinterpret it, so the answer was you did not talk to Mr. Lorentz before you filed the application, is that it?

The Witness: That is correct.

By Mr. Paul:

Q And all discussions with Mr. Lorentz were taken care of by your father?

A Up to that point, yes.

Q Up to that point.

Mr. Kestel: Excuse me just for the record what point is this, is this the amendment.

The witness: The amendment.

By Mr. Paul:

Q When did you have your first discussion with Mr. Stein, your legal

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WPT
A I don't recall.

Q Was it prior to the time the application was filed or was it with regard-

A It was before the application was filed.

Q Before the application was filed? Were the conversations with Mr. Lorents and Mr. Stein by telephone call?

A Yes.

Q Mr. Morgan, I show you an application or a duplicate copy of your application which bears the docket number 13473, and I direct your attention to section 4--A of the application and which has the stamp "Received by the commission or office of the Secretary upon January 6, 1959". I ask you whose name appears on the top line of that application form which requests the name of the applicant?

A That is my father's name.

Q Will you read it as it is there?

A This name?

Q Yes.

A "Clem Morgan"

Q Clem Morgan, And what is the date of the statement of Mr. Lorents as shown on page 2 of section 5?

A This date?

Q Yes.

A December 19, 1955.

Q Whose name appears at the top of section V-G of the Application?

A Clem Morgan.

Q Is that his address or is that your address?

A That is my address.

Q Were you living with him at that time?

A No.

Q But this was your address at that time?

A That is my address.

Q 1108 Champs Street, Pratt, Kansas?

A Yes.

Q Now you refer to the fly sheet of the engineering statement of Mr. Lorents and I ask you whether Mr. Clem Morgan's name appears thereon?

A It appears above my name, Francis C. Morgan, Jr.

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Copy

Q Can you tell or describe for the record how Francis C. Morgan's name was inserted?

A It was inserted by nototape clip and clipped in.

Q In other words, it seems the original was Clom Morgan and at some later date Francis C. Morgan was clipped and nototaped in?

A Yes.

Q I refer you to the exhibit of the application which is part of the engineering data prepared by Mr. Lorentz, and which may be further identified as E-1, and ask you to read for the record the first sentence.

A "Commercial Radio Equipment company has retained by Clom Morgan to prepare the necessary engineering data and exhibit to a company's application for a construction permit for a new standard broadcast station at Larned, Kansas, 1000 kilocycles 500 watts day."

Q I believe you left out the word "has" between "has" and "retained."

A "has been retained," that's right.

Mr. Paul: Mr. Stein, I think we will probably have a little time by a stipulation that the identification on Exhibit Nos. E-3, E-4, E-5, and E-6 of the application designate Clom Morgan as the applicant.

Mr. Stein: That is correct.

Mr. Paul: Is that stipulation agreeable to you gentlemen?

Mr. McDonough: Yes.

Mr. Kankel: Yes.

Mr. Stein: That relates to the application as filed January 6, 1959.

Presiding examiner: Yes.

Mr. Paul: Will the stipulation be acceptable to the hearing examiner?

Presiding Examiner: Certainly. Do all counsel stipulate to that fact?

Mr. McDonough: So stipulated.

Mr. Kankel: So stipulated.

Presiding Examiner: All counsel stipulate.

Mr. Paul: Also I would like to amend the stipulation to include E-2 and Exhibit E-10.

Mr. Stein: Of the same application? Same group of engineering data?

Mr. Paul: Yes. May I just say, I would also like you to stipulate with respect to any further amendments at the same time, I mean the engineering amendments at the same time? I will stipulate with you that the engineering amendment received by the office of the Secretary on May 15, 1959 contains Francis C. Morgan, Jr. as the applicant, and that Mr. Lorentz, the consulting engineer, in his affidavit states that he has been retained by Mr. Francis C. Morgan and all the attachments and exhibit number E-3 attached to this

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Amendment of May 1959, identified Francis G. Morgan, Jr. as the applicant, and Exhibit E-7 has the same identification, also E-5B-62-9 and E-10. Is that stipulation agreeable with all the attorneys?

Presiding Examiner: Mr. Stein, is that agreeable?

Mr. Stein: Yes.

Mr. McDonough: Stipulated. Do we have for the record who Glen Morgan is?

By Mr. Paul: Glen Morgan is your father, is he not?

A Yes.

Presiding Examiner: Off the record.

(Disposition of the record)

Presiding Examiner: Back on the record.

By Mr. Paul: Have Mr. Lorentz' engineering fees been paid?

A Yes.

Q Who paid these fees?

A I did.

Q By personal check?

A Yes.

Q Was the money acquired from your fund, your own funds?

A Yes.

Q It was not acquired from your father?

A No.

Q IX/11/11 Did your father make any payment to Mr. Lorentz?

A With regard to this application?

Q With regard to the frequency section and the engineering data which Mr. Lorentz prepared?

A No.

Q For the application.

A No.

Q Were any of the funds of Station WABZ used to pay Mr. Lorentz?

A No.

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Q When were you aware of the fact that Mr. Lorentz had entered your father's name rather than your name on his engineering statement?

A After I had received my copy of it.

Q Did you discuss the matter with Mr. Lorentz?

A I discussed the matter with Mr. Stein with regard to that.

Q Was an amendment filed correcting such error?

A No.

MR. STEIN: Just a moment. Were you referring to an amendment other than the engineering amendments or other amendments?
There are some amendments in that application.

MR. PAUL: My question was intended to request whether an amendment was filed explicitly correcting the ~~name~~ name of the applicant in the engineering portion of the application from Glen Morgan to Francis C. Morgan.

MR. STEIN: I don't recall. I think you did say that there were some corrections on the engineering statement filed with the original application, which corrections or some sort of -- some item with scotch tape reflected the name of Francis C. Morgan, Jr.

MR. PAUL: Mr. Stein, ~~is that true~~ --

MR. STEIN: I beg your pardon?

MR. PAUL: -- I have not seen it and certainly you can bring it out. Or you can request the examiner to take official notice of it.

MR. STEIN: ~~off~~ Of the application?

MR. PAUL: Yes.

MR. STEIN: Yes, I think you would want to look at it anyway.

PRESIDING EXAMINER: All right, official notice will be taken of the application, that is of the Morgan application.

Mr. Paul, do you think that your cross-examination will take much longer

MR. PAUL: Not very much. I have just about only one or two more questions and then we can recess for lunch and I think I will be through after lunch.

BY MR. PAUL:

Q Who is the chief engineer at your father's station in Pratt now?

A Ted Patterson.

Q Does he hold a first-class license?

A Yes.

Q Is he permanently employed by the station?

A Yes.

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(copy)

Q To the best of your knowledge?
If your application here is denied, do you propose to seek employment with the station?

A In Pratt?

Q Yes.

A NO

Q While you were employed by the station were you on a salary basis or commission basis?

A Salary only.

Q Salary?

A Salary basis.

MR. PAUL: It is agreeable with me, Mr. Examiner, to recess at this time and I would like to check over a few facts.

PRESIDING EXAMINER: All right, let's recess then until 2:30 o'clock.

(Whereupon, at 12:30 p.m. a recess was taken until 2:30 p.m. of the same day.)

AFTERNOON SESSION

2:30 p.m.

PRESIDING EXAMINER: On the record.
Before you begin your, resume your, cross-examination, Mr. Paul, may I make one statement?

Rule 1.142, requiring the hearing examiner to enter on the record a statement reciting all actions and so forth, no one has any question about that, I mean that rule can be waived.

MR. PAUL: We have no question on it, Mr. Examiner. I think the transcripts speak for themselves, and there are no stipulations by and between that parties that are not of record.

PRESIDING EXAMINER: That's right. I realize that.

MR. PAUL: And therefore, I think the transcript is sufficiently clear.

PRESIDING EXAMINER: All right.

MR. PAUL: We might enter into an agreement here that all of the rulings of the hearing examiner made at pre-hearing conferences are certainly part of the record, I have no question about that part of the record that controls the ruling, although I don't remember any rulings you may have made.

PRESIDING EXAMINER: I see. Is that satisfactory then, gentlemen?

MR. MC DONOUGH: Yes, sir.

PRESIDING EXAMINER: All right/

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Mr. Morgan, would you resume the stand, please?
Thereupon,

FRANCIS C. MORGAN, JR.

resumed the stand and testified further as follows:

CROSS EXAMINATION (Continued)

BY MR. PAUL:

Q Mr. Morgan, approximately how many years' broadcast experience has your father had, Clam Morgan?

A He has been in the business since 1923.

Q 1923, either as an announcer or --

A Yes.

Q -- or associated with Radios?

A Yes.

Q How many years has he acted in the capacity of general manager of radio stations prior to the time he owned his own station?

A To the best of my knowledge I recall as far back as 1939.

Q Is the station at Pratt, Kansas the only station in which he has ever held an interest?

A Yes.

Q Do you propose to use, not use, but consult your father or to seek his advice in the operation of your station?

A If there are questions, yes, I will seek his advice.

Q Do you have any common ownership with your father?

A No.

Q In real estate, or property or business?

A No.

Q Are there any outstanding loans between you and your father?

A No.

Q Do you propose to finance this station with any funds from your father?

A No.

Q I believe you stated in your exhibits that you do not propose any joint programming or joint staffing, is that correct?

A We do not.

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Q How do you propose any joint rates?

A No.

A Assuming that you receive the construction permit, would you have the authority to sell advertising over your father's station, say, in the rural areas around Pratt?

MR. STEIN: Will you please repeat that question?

(The question was read by the reporter.)

MR. STEIN: Are you referring to the construction permit for Larned?

BY MR. PAUL:

Q Yes.

By construction permit I mean assume you receive the construction permit which you are seeking through your application which is the subject of this hearing.

A The question is would I have authority to see advertising on his station?

Q Yes.

A No.

Q In other words, if some advertiser sought you out and said that "I want to carry some advertising over the station at Pratt", you would have no authority to accept that advertising.

A No.

Q But can you characterize your business affairs and your father's business affairs as being conducted "at arm's length distance"?

A For the last few months they were.

Q The last few months.

A You mean while I was employed at the station and working with him?

Q What I mean is at the present time?

A Yes, I would say so.

Q I take it you have no business interest other than your interest you have in this present application and also the employment which you have now?

A That is correct.

Q Does your father have any business interest other than the station which he owns?

A Not to my knowledge.

MR. PAUL: That is all I have. Thank you Mr. Morgan.

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PRESIDING EXAMINER: Is there any redirect?

MR. STEIN: Yes, I have a few questions.

REDIRECT EXAMINATION

BY MR. STEIN:

Q If I remember correctly, you stated that you and your wife finally decided to file an application for Larned some time in the middle of 1958, is that correct?

A Yes.

Q Now, did you at that time decide for yourself, sir?

A We did.

Q All right.

Now, I believe you stated, in answer to a question by Mr. Paul this morning, that you paid all the expenses for the engineering in connection with this application for Larned, is that correct?

Q Yes.

MR. STEIN: Now, I have shown other counsel, the bills which Mr. Morgan has handed to me, picked up this afternoon, three invoices from the commercial radio equipment company and I don't intend to submit them as exhibits unless you want me to, I don't think it is necessary.

BY MR. STEIN:

Q Now, Mr. Morgan, please refer to three bills in front of you from Commercial Radio Equipment Company, and give us the date of the bill, the invoice number and the amount?

A January 2, 1959, Invoice WA-3371, the amount \$394.67.

Q Let me ask you to whom that bill is made? Who is the person who is charged?

A The bill is charged to me.

Q Will you please read the name as shown on the document?

A Francis C. Morgan, Jr.

Q Address?

A "Care of Radio Station KWSK, Pratt, Kansas".

Q All right. Let's take it, the next invoice, date, number?

A May 13, 1959, invoice WA-3447.

Q To whom is it made?

A Francis C. Morgan, Jr.

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Q Address?

A Care of Radio Station KWCK, Pratt, Kansas.

Q And the amount?

A \$437.34.

Q The next invoice?

A Invoice WA-3732, dated June 22, 1959.

Q to whom is it made?

A It is addressed to Francis C. Morgan, Jr., care of Radio Station KWCK, Pratt, Kansas.

Q Have all these bills been paid by you, sir?

A They have.

Q What does the "C" in your name mean, the so-called middle initial?

A Olen.

Q Does your father have the same name, Olen or known by the same name?

A Yes.

Q Have you paid all the bills so far rendered to you for legal expenses in connection with this application?

A Yes.

Q Now, directing your attention again to mid-1958, at which time you decided to file your own application, did you know or learn at the time that there would or might be another application for a radio station at Larned?

A Yes.

Q How did you find out?

A There was a story I saw released in the Hutchinson News Herald.

Q Was this application filed at or about the same time as yours was filed?

A Yes.

Q I suppose the dates speak for themselves anyway. I believe you stated you are no longer employed at the station? What are your current plans with respect to employment?

A At the present time, I am going to keep working for National Press as long as I can make a living selling their merchandise, but I prefer to go to work for some other station if possible.

Q Now, what are your plans with respect to remaining at Pratt regardless of whether this application is granted or denied?

A We are not staying in Pratt.

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Q Do you have any plans or ideas as to where you might move, assuming this application, let's say is not granted for a year or two and you are waiting?

A Well, I will seek employment as I said -0
Q Pardon?

A I will seek employment.

Q And your place of employment would govern the place you live, I take it?

A Yes.

Q Did you know that Messrs. Dillard and Lorentz represented your father on engineering matters in the past?

A I did.

Q I believe you told Mr. Paul that you did not rely on your father for any financing in connection with this application?
Upon whom did you rely?

A Upon my wife's side of the family, her mother.

Q Then, of course, the letter of credit from Collins Radio Company?

A Yes.

MR. STEIN: I have no further questions.

PRESIDING EXAMINER: Is there anything else of Mr. Morgan?

MR. MC DONOUGH: I have no questions.

MR. KENNEL: I have a few on record.

PRESIDING EXAMINER: All right.

RECROSS EXAMINATION

BY MR. KENNEL:

Q Mr. Morgan, the bill Mr. Stein and you referred to earlier bearing Invoice No. WA3371, and dated January 9, 1959, is that the first bill you received from Commercial Radio Equipment Company?

A Yes.

Q Would you tell us what this bill covers?
Now you can, I would suggest that you read what the bill states it covers.

A "Engineering services in connection with the preparation of an engineering report, A. M. Engineering Appendix 1 to accompany application for a new station in Larned, Kansas, 1290 kilocycles 500 watts a day, said report includes section V-A and V-G of FCC Form 301, and the data and exhibit required thereby. Two copies of the report to Mr. Morgan with this letter this date. Copies for filing with the FCC, delivered to Attorney A.L. Stein."

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Q Up in the right hand corner of this invoice does it not say "Customer order No. Auth." which I assume means authorized, "Auth. by Clem Morgan."

A Yes.

Q Does that bill purport to cover frequency search charges?

A It does.

Q It does.
Isn't it true, Mr. Morgan, that there was no ~~no~~ frequency search in this case that was charged to you by the engineering company?

A There was a frequency search.

Q Did you pay for that frequency search?

A I did.

Q I see. Do you believe that bill charges you with a frequency search?

A I believe that is the one that does, yes.

Q Even though the bill itself states that it covers only the engineering report in connection with the application that was filed.
Do you understand my question? Maybe the reporter should read it back.

A What was the question?

(The question was read by the reporter.)

THE WITNESS: It was my understanding that it did.

BY MR. KEMEL:

Q But you don't know for a fact, do you?

A I couldn't say definitely at this time.

Q As a matter of fact you're not sure what this bill does cover, are you?

A It covers the engineering report.

Q It covers the matters recited there on the bill that you know about, isn't that true?

A That is all I know about it at the present time.

Q Are you finished?

A Yes.

Q You told us this morning that you had no contact with the engineer until the time came for filing the amendment to your application, isn't that right?

A No telephone contact.

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Q No telephone contact, no telephone conversation. Did you have any written correspondence?

A Yes.

Q When was that?

A When I first received the statements and at a later date I requested that it be worked out on a payment plan, if we could and then later I have a letter from Mr. Lorentz outlining that and then we decided to go ahead and pay it in full.

Q So you don't know then why your name appears on that bill, do you; that the first contact you had with the engineer was subsequent to the receipt of that bill? of your own knowledge, you don't know what arrangements were made which led to your name being placed on that bill, do you; of your own knowledge?

A If the statement was sent to my father, I would imagine that he would authorize it to be sent to me because that was the agreement in the beginning.

Q So if it was sent to you it was done because your father suggested it?

A Yes, it was. There was a misunderstanding on the name.

PRESIDING EXAMINER: There was a misunderstanding on the name?

THE WITNESS: Well, I would like to say that he requested the frequency search and that this is, that the engineering by, laid out and so forth.

BY MR. KEMKEL:

Q That the engineering be charged to you?

A Yes.

Q Do you know for a fact that he requested a frequency search?

A He did, at my request.

Q I am suggesting to you, Mr. Morgan, that no frequency search was made here in the commonly accepted understanding of that term, and that you know that you were applying for the frequency at Larned which had theretofore been applied for at Pratt?

A We consulted with Mr. Dillard about that before we even filed.

Q Before you filed?

A Yes.

Q And that was the extent of the frequency search whether this frequency was at Larned?

A We have a letter on the frequency search.

Q You and your father have it.

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A It was addressed to my father.

Q Addressed to your father?

A Yes.

Q Do you have an interest in a trust fund?

A That trust fund is not my interest. It is my wife's interest.

Q You have no interest in that trust fund?

A Well, half.

Q A half?

A Yes.

Q Who set up the trust fund?

A Well, that was set up by her family.

Q Her family?

A Yes.

MR. HENKEL: No further questions.

PRESIDING EXAMINER: Are all other counsel through with Mr. Morgan?

MR. MC DONOUGH: Yes, sir.

MR. PAUL: I have one question to ask Mr. Morgan.

BY MR. PAUL:

Q When your consulting engineer was employed, make sure I understand you, you requested him to make a frequency search, is that correct?

A Yes.

Q And I may have misunderstood you, but what report did your consulting engineer give you?

A Well, I would have to refer to the letter.

Q Do you have it available?

MR. STEIN: You may be able to get it from Dillard, I am not sure.

BY MR. PAUL:

Q Maybe I can refresh your recollection. Did he tell you any other frequencies were available other than 1290 kilocycles?

A As I recall, he said there was a possibility that 1310 might work.

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Q 1310 might work?

A Yes.

Q Well, did 1310 have problems which were not present in 1290?

A They had more interference problems, as I recall, than 1290.

Q Had more interference problems than 1290?

A Yes.

Q That was reported to you by your consulting engineer, Mr. Lorentz?

A Yes.

Q What did Mr. Lorentz advise you to do?

A He didn't give me any advice.

Q He didn't give you any advice. Just gave you the two frequencies which were available to Larned, Kansas, 1290 and 1310?

A That is correct.

PRESIDING EXAMINER: 1290, however, was applied for, was it not, Mr. Merga

THE WITNESS: It was.

PRESIDING EXAMINER: There was no one on 1310 in Larned at the time?

THE WITNESS: No.

BY MR. PAUL:

Q What was the extent or did he advise you of the extent of the problems on 1310?

A Just that the interference would probably be greater on 1310 than it would on 1290.

MR. PAUL: That is all. Thank you.

PRESIDING EXAMINER: Is that all you have, Mr. Paul?

MR. PAUL: That is all.

BY MR. KERRICK:

Q I have one question on that based on that just to clear it up. I didn't want to stop my brother as he was questioning, but the witness kept giving answers as if it was within his own personal knowledge and I want to clear it up. These answers you gave to Mr. Paul concerning the engineer's advice that was given to your father, is that correct?

A It was sent to him, yes.

Q It was sent to your father, not to you?

A No.

Q What you are telling us now is based on what your father told you?

A No, he gave me the letter on the frequency search.

Q When did he give you this letter?

A After it was sent to him, I don't recall the exact date.

Q Can you fix an approximate time?

A I would say probably November, October or November of 1958.

Q Of 1958?

PRESIDING EXAMINER: If all counsel are through, I would like to ask a question or two of Mr. Morgan?

Mr. Morgan, would you editorialize on your station?

THE WITNESS: Yes, I think it is a good policy to editorialize.

PRESIDING EXAMINER: If you did, what would be your policy as to opposing views?

THE WITNESS: We would seek out opposing views.

PRESIDING EXAMINER: Suppose, and this is purely hypothetical situation, suppose an agnostic were to ask for time on your station to explain his views, would you ask him to show you a script of his proposed talk or would you refuse him out of hand?

THE WITNESS: I don't understand the first part of that question.

PRESIDING EXAMINER: Well, let me continue in this way. An agnostic. Let's assume his talk was a sober rationalization of his position, with no attack upon religion as such. Would you grant him a hearing?

THE WITNESS: If he had a prepared -- if he had it written.

PRESIDING EXAMINER: Yes.

THE WITNESS: And I thought it was in the public interest, yes, I would.

PRESIDING EXAMINER: You mean you would first ask to see his script?

THE WITNESS: Yes.

PRESIDING EXAMINER: and, of course, you reserve the right to reject his request to appear on the station?

THE WITNESS: Yes.

PRESIDING EXAMINER: Now, what is your attitude, Mr. Morgan, towards entertainment programs, music programs, primarily, at the present moment?

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THE WITNESS: Yes.

PRESIDING EXAMINER: Do you have any feelings regarding the type of music that should be broadcast over your station?

THE WITNESS: Visiting with ~~the~~ the folks in Larned, they impressed me as wanting a better class of music rather than the rock and roll type music.

PRESIDING EXAMINER: By better class of music, what do you mean?

THE WITNESS: Well, the big bands and orchestra music, and so forth.

PRESIDING EXAMINER: Your background, as I gather it, Mr. Morgan, is not primarily academic?

THE WITNESS: No.

PRESIDING EXAMINER: I see. And primarily in the radio field it is technical?

THE WITNESS: Yes.

PRESIDING EXAMINER: I see. That is all I have now. If there are no other questions than of Mr. Morgan, all right, he may be excused then. All right you are excused.

(witness excused)

PRESIDING EXAMINER: ~~Call~~ Right, gentlemen.

MR. MC DONOUGH: We have previously identified the Huffman Exhibit No. 11, which consists of the verified engineering report submitted by the consulting engineer Vir N. Jensen as of July 30, 1960.

Page 1 consists of an index, page 1 to the affidavit. The remaining pages are numbered Pages 3(a), 3(b), and 3(c), consisting of an engineering statement.

Page 4, basis of determining areas of population, pages 5(a), 5(b), 5(c), continuation of engineering statement. Page 6, page 7(a), 7(b), page 8 and Page 9, tables 1 to 4, inclusive, with page 7(b) being a continuation of table 4.

Pages 10 through 16 consist of figures 1 through 7, setting forth the proposed daytime horizontal pattern, the night time horizontal pattern, the proposed and existing zero, 0.5 daytime contours, the proposed and existing 2 millivolt daytime contours, the proposed and existing night time interference-free contours, computed daytime interference from station KGOA, ~~and~~ proposed daytime service and interference from KGOA, KUCA, and KTRN. I ~~now~~ offer Exhibit No. 11, pages 1 to 16, inclusive, as heretofore identified, and I might explain that the numbering of certain pages in A, B, AND C sequence was necessitated by the inclusion of additional engineering material.

PRESIDING EXAMINER: Is there any objection to receipt of Huffman Exhibit

NO OBJECTIONS

(HUFFMAN EXHIBIT NO. 11 WAS RECEIVED IN EVIDENCE.)

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Huffman

"Proposed Findings"

January 23, 1961

HUFFMAN – January 23, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

In re Applications of)	
)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
)	
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
)	
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
For Construction Permits)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF WILMER E. HUFFMAN

Wilmer E. Huffman, (1) applicant in the above-entitled proceeding, by his attorneys, pursuant to the Commission's Rules and Regulations and in accordance with the directions of the Hearing Examiner, hereby respectfully submits his Proposed Findings of Fact and Conclusions of Law in support of his application for a construction permit for a new standard broadcast station to operate on 1290 kilocycles, with power of 500 watts nighttime and 5 kilowatts daytime, using a different directional antenna both day and night, at Pratt, Kansas. It is prayed that these findings and conclusions be adopted as the Examiner's Findings of Fact and Conclusions of Law.

Appearances

Appearances in the above proceeding were as follows: Francis X. McDonough, Esquire (Dow, Lohnes and Albertson), on behalf of Wilmer E. Huffman; A. L. Stein, Esquire, on behalf of Francis C. Morgan, Jr. and Arthur B. Schroeder, Esquire (Miller and Schroeder), on behalf of Pier San, Inc. and Ray R. Paul, Esquire, on behalf of the Broadcast Bureau of the Commission. (2)

(1) The parties to this proceeding will sometimes hereinafter be referred to as follows: Wilmer E. Huffman as "Huffman," Francis C. Morgan, Jr. as "Morgan," and Pier San, Inc. as "Pier San."

(2) Citations to the transcript of record and to the exhibits of the applicants will hereinafter be referred to respectively as "Tr. ____, " and "Huffman Ex. ____, " "Pier San Ex. ____, " or "Morgan Ex. ____."

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Preliminary Statements

This proceeding involves the application of Wilmer e. Huffman for a new standard broadcast station on 1290 kilocycles, with power of 5 kilowatts daytime and 500 watts nighttime, using a different directional antenna both day and night, at Pratt, Kansas, and two applications for identical facilities – 1290 kilocycles, with power of 500 watts, daytime only – at Larned, Kansas, submitted by Pier San, Inc., and Francis C. Morgan, Jr. In the Order of Designation, released April 18, 1950, the Commission found that each of the three applicants was legally, financially, technically and otherwise qualified to construct and operate its instant proposal. However, inasmuch as the three applicants have requested the same frequency, Pier San and Morgan at Larned, Kansas, and Huffman in Pratt, Kansas, their applications were therefore mutually exclusive and said applications were designated for hearing on the following issues:

- *1. To determine the areas and populations which would receive primary service from each of the instant proposals and the availability of other primary service to such areas and populations.
- *2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
- *3. To determine whether the instant proposals of BP-12749 and BP-12750 would involve objectionable interference with Station KSOK, Arkansas City, Kansas (sic), or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
- *4. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, whether the proposal for Pratt, Kansas, or one of the proposals for Larned, Kansas, would better provide a fair, efficient and equitable distribution of radio service.
- *5. To determine, in the event it is concluded pursuant to the foregoing issue that one of the proposals for Larned, Kansas, should be favored, which of the proposals of PB-12749 or BP-12750, would better serve the public interest, convenience and necessity in the light of the evidence adduced under the issues herein and the record made with respect to the significant difference between the said applicants as to:
 - a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.
 - b) The proposals of each of the applicants with respect to the management and operation of the proposed station.

c) The programming service proposed in each of the said applications.

"6. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted."

PROPOSED FINDINGS OF FACT

Communities Involved

A. Pratt, Kansas

2. Pratt, Kansas, is the county seat of Pratt County and, according to the 1950 U. S. Census of Population, had 7,523 residents within the corporate limits, with a county population of 12,156. This city is located in south-central Kansas, some 50 miles north of the Oklahoma line and 200 miles east of the Kansas-Colorado line. It is also 50 road miles southeast of Larned, Kansas. (Huffman Ex. 1)

3. Pratt is the trade center for a six-county area with a combined population of some 50,000 and a business volume exceeding forty million dollars annually. Among the multifarious economic activities of the area are livestock, wheat, railroads, oil and gas. Sample economic statistics for each industry are as follows: (Huffman Ex. 1)

Livestock: Annual revenues of five million dollars.

Wheat: 1958 wheat crop of thirty-six million dollars.

Railroads Passenger and freight service by Santa Fe and Rock Island Railroads.

Oil and Gas An assessed valuation of \$7,165,190.00 in 1959.

4. Consumer spending in Pratt County, as registered by retail sale volume, was a record \$23,032,000.00 for the year 1959. The previous year's volume was \$18,149,000.00. (Huffman Ex. 7)

5. Net incomes, after deduction for taxes, amounted to \$24,175,000.00 in 1959, as against a 1958 total of \$22,213,000.00. (Huffman Ex. 7)

6. Delimiting economic growth to the City of Pratt itself, excellent indices are shown in the two tables below: (Huffman Ex. 7)

Building Permits Issued in Pratt, Kansas,

From 1950 To July 1, 1960

	<u>Estimated Valuation</u>	<u>No. of Permits</u>
New Residences	\$ 3,235,700.00	433
Repair Residences	378,069.00	513
New Business Building	1,122,489.00	63
Repair Business	461,355.00	162
Private Garages	145,325.00	294

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Western Savings & Loan Association,
Pratt, Kansas

<u>Year Ended</u>	<u>Dollars</u>	<u>No. of Home Loans</u>
June 30, 1950	\$ 112,916.00	21
June 30, 1951	259,434.00	68
June 30, 1952	608,350.00	162
June 30, 1953	1,218,429.00	255
June 30, 1954	1,643,789.00	339
June 30, 1955	2,294,167.00	470
June 30, 1956	2,677,065.00	485
June 30, 1957	3,018,230.00	544
June 30, 1958	3,239,570.00	571
June 30, 1959	3,685,948.00	596
June 30, 1960	4,569,531.00	692

7. Pratt has 22 churches and eight schools, including a junior college. Total school enrollment amounts to 2,390 students. (Huffman Exs. 3 and 4)

8. The City of Pratt is run by the 'Commission form of government, each Commissioner being elected for a term of three years. There is also a Planning Commission consisting of nine members, appointed by the Mayor to serve for three-year terms. (Huffman Ex. 2)

B. Larned, Kansas

9. In 1950 the City of Larned had a population of 4,447 and Pawnee County, in which Larned is located, had a population of 11,041. (Pier San Ex. 8)

10. There are 11 manufacturing establishments in Larned serving the agricultural and oil activities in the area. Countywide, there are 948 farms, 14 commercial grain elevators, and eight oil and gas wells. (Pier San Ex. 8)

11. Larned has a school system with a total enrollment (1958 to 1959) of 1,275. Churches in the town number 18. (Morgan Ex. 2)

12. The City is governed by a City Manager, subject to the supervision of the Mayor and eight Councilmen who hold elective offices. (Pier San Ex. 8)

Daytime Broadcast Service Proposals

A. Huffman

13. The populates and areas to be served by the Huffman proposal for Pratt, Kansas, are as follows: (Huffman Ex. 11, Table I)

<u>Contour</u>	<u>Population (1950 Census)</u>	<u>Area (Sq. Mi.)</u>
2 mv/m	72,814	6,980
0.5 mv/m (normally Protected)	166,064	21,730
Interference-free	160,857	20,796

14. Stations serving the proposed interference-free service area number as follows: (Huffman Ex. 11, Tale II)

Stations serving	0 - 25%	-	25
Stations serving	25 - 50%	-	11
Stations serving	50 - 75%	-	4
Stations serving	75 - 100%	-	1
Stations serving	100%		1

15. Stations giving 2 mv/m service to the proposed 2 mv/m contour number as follows: (Huffman Ex. 11, Table III)

Stations serving	0 - 25%	-	3
Stations serving	25 - 50%	-	1
Stations serving	50 - 75%	-	2
Stations serving	75 - 100%	-	0
Stations serving	100%		0

16. Cities of over 2,500 persons within the proposed 2 mv/m contour and the number of other 2 mv/m services presently available are: (Huffman Ex. 11, table III)

Pratt (7,523)	-	4 (3)
Dodge City (11,262)		1
Larned (4,447)		2

(3) One of the four – KVGB – does not cover the entire City of Pratt.

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A. Pier San and Morgan

17. The populations and areas to be served by the Pier San and Morgan proposals for Larned, Kansas, are as follows: (Pier San Ex. 9A; Morgan Ex. 1, Table A)

<u>Contour</u>	<u>Population (1950 Census)</u>		<u>Area (Sq. Mi.)</u>	
	<u>Pier San</u>	<u>Morgan</u>	<u>Pier San</u>	<u>Morgan</u>
2 mv/m	51,335	49,361	2,940	2,884
0.5 mv/m (normally Protected)	132,579 (4)	132,579 (4)	12,500	12,469
Interference-free	127,353 (4)	127,353 (4)	11,907.5	11,959

18. Stations serving the proposed interference-free service areas of Pier San and Morgan are as follows: (Morgan Ex. 1, Table B; Pier San Ex. 9A, Table I)

	<u>Pier San</u>	<u>Morgan</u>
Stations serving 0 - 25%	- 11	15
Stations serving 25 - 50%	- 11	11
Stations serving 50 - 75%	- 4	4
Stations serving 75 - 100%	- 4	3
Stations serving 100%	3	3

19. The 2 mv/m contours for the proposed Pier San and Morgan stations include two cities with populations over 2,500 – Great Bend, Kansas, and Larned, Kansas. (Pier San Ex. 9A, Map F; Morgan Ex. 1, Fig. 1)

20. Two stations – one at Great Bend, Kansas, and another at Concordia, Kansas – presently provide a signal greater than 2 mv/m to Larned. (Morgan Ex. 1, Table B)

Nighttime Broadcast Service Proposals

A. Huffman

(4) Population figures stipulated by agreement of the parties. (Tr. 143)

Nighttime Broadcast Service Proposals

A. Huffman

21. The population and areas to be served by the Huffman proposal for nighttime operation are as follows: (Huffman Ex. 11, Table I)

<u>Contour</u>	<u>Population (1950 Census)</u>	<u>Area (Sq. Mi.)</u>
1000 mv/m	12	0.131
25 mv/m	8,086	73.9
14 mv/m interference- Free contour)	9,204	175
4 mv/m	16,099	1,108
2.5 mv/m	23,466	1,980

22. Of the total area and population within the Huffman 14 mv/m contour, KOMA, Oklahoma City, Oklahoma, provides nighttime primary service to 16 square miles (9.2 percent) and to 128 persons (1.39 percent). Thus, 9,075 persons in an area of 159 square miles will receive a first nighttime primary service if the Huffman proposal is granted. (Huffman Ex. 11, Table IV)

B. Pier San and Morgan

23. Neither of the Larned applicants proposes nighttime service.

Interference Considerations

A. Huffman

24. The Huffman proposal for Pratt will not cause interference to any existing station on the same or adjacent channels during daytime or nighttime hours. It will receive interference within the 0.5 mv/m contour affecting 5,207 (3.1 percent) persons during daytime hours. (Huffman Ex. 11, Table I)

B. Pier San and Morgan

25. The Pier San proposal for Larned does not cause interference to any existing station, while the Morgan proposal will cause slight interference to Station KSOK, Arkansas City Kansas, increasing the population affected by interference within the latter station's 0.5 mv/m contour from 9.80 percent to 9.83 percent of the total. (Morgan Ex. 1, Table C) Both Larned proposals will receive interference within their 0.5 mv/m contour affecting 5,226 persons (4.1 percent). (5)

(5) Population figures stipulated by agreement of the parties. (Tr. 148)

CONCLUSIONS OF LAW

i.

Applicability Of Section 307(b) Of The Communications
Act of 1934. As Amended

1. In the Order designating the applications herein involved for hearing, the Commission found all of the applicants to be legally, technically and otherwise qualified. The applications are mutually exclusive, however, and only one may be granted on the frequency sought by the competing applicants.

2. Since the applications are for broadcast stations on the same frequency in two separate communities, the mandate of Section 307(b) of the Communications Act of 1934, as amended, is decisive in determining whether the grant is to be to the Pratt, Kansas, applicant or to one of the Larned, Kansas, applicants, since the Commission must first determine which community has the greater need for additional services and only then determine which applicant can better serve that community's needs. As the Supreme Court of the United States has observed, the needs of the community are paramount or otherwise they would be subordinated to the ability of an applicant from another locality. Federal Communications Commission v. Allentown Broadcasting Corp., 75 S. ct. 855: 349 U.S. 358.

3. Section 307(b) of the Communications Act of 1934, as amended, prescribes as follows:

"(b) In considering applications for licenses, and modifications and renewals thereof, when and in so far as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

4. As shown by the text of Section 307(b), the terms "fair, efficient and equitable distribution of radio service" among communities are the operative words of the Congressional mandate to the Commission. As will be clearly demonstrated below, the application of Wilmer e. Huffman for Pratt, Kansas, must prevail over the competing applications in this proceeding under any reasonable construction of Section 307(b) applied to the facts of the instant case and in the light of previous Commission interpretations.

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II.

The Essential Facts As Disclosed By The Record
In This Multi-party Proceeding

5. The essential facts of this case are as follows and as disclosed in the Proposed Findings of Fact, supra:

(a) Pratt, Kansas, a city of 7,523 persons, has one 250 watt daytime-only station.

(b) Larned, Kansas, a city of 4,447 persons located approximately 50 miles from Pratt, has no local radio station.

(c) The Pratt applicant proposes a new local fulltime service.

(d) The Larned applicants propose a daytime-only service/

(e) The Pratt proposal will bring a new local primary daytime service to 33,504 more persons than either of the Larned proposals.

(f) The Pratt proposal will bring a first primary night-time service to a "white" area of 159 square miles and a population of 9,076 persons.

(g) Neither of the Larned proposals eliminates a "gray" or "white" area day or night.

(h) The Pratt proposal brings a second daytime primary service to Dodge City, Kansas (a city with a population of 11,262 persons, 1950 U.S. Census), and thereby eliminates a "gray" area in a city of substantial size.

(i) The Pratt proposal will bring Larned, Kansas, a third daytime primary service

(j) The record is silent on the nighttime needs of services of Larned, Kansas.

6. The above facts and factors are the essential ones to be considered when examining the proposal of Pratt vis-à-vis those for Larned in the light of Section 307(b). These factors clearly reflect which applicant proposes the more efficient use of the frequency sought in the light of community and population needs and they clearly demonstrate which applicant will alone remove a substantial "white" area, a factor which is an inherent purpose and raison d'être of Section 307(b).

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III.

Efficient Utilization Of The Frequency Daytime

7. It might be argued that, were the three competing proposals all daytime-only proposals, equity would dictate a grant to one of the Larned applicants in view of the fact that Pratt now has one daytime 250 watt local service. However, even in this posture of the case the factor of efficient utilization of the frequency would weigh strongly if not overwhelmingly to the side of the Pratt applicant inasmuch as the Huffman proposal for Pratt brings a new daytime primary service to 33,504 more persons than either of the Larned proposals!

8. Similarly, the Huffman proposal for Pratt brings a second daytime primary service to Dodge City, Kansas, a city of 11,262 persons per the 1950 U.S. Census, and a third daytime primary service to Larned, Kansas, the competing community, with a population of 4,447 persons (1950 U.S. Census). Thus, the Pratt proposal of Huffman brings a second primary service to Dodge City, a city of impressive size even under 1950 Census figures, and thereby eliminates a "gray" area daytime.

9. So it follows that, even under daytime comparison, the Pratt applicant stands preeminently ahead of the Larned proponents on the basis of efficient utilization of the frequency versus the need of Larned for a first local outlet. In addition, the need for a first broadcast outlet is not an iron-bound or rigid rule. Cf. Nick J. Chaconas, et al., 19 Pike & Fischer R.R. 100 29 FCC 1226, where the Commission said at 19 Pike & Fischer R.R. 100e, 29 FCC 1230:

10. Important and desirable as it is for every community to have a transmission facility, this consideration is not as absolute one. In short, this principle is not one to be followed at all costs, irrespective of other considerations bearing upon the public interest. Thus, it has been said on a number of occasions that while the Commission must and does give consideration to the three factors of "fair, efficient and equitable" distribution of facilities, no requirement exists that equal weight be given to each criterion without regard to the facts of a particular case considered in the light of the mandate of Section 307(b) that the Commission endeavor to provide the most widespread and effective broadcast service possible."

10. In the cited case, the Commission found the crucial factor to be the rendition of primary service to populations inadequately served at night, a factor which must be determined in the case at bar and which will be more fully discussed below: In the Chaconas case, cited supra, the Commission stated: (19 Pike & Fischer R.R. 100b)

"* * * The fundamental question on which, in the final analysis, the 307(b) determination must be made, is the relative weight and preference (which is given) to Chaconas' proposal to provide primary service to 'white' and 'gray' areas, vis-à-vis the competing proposals herein offering to provide more extensive service to larger populations."

11. In the case at bar, moreover, the Huffman proposal for Pratt not only provides more extensive service to larger populations, i.e., 33,504 more persons than either of the Larned proposals, but it eliminates a "gray" area, a city of substantial size, Dodge city, Kansas, with 11,262 population according to the 1950 U.S. Census, and, in addition, will eliminate a large "white" area nighttime which is discussed hereinafter.

12. This new primary service to Dodge city is an important factor when viewed in the light of 307(b) considerations. The elimination of a "white" area in a much smaller city was held to be of determinative significance in Alkima Broadcasting Company (Initial Decision, September 15, 1960). In Alkima, a first primary service to a city of 3,350 people (Elkton, Maryland) was the factor "which would give cogent implementation of the objectives of Section 307(b) and is decisive in this proceeding."

13. It must be concluded on the record in this case that a comparison of the daytime proposals of the Pratt and Larned applicants leads unerringly to the conclusion that equity and efficiency lie with the Huffman proposal for Pratt, since it offers substantially better utilization of the frequency in serving tens of thousands more persons daytime while eliminating a "gray" area in a city of impressive size.

IV.

Determinative Significance Of The Nighttime Proposal of Huffman For Pratt, Kansas

14. Within the 14 mv/m nighttime interference-free contour of the Huffman proposal for Pratt, Kansas, is a total population of 9,024 persons in an area of 175 square miles. Within this area Standard Broadcast Station KOMA, Oklahoma City, Oklahoma, provides a primary nighttime service to only 126 persons and to only 16 square miles. Thus, it is readily apparent that the Huffman proposal for Pratt will provide a nighttime interference-free primary service to a "white" area of 159 square miles and a population of 9,076 persons (1950 U.S. Census). The elimination of this large "white" area by the Huffman proposal must be of determinative significance in this hearing, for, in addition to the superiority of the Huffman daytime proposal, Huffman alone provides a nighttime primary service to a substantial population and area not now served.

15. The Commission found the rendering of primary service to populations inadequately served at night to be the "crucial distinction" in preferring an applicant even against competing applicants who were not only bringing a first local service to the competing communities, but whose engineering proposals brought primary service to substantially greater populations and areas which already had other service. cf. Nick J. Chaconas, supra.

16. The Examiner, in his Initial Decision in Chaconas, had observed at 19 Pike & Fischer R.R. 116:

“* * * True, Chaconas' proposed service area cannot compete in size with the service areas of its competitors but it alone of the three applicants can point to an existing need for service within that area that is direct, clear-cut and unaffected by countervailing considerations of service from other sources.”

The Examiner's rationale was upheld by the Commission (Cf. Chaconas, supra).

17. The Commission has granted preferential consideration to nighttime proposals even in the absence of “white” or “gray” areas proposed to be served. In Enterprise Broadcasting Co., 18 Pike & Fischer R.R. 402, Dinuba, California, and Fresno, California, were the subjects of competing applications. Dinuba had a fulltime station which proposed increased coverage daytime and a new primary service nighttime to 28,748 persons. The Fresno applicant proposed a new facility daytime only which would render a primary service to substantial areas and populations.

18. The Commission concluded that Section 307(b) would be better served by a grant of the Dinuba application on the grounds that it would bring an additional nighttime service to more than 28,000 persons, none of whom received more than four and some of whom received only two primary nighttime services. The Commission held in Enterprise, supra, that Section 307(b) was determinative without going into the comparative merits of the daytime proposals. See also B. J. Parrish, 15 Pike & Fischer R. R. 459.

Conclusions

19. In the final analysis, it must be determined in this proceeding whether the application which will eliminate “gray” and “white” areas, which makes more efficient use of the frequency whether considered nighttime or daytime only in comparison with the other applicants, is to prevail against the Larned applicants who propose the establishment of a first local daytime service. It is submitted that more efficient utilization of the frequency and, a fortiori, the elimination of “gray” and “white” areas are of determinative significance in this proceeding.

WHEREFORE, THE PREMISES CONSIDERED. The Examiner is urged to adopt the Proposed Findings of Fact hereinabove set forth and to follow the Conclusions of Law in the application of Section 307(b) of the Communications Act of 1934, as amended, to this proceeding. It is respectfully urged that the application of Wilmer E. Huffman for Pratt, Kansas, be granted and that those of Pier San, Inc. and Francis C. Morgan, Jr. for Larned, Kansas, be denied.

Respectfully submitted,
WILMER E. HUFFMAN

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By (signed) Francis X. McDonough
Francis X. McDonough

By (Signed) Thomas S. Sullivan
Thomas S. Sullivan
His Attorneys

Francis X. McDonough
Thomas S. Sullivan
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Munsey Building
Washington 4, D. C.

Attorneys for Wilmer E. Huffman

January 23, 1961

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of January, 1961, served a true and correct copy of the foregoing "Proposed Findings of Fact and Conclusions of Law of Wilmer e. Huffman," by United States mail, postage prepaid, upon the following:

Abe L. Stein, Esquire
Warner Building
Washington 4, D. C.
Counsel for Francis C. Morgan, Jr.

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Counsel for Pier San, Inc.

Ray Paul, Esquire
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Scharfeld & Baron
National Press Building
Washington 4, D. C.
Counsel for the KSOK Broadcasting Company, Inc.

(Signed) Francis X. McDonough
Francis X. McDonough

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Morgan

"Proposed Findings"

February 1, 1961

File 1,194

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

WILMER E. HUFFMAN,
Pratt, Kansas

DOCKET NO. 13469
File No. BP-12021

FRANCIS C. MORGAN, JR.
Larned, Kansas

DOCKET NO. 13470
File No. BP-12749

PIER SAN, INC.
Larned, Kansas

DOCKET NO. 13471
File No. BP-12750

For Construction Permits

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF FRANCIS C. MORGAN, JR.

Preliminary Statement

1. This proceeding involves two applications for new radio stations at Larned, Kansas, to operate on 1290kc, 500w Day, and one for Pratt, Kansas, to operate on 1290kc, 5kw Day, 500w Night (DA-2). The applications were designated for hearing by an order dated April 13, 1960, on the following issues:

1. To determine the areas and populations which would receive primary service from each of the instant proposals and the availability of other primary service to such areas and populations.
2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
3. To determine whether the instant proposals of BP-12749 and BP-12750 would involve objectionable interference with Station KSOX, Arkansas City, Arkansas, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
4. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, whether the proposal for Pratt, Kansas, or one of the proposals for Larned, Kansas, would better provide a fair, efficient and equitable distribution of radio service.
5. To determine, in the event it is concluded pursuant to the foregoing issue that one of the proposals for Larned, Kansas, should be favored, which of the proposals of BP-12749 or BP-12750, would better serve the public interest, convenience and necessity in the light of the

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evidence adduced under the issues herein and the record made with respect to the significant difference between the said applicants as to:

- a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.
 - b) The proposals of each of the applicants with respect to the management and operation of the proposed station.
 - c) The programming service proposed in each of the said applications.
6. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted.

IT IS FURTHER ORDERED, That, The KSCCK Broadcasting Company, Inc., licensee of Station KSCCK, Arkansas City, Arkansas, IS MADE A PARTY to the proceeding.

2. At the close of the hearings, the Examiner requested the applicants to file proposed findings except on engineering by December 1, 1960; reply findings could be filed by December 15, 1960. The Broadcast Bureau will file findings on engineering by December 1, 1960 (tr. 286). Francis C. Morgan, Jr., submits herewith his proposed findings and conclusions. The date for this filing has been extended to January 27, 1961, and subsequently extended to February 1 with reply findings due February 15.

I

THE COMMUNITIES INVOLVED

(a) Pratt, Kansas

3. Pratt, the county seat of Pratt County, is located in south-central Kansas about 50 miles north of the Oklahoma line. The population of the city and county are 7,523 and 12,156, respectively (U. S. Census, 1950)*. The industries in the Pratt area include raising of livestock and wheat. It is also a railroad center. About 25 years ago, oil and gas were discovered in Pratt County; at present about 260 persons are employed there in the oil industry (Huffman Ex. 1, pp. 1, 5-7).

The city has 22 churches (Huffman Ex. 3, pg. 1). The total school

*The 1960 preliminary U. S. Census showed a county population of 11,996 (Huffman Ex. 10).

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of population is 2,264 (Huffman Ex. 4). There are a number of civic clubs including Chamber of Commerce, Kiwanis, Rotary, Optimist, and various civic fraternal and educational clubs at Pratt (Huffman Ex. 5).

Radio Station KSMK (1570kc, 250w Daytime) has operated at Pratt since 1952 (Huffman Ex. 8). The city has two newspapers, the Pratt Daily Tribune and Hutchinson News Agent (Huffman Ex. 6, pg. 10).

(b) Larned, Kansas

4. Larned, a city with a population of 4,924, is the county seat and trade center of Pawnee County, which has a population of 10,244 (U. S. Census 1960 preliminary count). The city is 40 air miles and 50 road miles northwest of Pratt, Kansas.

Larned has a daily newspaper, the Filler and Toiler, published evenings five days a week, circulation 3,057 (Ayres, 1960 directory of Newspapers and Periodicals). It has no radio station; and the nearest station is at Great Bend which is 22 air miles northeast of Larned.

Civic and social groups in Larned include Rotary, Kiwanis, Chamber of Commerce, Gray Ladies, Junior Chamber of Commerce, Jaycee Jones, Lions Club, Lioness Club, Business and Professional Women. There are also a number of women's social clubs, fraternal organizations, veterans groups, farm clubs, home demonstration units, parents-teachers association, etc. There are 18 churches of various denominations. The school system includes one elementary school, three grade schools, a junior high school and a senior high school with a total enrollment (1958-1959) of 1,275 pupils. Larned State Mental Hospital is located near the city. Manufacturers in the city produce grain bins, irrigation casing, steel tanks, disc sharpeners, rubber mats, hanger arms and shaker arms for Massey-Harris combines, combine canvases for domestic and export trade, belts, oil field rig canvas and irrigation dam canvas. Larned is the center of a rural area where livestock and wheat are raised. Pawnee County also has numerous oil wells. (Morgan Ex. 2).

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II

PIER SAN (LARNED)

(a) Corporate Structure and Contributions

5. Each of the participants holds two shares (20% interest) and is an officer and director. The participants are (Pier San, Ex. 1, p. 1):

Name	Residence	Office held
Webb Pierce	Nashville; Tennessee	President
Jim Denry	Nashville, Tennessee	Treasurer
John Bozeman	Wichita, Kansas	Vice president
Port Early	Wichita, Kansas	Secretary
K. W. Pyle	Wichita, Kansas	Vice president & General Manager

6. Each participant paid \$200 for two shares of stock. There are no stock subscriptions. Denry and Pierce, the Nashville participants, agreed to loan applicant \$20,000, of which sum they have already advanced \$3,000. The three Wichita participants agreed to render services in connection with the application and construction of the station (tr. 237, 251).

(b) Other Broadcast Interests of Participants

7. The other broadcast interests of the five participants are (Pier San, Ex. 1):

Applicant Larned Kansas	KSIR Wichita Kansas	KOOO Omaha Nebr.	WJAT Swainsboro Georgia	WBRO Waynesboro Georgia	WSNT* Sandersville Georgia
W. Pierce, 20%	--	20% Pres. & Dir.	50% Officer & Dir.	50% Officer & Dir.	50% V. Pres. & Dir.
J. Denry, 20%	--	20% Treas. & Dir.	50% Pres. & Dir.	50% Pres. & Dir.	50% Pres. & Dir.
J. Bozeman, 20%	100% Pres. & Dir.	20% V. Pres. & Dir.	--	--	--
P. Early, 20%	Officer Dir. & Salesman	20% Secty & Dir.	--	--	--
K. W. Pyle, 20%	Officer Dir. & Gen. Mngr.	20% V. Pres. & Dir.	--	--	--

*Acquired since record closed. See BAL-1001 and Ownership Report.

(c) Background of Participants

8. Webb Pierce, who was born in Louisiana in 1921, has resided at Nashville since 1952. He is vice president of Cedarwood Publishing Company, a director of American Investors and president of Pierce Records of Nashville. He also records for Decca records and makes personal appearances (Pier San, Ex. 1, p. 4). Mr. Pyle, who prepared the Pier San application, has never met either Webb Pierce or Jim Derry; and obtained the information concerning them via telephone (tr. 157, 177, 180).

9. Jim Derry, who was born in 1911, is a resident of Nashville. From 1929-1956 he was employed at WSM, Nashville. He is president of Cedarwood Publishing Company and the Jim Derry Artist Bureau (Pier San, Ex. 1, p. 3). The records of Pierce and Derry will be played at the proposed stations without any special preference (tr. 191, 252).

10. Fort Early, who was born at Kingman, Kansas, in 1917, has practiced law at Wichita since 1950. He is a member of the Harper Blue Lodge, Wichita Consistory and St. James Episcopal Church. Early estimates he will spend one day per week at the proposed Larned station (Pier San, Ex. 1, p. 3).

11. K. W. Pyle, who was born at Webster City, Iowa, in 1904, resides at East Wichita, Kansas. He had been connected with the radio business in various capacities but primarily as an engineer until 1958, when he became general manager and chief engineer of KSIR, Wichita, Kansas. Since then he has been with that station. He had a 5% interest in KFBI, Wichita, from 1949 to 1958. He is a director and vice-president of KSIR, Inc.; and together with the other four participants has a 20% interest in KOOO. In addition to the radio field, he has had interests in retail stores and farms. He belongs to various professional groups. His community activities include Chamber of Commerce, Community Chest, Red Cross, Kiwanis, Shrine and Salvation Army. In the event of a grant of the Pier San application he will move to Larned and devote full time to the proposed station as manager (Pier San, Ex. 1, p. 2; tr. 165). He decided to join this group because he wants to "slow down" on his activities (tr. 174).

12. John Bozeman, a resident of Wichita, was born in Alabama in 1923 and has been associated with radio (except for 4 years in the army) since

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12. When he obtained a part time job at WSGH, Birmingham. Bozeman was employed at KNEI and KFH, Wichita, from 1951 to 1958, when he became owner of KSIR, Wichita (Pier San, Ex. 1, p. 1). Bozeman, who is also known as Mack Sanders, has a two-hour disc jockey program at KSIR six days per week and has a live program on the TV station at Hutchinson, Kansas, on Saturday afternoon (tr. 189). Bozeman proposes to devote on the average of one day per week to the proposed station at Larned. He is also a member of the Wichita Chamber of Commerce, Independent Businessmen's Association, Appliance Dealers Association and the Ad Club (Pier San, Ex. 1, p. 1).

13. There is some question as to whether Bozeman's operation of KSIR, which is based on his long-time knowledge of Wichita, has conformed with the proposals made to the Commission in his original application (Docket 12293). Although he contends that he has educational programs at KSIR, these are only selected records of classical music; there are no talk or forum programs, and the alleged discussion program is primarily one in which persons on the street are asked questions such as why are you shopping downtown (tr. 166, ff; 194). Proposed programs such as Jewish Synagogue, Our Home and Catholic Speaks were never carried; but Bozeman claims that the people would not cooperate or that the churches wanted the programs to originate in the church rather than at the station (tr. 229, ff).

14. Even prior to 1957 when he filed his application for KSIR, Wichita, Bozeman had considered filing an application for Larned on 1290 kc because Mr. Heffelfinger, a consultant, had told him the frequency was available for that town (tr. 225, 239). Residents of Larned also knew of this availability and tried to interest people to file. In June or July, 1958, Bozeman made an appearance before the Larned Chamber of Commerce and some local people suggested that he construct a station there (tr. 240, 245). Thereafter Pier San was organized for the purpose of filing an application on 1290 kc at Larned. When Bozeman and others returned to Larned in the fall of 1958 to look for a transmitter site, people recognized him and word leaked out that his group would file an application for Larned; the newspapers also carried a story, which Morgan saw (tr. 242, 133). The Morgan and Pier San applications for Larned on 1290 kc were filed the same day

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95, 115). The only frequency recommended to Bozeman by the consultant was 1290 kc; and after the Morgan application was filed (January, 1959), no effort was made by Pier San to ascertain if another frequency was available (tr. 246). Both Larned applicants knew of the pending application for Pratt when they filed for Larned (tr. 115, 240-42).

(d) Contacts for Programs

15. On May 2, 1960, Mr. Pyle contacted seven different persons representing different groups and four members of the clergy in connection with proposed programs for the Pier San station (Pier San, Ex. 6).

(e) Proposed Programs

16. Applicant submitted a detailed description of specific programs which it proposed to carry (Pier San, Ex. 5):

6:00 - 7:00 a.m.	Farm Program
7:00 - 7:05 a.m.	News and Sports; other news programs at 8:00-8:05; 9:00-9:05; 10:00-10:05; 11:00-11:05; 12:00-12:10; 1:00-1:05; 2:00-2:05; 3:00-3:05; 4:00-4:05; 5:00-5:05
7:05 - 7:15 a.m.	Prayer for the Day, Religious Music
7:15 - 8:00 a.m.	Music; other music programs at 8:05-9:00; 9:05-10:00; 10:15-11:00; 11:05-12:00; 12:20-1:00; 1:05-2:00; 2:35-3:00; 3:05-4:00
8:05 - 9:00 a.m.	Music interspersed with notices on meetings
10:05 - 10:15 a.m.	Kitchen Chatter; home economics
12:10 - 12:20 p.m.	Markets
2:05 - 2:35 p.m.	R U Classroom (Educational)
4:05 - 4:20 p.m.	With the Military Service
4:20 - 5:00 p.m.) 5:05 - 6:00 p.m.)	This is My Opinion; telephone conversations with listeners who call in and have an opinion on any subject they wish to discuss

In addition applicant proposes special Saturday and Sunday programs (Pier San, Ex. 5, p. 3).

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17. The following is an analysis of the proposed program schedule (Pier San, Ex. 4):

ANALYSES OF PROPOSED PROGRAM SCHEDULE

(1) Entertainment	59.6	%
(2) Religious	24.53	%
(3) Agricultural	13.83	%
(4) Educational	4.23	%
(5) News	8.21	%
(6) Discussion	11.6	%
	<u>100.0</u>	%

PROGRAM LOG ANALYSIS
(in percentages)

	8 a.m. 6 p.m.	6 p.m. 11 p.m.	All Other Hours	Total
Network commercial (NC)	--	--	--	--
Network sustaining (NS)	--	--	--	--
Recorded commercial (RC)	59.7	--	34.6	55.7
Recorded sustaining (RS)	9.9	--	7.15	9.48
Wire commercial (WC)	4.8	--	15.5	6.58
Wire sustaining (WS)	1:05	--	.65	3.59
Live commercial (LC)	2:05	--	34.6	7.16
Live sustaining (LS)	19.5	--	7.5	17.5
Total commercial	66.55	--	81.7	69.44
Total sustaining	33.45	--	15.3	30.56
Complete total	100 %	--	100 %	100 %
<hr/>				
Proposed broadcast hours (per week)	70	--	13	83
No. of spot announcements (SA) (per week)	356	--	66	422
No. of non-commercial spot announcements (NCSA) (per week)	84	--	18	102

(f) Proposed Staff

18. As stated above, K. W. Pyle proposes to move to Larned to devote full time to the station as general manager and chief engineer. The station will employ a news editor, three announcers and one administrative employee, plus part time employees as needed (Pier San, Ex. 7). Although Mr. Bozeman is talented and heads available talent, this talent will not be used at the

Larned station and will come to Larned only for the purpose of playing at a dance or some special affair (tr. 189).

III

FRANCIS C. MORGAN, JR. (LARNED)

(a) Background of Applicant

19. Francis C. Morgan, Jr., was born at Garden City, Kansas, in 1932; his family moved to Great Bend, Kansas (23 miles northeast of Larned), in 1939, when his father became manager of Station KWGE. There he attended elementary school and one year of high school, participating in freshman football and basketball and in the Hi-Y. In 1948 his parents moved to Hays, Kansas, where his father was employed to supervise the installation and become general manager of Station KAYS. (Hays is 49 air miles northwest of Larned.) At Hays High School, Morgan participated in basketball and track, was a member of the Courtesy Committee, choir, and boys' glee club. In May, 1951, he was selected as Junior Rotarian. During weekends and the summer he worked at the Kansas State Agricultural Experiment Farm. Following high school graduation in 1951, Morgan was employed as foreman for one year at the Dry Land Agricultural section of that farm. In 1952 his parents moved to Pratt, Kansas (40 air miles and 50 road miles from Larned), where he worked at the Swisher Implement Company and the Pratt Manufacturing Company to help support the family; he also helped his father install his own radio station, KMSK. After the station went on the air (October, 1952), Morgan attended Pratt Junior College for one year and worked as an announcer-operator at the station.

In September, 1953, Morgan entered the military service and received his basic training as an anti-aircraft artillery radar operator. In 1955 he was discharged and returned to KMSK, where he remained as an announcer-operator and salesman until September, 1958; thereafter and until July, 1960, he was employed as an announcer-operator, salesman and chief engineer at the station. During his time in service, Morgan started a correspondence course with the Cleveland Institute of Radio Electronics; and in July, 1958, enrolled in Elkins Radio License School, Dallas, Texas, where he received his First

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one license. While employed at KWSK he also gained experience in writing, news gathering and news writing, newscasting and public service programs.

Morgan is a member of the All Saints Episcopal Church, the Junior Chamber of Commerce, Elks Lodge and was a charter member of the Kiwanis Club of Pratt. When that club was organized, he became Chairman of the Boys and Girls' Committee and helped to organize the Kiwanis Kids' Day, which is now an annual event in Pratt. He has also aided and assisted in the following projects over a period of years: organization in 1955 of the radio production class at Pratt Junior College and Pratt Senior High School; establishment of the annual American education week program, which is an annual event at the schools; production of the senior high and junior college annual radio production class programs on KWSK; lecturing to the pre-engineers class of the high school and junior college on the basics of radio broadcasting; radio publicity of the Jaycee Road-A-0 (teenage driving contest); radio interviews with contestants in the annual Miss Kansas pageant, which is sponsored by the Pratt Jaycees; annual radio publicity for the Boy-Scout fund drive and the Scout Circus; publicity for the Rotary Club in the March of Dimes, and for the Lions Club in the sale of brooms for the blind; annual broadcasts from the county fair grounds; preparation of weekly broadcasts of 4-H leaders; promotion of the TB Clinic's free chest x-ray programs at Pratt; publicity for the local Red Cross bloodmobile.

Morgan has never had any ownership interest in a radio or television station, newspaper or theatre.

In the event of a grant of his application, Morgan and his family will move to Larned, where he will devote his entire time to the proposed station. His wife will assist him at the station.

On July 2, 1960, Morgan severed his connections with KWSK and became a salesman for National Press of North Chicago, selling advertising specialties, such as ballpoint pens, calendar advertising, business printing, etc. His territory includes the Pratt and Larned areas (Morgan, Ex. 3).

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left his father's station and obtained employment elsewhere because of a family conflict that arose after his mother passed away and his father remarried (tr. 97, 114). Since then his father has employed Ted Patterson as a first class engineer on a permanent basis. Even if his application is denied, Morgan will not seek reemployment at his father's station nor remain at Pratt (tr. 125, 126, 134); and will not have authority to sell time on KWSK if a grant is received (tr. 129). While employed by his father at KWSK, he had no authority to sign checks or to hire and fire employees (tr. 114, 126). The father has no business interests other than Station KWSK; and the son has no business interests other than his present job of selling advertising specialties (tr. 130, 151). Since leaving KWSK on July 2, 1960, the son's dealings with his father have been "at arm's length" (tr. 130). There is no common ownership between the son and his father with respect to real estate, no loans between them and no funds will be received from the father to construct the proposed station (tr. 129).

21. Francis C. Morgan, Jr., talked with his father about the possibility of filing an application for Larned several years ago, even before the Pratt application was filed and also while Morgan, Jr., was in the military service, but took no steps in that direction because of lack of money (tr. 116). He saw a story in the Hutchinson News Herald to the effect that an application would be filed for Larned (tr. 133). In the middle of 1958 he and his wife decided to file the Larned application and he asked his father to contact a Washington radio consultant and engineer of his acquaintance to make a frequency search and prepare an application. The consultant reported that the frequencies 1290 and 1310 kc were possibilities and that the interference would probably be greater on 1310 than on 1290 kc (tr. 100, 116, 131, 139, 142). The latter frequency was selected and the application filed on the same day as the other Larned application (tr. 133). Prior to filing, Morgan, Jr., had discussed the matter with people at Larned, including his former high school coach (tr. 99). Morgan, Jr., prepared the program schedule and its amendment without help from others (tr. 100). Subsequently he went to Larned on trips and contacted

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various persons either directly or by phone in connection with the proposed station (tr. 101-104). Morgan, Jr., was charged and paid the fees and expenses in connection with the application with his own funds (tr. 123, 124, 131, 133). When the Commission requested an additional showing of finances, he obtained a letter of credit from Collins Radio Company and assurances of financial aid from his wife's family (tr. 135).

(b) Contacts for Programs

22. Morgan contacted over 25 different persons in the Larned area and elsewhere at various times from April, 1959, to August, 1960, and discussed various programs with them and their desire to participate in such programs (Morgan, Ex. 4).

(c) Proposed Programs

23. The following is a summary of some of the important programs proposed by Morgan. The details underlying same are set forth in Morgan, Ex. 6.

8:00 - 8:15 a.m.	News and Civic Topics; other news programs at 9:00-9:15; 10:00-10:15; 11:00-11:05; 12:30-12:45; 4:00-4:15; 4:15-4:30; 5:45-6:00
8:15 - 8:30 a.m.	Ministerial Association
8:30 - 8:55 a.m.	Studio Varieties; other music programs of various types at 9:15-9:30; 10:15-10:55; 11:05-12:30; 12:45-1:00; 1:05-1:15; 2:00-3:00
8:55 - 9:00 a.m.	Opening Markets
9:30 - 10:00 a.m.	Ryan Time
10:55 - 11:00 a.m.	Mid Morning Markets
1:00 - 1:05 p.m.	Closing Markets
1:15 - 1:30 p.m.	Merchants Review: Brief announcements of special items from the merchants in Larned
1:30 - 2:00 p.m.	Party Lines: A two-way conversational program interviewing local residents.
3:00 - 4:00 p.m.	Farm Hour
4:30 - 4:45 p.m.	Kiddies Hour
4:45 - 5:45 p.m.	Open for Discussion: Schedules for discussion of local civic club activities, schools, Red Cross and other organizations operating in the public interest

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... 29 minutes past every hour, the weather forecast for Laredo and ... will be given. These weather forecasts have become very important to the farmers in the area because weather is a very important factor in their daily lives. On Sunday there will also be various farm, educational, sports, news and discussion programs (Morgan, Ex. 6).

24. The analysis of the proposed program schedule is as follows (Morgan, Ex. 7):

ANALYSES OF PROPOSED PROGRAM SCHEDULE

(1) Entertainment	15.82	%
(2) Religious	1.83	%
(3) Agricultural	1.72	%
(4) Educational	1.63	%
(5) News	20.70	%
(6) Discussion	8.10	%
(7) Talks	7.85	%

PROGRAM LOG ANALYSIS
(in percentages)

	8 a.m. 6 p.m.	p.m. 11 p.m.	All Other Hours	Total
Network commercial	--	--	--	--
Network sustaining	--	--	--	--
Recorded commercial	46	--	--	46
Recorded sustaining	9	--	--	9
Wire commercial	12	--	--	12
Wire sustaining	2	--	--	2
Live commercial	1	--	--	1
Live sustaining	30	--	--	30
Total commercial	59	--	--	59
Total sustaining	41	--	--	41
Complete total	100%	--	--	100%
<hr/>				
Proposed broadcast hours (per week)	70	--	--	70
No. of spot announcements (SA) (per week)	500	--	--	500
No. of non-commercial spot announcements (NCSA) (per week)	50	--	--	50

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(d) Staff

25. Morgan, Jr., proposes to move to Larned and devote his entire time to the new station. He will also be chief engineer and his wife will be bookkeeper. In addition, he will hire two full time engineer-announcers, a new director who will also announce, one full time salesman and a receptionist who will also handle women's programs and continuity.

He will operate his station independent of the one owned by his father at Pratt, 50 road miles away. There will be no joint rates, programming or common employees (Morgan, Ex. 5). As pointed out in paragraph 23, p. 11, supra, he has severed all business relationships with his father, never had any common or joint business ventures and will not sell any time for his father's station (tr. 98, 126, 129).

IV

CONCLUSIONS

1. This proceeding involves mutually exclusive applications for new radio stations at Pratt and Larned, Kansas. The proposed operations at Larned would be on 1200 KC, 500 watts daytime; the proposed operation at Pratt would be on 5 kw daytime, 500 watts night (DA-2). Since two communities are involved, the first determination to be made is the community to which the facility should be assigned. Both towns are substantially the same size. While Pratt now has a daytime station of its own, Larned does not have a station of its own and the nearest station is located at Great Bend, 22 miles from Larned. The proposal for Pratt is for an unlimited time station. Part of the nighttime proposed service area of the Pratt applicant does not receive any nighttime service

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at present.* Larned receives only two primary services daytime.** Since the proposal would provide Larned with its first local outlet, the Commission finds that public interest, convenience and necessity requires a grant for a first local outlet at Larned in preference to a second station at Pratt.

2. In making a choice between applicants for the same community, the Commission takes into consideration various criteria such as: integration of ownership and management; local residence; participation in civic affairs; diversification of media of mass communication; broadcast experience; past broadcast performance and program proposals. Morgan is favored with respect to integration of ownership and management, because he proposes to devote all of his time to the proposed station. Thus we have 100% integration. On the other hand Fyle, who has a 20% interest in the Pier San application, is the only one in that group that proposes to devote all of his time to the proposed station at Larned. Furthermore he has some business interests in the Wichita area. Two of the other participants in Pier San (Derry and Pledge) have indicated that they will not devote any time to the proposed station; two other participants (Aczeman and Early) propose to come to Larned from Wichita, where they have other business interests, and devote on the average of one day a week to the proposed station. On balance, Morgan deserves a substantial preference on the question of integration of ownership and management.

*The following is a tabulation of areas and populations within the pertinent nighttime contours of the Pratt proposal (Huffman, Exhibit 11, page 6):

	Population	Area (Sq. Mi.)
14 mv/m int. free	9,204	175
4 mv/m	16,099	1,108
2.5 mv/m	23,466	1,980

In view of the action of the Commission designating for a hearing an application for Conway, South Carolina (Docket No. 13841); a question arises as to whether the proposed operation violates Section 3.24(b) of the Rules and Section 307(b) of the Statute.

**It is understood that the applicants are not expected to make any engineering findings until the reply findings are submitted.

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3. Morgan and Pyle propose to move to Larned. While neither lived at Larned, Morgan has spent his youth in small communities north and south of Larned and has been in that city on a large number of occasions. His knowledge of the area, therefore, is greater than that of Pyle; and with respect to the proximity of residence, Morgan is entitled to a slight preference as against Pyle. Of the other four participants in Pier San, the record does not show whether either Pierce or Denny has ever been at Larned. Bozeman, Pyle and Early have been there several times. Since the factor of local residence is designed to reflect the applicant's knowledge of the needs of the area, it is clear that Morgan has greater knowledge of the needs of the area taking into consideration his visits and residence in small towns in the general area during his entire life. Although neither applicant has shown any participation in civic affairs at Larned, Morgan's participation in civic affairs at Pratt and in small communities comparable in size to Larned afford him a slight advantage over Pyle, most of whose civic activities have been in Wichita, a much larger city.

h. With respect to ownership of other media of mass communication, reference may be made to paragraph 7, page 4 supra. Messrs. Denny and Pierce each have an interest in four other radio stations. Early has an interest in one (KOOO, Omaha) and is connected with KSIR as an officer and employee. Bozeman is a licensee of KSIR, Wichita,* has a 20% interest in KOOO and is employed at a TV station. Pyle has a 20% interest in KOOO and states that he will sever his connections as manager of KSIR in the event of a grant. Since the participants of Pier San have varying amounts of other radio interests and Morgan has never had any interest in a station, theater or newspaper, he is entitled to a clear preference over the others on the question of diversification of media of mass communication.

*This station provides a 0.5 mv/m signal over much of the service area of the proposed Larned station.

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respect to broadcast experience, Early has some as a
ficer; he is a practicing attorney; Pierce and Denty have
stations, but the record is barren of any evidence that their
experience, if any, which they might have will be utilized at Larned.
Bozeman has had radio experience over a period of years, but because he is
occupied daily at his own station, his talent on a TV station and proposed
to devote at most on an average of one day a week at Larned, it is clear
that whatever experience he might have would not be reflected to any marked
degree in the operation at Larned. Furthermore his associated talent will
not be used at Larned. Pyle has been in the radio field for many years,
primarily as an engineer. The assistance he provided at KOOO, Omaha,
where he has a 20% interest, appears to be of an engineering nature. He
is general manager but not program director of KSIR, Wichita. On the
other hand Morgan has had a diversified experience in a small town station
and his special projects in the public service field on behalf of that
station as set forth in paragraph 19, page 10 supra, have provided him
with a unique background which can be utilized at another small town station
where little authority is delegated to others and the owner-manager must
maintain a close association with everything that occurs at the station.
Therefore Morgan is entitled to a preference on the basis of a unique
broadcast experience necessary for operation of a small town station.

6. Since Morgan has had no prior ownership of a station, we cannot
compare his past performance with that of Bozeman or others at KSIR.
However, it might be noted that in the light of Bozeman's knowledge and
prior experience in the Wichita area his performance at KSIR reflects
various shortcomings. One who has experience in programming in a given
community should be able to propose a program schedule that can be carried
into actual operation without much change or deviation. The discrepancies
between Bozeman's proposals and actual performance do not reflect too
favorably upon him.

7. The program proposals of both applicants are, generally speak-
ing, meritorious. Each shows higher percentage of certain programs in

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... devoted greater effort
... needs with
... , various
... .

RECOMMENDATION

8. It has been shown that the grant should be given to an applicant for learned, because that of localities. As between the two learned applicants, Morgan has long preference in the fields of instruction of ownership and certification of records of most communication. He is entitled to preference of local residence, participation in civic affairs, past broadcast experience in the area involved and program proposals. In view of the foregoing considerations, the application of Francis C. Morgan, Jr., learned, will be granted and the applications of Pier Can (Larnet) and Wilmer E. Huffman (Huff) must be denied.

Respectfully submitted,
FRANCIS C. MORGAN, JR.

By A. L. Stein, his attorney

February 1, 1961
Warner Building
Washington, D. C.

CERTIFICATE OF SERVICE

I certify that I have, this first day of February, caused by hand delivery only United States mail, postage prepaid, a copy of the foregoing to the following:

Robert Searles
Ray Ford
Federal Communications Commission
Washington, D. C.

Waller & Schroeder
One Logan & Albertson
Navy Building
Washington, D. C.

A. L. Stein

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Pier San

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177pgs

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)

WILMER E. HUFFMAN)
Pratt, Kansas)

FRANCIS C. MORGAN, JR.)
Larned, Kansas)

PIER SAN, INC.)
Larned, Kansas)

For Construction Permits)

DOCKET NO. 13469
File No. EP-12021

DOCKET NO. 13470
File No. EP-12749

DOCKET NO. 13471
File No. EP-12750

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND MEMORANDUM BRIEF
OF
PIER SAN, INC.

Comes now Pier San, Inc., by its attorneys, and pursuant to Section 1.149 of the Commission's Rules, files its proposed findings of fact, conclusions of law and memorandum brief in the above captioned proceeding.

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Wilmer E. Huffman (hereinafter referred to as "Huffman"), Francis C. Morgan, Jr. (hereinafter "Morgan"), and Pier San, Inc. (hereinafter "Pier San"), for construction permits for new broadcast stations to operate on 1290 kc. Huffman seeks to utilize the frequency at Pratt, Kansas, to establish the second station there, with 5 kw power during the daytime and 500 watts at nighttime and a directional antenna with different patterns for day and nighttime operation (500 w, 5 kw-LS, DA-2). Morgan and Pier San propose to use the frequency at Larned, Kansas, to establish the first station in the community. They propose to operate during daytime hours with 500 watts power.

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2. By Order released April 18, 1960, the mutually exclusive applications were designated for hearing. The Hearing Order stated that the Commission found each applicant to be legally, technically, financially and otherwise qualified to construct and operate his or its proposed station, except as may be indicated by the issues. The following issues were specified:

1. To determine the areas and populations which would receive primary service from each of the instant proposals and the availability of other primary service to such areas and populations.
2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
3. To determine whether the instant proposals of BP-12749 (Morgan) and BP-12750 (Pier San) would involve objectionable interference with Station KSOX, Arkansas City, Arkansas, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
4. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, whether the proposal for Pratt, Kansas, or one of the proposals for Larned, Kansas, would better provide a fair, efficient and equitable distribution of radio service.
5. To determine, in the event it is concluded pursuant to the foregoing issue that one of the proposals for Larned, Kansas, should be favored, which of the proposals of BP-12749 (Morgan) or BP-12750 (Pier San), would better serve the public interest, convenience and necessity in the light of the evidence adduced under the issues herein and the record made with respect to the significant difference between the said applicants as to:
 - a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.
 - b) The proposals of each of the applicants with respect to the management and operation of the proposed station.
 - c) The programming service proposed in each of the said applications.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted.

3. Prehearing conferences were held on May 10, September 12, and September 30. The applicants' exhibits were exchanged among the parties on August 17. The evidentiary hearing commenced on September 14, 1960, and hearing sessions were held that day and on October 17. The record was closed the last mentioned date. (T. 286).

II PROPOSED FINDINGS OF FACT

A. THE COMMUNITIES INVOLVED

1. In General

4. Pratt and Larned are separate communities in the State of Kansas, and each is the county seat of its respective county. Pratt, in Pratt County, is forty air miles, but fifty miles by road, from Larned, in Pawnee County. Both communities are located in the general south-central portion of Kansas. Pratt is some fifty miles north of the Oklahoma line, and Larned is north and west of Pratt, placing the latter city somewhat nearer the center of the State of Kansas. (Pier San Ex. 9A, p. 4; Morgan Ex. 8; Huffman Ex. 1). Both communities are in the agricultural region of the state, with grain and livestock farming operations and sales playing significant roles in their economies, although oil and gas wells are also important. (Pier San Ex. 8; Huffman Ex. 1, p. 7). There are, however, differences between the communities in other characteristics, as the following findings will show.

2. Pratt and Pratt County

5. In 1950 the city of Pratt had a population of 7,523, and Pratt County's population was 12,156. The 1960 Census figures were not available for individual cities in Kansas at the time of the hearing, although

the preliminary county totals had been released. The 1960 figure for Pratt County is 11,996, indicating a loss in population. The loss reported in the most recent census followed a trend which commenced in 1930, Pratt County reporting a smaller population in each census year. (Huffman Ex. 10).

6. Pratt was developed from a townsite created by the Kansas legislature in 1873, and its first settler was a trapper who made his camp there in the same year. The first residence was established five years later. The railroad came in 1886, and the townsite began to develop, and by the turn of the century Pratt's population was 1,300. In 1910 the town's government was changed from a council to the commission form which exists today, with three commissioners being elected on a staggered-term basis for three years each. The extension of the railroad to Pratt, the development of the telephone, electricity, and the automobile brought changes to Pratt and Pratt County, and World War II occasioned the establishment of an Army Air Force base near the town. (Huffman Ex. 1, p. 1-5).

7. Pratt has a municipal police department of twelve patrolmen and a chief, and a fire department of three fulltime men and fifteen volunteers. The fire company has three trucks. Light, water, and sewer facilities are municipally supplied. A Planning Commission, with two non-resident members, is appointed by the Mayor. There are twenty-two churches in Pratt, with memberships ranging from a low of thirty to a high of 1,354. Some 2,390 pupils are enrolled in the Pratt schools, comprised of three public and one parochial elementary schools, a junior high, a senior high, and a junior college. The principal civic clubs of Pratt are the Chamber of Commerce, the Junior Chamber, Kiwanis, Optimist, Rotary and Pilot Clubs, but other similar civic, fraternal and social clubs are active, including Boy Scout and Girl Scout troops and a ministerial association. (Huffman Ex. 2, p. 1-2, Ex. 3, p. 1-2, Ex. 4, Ex. 5, p. 4-5).

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8. The commercial and service enterprises are typical of small town businesses, ranging from title abstractors to hamburger stands to water softening services. (Huffman Ex. 6). Two banks and one savings and loan institution are located in Pratt, serving the town and surrounding area. (Huffman Ex. 1, p. 3, Ex. 7, p. 2). During the past ten years sixty-three permits for new business buildings and 433 permits for new residences have been issued. Public construction in the last decade includes street paving, improvements to the water department building and additions to the city hospital and garbage department. (Huffman Ex. 7).

9. Pratt has one radio station, KWSK, which was established in 1952. It operates on 1570 kc, employing 250 watts during daytime hours. (Huffman Ex. 8, p. 1). One newspaper, the Pratt Daily Tribune, is published in the town, and the Hutchinson (Kansas) News maintains an agency there. (Huffman Ex. 6, p. 10). Two railroads serve Pratt, one supplying freight and passenger service to Wichita and the other (Rock Island) making a scheduled stop there for the Chicago-Los Angeles train. (Huffman Ex. 1, p. 7).

10. In Pratt County livestock is an important facet of the economy, with wheat growing and oil and gas production also playing significant parts. The computed arithmetic average of net income per household during 1959 in the county was \$6,044. The business activity and purchasing ability of the residents when weighed against population and retail sales give Pratt County a score of 151 in the index of sales production, according to an article prepared for the Pratt newspaper last July. (Huffman Ex. 7, p. 3-4). However, as above found, Pratt County has been losing population in the last three decades, and the preliminary reports for the 1960 census indicate that the downward trend is not being reversed. (Huffman Ex. 10).

3. Larned and Pawnee County

11. In 1950 Larned had a population of 4,447 and Pawnee County's population was 11,041. Both Larned and Pawnee County have reported gains in population in the census years since 1930, although the 1960 preliminary figures indicate that there may have been a loss of 600 persons in the county between 1950 and 1960. (Pier San Ex. 8, Huffman Ex. 10). Larned is considered the site of the Larned State Hospital, although the institution is physically located just beyond the city's boundaries. The hospital has a staff of some 700 persons, taking care of approximately 1500 patients. Fort Larned, one of the original frontier military posts along the Sante Fe Trail is located near the city, and the fort is maintained and operated by the Fort Larned Historical Society. As mentioned above, Larned is the county seat of Pawnee County.

12. Larned's municipal government is comprised of a mayor and eight councilmen, all elected, and an appointed city manager. Pawnee County is governed by an elected board of commissioners. (Pier San Ex. 8). The school system of Larned includes one elementary, three grade schools, a junior high and a senior high school, with a total enrollment of 1,275. (Morgan Ex. 2). Eleven manufacturing establishments are located in Larned, engaged primarily in fabricating equipment for the oil and agricultural activities in the area and for export. (Pier San Ex. 8, Morgan Ex. 2). Two banking institutions operate in Larned. The Sante Fe and Missouri Pacific railroads serve Larned, and the city maintains an airport. (Pier San Ex. 8).

13. Within Larned and Pawnee County there are eleven service clubs, such as the Rotary, Kiwanis and Lions (Lions Club in Larned, Garfield and Burdette), and there is a branch of the Business and Professional Women's organization. Mixed groups, such as YWCA, Parent's Club and WOTU, number in excess of fifty. Eighteen churches are located in Larned, and

in the city and Pawnee County parishes, religious groups and churches exceed fifty. Larned and other communities in the county have National Guard armories and veterans' organizations. Fraternal groups, such as Eastern Star and the Knights of Columbus, are in Larned and Pawnee County, and Boy Scout, Girl Scout and Sea Scouts also operate there. Farm and grange groups and home demonstrations units are also present in both the city and county. (Pier San Ex. 8).

14. There are 948 farms in Pawnee County, with an approximate gross income of \$15,000.00 each. Fourteen commercial grain elevators operate in the county, with a combined capacity of 1,130,000 bushels of grain. At present there are eight oil and gas wells there, with an assessed valuation of more than \$6,000,000.00. Nationally known breeders of cattle and sheep have ranches in the county, constituting an important part of the rural economy. (Pier San Ex. 8).

15. There is no radio station in Larned, and the nearest station is twenty-two miles away in Great Bend. (Morgan Ex. 2). One newspaper is published in the city, five evenings a week, with a circulation of 3,057. (Pier San Ex. 2, Morgan Ex. 2).

B. AREAS AND POPULATIONS TO BE SERVED, AND OTHER SERVICES AVAILABLE

16. It is unquestioned that the proposals for the use of 1290 kc at Pratt and Larned, Kansas, are mutually exclusive, so detailed findings will not be made of the extent of interference which would be involved if a station operated at each place on the frequency here sought. (Pier San Ex. 9-A, p. 2). The findings on areas and populations to be served, on interference considerations, and on other services available, proceed from the same premise of mutual exclusivity and assume that the contested frequency will be used by one applicant at Larned or at Pratt.

1. The Pratt Proposal

17. The operation of the proposed station at Pratt, Kansas, will not cause interference to any existing station on the same or adjacent channels, during daytime or nighttime hours of operation. (Huffman Ex. 11, p. 3c). During the daytime, the proposed station would receive interference from three existing stations, and at nighttime it would be limited to its 14 mv/m contour because of interference. (Huffman Ex. 11, p. 6). The interference would result in Huffman being unable to serve approximately 3.2% of the population during the daytime and almost 40% during the nighttime of those living within the respective normally protected contours.

18. The areas and populations which would be served within the service contours of the proposed Pratt station, daytime and nighttime, are shown by the following table:

<u>Contours</u>	<u>Population 1950 U. S. Census</u>	<u>Area Square Miles</u>
<u>Daytime Operation</u>		
1,000 mv/m	12	0.655
25 mv/m	10,802	423
5 mv/m	29,275	2953
2 mv/m	72,814	6980
*0.5 mv/m	166,064	21,730
Interference from KTRN within 0.5 mv/m	4,059	723
Interference from KUOA within 0.5 mv/m	45	10
Interference from KSCB within 0.5 mv/m	1,103	201
C.5 Interference Free	166,657	20,796

* Normally protected contour

<u>Contours</u>	<u>Population</u> <u>1950 U. S. Census</u>	<u>Area</u> <u>Square Miles</u>
	<u>Nighttime Operation</u>	
1,000 mv/m	12	0.131
25 mv/m	8,086	73.9
**14 mv/m	9,204	175
4 mv/m	16,099	1108
*2.5 mv/m	23,466	1980

* Normally protected contour
 ** Nighttime Interference Free Contour (Huffman Ex. 11, p. 6)

19. During the daytime, a total of 42 stations provide service within the area to be served by Huffman. One station serves 100% and another from 75 to 100% of Huffman's daytime service area. Four stations serve from 50 to 75%, eleven serve from 25 to 50%, and twenty-five stations serve up to 25% of Huffman's daytime interference-free service area. (Huffman Ex. 11, p. 7 and 7b). A maximum of 23 services and a minimum of 4 are available to all parts of Huffman's 0.5 mv/m daytime contour. (Huffman Ex. 11, p. 5b).

20. A 2 mv/m signal is supplied by six stations within Huffman's proposed 2 mv/m contour. Although no station serves with a 2 mv/m signal all of Huffman's proposed 2 mv/m contour, (only three cities of a population requiring that grade signal for primary service are in Huffman's 2 mv/m contour, and each of them does receive such a strength signal from one or more stations.) (Huffman Ex. 11, p. 8).

21. Pratt receives a 2 mv/m signal from four stations (including the local station KWSK), three of which supply such a signal strength to the entire city, while the fourth puts that signal grade over a portion of the community. (Huffman Ex. 11, p. 8).

22. At night one station provides primary service within the proposed primary service area of the proposed Pratt station. That is Station KOMA at Oklahoma City, which supplies primary service to approximately 25% of Huffman's proposed primary service area. The nighttime limit of the

proposed Pratt station is the 1 $\frac{1}{4}$ mv/m. The total area within this contour is 175 square miles with a population of 9,204. KOMA provides primary nighttime service to 16 square miles, or 9.2% of this area, serving 128 persons or 1.39% of the population therein. Thus, the proposed Huffman station would provide nighttime interference-free service to a "white" area of 159 square miles with a population of 9,076 persons. (Huffman Ex. 11, p. 9).

2. The Larned Proposals

23. The two Larned applicants (Pier San and Morgan) propose substantially identical technical facilities, and their respective transmitter sites are very close. The exhibits submitted by each initially showed a slight divergence with respect to the populations within their primary service and interference-free contours, but at the hearing it was stipulated and agreed among all parties that the population within the 0.5 mv/m and interference-free contours would be the same, and the stipulated figures were put into the record and substituted for those appearing in the exhibits. (T. 148). Thus, so far as areas and populations which would receive service from either Pier San or Morgan are concerned, the proposals of both are the same. However, there is difference between the two Larned proposals with respect to interference which may be caused to existing stations, and findings in that connection will first be set forth before turning to the findings which are equally applicable to both Pier San and Morgan.

24. The operation of the station at Larned by Pier San would not cause interference to any existing station, either co-channel or on adjacent channels, including KSCX, Arkansas City, Kansas, mentioned in Hearing Issue No. 3. (Pier San Ex. 9B, p. 2).

25. Morgan's proposed use of 1290 kc at Larned would occasion some slight interference to KSKK. KSKK presently receives interference from other sources affecting 31,245 persons of the total of 318,801 persons within its 0.5 mv/m contour, and the Morgan proposal would cause objectionable interference to an additional 101 persons, or 0.03% of the total population within KSKK's normally protected contour. (Morgan Ex. 1, p. 2). Eighteen stations (counting two time-sharing operations as one station) serve with 0.5 mv/m or better all of the area where Morgan's proposal might cause objectionable interference to KSKK, two stations serve from 75 to 99% of such area, and two from 25 to 49%. A maximum of 21 and a minimum of 19 services are available to such interference area. (Morgan Ex. 1, p. 11).

26. The areas and populations which would be served by the use of 1290 kc at Larned, as proposed in this proceeding, are as follows:

<u>Contours</u>	<u>Population 1950 U. S. Census</u>	<u>Area Square Miles</u>
1,000 mv/m	0	.049
25 mv/m	5,598	60.8
5 mv/m	13,202	870.0
2 mv/m	51,335	2,940
0.5 mv/m	132,579	12,500
Interference from KOIL and KUOA	5,226	592.5
Interference free	127,353	11,907.5

(Pier San Ex. 9A, p. 2; Morgan Ex. 1, p. 5; T. 148).

27. As the table shows, the Larned proposals would receive interference within their normally protected contour from KUOA, Siloam Springs, Arkansas, and KOIL, Omaha, Nebraska, affecting 592.5 square miles wherein live 5,226 persons.^{1/} The population affected would be only 3.9% of the

^{1/} Morgan calculates a small amount of adjacent channel interference from KSKK in the same area in which interference would be received from KOIL and KUOA, but since it is in the same area no additional loss would be involved. (Morgan Ex. 1, p. 1, p. 4). Pier San does not find any adjacent channel interference. (Pier San Ex. 9B, p. 2).

population in the 1290 mc station's normally protected contour. In this small area where the Larned service would not be obtained, services from other stations are available, varying from 12 to 21 depending on the specific location in the interference area. (Pier San Ex. 9A, pp. 4,6; Morgan Ex. 1, pp. 4, 6).

28. Two stations provide a 0.5 mv/m signal to all of the area within Larned's proposed 0.5 mv/m contour. They are KFRM, near Concordia, Kansas, and KVGB, Great Bend, Kansas. KSAC, Manhattan, Kansas, provides such a signal when it is utilizing the frequency it shares with WIBW, Topeka, but WIBW serves less than all the area. Three stations (in addition to WIBW when it is operating) serve from 75 to 100% of Larned's proposed 0.5 mv/m area. Eleven other services are available in 25 to 50%, and another eleven in less than one-fourth of such area. ^{2/} The minimum number of 0.5 mv/m services in any part of the area is seven, and the maximum is twenty-three or twenty-four. (Pier San Ex. 9A, p. 3; Morgan Ex. 1, p.7-9).

29. There is no radio station in Larned, and only two stations in other locations provide the city with a primary signal (2.0 mv/m or better). The nearest such station is some twenty-two miles distant, in Great Bend, Kansas. (Pier San Ex. 9A, p. 3; Morgan Ex. 1, p. 9 and Ex. 2).

C. THE APPLICANTS

30. The Commission specified the standard comparative issue only as between the two Larned applicants, viz., Pier San and Morgan. No evidence was adduced concerning the Pratt applicant's background, experience or programming proposal as none was contemplated by the issues as framed by the Commission. Consequently, the balance of these Proposed Findings will concern only the two Larned applicants.

^{2/} Pier San finds only 11 serving these small segments of the area, although Morgan indicates that the number may be 15. (Pier San Ex. 9A, p. 3; Morgan Ex. 1, p. 9).

1. Pier San And Its Principals

31. Pier San, Inc., is a Kansas corporation, formed for the purpose of applying for and operating the station at Larned it seeks in this proceeding. Its authorized capital is composed of 100 shares of common stock (\$100 par value), and ten of the shares have been issued, two to each of the five members of the corporation. Three of Pier San's members live in Wichita, Kansas, and two in Nashville, Tennessee. Each member has paid for his shares, and each is on the board of directors of the company. None of them are related, but among them are several long-time friendships and common interests in other broadcasting activities. The three members from Wichita, being closer to the scene at Larned and more familiar with the needs of the community than are the Nashville members, have and will furnish services in connection with the prosecution of the application and the construction and operation of the station, while the two Nashville members' principal support will be by way of capital, although they too will include other participation in Pier San's activities and render on-the-scene services to the proposed station. (Pier San Ex. 1, T. 177, 237-8, 241, 252-3, 265).

32. The three members from Wichita, and the respective offices in the corporation held by them are: John Bozeman (known professionally as Mack Sanders, T. 252), Vice President; K. W. Fyle, Vice President; and Port Early, Secretary. The members from Nashville, and their respective offices are: Webb Pierce, President, and Jim Denny, Treasurer. (Pier San Ex. 1).

33. John Bozeman was born and educated in Alabama, but now lives in Wichita, Kansas. His broadcasting experience dates back to 1938, when he became a part-time employec at WSGH, Birmingham. He stayed there four years, on part and full-time basis, and severed his connection to enter the U. S. Army during World War II. After three years of service he joined

KMA, Shenandoah, Iowa, as an announcer and talent manager. In 1951 he came to KFBI, Wichita, Kansas, and stayed there six years. (Pier San Ex. 1). He served as talent manager, in charge of live talent, performed announcing duties, and had his own program on the air. (T. 216). He spent two and one-half years at KFH, also Wichita, on a basis approaching that of free-lance, broadcasting a two hour program daily. (Pier San Ex. 1, T. 216).

34. At the stations where he was employed, Mr. Bozeman not only observed programming, but was part of it, and since his entry into the broadcasting field in 1938 he has worked steadily to become familiar with programming, always with the desire of developing new ideas and improving the nature and type of material sent out to listeners. (T. 216-17). As Mack Sanders, Mr. Bozeman is a celebrated personality in the entertainment field, (T. 156) and he has appeared by invitation at community festivals throughout Kansas and the mid-west, including Larned (T.188, 244). At present he has a weekly half-hour show on the Hutchinson, Kansas television station, as well as a program on his Wichita station (KSIR) when he is in town. (T. 188).

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33. John Bozeman was born and educated in Alabama, but now lives in Wichita, Kansas. His broadcasting experience dates back to 1938, when he became a part-time employee at WSGH, Birmingham. He stayed there four years, on part and full-time basis, and severed his connection to enter the U. S. Army during World War II. After three years of service he joined

36. Mr. Bozeman is an expert of his profession in broadcasting, and he is interested in seeing smaller communities obtaining well-run, professional radio operations. (T. 242). His reputation led to the formation of Pier San and the application for Larned, the people of the community having asked him to apply for and build the station on the available frequency. The invitation was extended when he was appearing in Larned at a Chamber of Commerce affair. (T. 240-2, 244-5). At that juncture Mr. Bozeman, and Messrs. Early and Pyle, who were associated at KBIR, decided to bring to Larned the station so much desired by the community, and they were subsequently joined in the endeavor by Messrs. Pierce and Denny. (T. 241). Thus, Pier San, the applicant here was formed. (T. 241).

37. Mr. Bozeman's community activities include membership in the Wichita Independent Businessmen's Association and the Appliance Dealer's Association. He is a member of the Wichita Chamber of Commerce, and in connection with that civic group he has participated in good will tours throughout the state of Kansas, acquiring familiarity with the problems of the state and of its several communities. He is also a member of the Wichita Ad Club. (Pier San Ex. 1, p. 1).

38. John Bozeman will actively participate in the operations of the proposed Larned station, probably spending the average of one day a week in such activities, with the time being spent at Larned. (Pier San Ex. 1, p. 1, T. 186).

39. K. W. Fyle was born in Webster City, Iowa, and he now lives in Wichita, Kansas. His primary and high school education was obtained in Webster City, and he attended Iowa State College at Ames, Iowa. He graduated from the Dodges Radio Institute. Mr. Fyle's broadcast experience encompasses more than thirty-five years. He started as a radio operator in 1924, and in 1926 he was engineer and manager of portable stations for the Carrell Broadcasting Company. In 1929 he was the installation engineer

for WIBW, Topeka, Kansas, and WCLO, Janesville, Wisconsin. He joined the staff of KFBI, then at Milford, Kansas, as chief engineer and assistant manager in 1931, and he stayed with that station some twenty-seven years, including the period when it moved to Wichita, Kansas. In connection with the move of KFBI to Wichita in 1940, Mr. Pyle supervised the first directional antenna installation in the state of Kansas and he acted as the technical supervisor and assistant manager of the station thereafter. In 1958 Mr. Pyle joined the staff of KSIR, Wichita, as general manager and chief engineer. In addition to his previous employment at KFBI and present employment at KSIR in Wichita, Kansas, Mr. Pyle has other business interests in that city and state. He financed and acted in an advisory capacity for three retail outlets, a clothing store, a jewelry store, and a decorating firm. Additionally, he has operated two farms and he still retains a 20% ownership in a clothing store and in one of the farms. (Pier San Ex. 1, p. 2). Since July of this year he has participated in the operations of K000, Omaha, primarily in engineering matters. (T. 174).

40. Mr. Pyle's duties and responsibilities in radio broadcasting have included the management of stations and programming operations. At KSIR he works with Mr. Bozeman in the programming field, (T. 215) and is the vice-president and a member of the board of directors of KSIR, Inc. In addition to employment at broadcast stations and serving as installation engineer, Mr. Pyle has held and now has ownership interests. From 1949 to 1958 he was the Treasurer of KFBI, Inc. and owned 5% of the stock. In 1960 he acquired a 20% ownership interest in the licensee corporation of K000, Omaha, Nebraska. (Pier San Ex. 1, p. 2; T. 212-13).

41. Kay Pyle is a registered professional engineer in the state of Kansas and a past member of the NAB National Engineering Committee. He is state chairman of the State Industry Advisory Committee and a member of the National Defense Executive Reserve, both radio groups functioning under the aegis and jurisdiction of the F.C.C. (Pier San Ex. 1, p. 2).

42. Mr. Pyle has been a member of the Downtown (Wichita) Kiwanis Club with a record of sixteen years' perfect attendance. He has a membership in the Wakefield Blue Lodge, Wichita Consistory and Shrine, and for fifteen years served on the staff of directors of Midian Shrine and helped organize the Midian Shrine Oriental Band. He is past chairman of the Salvation Army Advisory Board and served on the Board for fifteen years. He is a member of the Wichita Chamber of Commerce, active in the Chamber's Retail Trade Committee. His other community activities include membership in the Farm and Ranch Club and services in Community Chest and Red Cross campaigns. (Pier San Ex. 1, p. 2).

43. Mr. Pyle is the vice-president of the applicant corporation and he will be the general manager of the Larned station. He will have responsibility for organizing the staff of the new station. He will move to Larned and act as a full-time manager of the proposed station, actively participating in the day-to-day activities of the station. In addition, he proposes to participate actively in the activities of the City of Larned, following the removal of his residence there after the new station is obtained. (Pier San Ex. 1, p. 2; T. 154, 187). Upon a grant of the Larned application, Mr. Pyle will sever all connection with KSIR. (T. 186-7).

44. At the hearing Mr. Pyle testified that he looks forward to running a station in Larned, because although his health continues to be good, he has reached the stage where the somewhat slower tempo of living in a smaller community is to be desired to the hectic ways of large cities, such as Wichita. (T. 174). Mr. Bozeman testified that utilizing Mr. Pyle's background and experience Pier San could bring to Larned the professional and well-run station desired by the community. (T. 242). Kay Pyle made several trips to Larned in connection with the preparation of Pier San's application, and in conjunction with Bozeman and Early prepared the proposal being considered in this proceeding. (Pier San Ex. 2, p. 2; T. 155).

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45. Port Early was born in Kingman, Kansas, and now lives in Wichita. He is a practicing lawyer in the city and a graduate of the University of Kansas School of Business and School of Law. His business experience includes one year's employment as a field collector for the John Deere Plow Company and in the expediting department of the Glenn L. Martin Company at Omaha. From 1943 to 1946 he was in military service. Since 1950 he has been practicing law in the City of Wichita. (Pier San Ex. 1, p. 3, T. 239). Mr. Early's community activities include membership in the Harper Blue Lodge, and the Wichita Consistory and Shrine. He is a member of the St. James Episcopal Church. (Pier San Ex. 1, p. 3).

46. Port Early has a 20% interest in KOOO, Omaha, and is an officer and director of the licensee corporation of that station. He is a director and officer, but with no ownership interest, in KSIR, Inc. (Pier San Ex. 1, p. 3). Additionally, he occasionally sells time for the station and he arranges to be at the station when Mr. Bozeman must absent himself. (T. 218). As a member of the board of KSIR, Inc., he participates in almost daily discussions and informal meetings with Messrs. Bozeman and Pyle concerning the programming and other phases of the operation of the station. (T. 212-13).

47. Mr. Early participated in the decision to apply for a station in Larned, and made several trips there during the preparation of the proposal. (T. 155). He will assist in the operation and will actively participate in the activities of the proposed Larned station, so far as his time and abilities are required by the station. It is estimated that he will spend one day a week, on the average, in Larned on the new station's business. (Pier San Ex. 1, p. 3).

48. Webb Pierce was born in West Monroe, Louisiana, and has lived in Nashville since 1952. He is vice president of Cedarwood Publishing Company, Inc. and a member of the Board of Directors of American Investors, both in

Nashville. He is president of Status Records, a recording company which primarily helps young talent to get established. Mr. Pierce also records for Decca Records and makes personal appearances. (Pier San Ex. 1, p. 4, T. 253). Mr. Pierce is 50% owner of WJAT and of WERO, and at the time of the hearing had a 20% ownership interest in KOOO, Omaha. (Pier San Ex. 1, p. 4).^{4/} Mr. Pierce will lend his experience and professional services to the Larned station, appearing there occasionally. However, it is not contemplated that he will participate in the actual operation of the station. (T. 265).

49. Jim Denny lives in Nashville, Tennessee. From 1929 through 1956 he was employed by the National Life and Accident Insurance Company and Radio Station WSM in Nashville. He presently operates two businesses in Nashville, which he owns, the Cedarwood Publishing Company, Inc. and the Jim Denny Artist Bureau, Inc. (Pier San Ex. 1, p. 3). Mr. Denny is president and 50% owner of WJAT, Inc. (WJAT), Swainsboro, Georgia, and president and 50% owner of WERO, Inc. (WERO), Waynesboro, Georgia. He acquired a 20% interest in Station KOOO, Omaha, in mid-1960. (Pier San Ex. 1, p. 3).^{4/} Mr. Denny's participation in the Larned station will be of the same limited scope as is contemplated for Mr. Pierce. (T. 265).

2. Past Broadcast Record

50. As indicated by the foregoing findings, at the time of the hearing the five members of Pier San had varying interests in existing broadcast stations. Mr. Bozeman was the president and sole stockholder of KSIR, Inc., licensee of KSIR, Wichita. Messrs. Bozeman, Fyle, Early,

^{4/} As mentioned in Footnote 3, suera, he no longer has any interest in KOOO. On November 2, 1960, after the record in the captioned proceeding was closed, the Commission granted the assignment of license of Station WSMT, Sandersville, Georgia, to Radio Station WSMT, Inc., a corporation of which Mr. Denny is president and in which he and Mr. Pierce, through their interests in WJAT and WERO, each have 50% ownership. (FCC Public Notice B, 95909, Report No. 3628).

Pierce, and Denny each had a 20% interest in KOOO, Omaha, which they acquired in mid-1960. Messrs. Pierce and Denny were each 50% owners of WJAT, Swainsboro, Georgia, and WERO, Waynesboro, Georgia. (Pier San Ex. 1). Prior to the hearing, counsel for Morgan indicated that he wanted to explore the record of those stations (KSIR, KOOO, WERO and WJAT), and served a demand on applicant Pier San for the production of logs of the stations so that they may be examined and used to test whether the members of Pier San had met their responsibilities to the Commission in the other stations in which they had interests. (T. 32-35).

51. The Examiner ordered the production of the logs, and delivery of them was made to counsel for Morgan. The composite week of 1959 was used except where the Pier San member or members did not have the ownership interest in the stations involved during the period covered by that composite week, and in those cases another week was agreed upon. Morgan did not introduce any of the logs or analyses thereof into evidence, and it must be found that an examination of such logs by the adverse applicant did not disclose anything which would have been helpful to him, i.e., detrimental to Pier San. In the light of this finding, it can further be found that the past broadcast records of the stations examined show that they have been programmed in a manner meeting the needs of their respective communities and the requirements of the Commission. Additional findings, however, can be made concerning KSIR based on the record.

52. KSIR, Wichita, Kansas, had been operating approximately two years at the time of the hearing. The permit for KSIR was granted on April 16, 1958, when the dismissal of a mutually exclusive application permitted the grant of Mr. Bozeman's application on a shortened hearing basis. Thereafter Mr. Bozeman organized a corporation, 100% owned by him, and the licensee of the station is now KSIR, Inc. (T. 170, 229, 233). ^{5/}

^{5/} And see the files of KSIR, of which official notice may be taken for the dates and file numbers involved.

Mr. Bozeman is the president of the company and a director. Kay Pyle and Port Early are directors of KSIR, Inc., as well as being salaried employees. (T. 211-12). The three directors meet as a board both formally and informally, discussing and resolving policies, programming questions and other matters relating to the station. The informal meetings occur practically daily. The program director of KSIR also attends these meetings. (T. 212-13). Mr. Bozeman explained that the mentioned individuals work together as a team, but that he has the last word in all matters affecting the station. (T. 215).

53. An analysis, by type and source, of the programs by KSIR during the 1960 composite week follows:

By Type

Entertainment	79.8%
Religious	5.7%
Agricultural	1.7%
Educational	2.1%
News	9.2 %
Discussion	1.1%
	<u>100.0 %</u>

By Source

	8 a.m.- 6 p.m.	6 p.m.- 11 p.m.	All Other Hours	Total
Recorded commercial (RC)	81.4	80.75	78.1	81.1
Recorded sustaining (RS)	4.08	8.75	7.86	4.76
Wire commercial (WC)	.72	-	.88	.19
Wire sustaining (WS)	7.2	10.5	1.8	6.7
Live commercial (LC)	3.	-	7.86	3.4
Live sustaining (LS)	4.2	-	3.5	3.85
Total commercial	84.52	80.75	86.84	84.69
Total sustaining	15.48	19.25	13.16	15.31
Complete total	<u>100 %</u>	<u>100 %</u>	<u>100 %</u>	<u>100 %</u>
Actual broadcast hours (per week)	69.25	4.75	9.5	83.5
No. of spot announcements (SA) (per week)	578	17	79	674
No. of non-commercial spot announcements (NCSA) (per week)	51	9	5	65

(Pier San Ex. 11, T. 270-283).

54. KSIR has carried educational programs and announcements in cooperation with or under the supervision of area schools, including Wichita University and Friends University. (T. 167,222, 257-8, 249, 262). During the school year KSIR staff members attend school activities and make broadcast time available to the institutions and students. One staff member assigned to this area of station activity suffered a heart attack, and in Mr. Bozeman's opinion the illness was caused by the individual's overwork in that field. (T. 258). School closings occasioned by inclement weather and snow storms are announced over KSIR, and students are interviewed over the air in connection with school activities. (T. 258). For the 1960 school year KSIR was working with the Wichita schools in arranging for a daily program of announcements of school activities. Each school will send a student to the station with the announcements of activities which may be desired on any day, and KSIR will broadcast them. At the time of the hearing the arrangements were being completed and the station had agreed to carry the program. (T. 259).

55. Throughout the year KSIR carries a two-hour educational program on Sunday afternoons. This program is "Great Works in Music", (Pier San Ex. 10, T. 167, 249). The program is prepared and announced by a Mr. Bart, a specialist engaged for that specific task. He visits the schools and produces the program on the basis of the educators' suggestions, keying the selection of musical works or artists featured on a given Sunday to the music and music appreciation classes of the schools. On some programs school instructors appear, often with their pupils, to discuss the music and the composer being featured that week. The opportunities for such appearances are rotated among the schools, on a weighted basis, the University being scheduled with greater frequency than the lesser grade schools. (T. 247-50). Additionally, the conductor of the Wichita Symphony Orchestra will appear from time to time to explain that orchestra's works which are played or scheduled for later programs. (T. 169, 222).

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56. The preparation of the program goes on during the week preceding the Sunday broadcast. (T. 222). "Great Works In Music" utilizes recorded classical or symphonic music with live commentary of Mr. Bart or his guests. (T. 248, 250). The commentary includes an explanation and critical evaluation of the music played, and material concerning the composer or artist. (T. 248). Monthly, the station prepares a printed schedule of the "Great Works In Music" programs planned for the ensuing four weeks, and distributes these to the schools and other listeners who request them. (Pier San Ex. 10, T. 221-2). Some 2,000 of these printed schedules are distributed by KSIR monthly, with 200 of them being sent to the Superintendent of Schools of the city for use in the music appreciation classes. (T. 167, 221-2). The students listen to the program and prepare reports for their classes. (T. 249). Although the program is sponsored, it results in a financial loss to the station in light of the production costs and the expenses of printing and mailing the advance schedules. (T. 221-2).

57. The Discussion programs carried by KSIR are entitled "Man On The Street." The program is carried daily, on a live basis, with remote origination in the public streets. Arranged interviews are scheduled with persons equipped to express an opinion on public and controversial issues, and passers-by are stopped and asked their opinion. (T. 195, 232-3, 272). During election periods KSIR invites the various candidates to meet the announcer and be heard on the program, at no cost to the candidate, so the listeners may become acquainted with the several office seekers and the views they hold. (T. 195). As may be expected, controversial issues aren't present daily, and on such occasions the discussion may involve other questions which will interest the listeners and the interviewees. (T. 167-8, 195, 231-2). The "Man On The Street" is scheduled for fifteen minutes each day, but when the discussion warrants it, the program time is extended. (T. 231, 278).

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58. The Agricultural programming carried by KSIR consists principally of farm news and market reports, carried daily except Sunday from 6:45 a.m. to 7:00 a.m. (T. 165, 270). The amount and type of agricultural programming is believed by the station to be adequate in view of the small amount of its rural audience. Mr. Pyle testified that although the calculated 0.5 mv/m contour of KSIR includes some rural area in the extreme southern portion, the actual listeners there are few in number because there are numerous other stations both located there and elsewhere to which those listeners turn. (T. 166).

59. As the analysis of the 1960 composite week shows, KSIR carries an average of 65 non-commercial spot announcements each week. (Pier San Ex. 11). Extending the typical week number, the annual figure would be in the neighborhood of 3,400. The announcements are carried throughout the day, rather than only during a single period, because Mr. Bozeman believes the listeners obtain more advantage from such method. (T. 232). This belief, Mr. Bozeman stated, is buttressed by his experience at KSIR and KCOO, where the single-period approach is being tried. (T. 261).

60. News programs on KSIR are both live and from a press wire. Some are sustaining and others are commercial. (T. 224, 262, 283). The wire services are utilized for national news, but local news is developed by the station's news director, news stringers, and other local services. The station attempts to give its listeners the news at the earliest possible moment. For example, when a siren is heard, the newsmen and the stringers check it out so as to stay on top of events developing locally. (T. 262).

61. KSIR devotes its entire Sunday morning to Religious programming, live and recorded, interrupted only by news. (T. 227, 275). A fifteen-minute program of Sunday School readings and recorded religious music is carried for the Grace Methodist Church, commencing at 7:30 a.m. (T. 225-7).

Mr. Bozeman testified that KSIR's listeners get up early on Sunday morning preparing for church and like a religious program at that time. (T. 227).

A one-hour program for the Gideon Baptist Church is carried commencing at 11:00 a.m. The program is originated live, at the church. No charge for time is made by the station, but the church pays the expenses incurred in connection with the remote facilities, and for this reason KSIR logs the program as commercial. (T. 228-9). The program is not rotated among other churches because of the line charges which would be involved in making changes each week. KSIR investigated the possibility of rotating by taping programs, but the station's facilities weren't sufficient for the purpose and the churches did not desire to share in the recording equipment and tape expenses. (T. 230).

62. The Entertainment programs of KSIR include the only live musical program carried by a radio station in Wichita. This is the "Ranch Boys", heard on Saturday mornings. (T. 188, 255, 279). KSIR maintains a variety of the music brought to its listeners by way of records and "personality" announcers. The only all-western music program is carried from 6:00 a.m. to 7:00 a.m., and as the morning hours grow, the type of music is changed, developing from part-western, part-popular records to popular music. In the afternoon album music is featured. (T. 231, 246-7, 248-9). Mr. Bozeman testified that the variety format was developed on the basis of the listeners' desires, and for the same reason the western music is included. (T. 231).

63. The programs listed on the log as live consist of the remote church broadcast and the live portion of another religious program on Sunday, the "Man On The Street" daily, and the Ranch Boys on Saturday. (T. 278-80). However, a number of the other programs carried by KSIR include live portions, such as the "Great Works In Music" two-hour program on Sundays and the locally originated part of news broadcasts. (T. 250, 283). The live programs are classified as commercial whenever they include

participating announcements, even though there may be but a single spot during the period. (T. 282-3). On some days, however, no spots appear and they are classified as sustaining. (T. 281).

64. As already noted, the original application for KSIR was filed by Mr. Bozeman in 1957 and was granted by the Commission on April 21, 1958. With the 1957 application Mr. Bozeman submitted a proposed program schedule and a statement of programming policy for the then proposed new station in Wichita. (T. 225, 234-5, Morgan Ex. 9). The policy statement and the proposed program schedule, together with the KSIR program logs for composite week 1959 and for the week of August 21, 1960, furnished to counsel for Morgan by the applicant Pier San (T. 219), served as the basis of the examination of Mr. Bozeman on "promise vs. performance" of KSIR. Bozeman testified that in his opinion KSIR has fulfilled the statement of policy and original programming proposal, albeit some changes were made in the time a program was carried or in the format. (T. 259). Such changes, however, resulted in better programming and reflected the desires of the community. (T. 232, 259, 260-1).

65. For example, the original application proposed a once-a-week discussion program, but after the station commenced operating it found that prospective participants preferred the less formal format and more convenient location utilized in the daily "Man On The Street" program, and the mentioned program substitutes to better effect for the original proposal. (T. 231-2). The original Wichita programming proposal specified a thirty-minute program, entitled "Our Home" for announcing club activities. However, after the station was on the air, Mr. Bozeman ascertained that the station would better serve the housewives to whom the program was directed by broadcasting the club news throughout the day rather than compressing them into a single program carried in only one period. The announcements are now made every day on Mr. Bozeman's morning program and during the afternoon. (T. 232, 260). The originally proposed religious programming

has similarly undergone some change, as the conditions required in actual operation. The scheduled times for two religious programs were shifted, but otherwise carried as proposed. (T. 225, 227-8). A thirty-minute program on Sunday, entitled "The Catholic Speaks", proposed in 1957, is not being carried, although the station has attempted on many occasions to obtain the necessary cooperation of the church. (T. 229). A program for the Jewish Synagogue, originally proposed, is not being carried because although the congregation had earlier advised Mr. Bozeman they would be interested in such a program, when the time came to produce it Mr. Bozeman was informed that they didn't desire program time. (T. 283-4). KSIR does, however, make announcements for the synagogue, and the beneficiaries of the arrangement prefer this to a religious program concerning their faith. (T. 284).

66. Mr. Bozeman testified that programming is one of the matters constantly under review, by both himself and the board members, and that changes have and will be made from time to time with the goal of making better service available. (T. 212-3, 214-5, 261). The matters developed on the record, including the showing that even during the hearing plans were underway in certain programming areas to continue improvements (T. 259), dictate a finding that KSIR has fulfilled its proposals and is serving its community according to the licensee's experienced and well-founded judgment of needs and desires. As above noted, Pier San's adversary in this proceeding was apparently satisfied that an examination of the programming of KOCO, WJAT and WERO contained nothing adverse to the members of applicant Pier San and the finding expressed with reference to KSIR's operation may thus also be made with respect to the other mentioned stations.

67. At this juncture findings may be made concerning the location and facilities of the several stations in which Pier San applicants have an interest. The location and separations may be determined from the exhibits, or from maps which will be officially noticed. (T. 185). KSIR,

at Wichita, Kansas, operates on 900 kc with a power of 250 watts, daytime only. (Pier San Ex. 9A, p. 3). K000, Omaha, Nebraska, is licensed for 1420 kc, 500 watts, daytime, with a directional antenna, and it holds a construction permit to increase power to 1 kw, continuing directional operation. (T. 186, and Official Notice of Commission Records). WERO, Waynesboro, Georgia, is licensed for daytime operation on 1310 kc with 1 kilowatt power. WJAT, Swainsboro, Georgia, is also a daytime-only station, with 1 kilowatt power, and it operates on 800 kc. (Official Notice).

68. KSIR, at Wichita, is approximately 105 miles from Larned. Station K000, at Omaha, Nebraska, is approximately 257 miles from Larned. The distance between Wichita and Omaha is 253 air miles. WERO and WJAT, in Georgia, are more than 800 miles from Larned and Wichita and 1,000 miles from Omaha. None of the stations would provide service to Larned, nor would the proposed Larned station provide service to Wichita, Omaha, or the communities of WERO and WJAT. (Pier San Ex. 9A, p. 5). There is no overlap of the 2 mv/m or greater contours of KSIR, Wichita, and the proposed Larned station. A small amount of 0.5 mv/m overlap will occur in an area appearing to represent approximately 35% of the Larned similar grade service area, but in such overlap area there are a minimum of 15 other services and a maximum of 24. (Pier San Ex. 9A, p. 5). The populations which may be involved in the overlap area were not calculated on the record, but inspection of maps and exhibits show that the overlap occurs in the sparsely settled rural area lying some 38 to 45 miles from Wichita and from 5 to 55 miles from Larned. (Pier San Ex. 9A, p. 5). No other overlap of any grade service between or among the several stations in which Pier San members have an interest appears. (T. 186).

3. The Applicant Morgan

69. Francis C. Morgan, Jr., presently resides in Pratt, Kansas

(T. 75), where his father owns and operates the only radio station located in the community. (T.112). The applicant is a relatively young man, being 28 years old. He was born in Garden City, Kansas, and lived with his father who managed radio stations in Great Bend and Hays, Kansas. In 1952 Mr. Morgan, Sr. came to Pratt to establish KWSK, and the applicant accompanied him. (Morgan Ex. 1). In 1953 Morgan, Jr. entered the military service and for the next two years served in the Artillery as a radar operator. When he was discharged from the service in 1955, he returned to Pratt, working at his father's station (KWSK) as an announcer-operator and salesman. In September of 1958 his father also made him chief engineer of the station. He maintained his association with his father's station until July, 1960. (T. 113, Morgan Ex. 2).

70. Morgan obtained his first class license after taking courses from radio correspondence schools. While working with his father at KWSK he gained some experience in copy-writing, news gathering, and he helped his father in some unspecified public service programs. (Morgan Ex. 2). Mr. Morgan is a member of the Junior Chamber of Commerce, the Elks Lodge, and was a member of the Kiwanis Club of Pratt. While at his father's station he helped the senior high school and junior college radio production class students one day a year during American Education Week, with a program on KWSK. Also, while at his father's station he helped to set up radio interviews in connection with radio publicity for Pratt organizations. He assisted the local Bloodmobile chairman and the TB Clinic, in some unspecified manner while at his father's station. (Morgan Ex. 2). Some of the time spent on these projects was his own, and some was a part of his employment duties. (T. 76).

71. Morgan's background and experience in the radio field is primarily in the technical field. (T. 145). Although on occasion when his father was absent from KWSK Morgan, Jr. would act as general manager, he had no authority to hire or fire employees, to sign checks, or to sign

any contracts except those for advertising time. (T. 113-4). After the captioned application was designated for hearing, Morgan, Jr. severed his connection with his father's station and took a job as a salesman for the National Press of North Chicago, selling advertising specialties such as ball point pens and calendars. (Morgan Ex. 2, p. 3). Morgan states that in the event his application is granted, he and his family will move to Larned so that he may devote the entire time to the station. (Morgan Ex. 2, p. 3).

72. At the hearing Morgan claimed that it was his own idea to sever his connections with his father's station, testifying that there was a family conflict and he just decided to leave. (T. 97). When questioned about the asserted family conflict which led to the termination of his association with his father's station, he testified that in 1957 his mother passed away and his father remarried and that from that time on there was disagreement among the three members of the family. (T. 114). However, it was not until July 1, 1960, after the captioned proceeding was designated for hearing that, according to Morgan's view, the disagreement became such that he found he had to leave KWSK. (Morgan Ex. 2, p. 3; T. 97).

4. Other Considerations With Respect To Morgan

73. As above noted, applicant Morgan's father, Francis C. Morgan, Sr., known as "Clem" Morgan, has owned and operated the only station in Pratt, Kansas, since 1952. (T. 112, 119, 123, Morgan Ex. 1). In May of 1958 an application for a new station in Pratt was filed by Wilmer E. Huffman, that application being one of those consolidated in this proceeding. (T. 114-5). Some six months later the captioned Morgan application for Larned was filed, specifying the same frequency as that sought by Huffman at Pratt. In portions of the application the applicant's name was shown as "Francis C. Morgan, Jr.", but the engineering sections and material

stated the applicant to be "Clem Morgan". (Morgan Application, EP-12749; T. 119-122). In Sections V-A and V-G the applicant's name is "Clem Morgan"; the covering sheet on the engineering exhibit, prepared by the engineer, stated that the engineer was engaged by Clem Morgan to prepare the material, but before filing, the name "Francis C. Morgan, Jr." was "Scotch-taped" over the original. (T. 120-1). Exhibits E-3, E-4, E-5, E-6, E-9 and E-10 of the application as originally filed designate Clem Morgan as the applicant. (T. 121-2).

74. When questioned about these circumstances at the hearing, Morgan, Jr. claimed that he had considered the possibility of a new station in Larned prior to the Huffman application for Pratt, but he added that it wasn't until he learned of the Huffman proposal (T. 133) that he renewed the consideration and discussed the matter with his father. (T. 96, 114-5). Morgan stated that he asked his father to engage engineering and legal counsel for him. (T. 117). Morgan did not have any communication with the engineer prior to the time the application was filed on January 6, 1959 (T. 118), and the first contact followed the receipt of a bill sent thereafter. (T. 117, 135). All the discussions and communications prior to January 9, 1959, were between his father and the engineer. (T. 118). Although Morgan, Jr. executed the application in his own name, he stated that he was not aware of the fact that the engineering sections and exhibits listed his father, Clem Morgan, as the applicant until he (Morgan, Jr.) received his copy of the application as filed. (T. 124). Morgan testified that upon discovering the error he discussed the matter with his attorney, but no amendment was filed to specifically correct the name of the applicant in the engineering sections and exhibits. (T. 124). However, when a general engineering amendment was filed in May of 1959, the new and substitute material listed the applicant as Francis C. Morgan, Jr. (T. 122).

75. The engineering firm which prepared the material and exhibits for the Larned application have represented Clem Morgan in the past. (T. 134). At the hearing Morgan, Jr. claimed that he had paid the engineering fees, and that the bills had been sent to him by the engineer at his father's direction. (T. 123, 133, 138). The first bill, being an invoice dated January 9, 1959, states on its face that it was rendered for "Engineering services in connection with the preparation of an engineering report, AM Engineering Appendix 1 to accompany application for a new station in Larned, Kansas, 1290 kc, 500 watts, day, said report includes Section V-A and V-G of F.C.C. Form 301 and exhibit required thereby. Two copies of the report to Mr. Morgan with letter this date. Copies for filing with the F.C.C. delivered to attorney A. L. Stein," and the right hand corner of the invoice states that the work was authorized by "Clem Morgan". (T. 136). As exhibited at the hearing, however, the invoice was addressed to Francis C. Morgan, Jr., although Morgan, Jr. stated he did not know what led to his name appearing on the bill unless his father had made those arrangements with the engineer since he, Morgan, Jr., had no contact at all with the engineer prior to January 9. (T. 138).

76. Morgan, Jr., thought that a frequency search for possible facilities at Larned had been made, and that he recalled a report on such a search addressed to his father from the engineer. (T. 139, 142-3). The report indicated that 1310 kc might work at Larned, but 1290 kc appeared to present less problems. The engineer did not give any advice as to which frequency should be applied for, however. (T. 141). Morgan admitted that both he and his father were aware that by applying for 1290 kc the Huffman application on the same frequency for Pratt could not be granted without a hearing. (T. 96). Morgan, Jr. at first claimed that he had paid for the frequency search, but could produce no invoice covering such services and finally admitted that he did not know whether the bills he has paid to the engineer cover that initial service. (T. 137). On re-direct examination by his own counsel, Morgan testified that the

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decision to file for Larned, Kansas, was made by him and his wife for themselves. (T. 131).

77. After being examined about the foregoing matters, Morgan stated that he has no present common business or ownership interests with his father, and that there are no outstanding loans between them. (T. 129). He does not propose, said Morgan, to finance the Larned station with any funds from his father, and does not propose any joint programming, joint staffing, or rates with his father's station in Pratt. (T. 129). However, he did testify that if questions arise in the operation of his station at Larned, Kansas, he would seek the advice of his father. (T. 128).

D. THE PROPOSALS FOR OPERATION AT LARNED

1. Development Of The Proposals

(a) Pier San

78. Mr. Bozeman is an entertainer, appearing regularly on television and doing personal appearances in communities around Larned. He made a personal appearance in Larned for the Chamber of Commerce at an affair which attracted over 5,000 people paying \$1.00 a head. (T. 239). After the affair was over, the Chamber of Commerce officials talked with Bozeman and asked him why he did not build a radio station in Larned, informing him that the way he was running KSIP radio induced them to believe that he would bring a station that would be a credit to their own community. One of the Chamber officials told him "There are too many little radio stations that are making noises on the air. We need somebody that will come out here and be a part of our community. And we feel that we can support our radio station. We realize it is a tremendous expense." (T. 240). After that Mr. Bozeman started talking with Mr. Pyle and ascertained that the latter wanted to start taking it a little easier and get out of the big city, desiring to move to and become a part of a smaller community. (T. 240)

79. Bozeman, Pyle, and Early decided that they would build a station for Larned, whether or not Denny and Pierce wanted to join them. However, when it was ascertained that the two men from Nashville would join, they were admitted to the group. (T. 241). The Pier San application was in preparation long before it was known that Morgan or anyone else would file for 1290 kc at Larned. (T. 246). Mr. Heffelfinger, Bozeman's consulting engineer, had reported that 1290 kc was available for Larned, and did not favorably report any other frequency. In fact, the frequency availability was known in the town, and the local people had tried without success to interest other radio people into building a station, and so when Bozeman appeared there they encouraged him to file for the station. (T. 244-45).

80. K. W. Pyle, the vice president of applicant Pier San and proposed as the general manager of the Larned station, worked on and prepared the application in conjunction with Messrs. Bozeman and Early. (T. 154-6). The three made numerous trips to the community, discussing the proposed station with businessmen and others in the community. (Pier San Ex. 3, T. 160-1). It is Pier San's stated intention to build and operate a station at Larned of which the community and the station's listeners may be proud. Mr. Bozeman testified that it has been his experience that the news programming of the run-of-the-mill small stations is probably the worst aspect of what he terms non-professional operation, causing the listeners to lose faith in the station and its programs. (T. 243). From the inception the Pier San group planned a station which would be professional in every sense of the word, and thus enable Larned to have the same benefits from a local station as large city listeners obtain from their stations. (T. 244).

81. Individuals and organizations in Larned, Kansas, and Pawnee County, were contacted by members of Pier San, primarily by Mr. K. W. Pyle, the proposed general manager of Pier San's Larned station, in an effort to determine how the proposed station could aid the community or the community

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activity with which the contactee was identified. For example, the principal of the high school was contacted, and he agreed to appear once a week on a school program or to assign one of his assistants to appear. In the discussion with the principal (Mr. Rose) it was developed that the Larned schools have band and glee clubs and that the Music Department of the schools is prepared to present the organizations to the public, over the radio. Similarly, the question of broadcasting of athletic contests was considered and it was ascertained that broadcasts where practically possible would be permitted or that a tape of the games to be broadcast the next day would be made. Mr. Rose, the principal, has had previous experience with radio at Liberal, Kansas, and has agreed to cooperate. (Pier San Ex. 6). The County Home Demonstration Unit was contacted and it was ascertained that material for "Kitchen Chatter" was available and the aid which radio could give to the activities of the County Home Demonstration Unit was developed in the conversation. (Pier San Ex. 6). Interviews were also had with the Mayor of Larned, the U. S. Soil Conservation Agent, a leading member of the Chamber of Commerce, an official in the office of the County Superintendent of Schools, and members of the Ministerial Alliance. Here too, the value of the contacts was demonstrated, when it was pointed out that of the eighteen churches in town, eight or ten are active in the Alliance and it was suggested that some provision be made for occasional use of the proposed station by churches which are not members of the Ministerial Alliance. Based on that, Pier San has agreed to make arrangements for non-members of the Alliance to use the proposed station. (Pier San Ex. 6). The President of the Rotary Club of Larned was contacted by Mr. Fyle, and Mr. Bozeman spoke to the Larned Kiwanis Club and answered questions of the members on the proposed station. (Pier San Ex. 6).

82. The members of the applicant corporation have determined that their Larned station, if granted, will become a vital part of the community's life and will bring to Larned a means of rapid communication and entertainment which does not now exist. It is proposed that sufficient time be

given to the exploration of all civic matters and that both sides of controversial issues will be aired, with programs arranged for the presentation of differing views. The members of the applicant corporation have committed themselves to dedicating the station to serving the residents of Larned and Pawnee County, and the surrounding trade territory. The facilities of the station will be available to civic, charitable, and governmental organizations, and the prime objective of the owners will be to integrate the station into the civic and cultural life of the community. Specifically, it is contemplated that regular weekly programs will highlight and discuss matters of local civic and public interest. (Pier San Ex. 2).

(b) Morgan

83. Morgan's application for Larned was filed by him while he was employed at his father's station in Pratt. As the earlier portions of these Findings show, although Morgan claimed that he had considered filing for Larned prior to the application on 1290 kc at Pratt which would compete with his father's station, he did not engage engineering or legal counsel in connection with his application, leaving those matters to be handled by his father. In fact, Morgan had no contact with the engineer who prepared the engineering material for the Larned application until the application had been filed with the Commission. Morgan, however, claimed that the programming schedule was prepared by him, without help from anyone else. (T. 100).

84. After the application was filed, contacts were made by Francis C. Morgan, Jr., or by others on his behalf, with individuals and representatives of associations and community organizations in Larned, to discuss participation in programs on Morgan's station of the local civic groups. People contacted represented the County Attorney's office, business establishments, the Chamber of Commerce, the Red Cross, the Ministerial Alliance, and the County Agent. (Morgan Ex. 4). Contacts were also made

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with individuals at Fort Hays State College, Hays, Kansas, in an effort to get the educational institution interested in supplying program material for Morgan's proposed station. (Morgan Ex. 4, p. 4). Of the contacts listed in his hearing exhibit, Morgan testified that one was made for him by his father. (T. 101). Some of the contacts were personal visits; others were by telephone, either from Pratt to Larned or within Larned, and a number of the telephone calls were made during business hours from KWSK, Pratt. (T. 102-4).

85. Mr. Morgan admitted that he had not read the Commission's "Report and Statement of Policy on Programming Inquiry" of July 29, 1960. (T. 111). He further demonstrated unfamiliarity with the term "Blue Book", and admitted he did not know what it encompassed. (T.112).

2. Programming Proposals

(a) Pier San

86. The schedule submitted by Pier San contemplates operation eighty-three hours a week, from 6:00 a.m. to 6:00 p.m. on Mondays through Saturdays, and from 7:00 a.m. to 6:00 p.m. on Sundays. (Pier San Ex. 3, T. 158). By type and source the analysis of the proposal according to Commission classifications is:

By Type

Entertainment	59.60%
Religious	2.53%
Agricultural	13.83%
Educational	4.23%
News	8.21%
Discussion	11.60%

	<u>By Source</u>		<u>Total</u>
	<u>8 a.m. - 6 p.m.</u>	<u>All Other Hours</u>	
Network commercial	No network proposed		-0-
Network sustaining	No network proposed		-0-
Recorded commercial (RC)	59.7	34.6	55.5
Recorded sustaining (RS)	9.9	7.15	9.48
Wire commercial (WC)	4.8	15.5	6.58
Wire sustaining (WS)	4.05	0.65	3.58
Live commercial (LC)	<u>2.05</u>	<u>34.6</u>	<u>7.16</u>
Total commercial	66.55	84.7	69.44
Total sustaining	33.45	15.3	30.56
Proposed broadcast hours (per week)	70	13	83
Spot Announcements (per week)	356	66	422
Non-commercial spot announce- ments (NCSA)	84	18	102

(Pier San Ex. 4)

87. Religious Programming Each morning, for ten minutes, commencing at 7:05 a.m., a prayer for the day and religious music will be carried. The prayer will be taped by a local minister, and the schedule for ministers will be rotated on a weekly basis among the different faiths. (Pier San Ex. 2, 5). On Sunday mornings, fifty-five minutes of religious music will be broadcast, commencing at 7:05 a.m. The music will include those of the various faiths. A fifteen-minute program, "Billboard of Church Services" will be broadcast after 8:00 a.m., giving a complete resume of church services that are scheduled by the different communities in Larned and Pawnee County. (Pier San Ex. 5). A twenty-minute "Sunday School Lesson" will be broadcast at 11:05 a.m. on Sundays. This program will include Bible readings and a Sunday School lesson, together with religious music. (Pier San Ex. 5). A fifty-five minute religious program will be carried on Sunday evenings, from 5:05 p.m. to 6:00 p.m. This broadcast will be a rebroadcast of a morning church service from one of the churches in the area. (Pier San Ex. 5). It is proposed that each Sunday morning a different church service will be taped in the church during the regular service. Rotation among the churches will be made so that all may have

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equal representation. (Pier San Ex. 5). The time for religious programs will include faiths within the Ministerial Alliance, and those which do not belong. (Pier San Ex. 6)

88. Agricultural Programs From 6:00 a.m. until 7:00 a.m. on Mondays through Fridays Pier San will carry a farm program, consisting of releases gathered and edited by the station's staff from the County Farm Agent's office, Soil Conservation office, and local agricultural markets and grain elevator operators. Information from these sources will be interspersed with music, and of the hour program it is anticipated that approximately fifteen minutes' worth of material will come from the news wire services in the form of market reports and agricultural information from sources beyond the local community. (Pier San Ex. 5).

89. At 12:10 p.m., and for ten minutes, a complete market report will be broadcast, including the reports of the Kansas City, Wichita, St. Joseph, and Omaha markets for livestock and grain. Again at 2:00 p.m. and for five minutes, local news and closing market reports from the United States Department of Agriculture will be broadcast. Time and temperature reports will be interspersed throughout the broadcast day, with accurate thermometer, wind direction and velocity meter readings broadcast for the benefit particularly of the rural listener. In the event of violent activity or severe weather conditions, alerts from the nearest Weather Bureau will be broadcast. (Pier San Ex. 5).

90. On Saturday during the hour from 8:00 a.m. to 9:00 a.m. notices of farm sales and county news and meetings of various organizations will be included. (Pier San Ex. 5). For fifteen minutes on Saturday afternoon, commencing at 1:05 p.m., farm news and farm highlights from experimental stations conducted by the Kansas State College will be broadcast. This program will deal primarily with new agricultural developments. (Pier San Ex. 5)

91. The program proposal for the Pier San station at Larned contemplates operation during certain times of the year prior to local sunrise. (T. 158). One farm program is placed in the early morning hours, but Mr. Pyle stated that consideration has been given as to when the program would be carried in the event that the station, because of a change in the Commission's rule or because of some objection by another regional station, would not be authorized to operate prior to local sunrise. The farm program then would be placed in the earliest possible hour in the program schedule. For example, if the station signed on at 7:00 a.m., then the farm program would run from 7:00 to 8:00 a.m. (T. 158). If the farm program commenced at 7:00 a.m. rather than an earlier hour during certain months of the year, Mr. Pyle believes that those months would be coincidental with the period in which the farmers would not go to the fields as early, because of long nights and late daylight hours. (T. 158-159).

92. Educational Programming "KU Classroom" is an educational recorded program, prepared by the University of Kansas, encompassing a different educational subject each day. The courses are prepared by the University to aid smaller schools in presenting outstanding authorities on the different subjects covered by the course. It will be carried by the Pier San station on weekday afternoons, from 2:05 p.m. to 2:35 p.m. (Pier San Ex. 5). This proposed program was described by Mr. Pyle who testified that some years ago Emporia State Teacher's College of Emporia, Kansas, presented such type of program over what was at that time a reversible wire of the Mutual Network serving the state of Kansas. The program was carried by nearly all the member stations and was well received. The program was a success and the proposed "KU Classroom" is based on that program and its reception, as Mr. Pyle remembers it. (T. 175-76). When the Mutual Network revamped their technical system so that the wires could not be reversed, the Emporia program had to be discontinued and Kansas University came up with such a program, offering it to stations on a taped basis. One

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day the program covers mathematics, another day English, another day a foreign language, etc., but each Monday will be the same program, for example, mathematics, Tuesday, English, etc. The program is designed for in-school listening. (T. 176). When Mr. Pyle talked to the County Superintendent of Schools she expressed great interest in the program and Mr. Pyle is of the view that the Larned schools would be very happy to have it, since they are not able to receive it at the present time. (T. 176).

93. "With the Classics", a fifty-five minute recorded musical program for weekday afternoons, Monday through Friday, will have a format including narration on the classical selections being presented, it being the applicant's intention that it can be used in conjunction with a music appreciation course. (Pier San Ex. 5). A similar program is carried on KSIR in Wichita, and has received considerable acceptance by the schools and educational authorities there. (T. 167, 221-2, Pier San Ex. 10). Another educational program is "Teacher's Desk", which will be carried for fifteen minutes on Saturday mornings. It will include school news and items of interest from county and city schools. The program will be produced in cooperation with the local schools. (Pier San Ex. 5)

94. News Programming Headline overnight developments, including items on local news and sports, will be broadcast for five minutes at 7:00 a.m. A five-minute news summary on overnight stories from the press wire will be broadcast at 8:00 a.m. Five minutes of news, each hour thereafter, will be given, and at noon the news period will be increased by five minutes for a complete summary of weather for the entire region as an aid to those planning a trip. The 2:00 p.m. news will include information from the closing agricultural and livestock markets. At 5:00 p.m. resume of athletic contest scores will be included with the news. (Pier San Ex. 5).

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95. In keeping with Pier San's avowed intentions to make the Larned station of value and interest to its listeners, local, state, national, and international news will be emphasized on an extensive and intensive coverage basis. A regular beat will be established for the gathering of local news, and news stringers will be used to obtain news items from the surrounding area. State and national news will come from a wire service, and initial contacts with the National Wire Service have already been instituted. Since there is no weather bureau in Larned, Pier San will obtain an accurate thermometer, a wind direction and velocity meter, and a barometer, and install it at the station so that local weather information can be broadcast. General weather forecasts will be broadcast as released from the nearest Weather Bureau office. (Pier San Ex. 2).

Larned has one daily newspaper, published five evenings a week. Pier San believes that its proposed station can perform a great public service by making news available seven days a week and bringing it to the listeners as it happens. All news will be handled in a factual and unbiased manner, and editing of the news will be done by management and trained personnel. The station will use portable tape recorders to cover on-the-scene events when landlines are not practicable. (Pier San Ex. 2).

96. Discussion Programs "This is my Opinion" will be carried each weekday from 4:20 p.m. to 5:00 p.m. and from 5:05 p.m. to 6:00 p.m. The program will provide for discussion of local activities and controversial issues. Each program, or all the discussions on a given program, may not necessarily be limited to controversial issues, and in such event a portion of "This is my Opinion" may be classified as Talk rather than Discussion. (Pier San Ex. 5). On Saturday "This is my Opinion" will be a fifty-five minute program, commencing at 5:05 p.m. This Saturday afternoon broadcast of the program is proposed for participation in by the teen-age group, Pier San believing that such group should have an opportunity to express their opinions on issues facing them. (Pier San Ex. 5).

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97. "The Editorial Page", is a twenty-five minute program scheduled for Sunday afternoons. On this program letters sent in by listeners will be read, and Pier San expects to obtain the participation of city and county officials in the program. (Pier San Ex. 5).

98. Other live programs will include "Kitchen Chatter", a ten-minute program scheduled for the weekday mornings, Monday through Friday, to contain news on home economics, recipes, and other information for women, including material from the County Home Demonstration Office. Depending on the content, this program would be classed variously as Discussion, Educational, or Talk. (Pier San Ex. 2, 5).

99. Entertainment Programs The entertainment programs will primarily consist of recorded music, some, however, with narration or comments. (Pier San Ex. 5). The applicant proposes to bring a variety of music to the listeners, and to use block programming for its musical programs where possible, keeping religious music, popular music, classical music, and western music in various segments of the broadcast day. (Pier San Ex. 2). Its musical programs are scheduled during the morning hours as well as the afternoon and evening hours. Typical "blocks" of the music are Town and Western Music, Breakfast-time Music (light recorded music), Religious Music, "With the Classics", Teatime Tunes (from 2:35 p.m. to 3:00 p.m., being light recorded versions of popular and present and past Broadway hit show tunes), Popular Music, Polka Time on Saturday mornings, a Dance Party on Saturday afternoons, with popular recordings directed primarily to the teen-age dance groups, and "Music Box", with records of old popular recordings for the nostalgic listener. (Pier San Ex. 5)

(b) Morgan

100. Morgan proposes to operate seventy hours a week, signing on at 8:00 a.m. daily and signing off at 6:00 p.m. (Morgan Ex. 7, T. 89). By

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type and source, the analysis of the typical week's proposal submitted by Morgan is:

By Type

Entertainment	45.82%
Religious	1.83%
Agricultural	14.70%
Educational	1.83%
News	20.70%
Discussion	8.10%
Talks	7.85%

By Source

	<u>8 a.m. - 6 p.m.</u>	<u>All Other Hours</u>	<u>Total</u>
Network commercial (NC)	-	-	-
Network sustaining (NS)	-	-	-
Recorded commercial (RC)	46	-	46
Recorded sustaining (RS)	9	-	9
Wire commercial (WC)	12	-	12
Wire sustaining (WS)	2	-	2
Live commercial (LC)	1	-	1
Live sustaining (LS)	<u>30</u>	<u>-</u>	<u>30</u>
Total commercial	59	-	59
Total sustaining	41	-	41
Spot announcements (per week)	500	-	500
Non-commercial announce- ments (per week)	50	-	50

(Morgan Ex. 7)

101. Religious Programming Morgan proposes a local live religious broadcast of fifteen-minute duration each morning. Ministers from the Ministerial Alliance will be assigned the program each week on a rotating basis. A half-hour of recorded hymns and announcements from the churches of Larned, as available, will be carried at 9:30 a.m. each day, including Sunday. (Morgan Ex. 6, p. 1). No additional religious programs are proposed for Sunday, however. (Morgan Ex. 5, p. 4, Ex. 6, p. 1).

102. Agricultural Programming A five-minute "opening markets" broadcast will be presented each morning at 8:55 a.m. Another five-minute market report will be made at 10:55 a.m. daily and at 1:00 p.m. a five-minute

program will give the closing market reports, including livestock prices for the day from the major midwest terminals, the news to be obtained from the wire facilities. Local market reports, if available, will be used at this time also. (Morgan Ex. 6, pp. 1 and 2). On Sunday, farm news will be carried, for five minutes each, at 8:55 a.m. and 10:55 a.m. and for thirty minutes at 1:00 p.m. (Morgan Ex. 6, p. 4). During the late afternoon musical program, material which may have been received by the station from releases from the Kansas State Agricultural College concerning fertilizing information, new sprays, and so forth, will be broadcast. (Morgan Ex. 6, p. 4).

103. Morgan has scheduled a program entitled "Farm Hour" at 3:00 p.m. weekdays, which he states will be used for livestock, implement, and farm sale descriptions. He proposes also to include on this broadcast news from the County Agricultural Agent's office, the 4-H, and other agricultural organization activities, all interspersed by popular and western music. (Morgan Ex. 6, p. 2, T. 105-6). Morgan claimed that the 3:00 program was designed for the rural area listener. (T. 106-107). However, he admitted that he did not know how many farmers and agricultural workers would be able to listen to a farm program at 3:00 in the afternoon, and agreed that the majority of men would be in the fields and at their jobs about the farm. (T. 107). He further admitted that most of the farmers and rural workers would not have a radio available to them at that time in the afternoon. (T. 107).

104. Educational Programming On Saturdays and Sundays, for forty minutes commencing at 10:15 a.m., Morgan proposes to carry such educational programs as may be available. He states that he will make this time available and an effort will be made to have speech and drama classes from the high schools utilize the time period. Over the objection of Pier San, Morgan was permitted to testify that when local programs are not available, he will carry some from the National Association of Educational Broadcasters

and the state universities. (Morgan Ex. 6, p. 4, T. 80-83).

105. News Fifteen minutes of news and announcements of civic events and weather will be carried commencing at 8:00 a.m. each weekday and Sunday. (Morgan Ex. 6, p. 1). At 9:00 a.m. a fifteen-minute news program will be carried, with a summary of national, state, and international news and weather. At 10:00 a.m. another quarter hour of news and weather, broken down to five minutes of national, state, and weather for the state of Kansas and a zone forecast for the Larned area will be broadcast. The 11:00 a.m. local news will be centered around police reports and a summary of state news from the leased wire facilities. News will also be carried at 12:30 p.m., 4:00 p.m., and at 5:50 p.m. (Morgan Ex. 6, pp. 1-3). Daily, at 29 minutes past the hour, a one-minute weather forecast for Larned and the area will be given. (Morgan Ex. 6, p. 3). Weather news will be given at 5:55 p.m. each evening; this will include national, state, and local weather. (Morgan Ex. 6, p. 3).

106. Morgan's proposed program of news and civic topics at 8:00 in the morning will be news from the United Press wire and, he hopes, some news of a local nature. (T. 104-105). He proposes one full-time news director, but such individual will have announcing duties and other staff duties such as writing, continuity, and selling. However, Mr. Morgan expressed a hope that he could avoid the necessity of adding the latter mentioned staff duties to the individual who will announce and serve as newsmen. (T. 105).

107. Discussion Programming "Open for Discussion", the title Mr. Morgan gives to the one-hour segment commencing at 4:45 p.m., will be used for discussion of community activities, interests, and problems or issues arising in the community. This is not purely a discussion program, but such discussion of controversial issues as may be carried will be broadcast during this program. However, Morgan suggests that not merely

local sources be used, but recorded programs from the National Association of Educational Broadcasters and other sources be carried. When club activity news or discussion events are not available, the program will consist of recorded music. (Morgan Ex. 6, p. 3). On Sunday "Open for Discussion" will be a thirty-minute program. Here too, the time will be primarily devoted to announcements of local civic club activities, such as the Red Cross, rather than discussion. When club activity news is scarce, the program will utilize recorded music. (Morgan Ex. 6, p. 4).

108. Talk Programs "Party Line" will be a conversational program between the announcer on duty and listeners. Birthday greetings and anniversary greetings will be given, and the recipients of the greetings will be called and asked questions concerning their personal life, such as the number in the family and the years of marriage. The "beeper" telephone will be used. This is a half-hour program carried Monday through Saturday. (Morgan Ex. 6, p. 2). At 9:15 a.m. on Sunday "Housekeepers Chat" will commence and run for an hour, if material is available. A woman staff member of the station will give talks on fashion, family care, and interview women in the area chosen for their prominence in various fields. (Morgan Ex. 6, p. 4). A fifteen-minute program scheduled to commence at 1:30 p.m. on Sundays, "The Old Book Shelf" will be a live program of poetry reading with organ music in the background. (Morgan Ex. 6, p. 4).

109. Entertainment Programs Morgan's entertainment programs will be primarily recorded music and he proposes to utilize the full range of record types, such as western, popular, instrumental, martial music, and so forth. (Morgan Ex. 6). The "Kiddies Hour", a recorded musical program, will include safety tips for the kiddies. (Morgan Ex. 6, p. 2). Morgan testified that he believed that Larned listeners wanted a "better class" of music rather than the rock and roll. According to Mr. Morgan, the better type of music is big bands and orchestra music. (T. 144).

110. Other Matters Morgan stated that the figure of 500 commercial spot announcements listed by him in his application and hearing exhibits was arrived at by determining the number which would be necessary to support the station with the rates he contemplated. However, he admitted he did not know whether he could sell 500 commercial spots weekly in Larned, and he further stated that if he could sell more than 500 he would probably carry them (T. 108), although there probably would be a top limit on the number to be carried, and in such connection he would operate by the NAB Code of Standards. (T. 108-109). Morgan's proposal contemplates 54 non-commercial spot announcements weekly and he testified that he arrived at this figure as his estimate as the top number as would be available in Larned in a week. (T. 109).

3. Management and Staffing

(a) Pier San

111. Mr. K. W. Fyle, the vice president and a director and 20% stockholder of Pier San will move to Larned and devote his full time to the operation of the proposed station, serving as general manager and chief engineer. He will sever his connections with KSIR upon a grant of the Larned application. (Pier San Ex. 7, T. 154, 187). Messrs. Bozeman and Early, each an officer, director and 20% stockholder, will participate to some extent in the Larned operation, devoting on the average one day a week to the station's affairs. (Pier San Ex. 1, T. 186). Messrs. Denny and Pierce will lend their professional services to the proposed station, making occasional appearances there. (T. 265). Generally, however, Mr. Fyle will be in charge of the Larned station and play the most important role. (T. 265).

112. It is proposed that Mr. Fyle will surround himself with professional people at Larned, using local people if they have the ability. They will not be placed on the air until they have ability, but if they show prospects, they will be used part-time until they can learn the business

and acquire a professional mien. (T. 244). A news editor, three announcers, and one administrative employee will be hired and additional part-time employees will be engaged as needed. (Pier San Ex. 7).

113. KSIR and the proposed Larned station will be operated with separate staffs, and except for the participation of Mr. Early and Mr. Bozeman, with separate management. No joint programming, joint sales of advertising, or joint rates is contemplated. (T. 187). Pier San proposes to use outside talent as may be available for occasional appearances on the station, and where the talent is of such repute or standing as to merit more than an occasional appearance, it will be called upon with greater regularity. (Pier San Ex. 7).

(b) Morgan

114. Morgan states that he will move to Larned and devote his entire time to the proposed operation, serving as general manager and chief engineer, with his wife serving as bookkeeper. In addition, he proposes to hire two full-time engineer-announcers, one news director who will also do some announcing, one full-time salesman, and a receptionist who will handle women's programs and continuity. (Morgan Ex. 8). At the present time Morgan doesn't know whether he will buy or rent a home in Larned, and indeed hasn't made any investigation as to whether a house will be available on a rental or sale basis. (T. 98). Morgan proposes to operate his station independent of that owned by his father at Pratt, and states that there will be no joint rates, joint programming, or common employees between the two stations. (Morgan Ex. 8).

III PROPOSED CONCLUSIONS

115. In this proceeding Huffman, Morgan and Pier San request construction permits for a new station to operate on 1290 kc; ^{Huffman} Morgan seeking to use the frequency to establish a second station at Pratt, Kansas, and Morgan and Pier San proposing a first station for Larned, Kansas.

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Mutually destructive interference precludes a grant of all three applications, and prevents a grant of one Larned application and the Pratt proposal. Thus only one of the applications may be granted. Issues numbered 1, 2 and 3 in the Hearing Order contemplate a consideration of technical aspects of the proposals, and those matters will be considered first.

A. TECHNICAL MATTERS

116. The Pratt proposal contemplates operation on 1290 kc with 5 kw during the daytime and 500 watts at night, a directional antenna being employed with different patterns during the day and night. No interference would be caused any existing station. During the daytime interference would be received from three stations, precluding Huffman from serving some 5,207 persons, or 3.2% of those residing in the normally protected 0.5 mv/m contour of his proposed station. The interference-free service which would be supplied during the day would reach an area of 20,796 square miles, wherein live 160,064 persons. Other services are available, however, to all those areas and populations. Some 42 services are found in varying portions of Huffman's daytime interference-free 0.5 mv/m contour; no part thereof has less than 4 existing services and some parts have as many as 23. One station serves the entire area, another serves from 75 to 100% thereof, and four serve from 50 to 75%. Eleven services are available in from 25 to 50% of Huffman's interference-free 0.5 mv/m contour, and twenty-five services are found in the remaining 25% portion. In the area where Huffman's 0.5 mv/m signal would receive interference (934 square miles, 5,207 persons), a minimum of five and a maximum of eight services are found.

117. Only three communities of a size requiring a 2 mv/m signal for primary service are within Huffman's proposed 2 mv/m service area, and each of them already receives such a signal strength from one or more stations. Pratt, Kansas, where Huffman would locate, receives a 2 mv/m or better signal from KWEK, located there, and from three other stations, although one of the latter does not put the mentioned grade signal over

the entire community.

118. At night Huffman's proposed station would receive interference from existing stations to an extent that the Pratt station would be limited to its 14 mv/m contour, unable to serve almost 40% of the persons in the normally protected nighttime contour (2.5 mv/m). Within the limitation Huffman would serve 175 square miles, where there are 9,204 persons. KOMA, Oklahoma City, provides primary service to 16 square miles and 128 persons there. The area and population which would receive a first service at night from Huffman would be 159 square miles and 9,076 persons.

119. The two proposals for the use of 1290 kc at Larned, Kansas, contain substantially similar technical service features, and except where a distinction is noted the conclusions as to areas, populations, interference considerations and availability of other services apply equally to Pier San and Morgan. The Larned applicants propose to establish a first station in the community, operating during the day with 500 watts power. Pier San would not cause interference to any existing station, either co-channel or adjacent channel.^{6/}

120. The use of 1290 kc at Larned, as proposed herein, would be subject to interference from two existing stations, affecting 5,226 persons or approximately 3.9% of those in Larned's normally protected 0.5 mv/m contour. The interference-free contour, where the Larned proposals would bring a new service, encompasses an area of 11,907.5 square miles, wherein reside 127,353 persons. Two stations provide a 0.5 mv/m signal to that area, and another station supplies that grade service when it is operating on the frequency it shares. The other

^{6/} Morgan calculates slight interference to one station, KSOX, involving 101 persons representing 0.03% of the population within the station's normally protected contour. Eighteen stations serve all of this small interference area, and still additional services are present in parts thereof.

time-sharer and three other stations serve from 75 to 100% of Larned's proposed 0.5 mv/m service area, four services are found in 50 to 75%, eleven in 25 to 50%, and another eleven in the remaining portion up to 25%. The minimum number of 0.5 mv/m services in any part of Larned's 0.5 contour is seven, and the maximum is twenty-three. In the area where Larned 1290 kc would be limited by interference, a minimum of twelve and a maximum of twenty-one existing services of 0.5 mv/m or better are present.

121. There is no radio station in Larned, and only two stations now provide the community with a signal of primary service strength (2.0 mv/m or better in view of Larned's population). The nearest such station is some twenty-two miles distant, in Great Bend, Kansas. Thus the use of 1290 kc at Larned would result in a first local station and a third primary service to the community.

B. SECTION 307(b) CONSIDERATIONS

122. Issue No. 4 calls for a determination to be made in the light of Section 307(b) of the Communications Act, of whether the proposal for Pratt, Kansas or one of the proposals for Larned, Kansas would better provide a fair, efficient, and equitable distribution of radio service. In carrying out the statutory mandate for a fair, efficient and equitable distribution of radio service the choice must be made between the two communities and the proposals which are made for establishing a new station in each of them, in one case the first station and in the other a second station.

123. The Huffman proposal would provide a second local outlet and a fifth (fourth in some portions) primary service during the day to Pratt, Kansas, a community with a population of 7,523. Either of the competing proposals would offer Larned, Kansas, with a population of 4,447 persons a third primary service, but above all would provide a first local transmission facility to the community. While the population of Pratt is

slightly larger than Larned's, it receives a greater number of primary services, having a choice of service from its local station and in most parts of the community four other stations (in all parts from three, including the local station). Larned, on the other hand, has but two primary services now available, and none of these is from a local station. It is inescapable that there is a significant preference for Larned and an application to establish a new station there.

124. Appraising the civic, economic, political, cultural and social attributes of the competing communities results in no significant difference between them, and it appears that both Pratt and Larned are typical, substantial mid-western Kansas communities, each serving as the county seat, urban center and focal point for the business and trade activities for the predominantly rural area surrounding it. The two counties which have been considered, Pratt County (Pratt) and Pawnee County (Larned) are not significantly different in population or other characteristics, the respective 1950 census figures for the two counties being 12,156 and 11,041. No preference would be accorded either Pratt or Larned on a basis of statistics or characteristics.

125. The facilities here proposed by each applicant are not professed or intended to serve only the populations of their respective cities of Pratt and Larned, and each applicant would provide a new daytime broadcast service to areas and populations beyond his or its respective community. The Huffman proposal would provide an additional daytime service to a somewhat greater area and population than would Pier San's or Morgan's, but where the latter applicants would supply such new service there is generally somewhat lesser service. Four existing services are found in all parts of Huffman's proposed daytime service area, while only two stations^{Some} presently provide a 0.5 mv/m or better grade service to all of the area where Pier San (or Morgan) would bring a new interference-free 0.5 mv/m service. On balance, then, a preference

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must be expressed in this area of consideration for the Larned proposal(s). From the summary of other services available during the daytime, listed in the earlier paragraphs of these Conclusions, it is apparent that beyond the preference for the Larned proposal(s) based upon the minimum number of services found in all parts of the service areas of the respective proposals, neither proposal would warrant a significant preference on account of the status of existing daytime broadcast services in their service area outside their respective communities.

126. The Pratt proposal contemplates operation at night as well as during the day, while the Larned proposals are for daytime operation only. As a consequence of this difference in the proposals Huffman would bring a new service at night to certain areas and populations while Pier San or Morgan have no comparable figures. However, nighttime use of the frequency at Pratt would be subject to very substantial interference from existing stations, and less than 10% of the area and only approximately 40% of the population within the normally protected contour would receive interference-free service -- 175 square miles out of 1,980 square miles and 9,204 persons out of a population of 23,466 being the figures involved. Of those able to receive service, 9,076 in an area of 159 square miles would be obtaining a first primary service, and this includes the community of Pratt. Thus, although ^{Huffman}Morgan might otherwise be entitled to some preference over his Larned competitors because he proposes nighttime operation and would thereby give service to a small "white area", the preference cannot be a strong one in view of the inefficient aspects of his proposal -- ⁴⁴more than 90% of the area and some ⁴⁷60% of the population within the normally protected nighttime contour not being supplied the service. In fact, only the aspect that he proposes a first nighttime station at Pratt saves his proposal from being barred from any consideration pursuant to the provisions of Section 3.28(c) of the Commission's Rules.

127. Upon the basis of the considerations above set out the conclusion emerges that no substantial preference may be awarded either to Pratt or to the Huffman proposal on the basis of daytime operation, and only a slight, if any, preference could result to Huffman by reason of nighttime operation, but that the community of Larned and the proposals for Larned obtain significant preferences under Section 307(b) of the Act by reason of the present lack of a local station which Pier San or Morgan would fill and because the Larned proposals would additionally bring a new daytime service to a community and an area not as well served by existing stations as is the community and the area to which Huffman's proposed station would supply an additional service. A fairer and more equitable allocation of broadcast facilities would ensue if either of the Larned applications were granted, and the inefficiency of the Pratt proposal at night precludes a conclusion that a grant of the ^{Huffman} Morgan proposal is so much required by the efficiency provision of Section 307(b) as to overturn the Larned preferences.)

128. The evidence dictates the conclusion that Larned is a substantial community entitled to a first local broadcast service. A long line of cases has established the doctrine that a proposal for a first local broadcast service is, in the absence of compelling considerations, to be preferred over a competing proposal which would add an additional station in a community already receiving sufficient service. For example, in Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216, 1233, the Commission stated:

"We have many times in our past decisions established the policy that the absence of a local transmission facility in a community constituted under Section 307(b), a showing by an applicant of substantial need for radio service. In this connection, our decisions have been grounded upon the Commission's belief that the public interest requires the availability of a local transmission facility to provide the population of a community with a program service adapted to their needs and with an opportunity for local self-expression."

In the cited case one proposal was for fulltime use of the frequency in a community with an existing station, while the other proposal specified daytime only operation in a community with no local station. The full-time applicant's community had a "substantially greater population" than the other community, and the proposal would serve 191,334 persons while the daytime applicant's interference-free contour encompassed a population of 150,617. None of these elements, however, were considered to be the compelling need to warrant a grant to the first applicant in preference to the rightful claim of the second community for a first local station.

"The controlling element in our determination of this proceeding is our policy to afford every community of substantial size, where possible, with an outlet for self-expression." (*Id.*, at 1234).

129. The conclusion is reached here that no compelling considerations exist requiring the overturning of the established principle that a proposal for a first local broadcast station to a community is to be preferred over a competing proposal which would add an additional station in another community, and it is concluded that one of the Larned proposals is to be preferred over the Pratt proposal. Issue No. 4 is accordingly resolved in favor of the Larned applicants, and the question now arises as to which of them should receive the permit sought in this proceeding.

C. COMPARISON OF PIER SAN AND MORGAN

1. Preliminary Matter

130. Before turning to an examination of the applicants against the comparative criteria considered by the Commission under the standard comparative issue (here, Issue No. 5), it is not inappropriate to note that the Commission found both Pier San and Morgan to be legally, technically, financially and otherwise qualified to construct and operate its proposal, except as may be indicated by the issues. (FCC 60-386, Mimeo. 86336). So far as Pier San is concerned, there is nothing to indicate that it isn't fully qualified to receive the permit it seeks. As the

Findings show, its proposal will not cause any interference to any station, and the slight amount of interference which it may receive is well within the 10% figure of Section 3.28(c). With respect to Morgan, however, the evidence developed on the record with respect to the preparation and filing of his (or his father's, quare) application for Larned indicates that the initial qualification determination must be reconsidered.

131. From Morgan's own testimony it appears that the engineer who prepared the engineering portion of the application filed on January 6, 1959, had not been engaged by him but by his father. Similarly, the attorney to whom the engineer transmitted the material for filing with the Commission had been engaged by the applicant's father. Morgan's claim that the engineering and legal counsel had been engaged by his father for him (Morgan) cannot be accepted without some reservations in light of the further evidence which indicates that Morgan had no contact with the engineer until some time after the application was filed. On cross-examination, Morgan admitted that the first time he ever saw the engineering material (Sections V-A, V-G and exhibits) was some days after it was filed with the Commission on January 6, 1959. How much time elapsed is not definitely fixed, but a minimum of four days was involved, as indicated by the evidence which shows that the application was filed on January 6th and the first date Morgan saw the engineering was after the receipt of the communication from the engineer bearing date of January 9th. Had the Commission been aware that the application was improperly executed it would have been returned, unworthy of consideration. Beyond that fact, however, it is doubtful that the Commission would have found Morgan "otherwise qualified" had it been aware of the circumstances surrounding the filing of the captioned Morgan application, whether or not a subsequent re-execution or amendment removed the improper initial execution.

132. Morgan's explanation that his father had engaged the engineer for him cannot be reconciled with the fact that the portions of the

application and exhibits prepared by the engineer listed the father's name as applicant. Morgan did not produce the engineer as a witness at the hearing, however, and Morgan's version stands unsupported. Morgan did not state who "Scotch-taped" "Francis C. Morgan, Jr." over the name William Morgan in one place in the engineering exhibit before it was filed with the Commission, nor does the hearing record show who physically filed the application and material with the Commission on January 6, 1959, except that it wasn't Morgan.

133. When it is remembered that Morgan was working for his father, who owned and operated the only station at Pratt; that an application for a new station there which would compete with KWSK was filed seeking 1290 kc; and that the Morgan application for the same frequency at Larned precluded a grant of the Pratt application -- at least without a hearing -- the flaws in Morgan's explanation of the singular circumstances surrounding the filing of the application take on additional significance. In this light, too, Morgan's failure to produce supporting witnesses or evidence for his version must be considered. Since these matters transcend the comparative evaluation, although they must be considered thereunder, the Examiner, and subsequently the Commission, will have to set forth separate conclusions with respect to them. On the basis of the record such conclusions can be no less than that serious questions remain as to whether the real party in interest was indicated in the Morgan application when filed with the Commission and whether the applicant is in fact otherwise qualified.

2. Comparative Criteria

134. The criteria considered by the Commission and their significances have been discussed in numerous previous decisions (See WHDH, Inc., 22 F.C.C. 767) and it should be sufficient to list those which may have application here without an extended discussion of their meaning.

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Under each one the conclusions based upon the findings, which in turn are based upon evidence of record, will be set forth.

135. Local Residence Mr. K. W. Pyle, the vice-president and a director and 20% stockholder of Pier San, who will be the general manager of that applicant's proposed station, will move to Larned, live there, and fulfill his desire to become a part of the community while operating a radio station. Although Mr. Pyle is not presently a local resident of Larned, he has worked and lived in nearby Wichita, Kansas, since 1940, when he helped move Station KFBI to that city. Prior to that he lived and worked in Milford, Abilene, and Salina, Kansas. Mr. Bozeman has lived and worked in Wichita since April of 1951, and his professional tours, on entertainment activities, have taken him to the Larned area and to Larned itself. Although he will not move to Larned if the Pier San application is granted, he must be considered as having local ties there. Similarly, Fort Early lives in Wichita. The other two stockholders of Pier San, each with 20%, live in Georgia, and it is not proposed that they move to Larned.

136. Francis C. Morgan, Jr. resides in Pratt, Kansas, but he states that if his application for Larned is granted he and his wife will move to that community. Thus he is not now a local resident of Larned, albeit he is a resident of that general area of Kansas. Since neither applicant is now a local resident of Larned, this criteria must be considered with respect to the proposals of each for residency there in the event his or its application is granted. Morgan cannot be held to merit any preference simply because as the individual owner his future local ownership would be 100% while Pier San's would be represented by Mr. Kay Pyle, a 20% stockholder. When the phrase "local ownership" is examined in light of the sense in which it has been used by the Commission in past decisions, it becomes clear that Pier San

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merits a preference. This comparative criteria has often been termed "meaningful local ownership", and it connotes the desirable combination of residency in the community sought to be served together with the other ingredients which suggest a translation of awareness of the community's problems, developed by residency, into a broadcast operation designed to meet the community's needs. At the risk of some repetition it should be pointed out that Mr. Kay Pyle will be the general manager and as among the five members of Pier San effectively "run" the Larned station. His long experience in broadcasting and his ability to operate a station meeting the community's needs lead to the conclusion that some preference must be extended to Pier San in the local ownership area of comparison.

137. Civic participation Pier San's showing on local civic participation rests principally on Messrs. Bozeman, Pyle, and Early. They each have good records of civic activity in Wichita, and Bozeman's extends to other areas including Larned, where he cooperated with the Chamber of Commerce, albeit he appeared there in his professional entertaining capacity. Since none of Pier San's members live in Larned, none have a record of civic activity in that community. Neither, on the other hand, does Morgan. Since neither has a record of civic activity in Larned, we must look to their activities in their present communities. Morgan's record of civic activity in Pratt is slight. Weighing all these factors, it is concluded that some preference is awarded to Pier San, both with respect to past activities and with respect to an estimate of which applicant would be more meaningfully active in Larned if he or it obtained a permit.

138. Diversification of Business Interests Pier San's principals have engaged in the following businesses in the State of Kansas and elsewhere: radio broadcasting work, professional entertaining, consultant work for retail stores, operation of farms and an interest in a clothing store, practice of law, music publishing, and ownership of a recording

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company. Morgan, on the other hand, is a relatively young man and his business experience is limited to employment by his father at his father's radio station in Pratt and a brief period of selling advertising specialties, such as matchbooks and calendars. The total business interests of Pier San's principals are more diversified than Morgan's, and the interests of Pier San's participating principals (Pyle, Bozeman, and Early) show greater diversification than does Morgan's interests. Consequently, the difference between the applicants being great, a strong preference is awarded to Pier San.

139. Broadcast Experience Pier San's showing of broadcast experience, both management, and of an employee type, is far and away superior to that of Morgan's. Key Pyle, who will be Pier San's participating principal in Larned, is a pioneer in the broadcast industry. He started in 1924 as a radio operator, and the biographical data developed on the record leaves no doubt that his broadcast experience is extensive. Most recently, he has served as general manager of KSIR in Wichita, and at the hearing he demonstrated that at that station he had translated his experience into effective operation. Mr. Bozeman has been in the broadcasting industry since 1938 and his experience includes announcing, talent managing, entertaining, and ownership. Mr. Early has a 20% ownership interest in KOOO, Omaha, and since 1958 he has been associated with Mr. Bozeman and Mr. Pyle in the operation of KSIR, serving both as an officer of the licensee corporation and in various functions in the operation of the Wichita station. The other two members of Pier San, Messrs. Pierce and Denny, have ownership interests in two stations in Georgia, and Mr. Denny's biography shows that he was previously employed at Station WSM.

140. Morgan had some duties at his father's station in Pratt on a part-time basis for a year before he went into the service. He returned to his father's station in September of 1958, and for the next twenty-two months was employed there, serving as an announcer-operator, salesman,

and for some time as the chief engineer. Although he ran the station during his father's absence on occasion, he had no managerial authority, and could not hire or fire employees, enter into any contracts except for the sale of station time, or sign any checks.

141. Pier San's showing on broadcast experience is considerably more extensive than Morgan's, and Pier San is entitled to a preference. This preference becomes a strong one when it is remembered that the evidence in the record concerning the operation of Station KSIR shows that on an over-all basis the stations' operations were designed to and did serve the needs of its licensed community, and when it is remembered that the member of Pier San who will be principally concerned with the Larned station has been manager of KSIR and in addition has experience in all phases of radio operation, running back almost thirty years.

142. Integration of Ownership and Management The Commission has held that "the highest degree of quality of integration is that wherein stockholders with meaningful broadcast experience and active civic backgrounds devote their full energies to the day-to-day operation of a station", (The Travelers Broadcasting Service Corp., 12 R.R. 689, 801), but that lesser participation is also of some weight. (Columbia Amusement Company, 12 R.R. 509, 564). Kay Fyle, one of Pier San's principals, will devote full time to the operation of the station as general manager and chief engineer. The Findings and the earlier portions of these Conclusions demonstrate that Mr. Fyle has meaningful broadcast experience in the best sense of the term, and otherwise possesses the qualifications and background most likely to result in qualitative integration of ownership and management. Two other stockholders, each with 20%, Messrs. Bozeman and Early, will devote some time to the Larned station, each averaging one day a week in activities at the station. Lesser participation of the remaining two stockholders will be present.

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143. Morgan proposes to devote his full time to the operation of the station if he obtains the permit. Quantitatively, Morgan would appear to have somewhat greater integration than Pier San, simply because he is an individual while Pier San is a corporation. However, when consideration is given to both full-time and part-time integration and consideration is given to the meaningful broadcast experience of Mr. Fyle, who will spend 100% of his time at Larned and of Messrs. Bozeman and Early, who will spend some time each week there, the quantitative difference would not be substantial enough to justify a preference for either applicant. Qualitatively, Pier San is entitled to a preference, due to the more extensive broadcast experience of its principals who will be integrated.

144. Past Operation Neither of the applicants has been the licensee of a broadcast station; however, each of Pier San's principals has an interest in one or more existing stations. Morgan has had no ownership interest in any other station.

145. Mr. Bozeman, president, director, and 20% stockholder of Pier San, is 100% owner of KSIR, Wichita. The evidence of record concerning the operation of this station is sufficiently comprehensive to form the basis for a judgment on its over-all performance, and that judgment is that the station has been programmed in a manner well-calculated to meet the needs of Wichita, its licensed community. Several of the programs carried on KSIR merit special approval, and it is interesting to note that these programs will have their counterpart on the proposed station at Larned. Reference here is made to the KSIR programs entitled "Man On The Street" and "Great Works Of Music". Mr. Kay Fyle has been general manager of KSIR during the period for which the station's programming was examined on the record, and there is every reason to expect that he will operate the proposed Larned station in the same responsible manner in which KSIR has been run. The logs of the other stations in which members of Pier San

have an interest (K000, WERO, and WJAT) were made available to counsel for Morgan. He did not introduce any of the logs into evidence or question the members of Pier San concerning the operations of those stations, and, it must be concluded that from an examination of such logs Morgan did not turn up anything which might be deemed to be helpful to him, that is, detrimental to Pier San. In this light it must be concluded that the past broadcast records of those stations show that they have been programed in a manner meeting the needs of their respective communities and the requirements of the Commission. Weighing the foregoing matters against the absence of any past operation by Morgan, it must be concluded that Pier San is entitled to a preference in this comparative area.

146. Diversification of Media of Mass Communications The members of Pier San have interests in other broadcast stations. Mr. Rozman is 100% owner of KSIR and he has a 20% interest in K000, Omaha. Messrs. Pyle and Esly are on the board of directors of the licensee corporation of KSIR and they each have a 20% interest in K000. Messrs. Pierce and Denny each have a 50% interest in WERO and WJAT, both in Georgia. ^{7/} There is no overlap of the service contours of any of the mentioned stations, except for a small overlap in the 0.5 mv/m contours of KSIR and the proposed Larned station. ^{8/} However, in this overlap area there is a plethora of other services, a minimum of 15 and a maximum of 24 services being present.

^{7/} As mentioned in Footnotes 3 and 4, *supra*, since the hearing concluded Messrs. Pierce and Denny have withdrawn from K000, but they have acquired WSNL.

^{8/} Finding 68, *supra*, noted that Larned is 105 miles from Wichita and that the overlap area lay between 45 and 88 miles from Wichita and from five to 55 miles from Larned. Official notice should be taken of the information and engineering material in the Commission's files with respect to KSIR which shows that KSIR (500 kc, 250 w, DA-D) is subject to interference in the direction of Larned. The interference-free contour of KSIR would thus be further from Larned than the normally protected 0.5 mv/m and the actual service overlap would be even less than the small theoretical overlap. (KSIR license files; RF-11188).

147. Morgan does not have any broadcast interests and he owns no media of mass communication. Because of the absence of any such interest he is entitled to a preference in this comparative area; however, in this connection it must be remembered that his father, Clem Morgan, is the sole owner of Station KWSK in nearby Pratt, Kansas.

148. Preparation of Program Proposals The steps taken by Pier San and by Morgan in the preparation of their respective program proposals have been described in the Findings. More adequate contacts with local civic, religious, educational and agricultural organizations and representatives were made by Pier San than by Morgan to determine the program needs of the area. Moreover, the record shows that Mr. Bozeman, of Pier San, was invited by responsible individuals in Larned to construct and operate a station there, the invitation being extended on the basis of Mr. Bozeman's reputation and known experience in broadcasting and entertaining. On the other hand, although Morgan claimed that he prepared the programming proposal himself, the circumstances surrounding the decision to file for Larned and the filing of the application therefor with the Commission leave much to be desired by way of indicating that the Larned proposal by Morgan represents any considered judgment of the needs of the community. Pier San is entitled to a preference on the factor of preparation of program proposals.

149. Program Proposals There is a significant difference between Pier San and Morgan with respect to the matter of proposed broadcast hours, and Pier San is entitled to a preference therefor. The applicants are about equal in over-all program balance, including the percentage of time devoted to commercial and sustaining programs and the percentage of time devoted to the various categories of programs by type. A comparison of the live program proposals reveals certain differences, some of which are significant. Pier San's proposals in the area of discussion, educational,

and religious programming are more extensive and appear better designed to meet the needs of the community. In view of the foregoing, Pier San is entitled to a preference on its programming proposal.

150. Staff The record does not show that the respective staffs of Pier San and Morgan will be inadequate to effectuate their proposals, although were it not for the Commission's reluctance to express preferences on the factor of staff proposals one would be given to Pier San for its employment policies designed to assure Larned of a professionally operated station.

151. Summation of Comparison of Pier San and Morgan Pier San has been awarded preferences on proposed local residence, civic participation, diversification of business interests, broadcast experience, past operation, preparation of its program proposals, qualitative integration of ownership and management and on its programming proposals. Morgan has been preferred on only one factor of comparison, and that preference arises not from any positive action or affirmative factor on his part but simply because the members of Pier San have interests in other broadcast stations. Morgan's preference is for diversification of media of mass communications, a matter which is but one element to be considered in the over-all comparison. Here it is apparent that the superiority of Pier San in all other comparative areas outweighs Morgan's single preference.

152. It is concluded, therefore, that Pier San is to be preferred over Morgan on a comparative basis and that it would better serve the needs of Larned than would the other applicant for the community.

D. ULTIMATE CONCLUSION

153. In view of all the foregoing, it is concluded that public interest, convenience, and necessity would be served by a grant of the application of Pier San, and by the denial of the applications of Morgan and of Huffman. It is found and concluded that a grant of the application of Pier San for the first local station in Larned, Kansas would affirmatively serve the public interest, convenience, and necessity, and the grant to it should be made.

WHEREFORE, the Examiner is respectfully requested to find and conclude as set forth in these Findings and Conclusions of Pier San, Inc., and to prepare and issue an Initial Decision granting the application of Pier San, Inc., and denying the applications of Wilmer E. Huffman and Francis C. Morgan, Jr.

Respectfully submitted,

PIER SAN, INC.

By:

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V MEMORANDUM BRIEF

1. Scope Pier San believes that a repetition of the facts already set out in the Findings or a detailed discussion of comparative criteria established by many Commission Decisions would unduly extend the within pleading without offering any significant advantages to the Examiner. For that reason this Memorandum Brief will not cover every aspect of the matters raised in the foregoing Findings and Conclusions, but will be limited to those two or three questions concerning which further discussion may be helpful. In discussing such questions in this Brief and in leaving others to the determination posed for them by the Conclusions, Pier San does not suggest that additional support is necessary with respect to the one group of Conclusions and not the other. Rather, the selection of the issues treated herein was made with the view of supplying background considerations which should not be overlooked in reaching a decision in this case.

2. The 307(b) Issue Hearing Issue No. 4 contemplates an inquiry and a determination as to whether one of the Larned proposals or the application for Pratt, Kansas, would better fulfill the directive contained in Section 307(b) of the Communications Act, namely, that in considering applications for licenses the Commission shall make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same. This Section "empowers the Commission to allow licenses so as to provide a fair distribution among communities. Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece." F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358, 362 (Underscoring supplied). Translated into a principle in proceedings such as this, where mutually exclusive proposals for different communities are involved, Section 307(b) is better served by preferring the proposal for a first local station than

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by preferring, to the first proposal's exclusion, one which would add an additional station in a community already possessing a local radio outlet, unless there are compelling reasons contra. Lawton - Fort Sill Broadcasting Co., 7 R.R. 1216.

3. Without attempting to oversimplify the factual situation while yet avoiding a recitation of obfuscating statistics, the pertinent facts in this case with respect to local needs are: Larned and Pratt are both mid-western communities, located in the same general area of Kansas. They both may be considered as medium size Kansas communities, and although Pratt has a slightly larger population, the difference is not significant within the mentioned class of communities found in the mid-west. Each is a county seat, and their respective counties are within a few hundred people of being equal in population. Such differences as may exist between them in social, economic and cultural characteristics are differences without distinctions for our purposes here. However, in the area of radio services we do find a great difference, and a great distinction.

4. Pratt has an existing radio station, KWSK. Larned does not. Pratt receives primary service during the daytime from four stations, including its local outlet, while Larned receives only two primary services, both from stations located elsewhere. The record shows that *Huffman would provide time with its 3rd primary service.* Larned is a substantial community, entitled under Section 307(b) to a first local broadcast service -- "a community radio mouthpiece". (F.C.C. v. Allentown Broadcasting Co., supra).

5. A long line of cases has established the doctrine that absent compelling contra considerations a proposal for a first local broadcast service is to be preferred over a competing proposal which would add another station in a community already possessing its "radio mouthpiece". Northwestern Cb10 Broadcasting Corp., 3 R.R. 1945, 1953; Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216; Greater Newcastle Broadcasting Corp.,

8 R.R. 291; Mercer Broadcasting Co., 13 R.R. 891. And see, Harrell v. F.C.C., 267 F.2d 629, 18 R.R. 2072, 2076, ".....and would therefore have had to award the station to the petitioner on the basis of the Section 307(b) presumption."

6. In the Northwestern Ohio case the Commission stated:

"In this connection, our decisions have been grounded upon the Commission's belief that the public interest requires the availability of a local transmission facility to provide the people of a community with a program service adapted to their needs and with an opportunity for local self-expression." (3 R.R. at 1953).

Again, in Lawton-Fort Sill Broadcasting Co., the following appears:

"We have many times in our past decisions established the policy that the absence of a local transmission facility in a community constituted under Section 307(b), a showing by an applicant of substantial need for radio service. In this connection, our decisions have been grounded upon the Commission's belief that the public interest requires the availability of a local transmission facility to provide the population of a community with a program service adapted to their needs and with an opportunity for local self-expression." (7 R.R. at 1233).

7. At this juncture we might examine the respective Pratt and Larned proposals to ascertain whether there are present such compelling considerations as would preclude the application of the first local service doctrine. Preliminarily it might be noted that even if consideration were given to Pratt's somewhat larger population, the cited doctrine would still determine the choice between Pratt and Larned. Greater New Castle Broadcasting Corp., 8 R.R. 291. In that case New Castle had a population of 48,834, while Farrell had a population of 13,644. New Castle had a local station; Farrell did not. The Farrell applicant proposed a first station there; the New Castle applicant would bring the second station to the larger community. Nevertheless, the Commission held that "the requirements of Section 307(b) of the Act, as amplified by our policy favoring the establishment of a first local transmission facility for a substantial community, dictate a grant to Farrell." (8 R.R. at 292a).

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8. The use of 1290 kc at either Fratt or Larned will result in a new service during the day to substantial areas and populations, and between the two proposals the difference in the size of the area and the number of persons who would receive an additional service is not significant in view of the fact that in the places where the Fratt proposal would serve somewhat more persons with an additional service there is already available a plethora of available service, the number ranging up to forty-two. Again, too, even acknowledging a difference, it does not constitute a "compelling consideration" against the first local station principle. Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216, 1234.

9. In considering the comparative merits of the proposals for the use of 1290 kc we see that the Pratt proposal contemplates operation at nighttime, while the Larned proposals do not. However, before rushing to a conclusion that the Pratt proposal therefore constitutes a more efficient utilization of the frequency [we must remember that the nighttime operation proposed is highly inefficient.] 1290 kc at Fratt will be limited by interference at night to its 14 mv/m contour, unable to serve more than 90% of the area and 47% of the population residing between that contour and its normally protected one. Although the Pratt proposal is saved from the bar of Section 3.28(c), the fact remains that its nighttime proposal is inefficient.] Any preference for Pratt under the "efficiency" standard of Section 307(b) flowing from fulltime operation can be but a limited one in view of the inefficient aspects of the operation at night.

10. However, even if the inefficient aspects of the nighttime proposal are ignored, a preference for operating fulltime would not outweigh the "equitable" and "fair" Section 307(b) preferences for Larned. This is established by Lawton-Fort Sill, supra.

"Thus, apart from the fact that Lawton proposes a fulltime rather than a daytime operation, which of itself constitutes a more efficient use of the frequency, a somewhat greater area and population would gain daytime

service from Lawton than from the Anadarko applicant. It is our view, however, that the demonstrated need for a station in Anadarko, and Caddo County, outweigh these considerations arising out of a more efficient use of the frequency in Lawton than in Anadarko." (7 R.R. at 1234). Underscoring supplied.

11. One of the results of Pratt's nighttime operation would be the filling in of interstices in existing nighttime service. A first reception service at night would be brought to 159 square miles and a population of 9,076. This consideration, however, cannot overturn the preference for a Larned proposal, in view of the fact that the Commission has established, and been affirmed by the Court of Appeals, that white area service at night is not all-controlling. Vidalia Broadcasting Co., 8 R.R. 1; Gillespie Broadcasting Co., 15 R.R. 878, affirmed, sub nomine, Red River Valley Broadcasting Corp. v. F.C.C., 22d, 19 R.R. 2028.

12. In the Red River Valley case the Commission held that the loss of the only nighttime service to a community was not a possible basis for denial of an application, and that a grant would be made for other public interest considerations. In the Vidalia case (cited with approval by the Court of Appeals in Red River) the Commission authorized the only station in a community to change from full-time to daytime-only operation, even though this would result in the loss of the only nighttime primary service to some 5,000 persons, because the change would serve other considerations of Section 307(b), viz., additional daytime service to additional persons. ^{1/} Filling in interstices in existing nighttime service may be a consideration, but it certainly cannot be viewed as one so compelling as to bar an opportunity to grant a first local station.

^{1/} These recent cases suggest that the Commission is recognizing the phenomenon of which all broadcasters are aware -- that nighttime AM radio listening is a vanishing habit, due principally to the preference for television during such hours.

13. From the foregoing it is clear that Section 307(b), as translated into principle in proceedings such as the instant one, would be better served by a grant of either of the Larned proposals than by a grant of the Pratt proposal, which latter grant would concomitantly result in a denial of Larned's opportunity for a first local outlet. The demonstrated need for a first station in Larned outweighs any and all of the considerations arising out of the proposal to establish a second station at Pratt. It simply cannot be held that there is any requirement under Section 307(b), or elsewhere, for the Commission to grant the Pratt proposal to fill in some interstices in existing service before it grants Larned its first station. The 307(b) presumption for a grant to Larned is reinforced by the record, and the Commission will have to award the permit to a Larned applicant.

14. Comparative Matters The Findings and Conclusions, based upon the evidence of record, permit of no determination or decision on the comparative issue between the Larned applicants other than that Pier San must be preferred over Morgan. Since it is established that one of the Larned proposals will be preferred under the 307(b) issue, it follows that the overwhelming preferences for Pier San over Morgan result in Pier San being granted the permit sought by all three applicants herein.

15. Pier San does not believe it is being sanguine when it states that the record so compels a preference for Pier San over Morgan that further discussion or argument under the comparative issue, beyond the matters set out in the Findings and Conclusions, is unnecessary. One element, however, might be touched upon briefly. That concerns the minimal overlap between KSIR and Pier San's proposed Larned station.

16. Mr. Bozeman, an officer, director and 20% stockholder in Pier San, owns all of the stock of the licensee corporation of KSIR, Wichita. Mr. Early, also with 20% in Pier San, is an officer and director of KSIR,

but holds no stock. Similarly, Mr. Pyle is an officer and director in KSIR, Inc., but upon a grant of the Larned application he will sever all connections with the Wichita station. Wichita and Larned are 105 miles apart, but it appears that there may be a small area of overlap of the 0.5 mv/m contours of KSIR and proposed Larned. However, KSIR is subject to interference in the direction of Larned, and one of the areas in which the proposed Larned station would receive interference is in the direction of Wichita. Thus, such overlap of actual service contours as may result would be even less than the small overlap suggested from a view of the normally protected 0.5 mv/m contours of the two stations.

17. Wichita and Larned are separate and distinct cities, each located in a different and non-adjointing county of Kansas. They are, as above noted, 105 miles apart. One is a metropolitan center, the other a medium size community in a rural area. KSIR would not serve the city of Larned, nor would Larned serve Wichita. The Commission has held in numerous decisions that small overlap of 0.5 mv/m contours in such instances neither raises the duopoly rule (Section 3.35 of the Rules) nor warrants more than passing consideration. Howard E. Griffith, 13 R.R. 1125; Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216.

18. The separation between Larned and Wichita is more than two times greater than that which existed between two stations recently considered by the Examiner in Clarence E. Wilson, 20 R.R. 1143, 1150. Additionally, there is no overlap of the 2 mv/m contours here, while there was some marginal 2 mv/m overlap in Wilson. Here, as in Wilson, there will be separate operation of the stations involved; no rate tie-ins or discounts. The facts here compel the same observation made by the Examiner in Wilson, viz., "As a matter of fact, few advertisers would be interested in buying time on both stations." The instant slight overlap cannot be held to affect adversely Pier San or its Larned proposal.

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19. Finally, in this connection it might be noted that the Commission's prehearing examination of the situation convinced it that such overlap as may be present would not be significant, and no specific issue on the question was included. Similarly, the competing applicants were apparently satisfied that the matter was of no decisional significance, and neither of them attempted to raise the question.

"The applicants are hostile, and their respective interests depend not only upon their own virtues but upon the relative shortcomings of their adversaries. We think, therefore, that the Commission is entitled to assume that in such a proceeding the record of the testimony will contain reference to all the facts in respect to which a difference between the parties exist, and that the parties will urge, each in his own behalf, the substantial points of preference. The Commission need not inquire, on its own behalf, into possible differences between the applicants which are not suggested by any party, although in its discretion it may do so." Johnston Broadcasting Co. v. F.C.C., 175 F.2d 351, 357.

Obviously, the slight overlap is without effect on Pier San or its comparative standing.

20. Conclusion For the foregoing reasons, and for those shown in the Proposed Findings and Conclusions of Pier San, it is submitted that in order to carry out the mandate of Section 307(b) of the Communications Act the Examiner must decide that either of the proposals for Larned, Kansas, must be preferred to the proposal for Pratt, Kansas. Then, upon

an evaluation of the Larned applicants under the comparative issue, the Examiner must conclude that Pier San is to be preferred over Morgan, and order the grant of the application of Pier San, Inc., and the denial of the competing proposals.

Respectfully submitted,

PIER SAN, INC.

By:

MILLER & SCHROEDER
Its Attorneys

/s/ Arthur H. Schroeder
ARTHUR H. SCHROEDER

/s/ John B. Kenkel
JOHN B. KENKEL

218 Munsey Building
Washington 4, D. C.

February 1, 1961

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CERTIFICATE OF SERVICE

I, Alice F. Hopper, hereby certify that I did, this first day of February, 1961, deliver to the following, at their respective offices indicated, a copy of the foregoing "PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM BRIEF OF PIER SAN, INC.":

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Warner Building
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Counsel for Francis C. Morgan, Jr.

Ray Paul, Esquire
Federal Communications Commission
Washington 25, D. C.
Counsel for the Chief, Broadcast Bureau

Examiner Herbert Sharfman
Federal Communications Commission
Washington 25, D. C.

/s/ Alice F. Hopper
Alice F. Hopper

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Huffman

"Reply To Proposed Findings"

February 17, 1961

Feb 17, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

WILMER E. HUFFMAN
Pratt, Kansas

FRANCIS C. MORGAN, JR.
Larned, Kansas

PIER SAN, INC.
Larned, Kansas

For Construction Permits

DOCKET NO. 13469
File No. BP-12021

DOCKET NO. 13470
File No. BP-12749

DOCKET NO. 13471
File No. BP-12750

REPLY FINDINGS OF WILMER E. HUFFMAN

Comes now Wilmer E. Huffman, applicant in the above-entitled proceeding, by his attorneys, and respectfully submits his reply to the Proposed Findings of Fact and Conclusions of Law submitted by the competing applicants, Francis C. Morgan, Jr. (Morgan) and Pier San, Inc. (Pier San), and by the Broadcast Bureau.

1. Wilmer E. Huffman (Huffman) and his counsel, engineering and legal, have carefully reviewed the Proposed Findings of Fact and Conclusions of Law submitted by the Broadcast Bureau and are in full agreement with these proposed findings and conclusions, particularly the ultimate conclusion.

2. Huffman and counsel have also reviewed the Proposed Findings of Fact and Conclusions of Law submitted by Morgan and will address this reply to the conclusions contained in Section IV thereof. In said Section IV, Page 14, Paragraph 1, Lines 6 and 7, the statement is made that both Pratt and Larned are substantially the same size. The record

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clearly reflects, using 1950 Census figures, that Pratt is a community of 7,523 persons and that Larned has only 4,447. Thus Pratt has on this comparison 3,076 more persons, or approaches twice the size of the town of Larned.

3. In the same paragraph referred to above it is stated that part of the nighttime proposed service area of the Pratt applicant does not receive any nighttime service at present. As is shown in Huffman Exhibit 11, Table 1, 90.8 percent of the area within the Huffman proposed 14 mv/m contour and 98.61 percent of the population therein residing (9,076 persons) receive no nighttime service at all. These people reside in a "white area." This "white area" is located in a predominantly agricultural area of the country. At nighttime after the day's work and when families gather in their homes to learn of the news of the day affecting their local area, State and Nation; when they wish to learn of weather conditions affecting the source of their livelihood; and when they want to be advised of the nature and progress of the serious storms not uncommon in this region, they are rewarded only with static and silence.

4. Turning to the Pier San conclusions appearing at Pages 52 to 56 and in the Memorandum Brief appended to the Pier San findings, we observe and respectfully take issue with the following proposed facts and conclusions:

(a) Page 53, Paragraph 125, of the Pier San findings contains the following statement:

"Four existing services are found in all parts of Huffman's proposed daytime service area, while only two stations presently provide a 0.5 mv/m or better

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grade service to all of the area where Pier San (or Morgan) would bring a new interference-free 0.5 mv/m service."

The statement that four services are found in all parts of the proposed Huffman service area is true; but, unfortunately, the remainder of the sentence in which a comparison is attempted is ^{1/} inconsistent. It is submitted that this sentence should read:

A minimum of four existing services are found in all parts of Huffman's proposed daytime service area, while a minimum of seven stations are found to serve all parts of the area where Pier San (or Morgan) would bring a new interference-free 0.5 mv/m service.

If Pier San is talking about stations which serve all of the area of Huffman's proposal there is only one, while three serve all of the area of the proposal of Pier San (or Morgan). In this connection see the engineering exhibits introduced on behalf of each of the parties to this proceeding: Huffman's Figure 3; Morgan's Figure 2; and Pier San's last figure.

(b) Page 54, Paragraph 126, Line 13, should read "Huffman" and not "Morgan."

(c) Page 55, Paragraph 126, Line 17: The figures contained in this statement are incorrect. Huffman proposes a Class III-B station which, according to the Commission's Rules,^{2/} is defined as

^{1/} In other words, Pier San has compared the minimum number of services in any part of Huffman's proposal with the services which serve all of Pier San's or Morgan's proposal. A most unfair comparison!

^{2/} § 3.182(a)(3)(ii): "Class III-B stations which operate with powers not less than 0.5 kw, or more than 1 kw nighttime and 5 kw daytime are normally protected to the 4000 uv/m groundwave contour nighttime and 500 uv/m groundwave contour daytime."

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a station operating on a regional frequency (here 1290 kilocycles) with a power of not less than 0.5 kilowatt, or more than 1 kilowatt nighttime and 5 kilowatts daytime, and prescribes that these stations are protected to the 0.5 mv/m contour daytime and to the 4.0 mv/m contour nighttime. Therefore, since the 14 mv/m contour of Huffman's proposal encompasses 9,204 persons in an area of 175 square miles; and since the 4.0 mv/m contour encompasses 16,099 persons in an area of 1,108 square miles, the arithmetic is a matter of simple computation and 84 percent of the area and 43 percent of the population within the normally protected 4.0 mv/m contour for a Class III-B station do not receive an interference-free service; not the grossly exaggerated 90 percent of area and 60 percent of population alleged by Pier San in its proposed findings.

Certain other allegations and conclusions on the part of Pier San which Huffman feels are not supported by the facts are refuted hereinbelow.

5. It is apparent that Pier San is relying on the argument that their applications (Pier San's and Morgan's) disclose a need for a first local service at Larned which overcomes the case for the grant to the Pratt applicant. There is no doubt that the need for a first local broadcast service to a community not presently having one is a strong and compelling argument. However, the Commission has to consider all factors of decisional significance in making a determination of which of competing applicants, all legally, technically, and financially qualified, shall win a grant.

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6. Even when one weighs the daytime considerations in comparing the equities of a grant to Huffman or one of the Larned applicants, the need for a first local service to Larned does not emerge as the sole factor of decisional significance. Fairness, equity, and efficiency are the three criteria and the Commission, while paying attention to each, is not bound to weigh all three equally. The strongest single argument for one of the Larned applicants is the need for a first local service, as we have said, but this argument, compelling as it is, fails to answer other arguments for Huffman's application which, taken together, clearly show that equity, efficiency and fairness require a grant of the Huffman application.

7. For Huffman's daytime proposal eliminates a "gray area" daytime in storied Dodge City, a city of substantial size and an important Kansas community. This city has a population of 11,262 (1950 U.S. Census) and is thus a city almost as large as Pratt and Larned put together and yet which has only one daytime primary service! Larned already has two primary services and would receive a third from a grant of the Huffman application.

8. Again, a most compelling argument to grant the Huffman application comes from the fact that the Huffman proposal for Pratt would bring a new daytime primary service to 33,504 more persons than either of the Larned proposals. So it may be seen that even the comparison of the daytime proposals of Pratt and Larned reveals more factors in favor of the Huffman application than for the Larned applications. There must be added to this the factor of elimination

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of a substantial "white area" by the Huffman proposal nighttime. Huffman's proposal will bring a first nighttime service to more than 9,000 people in an agricultural state where radio is both a needed form of entertainment and a necessity for the information of the people on weather conditions and other news affecting their health, welfare and safety.

9. The importance of bringing a first nighttime service to an area where there is none has been provided for by the Commission in its own Rules. Section 3.28(c) of the Commission's Rules and Regulations, which provides for the amount of interference which the Commission will tolerate under Standards of Good Engineering Practice, makes a specific exception for the bringing of a standard broadcast nighttime facility to a community not having such a facility, in this case Pratt. Nothing that counsel could say would better emphasize the importance with which the Commission views the elimination of a "white area" in the bringing of a first nighttime service to a community and its environs.

10. Counsel for Pier San rely heavily in their conclusions and Memorandum Brief in support thereof on the Lawton-Fort Sill Broadcasting Co. case reported at 7 Pike & Fischer R.R. 1216, affirmed by the Commission, 7 Pike & Fischer R.R. 1236. We agree with our brother counsel for Pier San that the Commission has, in a long line of cases, established a doctrine that "a proposal for a first local broadcast service is, in the absence of compelling considerations, to be preferred over a competing proposal which would add an additional station in a community already receiving sufficient service."

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(Emphasis supplied.) But we argue the compelling considerations supported by the record in this case and we assert that Pratt, having a daytime-only service, is not receiving sufficient service, nor is Dodge City, a community of impressive size now having only one primary service, receiving sufficient service, nor are those nine thousands of persons who receive no nighttime service at all now receiving sufficient service.

11. We distinguish Lawton-Fort Sill (supra) where there was a plethora of daytime service to the Lawton-Fort Sill communities^{3/} and

"At night, the rural area included within the nighttime interference-free contour (0.8 mv/m) of the Lawton proposal receives primary service in its entirety from WFAA-WBAP (820 kc, 50 kw, U) and KOWA, Oklahoma City, Oklahoma (1520 kc, 50 kw, U). In addition, KWFT and KSWO serve between 76% and 99% thereof. The entire city of Lawton is served by KSWO and the residential areas thereof are served by KWFT." — (7 Pike & Fischer R.R. 1225)

In addition, Lawton already had a fulltime station whereas, in the case at Bar, Pratt, Kansas, does not. The unlimited-time station which Lawton already had was affiliated with the American Broadcasting Company Network, which the Commission noted. The Commission also noted at 7 Pike & Fischer R.R. 123⁴ that a fulltime service represented a more efficient use of the frequency than a daytime-only service. From the foregoing, it may readily be seen that the Lawton-Fort Sill case (supra) is readily distinguishable on the facts from the case at Bar.

^{3/} Lawton and Fort Sill were considered as one community by the Commission. 7 Pike & Fischer R.R. 1223.

12. Northwestern Ohio Broadcasting Corp., 3 Pike & Fischer R.R. 1945, is clearly inapposite to the factual situation supported by the record in the instant case. In Northwestern both of the competing communities, Lima and Columbus, had fulltime stations and both communities received service both day and night. The Commission emphasized in its opinion in Northwestern that there was nothing in the Act, Rules or Regulations or Commission policy which requires the Commission to give equal weight to each of the criteria embodied in Section 307(b) of the Act. (3 Pike & Fischer R.R. 1954)

13. Again, Greater New Castle Broadcasting Corp., 8 Pike & Fischer R.R. 291, is inapposite inasmuch as it represents a community with one fulltime station versus a community with no local station and may thus be readily distinguishable from the facts of this case. Pier San also relies on Mercer Broadcasting Co., 13 Pike & Fischer R.R. 891. This case is even less applicable to the present situation because it represents the case for a community with no local broadcast station versus a community with three stations.

14. Counsel for Pier San also rely on Harrell and Ashby, dba Star of the Plains Broadcasting Co. v. Federal Communications Commission (U.S. App. D.C.), 267 F.2d 629, 18 Pike & Fischer R.R. 2072. But this case was not before the Court of Appeals on a 307(b) issue per se but on the question of the sufficiency of the evidence to support the findings made by the Commission in that 307(b) case. The Court took notice of the "Commission's longstanding policy to afford every community of substantial size, where possible, with an outlet of local

self-expression." The Court, while citing previous Commission decisions supporting the doctrine of importance of a first local service, also was quick to observe at 267 F.2d 631:

"Of course, the fact that a grant to a community would bring to that community its first local broadcasting facility does not per se mean that such a grant is in the public interest. [Citing] North Plains Broadcasting Corp., 7 Pike & Fischer Radio Reg. 93, 106a (1951); City Broadcasting Corp., 7 Pike & Fischer Radio Reg. 1055 (1953)."

In City Broadcasting Corp. (supra) the Commission took note of the fact that the need for a first local radio service is not paramount to other factors which have to be considered when implementing the "overall mandate" of Section 307(b) of the Act. Cf. 7 Pike & Fischer R.R. 1073.

CONCLUSIONS

The overall mandate of Section 307(b) of the Act would be better served and implemented by a grant of the Huffman application for Pratt than by either of the competing applicants at Larned. The Huffman proposal is the more efficient daytime in bringing a new primary service to tens of thousands more persons than the Larned applicants. The Huffman proposal will eliminate a daytime "gray area" in a city of substantial size. The Huffman proposal will eliminate a substantial "white area" nighttime to more than 9,000 persons. When the Commission considers equity, efficiency and fairness in assigning this frequency the Commission

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should, it is respectfully submitted, decide for Wilmer E. Huffman whose proposal best satisfies all criteria and which is the best for the people of the State of Kansas.

Respectfully submitted,

WILMER E. HUFFMAN

By (Signed) Francis X. McDonough

Francis X. McDonough

By (Signed) Thomas S. Sullivan

Thomas S. Sullivan

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Counsel for Wilmer E. Huffman

February 17, 1961

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of February, 1961, served a true and correct copy of the foregoing "Reply Findings of Wilmer E. Huffman," by United States mail, postage prepaid, upon the following:

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Federal Communications Commission
Washington 25, D. C.
Counsel for Broadcast Bureau

(Signed) Thomas S. Sullivan

Thomas S. Sullivan

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Morgan

"Reply To Proposed Findings"

February 17, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

and
In re Applications of

WILMER E. HUFFMAN
Pratt, Kansas

DOCKET NO. 13469
File No. BP-12021

FRANCIS C. MORGAN, JR.
Larned, Kansas

DOCKET NO. 13470
File No. BP-12749

PIER SAN, INC.
Larned, Kansas

DOCKET NO. 13471
File No. BP-12750

For Construction Permits

REPLY FINDINGS OF FRANCIS C. MORGAN, JR.

Preliminary Statement

The three applicants and the Broadcast Bureau have filed their proposed findings and conclusions. The basic issues are (1) comparative consideration between the Larned applicants and (2) the 307(b) issue as between Pratt and Larned. We shall discuss each of these points.

The 307(b) Issue

1. The Broadcast Bureau favors Pratt, among other reasons, because that proposal would provide a second daytime service to Dodge City, a gray area, which has only one station. However, on November 16, 1960, the Commission granted an application for a second station at Dodge City to operate on 1550 kc, 1 kw day (BP-13039). The grant was made after the record was closed; we request the Examiner to take judicial notice of same.

2. Pratt is in Pratt County. The existing station there (KNSK) serves the entire county (Huffman, Ex. 11, p. 12; U. S. Census, 1950, P-A16, page 16-5).

3. The area near Pratt which would be served daytime by Huffman has from 9 to 19 services at present (Huffman, Ex. 11, p. 12).

4. A grant of the Pratt application would provide a city of 7,523 (U. S. Census, 1950) with two stations that must compete for advertising revenue in an area that has numerous other radio services. The city of Pratt has three primary (plus one partial) services.* On the other hand a grant of the Larned applicant would provide the first local

*Huffman Ex. 11, p. 8, 13. Applicant would add one more total service. Cf. Broadcast Bureau Proposed Findings, p. 4, par. 3.

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outlet to a community that receives two primary services, one from Great Bend, 22 miles distance, and the other from Concordia, about 120 miles away. Larned is the county seat of Pawnee County, which has no station at present. A grant of the Larned application would be consistent with the Commission's long established practice of providing every community of substantial size, where possible, with an outlet for local expression.* Lawton-Fort Sill Broadcasting Co., 7 RR 1216, 1234 (1952); FCC v Allentown, 349 U.S. 358, 362; Northwestern Ohio Broadcasting Corp., 3 RR 1945 (1948); Harrell v Ashly, 267F² 2072 (1959). See also Section 1 of the Communications Act of 1934, as amended.

5. While the Pratt applicant will provide a new service to Larned, 50 miles away, such service does not afford that city an outlet for local expression.

6. The fact that the Pratt applicant will serve 160,857 persons daytime, while the Larned applicants will serve only 127,353 is not a critical point. While it may be contended that even daytime the Pratt applicant will provide the most efficient use of the frequency, it should be borne in mind that due to the crowding of the frequency spectrum, those who use more power prevent the use of the frequency in nearby communities and therefore are guilty of a waste or inefficient use of the spectrum. This factor is significant in areas like Kansas where the soil conductivity is very high and stations obtain extensive coverage with very little power. Furthermore in the instant case there is a plethora of other services in the extensive area proposed to be served daytime by the Pratt applicant (Huffman, Ex. 11, p. 12). On the other hand, the Larned applicants have shown that with 1/10 as much power they can serve areas and populations nearly as large as those served by the Pratt applicant. See also Section 324 of the Communications Act of 1934 as amended, which sets forth a policy looking toward use of minimum power to provide the necessary service.

7. The Larned applicants will provide a 2 mv/m signal (new primary service) to Great Bend and Holsington, Kansas (Morgan, Ex. 1, p. 4).

*Section 307(b) refers to transmission service as well as reception.

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8. As pointed out in the proposed findings of each applicant (see, for example, Morgan, p. 15, footnote), the nighttime proposal at Pratt is an inefficient one because of high losses of areas and populations within the normally protected contour.⁸ The Commission has recently changed its policy even when applicants conform with the nighttime exceptions in Sec. 3.28(c). It has recently designated for hearing applications because of possible violations of Section 3.24(b) of the Rules. Coastal Broadcasting Co. (Docket 13841); Burlington Broadcasting Co. (Dockets Nos. 13931-33, Order released February 7, 1961); Strafford Broadcasting Co. (BP-13053, especially the 309/B letter dated September 30, 1960).

9. Although the Pratt applicant proposes to serve a white area at night, this does not justify a grant of a second station to a town of that size as against an applicant for a town of virtually the same size that has no local outlet. For if the nighttime facility is not used at Pratt, it could well be used elsewhere. (L.e)?

10. In a number of recent cases the Commission has favored daytime operation even at the expense of creating large white areas at night. See Rogers, 20 RR 522 (1960); recent instructions to staff to prepare decision affirming Examiner's Report; Red River Broadcasting Corp. v FCC, 19 FCC 2028 (1959). Here we have no loss of a present service.

11. The Chaconas Case, 19 RR 100, cited in Huffman, proposed findings, p. 15, is clearly distinguishable. There the Commission had before it three applicants for full time in communities that had no stations. The question was which city needed the service the most; and the choice was based on outside services received at night. Here we have one small town with a station and another without a station. Enterprise Broadcasting Co., 18 RR 402 (1960), cited in Huffman findings, p. 16, is also distinguishable. There the choice was between Fresno, which has seven stations, and Dinuba, which has one that sought to improve its facilities. We have already pointed out that Dodge City is no longer a "gray area" so the Alkiza case (Huffman findings, p. 14) is inapplicable.

⁸The nighttime coverage of 9,204 persons is less than the population of Pratt County, 12,156.

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12. The contention that Pratt is the trade center for a six county area (Huffman findings p.4) is a conclusion which the Commission must disregard since it is not based on any factual evidence. The six counties are not even named.*

In any event there are many other stations in the general area located closer to the listeners than Pratt is. See for example Dodge City, Great Bend, Hays, Russell, Garden City, Hutchinson, Salina, etc. (Huffman Ex.11, p. 12).

Comparative Consideration

13. Comments on Morgan's qualifications are set forth in Pier San Prop. Find. p. 30ff, p. 57ff. Applicant's father is known as "Clem" Morgan but the middle initial "C" in applicant's name is also "Clem" (tr. 119-20, 133); as pointed out earlier the availability of 1290 kc at Larned was a matter of common knowledge. Morgan learned Pier San expected to file an application and both Larned applications were filed the same day. (Morgan Morgan's application Prop. Find. p.6 par. 14; tr 133). Sec. V-G and Sections II and III plus exhibits showed his home address as 1108 Champa St. (tr.119-20). The financial amendment filed on November 23, 1959 also showed that street address. Morgan's engineering amendment, dated May 1959, which superseded the original engineering exhibit, showed that applicant whose address is given as 1108 Champa had hired Commercial Radio Equipment Co. to prepare the revised engineering (Ex. No.E-1 and Sec. V-G). Applicant brought his paid bills to the hearing room and testified that they included cost of the frequency search (tr.123,131,136). Pier San (Prop. Find. p.58) contends that Morgan's version "stands unsupported" but if Pier San or others had any doubts as to his statements they could have requested cross examination of the Washington consultant whose engineering study (Morgan Ex-1) was received without any question or challenge (tr. 73, 147). If there was any question as to who is the real party in interest, Pier San and others could have requested

*We realize that there is some question as to admissability of trade area maps. However the Rand McNally, Commercial Atlas and Marketing Guide p.28 (1959) shows that Pratt County is in Basic Trading Area #143, the trading center which is Wichita, Kansas.

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the presence of applicant's father and others. In any event if they felt there was any merit to the contention a request could have been made for enlargement of issues.

14. Pier San emphasizes its proposed educational programs for Larned especially KU classroom and others. (Prop. Find. p. 37,40). Yet at KSIR a commercial recorded program consisting of classical music is defended as an educational program. One wonders why educational programs are available for small towns but not for a large center such as Wichita, except when the question is raised at a hearing (Prop. Find. p.22; tr.259). KSIR has no talk programs, and has nearly 85% of commercial (Id.p.21).

15. Morgan did not set forth a detailed description of all his proposed programs because they are shown in Morgan Ex. 6.

16. The difference in proposed hours is based on the fact that Morgan was not certain whether the station would be able to operate pre-sunrise under Sec. 3.87 of the Rules. Whether it can is purely speculative. For the same reason he is not certain whether farm programs can be carried in the early morning hours. Objection is taken to the Examiner's refusal to receive this. (Pier San Prop. Find. p.45, 65; tr. 84, 89, 92,106).

17. The recent transfer of the interests of Pierce and Derry in KOOO to the other three participants does not affect the overall showing of other broadcast interests, 5 AM stations, of the Pier San group. (Morgan Prop. Find. p.4). We did point out that the Nashville group would advance substantially all the funds for the proposed station at Larned. There was a similar arrangement for the purchase of KOOO in 1960; there each participant purchased \$2000 in stock; and each Nashville participant agreed to loan the corporation \$30,000 (BAPL-214).

18. Pier San's reference to overlap (Prop. Find. p.64,74) adds further support to Morgan's preference on the lack of ownership of other means of mass communications.

19. KSOK did not participate in the hearing or file any proposed findings. In any event interference to it is de minimus and there are a number of other services in the interference area which involves 101 persons or a loss of .03% (Morgan Ex. 1 p.11).

Respectfully submitted,

FRANCIS C. MORGAN, JR.

By

A. L. Stein, his Attorney

February 16, 1961
Warner Building
Washington, D. C.

Morgan, "Reply To Proposed Findings"
February 17, 1961 Page 5

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CERTIFICATE OF SERVICE

I certify that I have, this seventeenth day of February, 1961, served by hand delivery or by United States mail, postage prepaid, a copy of the foregoing to the following:

Herbert Sharfman
Robert Rawson
Federal Communications Commission
Washington, D. C.

Miller & Schroeder
Dow Lohnes & Albertson
Munsey Building
Washington, D. C.

A. L. Stein

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Pier San

"Reply To Proposed Findings"

February 17, 1961

Feb 17, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
)	
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
)	
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
)	
For Construction Permits)	

PIER SAN'S REPLY TO PROPOSED FINDINGS AND CONCLUSIONS
OF HUFFMAN, MORGAN AND BROADCAST BUREAU

Comes now PIER SAN, INC., by its attorneys, and files this Reply to the Proposed Findings of Fact and Conclusions of Law of Wilmer E. Huffman, Francis C. Morgan, Jr., and the Broadcast Bureau, which were filed herein on February 1, 1961.

Pier San submits that the findings of fact, conclusions of law and memorandum brief filed by it contain a fair and accurate description of the proceedings, the proper findings and conclusions to be made on the basis of the evidence of record, and the established principles of law supporting the ultimate conclusion that a grant of the Pier San application should be made. The findings and conclusions proposed by the other parties, herein replied to, are improper or defective for the following reasons:

A. GENERAL MATTERS

1. Of the four parties filing proposed findings and conclusions only Pier San included findings and conclusions required to be made under all the issues specified in the Hearing Order. Huffman limited his February 1st filing to material concerning engineering matters and the

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307(b) issue; the Broadcast Bureau limited itself to engineering matters and then attempted to propose a resolution of the 307(b) issue simply on technical engineering grounds; Morgan proposed findings and conclusions under all but the engineering issues, exercising in that respect the option permitted under the Examiner's ruling to postpone engineering findings until the Reply stage. Since Pier San's proposed findings and conclusions are complete, the Examiner can best utilize that pleading in the preparation of his Initial Decision.

2. In light of the fact that Pier San's findings are complete and are based on evidence of record and that its proposed conclusions flow therefrom, supported in appropriate instances by reference to Commission precedent, it should not be necessary at this juncture to repeat the earlier filed material simply to demonstrate the omissions or errors in the filings of the other parties. Since the within party urges that its own Proposed Findings and Conclusions are proper and complete, it follows that where Pier San's proposals differ from those of any of the other parties the latter are objected to, opposed and denied. For the foregoing reasons the within Reply will be limited to the more glaring mistakes or omissions in the material filed by Huffman, Morgan and the Broadcast Bureau.

B. HUFFMAN'S PROPOSED FINDINGS

3. Huffman's Finding 3 presenting statistics for an undefined "six-county area" is irrelevant and immaterial for purposes of findings in this proceeding, and since there is no way of determining what part or proportion of the figures are applicable to Pratt or Pratt County, the entire finding must be rejected. Finding 3 is also faulty in that it fails to note that the exhibit referred to therein was compiled from sources not tested by cross-examination during the bearing and that such source

material included literature of doubtful reliability. (Huffman Ex. 1, p. 10; T. 46, 51). Finally, Finding 3 includes conclusionary and hyperbolic statements, contrary to the Examiner's ruling that such statements would not be considered for purposes of findings if permitted to remain in the exhibit over objection. (T. 52-3).

4. Findings 4, 5, and 6 are verbatim recitation of material found in the exhibits, without any attempt having been made to distill such "evidence" into findings. Findings 4, 5 and 6 should be re-written, if indeed they are in any part necessary for an Initial Decision. Pier San's Proposed Finding 8 adequately covers the lengthy schedule of figures and other material Huffman attempts to present in his Findings 4, 5, and 6.

5. Huffman neglects to find that there is an existing radio station in Pratt, and he similarly fails to find that Larned, the other community being considered herein, is presently without a radio station. (Huffman Ex. 8, p. 1; Morgan Ex. 2).

6. Huffman's Findings 9 - 12, inclusive, are incomplete and present a totally inadequate picture of Larned. Pier San's Findings 11 through 16 are the proper findings to be made concerning Larned and Pawnee County.

7. Huffman's Finding 18, concerning other services available to the interference-free service area of the Larned applicants (Pier San and Morgan), is incorrect in that only two, and not three as Huffman recites, stations provide a 0.5 mv/m signal in the referenced area. WIBW, which shares time with one of those stations does not provide such a signal to all the area when it is utilizing the shared frequency. (Pier San Ex. 9A, p. 3).

8. Huffman's Finding 25 is incorrect with respect to the computed figure therein appearing concerning the population within the Larned 0.5 mv/m contour which would be subject to interference. The correct figure is 3.9%, and not the 4.1% computed by Huffman. (132,579 within 0.5 mv/m of which 5,226 would receive interference, computes to 3.9%. Pier San Ex. 9A, L. 2).

C. MORGAN'S PROPOSED FINDINGS

9. Morgan's Proposed Findings are generally so sketchy and incomplete as to be without value to the Examiner, except where the findings relate to Morgan himself and his proposals, and there the deficiencies are of undue length with the inclusion of erroneous, immaterial and non-significant recitations. In every instance the more proper and correct finding proposed by Pier San must be utilized and the improper findings of Morgan disregarded. In any event, the below listed errors cannot be permitted to stand uncorrected.

10. Morgan Finding 7 lists an additional broadcast interest acquired by two members of Pier San after the close of the record, but it does not show the disposition of interests in another station in the same period. If Morgan would have the Examiner notice developments after the close of the record he should not attempt to restrict the notice merely to facts Morgan believes helps him and harms Pier San. Footnotes 3 and 4 in Pier San's Findings recite all the changes which have occurred in the ownership interest since the close of the record, and if the Examiner includes such changes in his Initial Decision, Pier San's and not Morgan's recitation is the preferable one.

11. Morgan Findings 8 and 9 are incomplete in that they fail to recite that Webb Pierce and Jim Denny will make available their experience

and professional services to Pier San's Larned station, albeit they will not participate in the day-to-day operation. (T. 265).

12. Morgan Findings 10, 11, and 12, containing biographical information of Messrs. Bozeman, Pyle and Early, are incomplete. Pier San's Findings 33 to 49, inclusive, are the proper findings to be made in such connection.

13. Morgan Finding 13 is improper and erroneous, containing recitations which are argumentative, conclusionary and not supported by the record. The statement that "there is some question as to whether Bozeman's operation of KSIR...has conformed with the proposals made to the Commission in his original application" especially suffers from the mentioned deficiencies, since Morgan fails to point out that such changes as have been made in individual programs of KSIR during the past several years have been based upon experience gained in actual operation and were generally of a nature which improved the over-all programming. (T. 225, 227-8, 259). Morgan Finding 13 also fails to point out that an analysis of the most recent composite week for the operation of KSIR was adduced by Pier San (Pier San Ex. 11, T.276-283), and Morgan did not apparently believe it reflected any significant change from the analysis appearing in the original application for the Wichita station as would warrant placing the original analysis in the record for comparison purposes. The record will not permit any adverse finding on the question of "promise vs. performance" with respect to KSIR or any other station in which members of Pier San had or have an interest. See Pier San Findings 50, 51, and 53-56. Finally, Morgan Finding 13 is erroneous where it fails to note that the regularly scheduled live discussion program carried by KSIR includes participation by officials and others equipped to express opinions on public and controversial issues, as well as candidates for offices during primary and general election periods. (T. 195, 232-3, 272).

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February 17, 1961 Page 5

14. The statement in Morgan Finding 14 that he (Morgan) saw a newspaper article in the Fall of 1958 that an application for Larned was being considered by the Pier San group is irrelevant and immaterial. However, in connection with newspaper articles read by Morgan he fails to note that his decision to file at Larned was based upon information gleaned from a newspaper account of the application for Pratt, where his father owns the only existing station. The record shows that Morgan learned in the latter part of April, 1958, that the Pratt application was being prepared for filing with the Commission (filed on May 18, 1958) and Morgan almost immediately then, "about midway in 1958", determined to file for the same frequency at Larned, with engineering and legal counsel provided by his father, the owner of KWSK, Pratt. (T. 116-7).

15. Morgan Finding 19, occupying almost two pages of his pleading (almost 10% of his total filing) recites biographical information about the young applicant. The Finding is certainly not a proper "finding", and it cannot be accepted by the Examiner. The minutiae and irrelevant material recited in Finding 19 merely encumbers the record at this stage.

16. Finding 21 is erroneous where it seeks to have the Examiner find that the Pier San Larned application triggered Morgan's application, because the record shows that Morgan's determination to file followed almost immediately after he learned of Huffman's proposal to establish a station on the frequency at Pratt, where Morgan's father owned the only existing station, at which station Morgan was employed. (T. 116-7).

Finding 21 is further erroneous in the portion where Morgan attempts to urge that he "asked his father to contact a Washington radio consultant and engineer of his acquaintance", for the record shows that the engineer and legal counsel were engaged by Morgan, Sr. and not the applicant, and that applicant Morgan did not have any communication with the engineer until after the application was filed. (T. 99-100, 118, 135). The

application as originally filed showed his father's name as the applicant in several places. (T. 119-122).

17. Morgan Finding 22 is incomplete in that it fails to find that many of the contacts claimed to have been made with Larned persons by Morgan were made by telephone calls from Pratt, others were made by telephone calls in Larned, and one was made by Morgan's father for the applicant. (T. 101-04).

18. The statement in Morgan Finding 25 that the applicant Morgan "never had any common or join (sic) business ventures (with Morgan, Sr.)" cannot be made in light of the evidence of record showing Morgan's employment at his father's station in Pratt and the roles played by each in causing the filing of the instant Morgan application for Larned, Kansas. See Pier San Findings 73-77, inclusive.

D. BROADCAST BUREAU FINDINGS

19. Bureau Finding 2 is incorrect in that it fails to note that although Morgan's proposal for 1290 kc at Larned would occasion some interference to an existing station, Pier San's proposal does not involve objectionable interference to any existing station, co-channel or adjacent channel. (Pier San Ex. 9B, p. 2; Morgan Ex. 1, p. 11).

20. Bureau Finding 3 is incomplete and misleading in that it omits the figures which indicate the inefficient aspects of Huffman's nighttime proposal. The record shows that 60% of the persons and more than 90% of the area in Huffman's normally protected nighttime service contour will not receive service because of interference. The figures which the Bureau should have set out in Finding 3 for Huffman's nighttime proposal are:

	<u>Area</u>	<u>Population</u>
2.5 mv/m contour	1980	23,466
Interference free (1 1/2 mv/m)	<u>175</u>	<u>9,204</u>
Portion of normally protected not receiving service on account of interference	1805	14,262

(Huffman Ex. 11, p. 6)

21. Bureau Finding 6 is incorrect in that it would leave the impression that both Larned proposals would cause interference to KSCX, while the record shows that Pier San's proposal would not occasion any interference to that or any other station. (Pier San Ex. 9B, p. 2).

E. HUFFMAN'S CONCLUSIONS

22. We return now to the pleading filed by Huffman and direct our attention to that portion of the pleading wherein proposed conclusions of law are set forth. As a preliminary matter it might be noted that Pier San's proposed conclusions, supported by a showing of established legal principles in a Memorandum Brief, demonstrated that the 307(b) issue must be resolved in favor of the proposed use of the contested frequency at Larned, where there is no station, rather than at Pratt, a community already having a radio station, while Huffman suggests that a contrary result should be reached. To an extent, then, Pier San has already replied to Huffman's conclusions. However, the following additional reply is now made.

23. Throughout his conclusions Huffman attempts to skirt the real issue, viz., that a grant of a Larned application would bring a first station to that important community, while a grant of the Pratt application would mean that Larned would not have any station while Pratt would wind up with two. The question posed by this proceeding -- where one community already has a station and another community of comparable

importance and size does not, is the public interest better served by the grant of a single available facility to the first community or to the second -- almost answers itself. Since the answer does not suit Huffman he avoids the direct question and limits his argument to subsidiary and side issues. It is interesting to note that the first case cited by him, F.C.C. v. Allentown Broadcasting Co., 349 U. S. 358, establishes the answer which Huffman tries to avoid. "Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece." (Id., at 362).

24. In Conclusion 5 Huffman lists the differences between the Larned and Pratt proposals, but he buries in the middle of such list the really significant, important and controlling difference -- the absence of a transmission facility in Larned and the presence of an already existing station in Pratt. As Pier San showed in its conclusions and memorandum brief, such other differences as may exist between the proposals are not of decisional effect. An examination of Huffman's list of differences against established precedent demonstrates the correctness of Pier San's proposition and the error in Huffman's approach.

25. Population Differences. Larned and Pratt are both Kansas communities of the same general type or class considering location, population, social, cultural and economic activities and other characteristics. Each is the seat of its respective county and the two counties are within a few hundred persons of being equal in population, although Pratt city (7,423) has a somewhat larger population than Larned (4,447). Such difference, however, takes neither the one nor the other out of population class associated with the typical medium sized community found in the mid-west. However, even if the population difference were greater, it would nonetheless lack decisional significance when it is remembered that Huffman's proposal is for a second station in his community while the

Larned proposals would bring a first station to that community. See Greater New Castle Broadcasting Corp., 8 R.R. 291, where a proposal for a first station in a city of 13,644 was preferred over a second-station proposal for a community of 48,834. See, also, Plainview Radio, 15 R.R. 382c (Supplemental Initial Decision recently announced as under instruction for affirmance by the Commission), preferring first station in Slaton with population of 5,036 to second station in Plainview, with population of 14,044.

26. Fulltime vs. daytime only. Huffman proposes fulltime operation while the Larned applicants propose to operate during the daytime only. Huffman conveniently forgets to mention in his Conclusion 5 that his nighttime proposal contains serious aspects of inefficiency and that he will be unable to serve more than 90% of the area and some 60% of the persons within the normally protected nighttime service contour. But even without this factor, it is clear that a first local station, albeit daytime only, must be preferred over a second station in another community, even though a fulltime operation is proposed for the latter. Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216, 1234.

*This is there
One & only argument*

27. Number served by additional service. Huffman seeks to rely on the fact that his proposal will bring a new service during the daytime to more persons than would either of the Larned proposals. The number of persons who would receive an additional service from the use of the frequency at either Pratt or Larned are comparatively the same, but even with a difference in this regard in favor of Huffman's proposal the first local station aspect of the Larned proposals nonetheless controls. Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216, 1234.

28. White and gray area service. Huffman argues that the fact that his proposal will bring service to a small white area at nighttime and

provide a second service of 2.0 mv/m strength to Dodge City during the daytime, requires a preference for the use of 1290 kc at Pratt over the use of the frequency to establish a first local station at Larned. This argument overlooks several significant matters. The first is that the Commission has recognized in recent years the lessening importance of nighttime radio service even where "white area" is involved. Several cases reflecting the Commission's policy in this regard are set out and discussed in Pier San's Memorandum Brief (Par. 11-13). In addition, the case of John K. Rogers, 20 R.R. 522, should be noted. The citation is to the Initial Decision which held that the loss of an only nighttime service, ^{1/} and thus the creation of a white area at night, was not decisionally controlling where other 307(b) factors suggested the grant. On February 3, 1961, the Commission issued instructions for the preparation of a Final Decision affirming the Initial Decision. (Public Notice B, Mimeo. No. 8, Report No. 134, February 6, 1961).

29. The feature of Huffman's proposal which involves a second 2.0 mv/m signal to Dodge City, and thus a second daytime primary listening service there, cannot overturn the decisional preference for the use of the contested frequency at Larned where it will provide a first local station for the community and a third reception service. A second listening service to Dodge City further loses significance when it is remembered that that community was not subject of any consideration in this proceeding, and whether or not there is any need for such service is at best a matter of speculation and conjecture. If Dodge City is to become the controlling community then it would be necessary to examine existing applications pending before the Commission to determine whether or not one or more of them would provide a new listening service to the mentioned city. Any grant of another proposal involving listening service to Dodge City made by the Commission before a final decision in the captioned

^{1/} Twenty-seven thousand, two hundred and eighty-nine persons, 17,136 of which lived within the city and 10,153 beyond the city were involved in the white area created. Against these figures Huffman's white area service to some 9,000 persons pales into insignificance.

proceeding would immediately remove all consideration of the listening-service-to-Dodge City argument of Huffman. The Examiner cannot give any decisional weight to that temporary factor appearing in Huffman's proposal, and certainly cannot deny Larned the opportunity to obtain its first local station on the mentioned ground.

30. Other matters. Huffman makes reference to the Chaconas case (Nick J. Chaconas, et al., 19 R.R. 100), and argues that the Commission's action therein is precedent for a grant of Huffman's application herein. Huffman fails to point out, however, that in that case the competing applications were each for a first local station, (Gaithersburg, Laurel and College Park, Maryland), and the Commission's consideration of other 307(b) factors (size of population served, white or gray area service, etc.) was required in order to arrive at a decision as among three applicants otherwise equal in the generally controlling 307(b) factor, viz., first local station. Thus the Chaconas case cannot be held to suggest a grant of Huffman's application for a second station in Pratt in preference to a grant of Pier San's application for a first station in Larned.

in QMAD

31. The other cases cited by Huffman are similarly not apposite here, for in none of them was there involved a consideration of a first local station. In this connection it might be noted that Huffman has failed to point to even a single decision of the Commission where the factors relied upon by Huffman for a preference here overturned a preference for a competing proposal which would establish a first local station. Pier San, however, showed in its Memorandum Brief a number of cases where the first-station controlling preference continued to obtain against such factors as Huffman urges. See Lawton-Fort Sill, supra, for example. Without further argument it should be apparent to the Examiner that the 307(b) issue must be resolved in favor of the proposal for the use of the contested facility at Larned.

F. MORGAN'S CONCLUSIONS

32. Morgan's conclusions are all directed toward the comparative issue, except Conclusion 1 which states that a first local outlet at Larned is to be preferred to a second station at Pratt. Pier San does not, of course, quarrel with Morgan's Conclusion 1, but with the balance of that applicant's conclusions exception is taken.

33. Morgan's Conclusions 2-8, inclusive, do not contain any reference to precedents and in many places they mis-state the record or omit significant facts. Pier San has already shown by its Conclusions the proper evaluation of the several comparative criteria, and a consideration of Pier San's and Morgan's conclusions, side by side, illuminate not only the deficiencies in Morgan's pleading but the areas of divergence and difference between the parties in the application of facts from those portions of the record which Morgan didn't ignore. For the convenience of the Examiner a parallel table of conclusions is listed.

34. <u>Comparative Matter</u>	<u>Pier San Conclusion</u>	<u>Morgan Conclusion</u>
Local residence	Par. 135, 136	Concl. 3
Civic participation	Par. 137	Concl. 3
Diversification of business interests	Par. 138	none ✓
Broadcast experience	Par. 139, 140, 141	Concl. 5
Integration of ownership and management	Par. 142, 143	Concl. 2
Fast operation of broadcast stations	Par. 144, 145	Concl. 6
Diversification of media of mass communications	Par. 146, 147	Concl. 4
Preparation of program proposals	Par. 148	none ✓
Program proposals	Par. 149	Concl. 7
General character and background matters	Par. 131, 132, 133	none ✓

Further reply would not appear to be necessary.

G. BROADCAST BUREAU CONCLUSIONS

35. Broadcast Bureau Conclusions 1, 2 and 4 are concerned with the technical aspects of the several proposals and no detailed reply is necessary. However, one matter should be noted, and that is with respect to Conclusion 1 where the Bureau fails to note that there is a difference between the two proposals for Larned in the matter of interference which might be caused. Pier San's proposal does not involve interference to any existing station, while Morgan's operation would cause interference to KSOX. In such light the Broadcast Bureau's statement that "one set of facts (concerning technical aspects) is applicable to both" is erroneous.

36. Bureau Conclusion 3 is no more than an expression of unsupported, and unsupportable, opinion on the 307(b) issue. The Bureau fails to cite any precedent for its view that the allocation of the contested frequency to Pratt for a second station better serves the public interest or meets the requirements of Section 307(b) of the Communications Act than the assignment of the facility to Larned for a first station in that community. Without any precedent support the Bureau suggests that the nighttime white area service which Huffman would provide is more important than the first transmission facility which either of the Larned applicants would provide. Pier San's heretofore filed Conclusions and Memorandum Brief demonstrate the lack of basis for any such contention, but if further reply is thought necessary Pier San would point out that the Bureau's position on the significance of nighttime white area service differs from that held by the Commission.

37. The most recent example of the Commission's disinclination to go along with the Bureau's ideas about nighttime white area service is the John K. Rogers case, cited above. The Bureau there opposed a grant of the

3 .

avored application because it would create a white area at night. However, neither the Examiner in the case, nor apparently the Commission, which has issued instructions for the preparation of a decision affirming the Examiner, accepted the Bureau's contentions. The Examiner in this proceeding would be well advised to similarly reject the Broadcast Bureau's unsupported Conclusions.

WHEREFORE, the premises considered, it is submitted that the Examiner should find and conclude as heretofore shown by Pier San, Inc., in its Proposed Findings and Conclusions, and reject as insufficient, improper, erroneous, contrary to the record and contrary to precedent the findings and conclusions submitted by the other parties. The Examiner's Initial Decision must conclude that a grant of the application of Pier San for a first local station in Larned, Kansas, is required in preference to either a grant of the Huffman application for a second station in Pratt, Kansas, or a grant of the Morgan application, also for Larned, Kansas.

Respectfully submitted,

PIER SAN, INC.

By:
MILLER & SCHROEDER
Its Attorneys

/s/ Arthur H. Schroeder
ARTHUR H. SCHROEDER

/s/ John B. Kenkel
JOHN B. KENKEL

218 Munsey Building
Washington 4, D. C.

February 17, 1961

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Pier San, "Reply To Proposed Findings"
February 17, 1971 Page 15

CERTIFICATE OF SERVICE

I, Alice F. Hopper, hereby certify that I did, this 17th day of February, 1961, deliver to the following, at their respective offices indicated, a copy of the foregoing "PIER SAN'S REPLY TO PROPOSED FINDINGS AND CONCLUSIONS OF HUFFMAN, MORGAN AND BROADCAST BUREAU":

Francis X. McDonough, Esquire
Dow, Lohnes & Albertson
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Counsel for Francis C. Morgan, Jr.

Chief, Broadcast Bureau
Federal Communications Commission
Washington 25, D. C.

Examiner Herbert Sharfman
Federal Communications Commission
Washington 25, D. C.

/s/ Alice F. Hopper
Alice F. Hopper

Pier San, "Reply To Proposed Findings"
February 17, 1961 Page 16

Huffman-Morgan Denied

Pier San Granted

March 29, 1961

March 29, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

2397
FCC 61D-36

In re Applications of

WILMER E. HUFFMAN
Pratt, Kansas

FRANCIS C. MORGAN, JR.
Larned, Kansas

PIER SAN, INC.
Larned, Kansas

For Construction Permits

DOCKET NO. 13469
File No. BP-12021

DOCKET NO. 13470
File No. BP-12749

DOCKET NO. 13471
File No. BP-12750

Appearances

Messrs. Francis X. McDonough and Thomas S. Sullivan for
Wilmer E. Huffman; Mr. A. L. Stein for Francis C. Morgan, Jr.;
Messrs. Arthur H. Schroeder and John B. Kenkel for Pier San, Inc.;
and Messrs. Robert J. Rawson and Ray R. Paul for the Commission's
Broadcast Bureau.

INITIAL DECISION OF HEARING EXAMINER HERBERT SHARFMAN

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of 1) Huffman for a construction permit for a new standard broadcast station at Pratt, Kansas to operate on 1290 kc, with 5 kw power day and 500 watts night, using a directional antenna with different patterns for day and night, unlimited time; and 2) Morgan and 3) Pier San for a construction permit for a new station at Larned, Kansas, to operate on 1290 kc, with 500 watts power, daytime only. By order released April 18, 1960, the Commission, finding each applicant legally, technically, financially, and otherwise qualified except as may be indicated by the issues, designated the applications for hearing on the following issues:

1. To determine the areas and populations which would receive primary service from each of the instant proposals and the availability of other primary service to such areas and populations.

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2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
3. To determine whether the instant proposals of BP-12749 and BP-12750 would involve objectionable interference with Station KSOX, Arkansas City, Arkansas, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
4. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, whether the proposal for Pratt, Kansas, or one of the proposals for Larned, Kansas, would better provide a fair, efficient and equitable distribution of radio service.
5. To determine, in the event it is concluded pursuant to the foregoing issue that one of the proposals for Larned, Kansas, should be favored, which of the proposals of BP-12749 or BP-12750, would better serve the public interest, convenience and necessity in the light of the evidence adduced under the issues herein and the record made with respect to the significant difference between the said applicants as to:
 - a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.
 - b) The proposals of each of the applicants with respect to the management and operation of the proposed station.
 - c) The programming service proposed in each of the said applications.
6. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted.

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2. Prehearing conferences were held on May 10, September 12, and September 30, 1960. The applicants' exhibits were exchanged on August 17. Hearings were held on September 14 and October 17, 1960, when the record was closed. Proposed findings of fact and conclusions were filed, as directed, by applicants Huffman, Morgan, and Pier San on February 1, 1961, as well as by the Broadcast Bureau. Replies were filed by applicants on February 17, 1961. */

Findings of Fact

3. The Communities. Pratt is the county seat of Pratt County and Larned of Pawnee County. The cities, in south-central Kansas, are 40 air and 50 road miles apart. The 1950 population of Pratt was 7523, and of Pratt County 12,156; of Larned 4447 and of Pawnee County 11,041. Pratt and Larned are in the midst of farm country, with grain and livestock significant, though gas and oil wells are also important factors in their economy; in addition, Pratt is a railroad center, and there is some manufacturing in Larned. Pratt has 1 radio station, KWSK, established in 1952 (1570 kc, 250 w, D), and 1 daily newspaper published in the city; in addition, the Hutchinson (Kansas) News Agent maintains an agency there. Larned has no radio station, the nearest station being at Great Bend, 22 air miles to the northeast. A daily (weekday evening) newspaper is published in Larned. Both cities support the usual civic, fraternal, and social organizations.

4. The Service to Be Rendered. Morgan's proposed transmitter site is about 2 miles west, and Pier San's about 3 miles northwest, of the center of Larned. Since both Morgan's and Pier San's engineering consultants assumed the same antenna radiation (125 mv/m), the same ground conductivity for the area as shown by Figure M-3 of the Rules, determined the same distance from transmitter site to pertinent contours (63-mile radius to the proposed 0.5 mv/m contour), and agreed upon the population served and interference received within the 0.5 mv/m contour, the small separation between the proposed transmitter sites is not significant in terms of coverage or interference considerations. Accordingly only one tabular showing follows for the Larned proposal.

*/ As ordered by the Hearing Examiner, Morgan and Pier San each submitted, on March 20, 1961, a supplemental brief on diversification of control of communication media.

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5. Huffman's Pratt station would provide the following coverage:

<u>Contour (mv/m)</u>	<u>Population</u>	<u>Area (sq. miles)</u>
<u>Day</u>		
2.0	72,814	6,980
0.5 (normally protected)	166,064	21,730
(Existing interference)	- 5,207	934
0.5 (interference-free)	160,857	20,796
<u>Night:</u>		
2.5	23,466	1,930
4.0 (normally protected)	16,099	1,108
14. (interference-free)	9,204 (57.2% of normally protected)	175

Huffman's proposed station would (as of the date of the hearing) provide a second primary service (2 mv/m or greater) daytime to Dodge City (Pop. 11,262)^{1/} and a third such service to Larned. In addition to service from KWSK, the present Pratt station, Pratt also receives primary service from KFRM, Concordia, Kansas, KFBI, Wichita, Kansas, and in part from KVGB, Great Bend, Kansas. Consequently, the new station would provide a fourth daytime service to a portion of Pratt and a fifth service to the remainder of the city. The rural area within which Huffman's station would furnish a new primary service daytime has other primary service (0.5 mv/m or greater) available in any one part from a minimum of 4 to a maximum of 23 stations; the total number of stations serving the area is 42. Of the 9204 persons in 175 square miles which the proposed station would serve nighttime, only 128 persons in a rural area of 16 square miles now receive a primary service from an existing station (KOMA, Oklahoma City, Oklahoma). The remainder of the population and area, including the city of Pratt, a total of 9076 persons in 159 square miles will receive their only primary service from the proposed Pratt station.

6. The Pratt station would not cause interference either day or night to the operation of any existing station.

^{1/} On November 16, 1960, however, the Commission granted an application for a second station at Dodge City (BP-13039). Official notice is taken of this action, which took place after the close of the record.

7. The Larned daytime-only station would provide service as follows:

<u>Contour (mv/m)</u>	<u>Population</u>	<u>Area (sq. miles)</u>
2.0	49,361	2,884
0.5 (normally protected)	132,579	12,469
(Existing interference)	5,226 (3.9%)	510
0.5 (interference-free)	127,353	11,959

Larned now receives primary service (2 mv/m or greater) daytime from KFRM, Concordia, Kansas, and KVGB, Great Bend, Kansas, the latter, as previously indicated, being the closer of the two. The rural area which would gain a new service from the proposed Larned station receives other service in any one part from a minimum of 7 and a maximum of 23 stations.

8. The only existing station which would receive interference from a new Larned station is KSOK, Arkansas City, Kansas, operating on the adjacent 1280 kc frequency. That interference would be from Morgan's proposal; Pier San's would cause no interference to any existing station. But for interference from existing stations KSOK would provide a primary service to 318,301 persons in 17,597 square miles within its 0.5 mv/m normally protected contour. Interference from existing stations deprives 31,245 persons in 2574 square miles of KSOK's service, representing 9.8% of the population and 14.6% of the area within KSOK's normally protected primary service area; as now operating, primary service from KSOK is available to 287,556 persons in 15,023 square miles. Should Morgan's new Larned station be authorized, its operation would cause additional interference to KSOK involving 101 persons in 18 square miles, thereby further reducing KSOK's service population to 287,455 in 15,005 square miles. Interference from Morgan's station would increase the KSOK population loss from 9.8% to 9.83%, and the area loss from 14.6% to 14.7%. No part of the expected new interference area receives less than 19 services. KSOK did not participate in this case, though named a party.

9. The Larned Applicants. Francis C. Morgan, Jr. was born in Garden City, Kansas, in 1932. His family moved to Great Bend, Kansas, 23 miles from Larned, in 1939, when his father ("Clem" Morgan) became the manager of Station KVGB. In 1948 his parents moved to Hays, Kansas, 49 miles from Larned, where his father supervised the installation of KAYS and was general manager of that station. In 1951 Morgan was graduated from Hays High School, and in 1952 moved with his parents to Pratt, Kansas, where, among other things, he helped his father install the latter's own radio Station KWSK, which is still Pratt's only station. After KWSK went on the air in October 1952, Morgan attended Pratt Junior College for one year and worked as an announcer-operator at his father's station.

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10. Morgan was in the military service from 1953 to 1955, when he returned to KWSK as an announcer-operator and salesman until 1958; from 1958 to July 1960 he was an announcer-operator, salesman, and chief engineer at the station. In the service Morgan had started a correspondence course in radio electronics. In July 1958 he enrolled in a radio school in Dallas, Texas, and received his First Class Radiotelephone Operator License. In addition to his other work at KWSK, he had experience in copywriting, news gathering, news writing, and newscasting, and assisted in some "public service" programs.

11. Morgan is a member of the All Saints Episcopal Church, the Junior Chamber of Commerce (Jaycees), the Elks, and was a charter member of the Pratt Kiwanis Club. When the Kiwanis Club was organized he became chairman of the Boys and Girls Committee and helped to organize the Kiwanis Kids Day, now an annual event in Pratt. In 1955 he aided in the formation of radio production classes at Pratt Junior College and Senior High School. He also helped establish the annual American Education Week program in the schools, the radio production classes of the Junior College and Senior High School being given all open time on KWSK for one day during American Education Week. Morgan has given a talk to pre-engineering students of the High School and Junior College on the basics of broadcasting, and has worked with the chairman of the Jaycee Road-E-O, a teen-age driving contest, in preparing radio publicity. During the past four years he helped set up radio interviews with contestants in the annual Miss Kansas pageant sponsored by the Pratt Jaycees. He also helped a) Boy Scout officials to publicize the Boy Scout Fund Drive and the Scout Circus; b) the Rotary Club in the March of Dimes; c) the Lions Club in the sale of brooms for the blind; d) in outlining the broadcasts from the County Fair Grounds, where KWSK set up a booth from which it broadcast full time; e) 4-H leaders in preparing tape broadcasts each Saturday morning when material was available; f) in promoting the TB Clinic's free chest X-rays; and g) the local Bloodmobile chairman in soliciting blood donors for the Red Cross.

12. Morgan's radio background is primarily technical. ^{2/} Although when his father was away he would act as general manager of KWSK, he had no authority to hire or fire employees, to sign checks, or to sign contracts except for advertising time. After the present applications were designated for hearing, Morgan, on July 1, 1960, severed his connection with his father's station and took a job as a salesman for the National Press of North Chicago, selling advertising specialties like ball point pens and calendars. His territory includes the Pratt and Larned areas. Morgan left KWSK and got another job because of a family conflict. Even if his application is denied Morgan will not stay in Pratt nor return to KWSK. He will not have authority to sell time on KWSK if he receives a grant. Morgan's father has no business

^{2/} Morgan testified that he had not read the Commission's "Report and Statement of Ruling on Programming Inquiry" (Tr. 111), and did not know what the "Blue Book" was (Tr. 112).

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interests other than KWSK, and the son none other than his present job of selling advertising specialties. There is no common ownership of real estate by father and son, there are no loans between them, and Morgan will not finance the station with his father's funds. The son has never had any ownership interest in a radio or television station, newspaper, or theater. If he is successful in the present application, Morgan and his family will move to Larned, where he will devote his entire time to the station; his wife will assist him at the station.

13. While Morgan was in the military service he talked with his father about the possibility of filing an application for Larned (this was before the Huffman application for Pratt was filed) but nothing was done then because neither Morgan, his father, nor his wife had the money. About April 1958 Morgan learned from a story in the Hutchinson News Herald that an application was in process of being filed for Larned. In May 1958 Huffman filed his Pratt application. Some time in the middle of 1958 Morgan and his wife decided to file an application for Larned. His father, at his request, engaged an engineering consultant and counsel for him, but he prepared the proposed program schedule attached to the application unaided. Morgan's application was filed about 6 months after Huffman's Pratt application, specifying the same frequency; it was filed on the same day as the Pier San application for Larned. Two frequencies were available at Larned, according to Morgan's consulting engineer, 1310 kc and 1290 kc, but he also reported that greater interference could be expected on 1310 kc. Morgan and his father were both aware that by applying for 1290 kc the Huffman application on the same frequency for Pratt could not be granted without a hearing. ^{3/} There will be no joint rates, programing, or common employees of Morgan's proposed Larned station and his father's station in Pratt.

^{3/} In its proposed findings of fact and conclusions Pier San suggests that the real party in interest in Morgan's application was Clem Morgan. The Hearing Examiner feels that it is unprofitable to pursue these implications. In any event, the fact that invoices and engineering exhibits originally bore the name Clem Morgan instead of the applicant may be ground for suspicion by a vigorous advocate, but is hardly the basis for a holding that the father was not really acting as his son's agent in engaging professional assistance, or that the engineer had done more than designate on the documents the name of the person - Clem - who had directly hired him; in short, no finding or conclusion is possible on this record that Francis C. Morgan, Jr. is not the real party in interest, or that his application is not filed in good faith. Pier San did not call as witnesses applicant's father or the engineering consultant.

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14. Pier San, Inc. is a Kansas corporation formed for the purpose of applying for and operating a Larned station. Its authorized capital consists of 100 shares of common stock of \$100 par value. Ten of the shares have been issued, 2 to each of the 5 stockholders. Three of the stockholders live in Wichita, Kansas, and 2 in Nashville, Tennessee. Each is on the Board of Directors of applicant. None of them are related to each other, but among them are several long-time friendships and common interests in other broadcasting activities.

15. The three principals from Wichita and their offices are: John Bozeman (known professionally as Mack Sanders), vice president; K. W. Pyle, vice president; and Port Early, secretary. The Nashville residents and their offices are: Webb Pierce, president, and Jim Denny, treasurer. Denny and Pierce agreed to lend applicant \$20,000, of which they have already paid \$3000, while as an agreed-upon equivalent the 3 Wichita principals would render services in connection with the application and in the construction of the station.

16. The other broadcast interests of the 5 Pier San principals are (percentages shown are of stock interests in respective corporations):

Applicant	KSIR Wichita, Kansas	KOOO* Omaha, Nebr.	WJAT Swainsboro, Georgia	WERO Waynesboro, Georgia	WSNF** Sandersville, Georgia
W. Pierce, 20%	-	20%	50%	50%	50%
		Pres. & Dir.	Officer & Dir.	Officer & Dir.	V. Pres. & Dir.
J. Denny, 20%	-	20%	50%	50%	50%
		Treas. & Dir.	Pres. & Dir.	Pres. & Dir.	Pres. & Dir.
J. Bozeman, 20%	100%	20%	-	-	-
	Pres. & Dir.	V. Pres. & Dir.			
J. Early, 20%	Offcr, Dir. & Sales- man	20%	-	-	-
	Offcr, Dir. & Gen. Mgr.	Secy & Dir.			
K.W.Pyle, 20%	Offcr, Dir. & Gen. Mgr.	20%	-	-	-
	Offcr, Dir. & Gen. Mgr.	V. Pres. & Dir.			

* The percentages shown for KOOO are as of the time of the hearing. Pierce and Denny are no longer members of the KOOO licensee corporation, having transferred their stock to the 3 remaining members, Bozeman, Pyle, and Early, who now own 33-1/3% each.

** Acquired since record closed. See BAL-4001 and Ownership Report.

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17. John Bozeman was born in 1923 in Alabama, but now lives in Wichita. He has been associated with radio broadcasting (except for three years in the army) since 1938, when he became a part-time employee at WGN, Birmingham, Alabama. After his army service he joined Station KMA, Shenandoah, Iowa, as an announcer and talent manager. In 1951 he came to KFBI, Wichita, and stayed there for six years; he served as talent manager and announcer, and was in charge of live talent, and had his own program on the air. From 1957 to 1959 he was at KFH, Wichita, where he "was more or less a free lance operator, free lance program stylist," and "did one program per day, two hours a day" (Tr. 216). As already indicated, Mr. Bozeman is an entertainer under the professional name Mack Sanders. At present he has a weekly 1/2-hour show on the Hutchinson, Kansas, television station, as well as a 2-hour program on his Wichita station (KSIR) when he is in town.

18. Bozeman's 100% stock ownership and presidency of KSIE, Wichita, dates from May 1958, and, as already noted, Pyle and Early are also directors of the KSIR licensee corporation. In mid-1960 he and the 4 other members of Pier San acquired KOCO, Omaha, Nebraska, each then having a 20% interest in the licensee corporation (see page 8).

19. After Bozeman appeared at a charity show in Larned, in June 1958, residents of the community "encouraged" him to file an application for a station there. He was first joined in the proposed venture by Early and Pyle, and then by Pierce and Denny; and Pier San, Inc. was organized.

20. Bozeman is a member of the Wichita Independent Businessmen's Association and the Appliances Dealers Association. A member also of the Wichita Chamber of Commerce, he has participated in goodwill tours throughout Kansas. He is also a member of the Wichita Ad Club.

21. Bozeman will probably spend one day a week at the proposed station, helping in sales and promotion especially, and to "work out any problems" that Pyle, who will be full-time manager, thinks "he can help on" (Tr. 186).

22. K. W. Fyle was born in Iowa in 1904, and now lives in Wichita. He attended primary and high school in Webster City, Iowa and Iowa State College, Ames, Iowa, in 1921 and 1922. In 1923 he was graduated from the Dodge Radio Institute. Fyle's broadcast experience began more than 35 years ago. He started as a radio operator in 1924, and in 1926 was engineer and manager of portable stations for the Carrell Broadcasting Company. In 1929 he became the installation engineer for Stations WIBL, Topeka, Kansas, and WCLO, Janesville, Wisconsin.

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In 1930 he joined the staff of Station KFBI, then at Milford, Kansas, as chief engineer and assistant manager; in 1931 he was general manager of KFBI at Abilene and Salina, Kansas; and in 1940 moved KFBI to Wichita, where he supervised the first directional antenna installation in Kansas and acted as technical supervisor and assistant manager of KFBI until 1958. In 1958 Pyle joined the staff of KSIR, Wichita, as general manager and chief engineer. During his stay in Wichita he has financed and acted in an advisory capacity for three retail outlets - a clothing store, a jewelry store, and a decorating firm. He has also operated two farms, and retains a 20% interest in the clothing store and one of the farms. Since July 1960 he has made 4 trips to Omaha in behalf of Station KCOO, "primarily on engineering matters and movement of studio" (Tr. 174).

23. At KSIR Pyle works with Bozeman in the programming of the station. He is vice president and a director of KSIR, Inc., but as noted above, owns no stock in that corporation. From 1949 to 1958 he was treasurer and 5% stockholder of KFBI, Inc. His 20% (now 33-1/3%) ownership interest in the licensee of KCOO, Omaha, dates from 1960.

24. Pyle is a registered professional engineer in Kansas and a past member of the NAB National Engineering Committee. He is state chairman of the State Industry Advisory Committee (FCC) and a member of the National Defense Executive Reserve (FCC). He has been a member of the Downtown Kiwanis Club with a record of 16 years' perfect attendance; and is a Shriner and for 15 years served on the directors' staff of the Midian Shrine and helped organize the Midian Shrine Oriental Band. He is past chairman of the Salvation Army Advisory Board, and has served on the Board for 15 years. A member of the Wichita Chamber of Commerce, he is active on its retail trade committee. He is active in the Community Chest and Red Cross.

25. Together with Bozeman and Early, Pyle prepared Pier San's application. Pyle will be general manager of the proposed Larned station, as well as chief engineer. He will organize the station staff. He proposes to move his home to Larned and will devote full time to the operation of the station. He also proposes to participate in Larned activities. Upon a grant of the Larned application, Pyle will sever all connection with KSIR. He testified that he looks forward to moving to the small community of Larned and running a station there because he has reached an age at which a slower pace of living is attractive.

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26. Port Early was born in Kingman, Kansas, in 1917, and now lives in Wichita. He is a graduate of the University of Kansas School of Business and School of Law, and since 1950 has practiced law in Wichita. From 1940 to 1941 he was a field collector for the John Deere Plow Company, and from 1941 to 1943 head of the expediting department of the Glenn L. Martin Company, Omaha. From 1943 to 1946 he was in military service. He is a Mason and Shriner, and member of St. James Episcopal Church. He occasionally sells time for KSIR, and as a member of the Board of KSIR, Inc. participates in frequent discussions with Bozeman and Pyle on the programing and policy of the station. The exhibit submitted in his behalf declares that he "will be making frequent trips to Larned to assist in the operation and actively participate in the activities of the station as far as it is desirable and necessary. It is estimated that one day a week, on an average, will be spent in Larned."

27. Webb Pierce was born in Louisiana in 1921, and has lived in Nashville, Tennessee since 1952. He is vice president of Cedarwood Publishing Company, Inc. and a director of American Investors, both of Nashville. He is president of Statue Records, a recording company promoting young talent. Pierce also records for Decca Records and makes personal appearances. Pierce will, if requested, lend his "professional services" (as an entertainer) on occasion to the proposed station, but he will not participate in the actual operation of the station.

28. Jim Denny was born in 1911 and lives in Nashville. From 1929 to 1956 he was employed by the National Life and Accident Insurance Company and Station WSM, Nashville. He owns and operates two businesses in Nashville, Cedarwood Publishing Company, Inc. and the Jim Denny Artists Bureau, Inc. His participation in the Larned station would be of the same limited scope as is contemplated for Pierce.

29. Past Broadcast Record. As above indicated, the 5 Pier San principals have or have had various broadcast interests. Before the hearing counsel for Morgan indicated that he wanted to explore the records of the stations involved (KSIR, WOOD, WBRC, and WJAT). The Hearing Examiner ordered the production of their logs for stated periods, and they were delivered to counsel for Morgan. Morgan's counsel did not introduce any of the logs or an analysis of them into evidence, though at the hearing and in his proposed findings he raised some question about the operations of KSIR, which will be discussed below. As to the stations other than KSIR, therefore, it can be assumed without further discussion, in view of Morgan's opportunity and failure to show anything detrimental in their records, that nothing contrary to the public interest is apparent in the record of their operations. So far as KSIR is concerned, specific consideration will be given to its record, both because of Morgan's criticism and because Pier San relies upon KSIR's operations as a point in its favor.

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30. KSIR, Wichita, had been operating for about two years at the time of the hearing. An analysis, by type and source, of KSIR's programs during the 1960 composite week, follows:

<u>By Type</u>				
	<u>%</u>			
Entertainment	79.85			
Religious	5.78			
Agricultural	1.79			
Educational	2.19			
News	9.2			
Discussion	1.19			
	<u>100 %</u>			

<u>By Source</u>				
	<u>8 a.m.-</u>	<u>6 p.m.-</u>	<u>All</u>	<u>Total</u>
	<u>6 p.m.</u>	<u>11 p.m.</u>	<u>Other Hours</u>	
Recorded Commercial (RC)	81.4	80.75	78.1	81.1
Recorded Sustaining (RS)	4.08	8.75	7.86	4.76
Wire Commercial (WC)	.72	-	.88	.19
Wire Sustaining (WS)	7.2	10.5	1.8	6.7
Live Commercial (LC)	3.	-	7.86	3.4
Live Sustaining (LS)	4.2	-	3.5	3.85
Total Commercial	<u>84.52</u>	<u>80.75</u>	<u>86.84</u>	<u>84.69</u>
Total Sustaining	<u>15.48</u>	<u>19.25</u>	<u>13.16</u>	<u>15.31</u>
Complete Total	<u>100 %</u>	<u>100 %</u>	<u>100 %</u>	<u>100 %</u>

Actual Broadcast Hours (per week)	69.25	4.75	9.5	83.5
No. of Spot Announcements (SA) (per week)	578	17	79	674
No. of Non-Commercial Spot announcements (NCSA) (per week)	51	9	5	65

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31. In its original application KSIR proposed an Educational program percentage of 6.82%. As noted in Paragraph 10, in the 1960 composite week the percentage so classified by the station was considerably less; but to support its contention that KSIR is substantially living up to its representations, Pier San relies, with little documentation, on program activity for the benefit of schools and other "educational" material not expressly meeting the Commission's definition. It points especially, however, to a program called Great Works in Music, which KSIR classifies Educational and which will be considered at length below. In fact, it seems that Great Works is the only program now regularly carried specifically classified as Educational (Tr. 257). Bozeman testified, however, to having on occasion carried "interviews" over KSIR with Wichita University and Friends University, though no information was vouchsafed as to their contents. During the school year KSIR constantly makes announcements on behalf of the public schools. School closings caused by the weather are announced, and students frequently interviewed about school activities. KSIR was working on the mechanics of securing daily announcements from Wichita schools for regular broadcast during the coming season.

32. Great Works in Music, a recorded program, is carried throughout the year, for 2 hours each Sunday afternoon. It is the only program during the week presenting "classical" music. The program is prepared and announced by Mr. Bart (whose first name does not appear in the record), an educated musician especially engaged for this purpose. He visits the schools and produces the program on the basis of the teachers' suggestions, keying his selections of works or artists to material being studied in the schools. Bart often invites school music instructors to appear with their pupils on the program. The conductor of the Wichita Symphony Orchestra appears from time to time to explain works the orchestra has scheduled. Bart prepares for the program during the week preceding the Sunday broadcast. Monthly, the station publishes a printed schedule of Great Works in Music programs planned for the next four weeks, and distributes them to schools and listeners requesting them. Some 2000 are distributed monthly, with 200 sent to the Wichita Superintendent of Schools, at his request, for use in music classes. Although the program is sponsored, KSIR's latest audit by Early shows that it loses \$10 a week on the program because of the heavy printing and distribution costs of the schedules.

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33. KSIR's original application proposed a once-a-week 1/2-hour Discussion program there entitled Problem of the Week (Civic Problem Discussion). For this program apparently a studio discussion was envisaged, but the station at present has no program with such a format. Instead, a 15-minute daily on-the-street program is carried, with the announcer-moderator generally asking questions of passersby on various topics. Occasionally-arranged though also al fresco-interviews are scheduled with "experts" on public subjects. During election campaigns KSIR invites candidates to appear on the program, at no cost. Pier San concedes (proposed findings, Par. 57) that questions of cosmic interest are not asked every day on the program, the implication apparently being that the questions are pretty trivial, if interesting, at times. The original program proposal also specified a 30-minute program called Our Home for announcements of club activities. After the station started operating, however, Bozeman felt that it would serve housewives better if club news was broadcast throughout the day rather than if it was compressed in a single program; the announcements are now made every day on Bozeman's morning program and during the afternoon. An average of 65 non-commercial spot announcements are carried each week, or about 3400 a year. KOCO now limits these announcements to a single period, and Bozeman feels that KSIR's all-day method is so much better that KOCO is thinking of changing its practice. Originally proposed religious programming has similarly undergone some change, as actual operating conditions required. The scheduled times for 2 religious programs were shifted, but otherwise carried as proposed. A proposed 30-minute Catholic program is not being presented, although the station has often attempted to get the cooperation of the local Church. A Jewish program, originally proposed, is not being carried although "earlier they /the Jewish congregation/ had indicated perhaps they would be interested in this" (Tr, 283), because the congregation does not want their religious services broadcast; they prefer to have announcements made, and KSIR cooperates. KSIR Sunday morning programming is entirely Religious, live and recorded, except for news interruptions. A 15-minute program of Sunday School readings and recorded religious music is carried at 7:30 a.m. for Grace Methodist Church. A 1-hour program for Gideon Baptist Church is carried at 11 a.m. It originates live at the church; the station does not charge for time, but the church pays all live charges and remote expenses, so the program is logged as commercial. The program is not rotated among other churches because of the line charges involved in making changes every week. KSIR investigated the possibility of rotating by taping programs, but the station did not have the equipment and the churches would not share the recording equipment and tape expenses.

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34. KSIR's Agricultural programming consists mainly of farm news and market reports, carried daily except Sunday from 6:45 to 7 a.m. Fyle testified that although the calculated 0.5 mv/m contour of KSIR includes some rural area in the south, actual listeners there are few because there are many other stations to which they turn.

35. Newscasts on KSIR are classified both live and wire, some being sustaining and others commercial. The wire service is the basis of national news, but for local news the station has a news director, stringers, and other services. The station tries to broadcast local news as fast as it breaks.

36. KSIR's Entertainment programs include the Ranch Boys, a 30-minute program which is the only live musical program carried by a Wichita station. A variety of other simple recorded music - western, "popular," and "album" music - presided over by "personalities" - rounds out the Entertainment schedule (as previously noted, Great Works in Music, featuring "classical" music, is logged Educational). Bozeman took pride in the fact that KSIR is "the only station in Wichita that is playing any western music at all" (Tr. 231).

37. Location of Other Stations in which Pier San Principals Have Interests and Other Related Pertinent Facts. KSIR, Wichita, operates on 900 kc, 250 watts, daytime only. K000, Omaha, operates on 1420 kc, 500 watts, daytime, directional, and holds a construction permit to increase power to 1 kw, directional. WERO, Waynesboro, Georgia, is on 1310 kc, 1 kw, daytime; WJAT, Swainsboro, Georgia, is on 1000 kc, 1 kw, daytime; and WSNT is on 1490 kc, 250 watts, unlimited. KSIR, at Wichita, is about 105 miles from Larned; and K000, at Omaha, about 257 miles from Larned. Wichita is 253 air miles from Omaha. The Georgia stations are more than 800 miles from Larned and Wichita, and 1000 miles from Omaha. None of the stations serve Larned, nor would the Larned proposal serve Wichita, Omaha, or the Georgia towns. There is no overlap of the 2 mv/m contours of KSIR and the proposed Larned station; the 0.5 mv/m contours would overlap, however, with about 35% of the area within the Larned 0.5 mv/m contour included, but in this overlap area there are a minimum of 15 other services at any one point and a maximum of 24. The population in the overlap area was not calculated on the record, but inspection of maps and exhibits indicates that it is a sparsely settled rural area some 45 to 88 miles from Wichita and 5 to 55 miles from Larned. There is no other overlap of any grade service between the other stations in which Pier San principals are interested.

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38. Preparation for Programing. After the application was filed Morgan, called upon, personally or by telephone, individuals and representatives of associations and community organizations in Larned, to discuss participation in his station's proposed programs. He (and in one instance his father) spoke to representatives of the County Attorney's office, Chamber of Commerce, local business houses, Red Cross, Sheriff's office, City Manager's office, Garden Club, Music Clubs, Ministerial Alliance, Kiwanis, Rotary, Farm Agents, School Superintendent, Fort Hays Kansas State College, and State Game Commission, among others. Contacts, some duplication of previous contacts, were made on the following dates: April 8, 1959 - 4; April 18, 1959 - 1; July 29, 1959 - 2; August 1959 - 2; March 15, 1960 - 4; March 30, 1960 - 1; April 28, 1960 - 1; July 25, 1960 - 2; July 26, 1960 - 5; July 27, 1960 - 7; July 28, 1960 - 1; August 2, 1960 - 3; August 3, 1960 - 1; August 8, 1960 - 2; August 10, 1960 - 1; August 11, 1960 - 1. In all, Morgan spoke to about 28 persons. In general, the persons spoken to expressed interest in the proposed programing and a willingness to cooperate. Contacts of a similar nature (all personal, however) and with similar result, with the Larned High School principal, County Home Demonstration Agent, U.S. Soil Conservation Agent, Mayor of Larned, Chamber of Commerce representatives, County School Superintendent, Ministerial Alliance, and Rotary president, were made by Pyle for Pier San on May 2, 1960. Pyle made 6 or 7 trips to Larned from the time work was started on the Pier San application, 2 being after May 2, 1960.

39. Proposed Programs. Morgan proposes to operate 70 hours a week, daily from 8 a.m. to 6 p.m. Morgan's analysis, by type and source, of his typical week's proposal follows:

<u>By Type</u>	<u>%</u>
Entertainment	45.32
Religious	1.83
Agricultural	14.7
Educational	1.83
News	20.7
Discussion	8.10
Talks	7.85

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By Source

	<u>8 a.m. - 6 p.m.</u>	<u>All Other Hours</u>	<u>Total</u>
Network Commercial (NC)	-	-	-
Network Sustaining (NS)	-	-	-
Recorded Commercial (RC)	46	-	46
Recorded Sustaining (RS)	9	-	9
Wire Commercial (WC)	12	-	12
Wire Sustaining (WS)	2	-	2
Live Commercial (LC)	1	-	1
Live Sustaining (LS)	<u>30</u>	<u>-</u>	<u>30</u>
Total Commercial	59	-	59
Total Sustaining	41	-	41
Spot Announcements (per week)	500	-	500
Non-Commercial Announcements (per week)	50	-	50

40. Entertainment. Morgan's entertainment program will be primarily of recorded music, the types proposed being the simpler categories like western, popular, instrumental, and martial, but ignoring the more complex and sophisticated genres. Kiddies Hour, a recorded musical program, will include safety tips for children. Morgan believed that Larned listeners want a "better class" of music than rock-and-roll. By "better class," he testified, he meant "the big bands and orchestra music" (Tr. 144).

41. Agricultural. A 5-minute Opening Markets broadcast will be heard each morning at 8:55 a.m. Another 5-minute market report will be made at 10:55 a.m. daily, and at 1 p.m. a 5-minute program will give the closing market reports, including livestock prices for the day from the major midwest terminals, the news to be obtained from the wire facilities. Local market reports, if available, will be used at this time also. On Sunday, farm news will be carried, for 5 minutes each, at 8:55 a.m. and 10:55 a.m., and for 30 minutes at 1 p.m. During a late afternoon "western" musical program, material from the Kansas State Agricultural College on fertilizing, new sprays, planting time, and the like, will be broadcast.

42. Morgan has scheduled the Farm Hour at 3 p.m. weekdays. It will carry livestock, implement, and farm sales descriptions, and national and regional farm news from the wire. The program will also include news from the County Agent, 4-H, and HDU activities, and local produce and grain prices. The whole will be interspersed with popular and western music. The scheduling of this program in the middle of the afternoon opens up a time-honored controversy as to the best time to reach farmers. Morgan testified that the program "was designed for the rural area" (Tr. 107), but he went on to say that he did not know how many farmers and farm workers would be able to listen to a farm program at 3 p.m., and he agreed that most of them would be in the fields away from a radio.

43. Educational. On Saturday and Sunday, for 40 minutes beginning at 10:15 a.m., Morgan will offer time to Larned and other area schools on a rotating basis. He will try to present high school speech and drama classes and debating teams. When local material is not available, he will use programs furnished by the National Association of Educational Broadcasters and State universities.

44. News. There will be 15 minutes of news, civic topics, and weather at 8 a.m. every day, some of the material from the wire but most of it local. The 15-minute 9 a.m. World News every day will carry a daily summary of national, state and international news, and weather. At 10 a.m. every day there will be another 1/4-hour of news and weather, "consisting of five minutes [each] of national, state news, and weather for state of Kansas and some forecast for Larned area" (Morgan Exh. No. 6, page 1). The 5-minute 11 a.m. local newscast each day will feature police reports and a summary of Kansas news from the leased wire. News will also be carried at 12:30, 4, and 5:50 p.m. daily, and 12:30, 4, and 5:50 p.m. Sunday. Daily at 5:45 p.m. and Sunday at 5 p.m. there will be 5 minutes of sports news from the wire or the staff. Daily, at 29 minutes past the hour, there will be a 1-minute weather forecast for Larned and the area, and at 5:55 each evening national, state, and local weather news will be furnished.

45. Morgan will have one full-time news director, who will also be an announcer; and he may be a continuity writer and salesman as well, though Morgan said, "If it can be avoided he won't" (Tr. 105).

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46. Discussion. Open For Discussion is the title of a 1-hour daily (except Sunday, when it is 15 minutes) program. According to the description in Morgan's Exh. No. 6, page 3, it "Schedules for discussion of local civic club activities, Red Cross and other organizations operating in the public interest. Also school problems, traffic problems, necessity for expansion or improvement of public utilities, problems facing the city council, etc. Material for discussion programs is also available from the Marion Forum, South Bend, Indiana, and other sources. The National Association of Educational Broadcasters can also provide some programs relating to civil rights and court decisions. The Broadcasting Foundation of America (National Educational Television and Radio Center, New York City) has various programs of good music from abroad. These will be carried some days. When adequate discussion material is not available for this program it will be classed as RS(1) and feature music of the big bands such as Tommy Dorsey, Ray Anthony and Glenn Miller."

47. Morgan would editorialize over his station, and would seek out opposing views. He testified that he would permit a broadcast by one who might be espousing unpopular views, if he felt his talk was in the public interest.

48. Talk, Party Line, a 1/2-hour program Monday through Saturday, will feature telephone conversations over a beeper-equipped telephone between the announcer and listeners. Birthday and anniversary greetings would be announced, and the subjects of the greetings called and asked questions about the number of people in the family, how long they have been married, and the like. At 9:15 a.m. Sunday, Housekeepers Chat would run for 1/2 hour. A woman staff member will talk on topics like fashion and family care, and interview women in the area chosen for their prominence in various fields. The Old Book Shelf, a 15-minute program at 1:30 p.m. Sunday, will consist of verse reading with background organ music.

49. Religious. Morgan proposes a local live 15-minute religious broadcast each morning, including Sunday. Ministers from the Ministerial Alliance will be assigned the program each week on a rotating basis. Hymn Time will be 1/4-hour each day, including Sunday, of recorded hymns and Larned church announcements. No additional Sunday religious programs are proposed.

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50. Pier San would operate 83 hours a week, from 6 a.m. to 6 p.m. Monday through Saturday, and from 7 a.m. to 6 p.m. Sunday. Its analysis, by type and source, of a typical week's program follows:

By Type

	<u>%</u>
Entertainment	59.60
Religious	2.53
Agricultural	13.83
Educational	4.23
News	8.21
Discussion	11.60

By Source

	<u>8 a.m. - 6 p.m.</u>	<u>All Other Hours</u>	<u>Total</u>
Network Commercial (NC)	No network proposed		-0-
Network Sustaining (NS)	No network proposed		-0-
Recorded Commercial (RC)	59.7	34.6	55.5
Recorded Sustaining (RS)	9.9	7.15	9.48
Wire Commercial (WC)	4.8	15.5	6.58
Wire Sustaining (WS)	4.05	0.65	3.58
Live Commercial (LC)	2.05	34.6	7.16
Total Commercial	66.55	84.7	69.44
Total Sustaining	33.45	15.3	30.56
Proposed Broadcast Hours (per week)	70	13	83
Spot Announcements (per week)	356	66	422
Non-Commercial Spot Announcements (NCSA)	84	18	102

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51. Entertainment. The entertainment programs will primarily consist of recorded music, some, however, with narration or comments. The applicant proposes to bring a variety of music to listeners, and to use block programming for its musical programs where possible, keeping religious music, popular music, "classical" music, and western music in various segments of the broadcast day. Its musical programs are scheduled throughout the day. Typical "blocks" of music are Town and Western Music, Breakfast-time Music (light recorded music), Religious Music, With the Classics (55 minutes of "better type" music with narration on the orchestra or artist), Teatime Tunes (from 2:35 p.m. to 3 p.m., light recorded versions of popular present and past Broadway musicals), Popular Music, Polka Time on Saturday afternoons, Dance Party on Saturday afternoons with popular recordings for teen-age dance groups, and Music Box with records of old popular recordings.

52. Agricultural. From 6 to 7 a.m., Monday through Friday, Pier San will carry a farm program, consisting of releases gathered and edited by the station's staff from the County Farm Agent's office, Soil Conservation office, and local agricultural markets and grain elevators. The program will be interspersed with music, and of the 1-hour program it is anticipated that about 15 minutes of material will come from the news wire services in the form of market reports and other information.

53. At 12:10 p.m., for 10 minutes, there will be a complete breakdown of the Kansas City, Wichita, St. Joseph, and Omaha markets for livestock and grain. Again at 2 p.m., for 5 minutes, local news and closing market reports from the United States Department of Agriculture will be furnished. Time and temperature reports will be broadcast throughout the day, with accurate thermometer, wind direction and velocity meter readings. Storm alerts from the nearest Weather Bureau will be broadcast.

54. On Saturday from 8 to 9 a.m. notices of farm sales and county news and meetings of various organizations will be included in a recorded western music program. For 15 minutes on Saturday afternoon, beginning at 1:05 p.m., farm news and farm highlights from experimental stations conducted by the Kansas State College will be broadcast, dealing primarily with new farming developments.

55. Pier San's program proposal contemplates operation during the warmer months before local sunrise. One farm program is scheduled in the early morning, but Pyle testified that consideration had been given to moving the program if the station, because of a change in the Commission's Rule or because of some objection by another regional station, would not be authorized to operate before local sunrise. It then would be placed in the earliest possible hour in the schedule. For example, if the station signed on at 7 a.m., the farm program would run from 7 to 8 a.m. Pyle believes that during months when the program might begin at 7 a.m. rather than earlier, farmers do not go to the fields as early because of later sunrise.

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56. Educational. KU Classroom is a recorded program, prepared by the University of Kansas, with specific subjects featured each day in the week (for instance, Mathematics on Monday, English on Tuesday, etc.). The courses are prepared by the University, to help smaller schools, with outstanding authorities on various subjects. It will be carried on weekday afternoons, from 2:05 to 2:25 p.m. (This proposed program was described by Pyle, who testified that some years ago Emporia State Teachers' College, Emporia, Kansas, presented a similar program over what was at that time a reversible wire of the Mutual Network serving Kansas. The program was carried by nearly all the member stations and was well received. When Mutual revamped its system so that the wires could not be reversed, the Emporia program had to be discontinued and Kansas University developed the program now proposed by Pier San, offering it to stations on a taped basis.) The program is designed for in-school listening. Pyle talked to the County Superintendent of Schools, who expressed great interest in the program, but Pyle did not know whether there would actually be in-school participation, though he is "in hopes" there will be.

57. Already mentioned under Entertainment, but also claimed as Educational by Pier San because it can be used in conjunction with music appreciation courses (though no details are given) is With the Classics, the 55-minute weekday afternoon recorded musical program. Another "Educational" program is Teacher's Desk, 15 minutes on Saturday morning, featuring school news and coming events of county and city schools.

58. News. Headline overnight developments, including items on local news and sports, will be carried for 5 minutes at 7 a.m. A 5-minute news summary on overnight stories from the press wire will be broadcast at 8 a.m. Five minutes of news, generally from the wires, each hour thereafter, will be given, and at noon the news period will be increased by five minutes for a complete summary of weather for the entire region as an aid to travelers. The 2 p.m. news will include information from closing markets, furnished by the Department of Agriculture. At 5 p.m. a resumé of sports scores will be included with the news.

59. Pier San will establish a regular local news beat. Stringers will be used for the surrounding area. State and national news will come from a wire service, and initial discussions have already been held with UPI for this purpose. As there is no weather bureau in Larned, Pier San will buy an accurate thermometer, a wind direction and velocity meter, and a barometer, for local broadcasts of basic data (see Par. 53, above). General weather forecasts will be furnished as released by the nearest Weather Bureau office. The station will use portable tape to cover events on the scene when landlines are not practicable.

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60. Discussion. This Is My Opinion will be carried each weekday from 4:20 to 5 p.m. and from 5:05 to 6 p.m. It will consist of telephone conversations with listeners who call in and have opinions on subjects they wish to discuss. Topics will include references to local civic activities and issues, but it is not expected that all conversations will be limited to controversial issues, and when not so limited that portion of the program would be classified as Talk rather than Discussion. On Saturday This Is My Opinion will run from 5:05 to 6 p.m., and will be directed to teenager participation. On The Editorial Page, a 25-minute program on Sunday afternoons, an announcer will read letters sent in by listeners. Pier San "anticipates" that city and county officials will participate in this program.

61. Talk programs apparently include Kitchen Chatter, a 10-minute Monday-Friday morning program, with news on home economics, recipes, and other information for women, including material from the County Home Demonstration Office. Saturday afternoon programming will be changed seasonally to present high school games, either on a live or tape-delayed basis; if the games are played during the week they will be covered at that time.

62. Religious. Each morning, for 10 minutes, at 7:05 a.m., a prayer for the day and religious music will be carried. The prayer will be taped by a local minister, and the schedule of ministers will be rotated on a weekly basis among the different faiths. On Sunday morning, 55 minutes of religious music will be broadcast at 7:05 a.m. Music of various faiths will be included. A 15-minute program, Billboard of Church Services will be broadcast on Sunday at 8:05 a.m., giving a complete resumé of church services scheduled in Larned and Pawnee County. A 20-minute Sunday School Lesson will be broadcast at 11:05 a.m. on Sunday. This program will include Bible readings and a Sunday School lesson, together with religious music. A 55-minute religious program will be carried on Sunday evening, from 5:05 to 6 p.m. It will be a rebroadcast of a morning church service from one of the churches in the area. It is proposed that each Sunday morning a different church service will be taped during the regular church service. Rotation among the churches will be made so that all may have equal representation. The religious programs will include members in the Ministerial Alliance, as well as non-members on occasion.

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63. Management and Staffing. As noted above, Morgan will move to Larned and devote his entire time to his station as general manager and chief engineer. His wife will be bookkeeper. In addition, he will hire 2 full-time engineer-announcers, 1 news director, 1 full-time salesman, and a receptionist who will also handle women's programs and continuity. For Pier San, Pyle, also as previously mentioned, will move to Larned to serve full-time as the station's general manager and chief engineer, severing his connection with KSIR. The station will employ a news editor, 3 announcers, and 1 administrative employee. Part time employees will be added as needed. In addition, Pier San proposes to use available outside talent for occasional appearances, or, if they merit it, more often. KSIR and the proposed Larned station will be operated with separate staffs, and except for the participation of Early and Bozeman to the extent already described, with separate managements.

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CONCLUSIONS

64. Section 307(b) Choice. First to be decided is the Section 307(b) issue whether Pratt or Larned is entitled to the one frequency allocation possible in this case. That section directs that:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Huffman contends that an unlimited time grant to Pratt (Pratt's first nighttime and second daytime station) would be more "fair, efficient, and equitable" 4/ than a daytime-only grant to Larned because a) Huffman would bring a new daytime primary service to 33,504 more persons than either of the Larned proposals; b) it would eliminate a daytime gray area in Dodge City, Kansas (see, however, Par. 5, above, footnote); and c) it would eliminate a substantial white area nighttime to more than 9000 persons. The Broadcast Bureau, for similar reasons, declares that a first nighttime station for Pratt should be preferred over a first station for Larned. The Larned applicants stress the Commission's policy of providing every community of substantial size, where possible, an "outlet for local self-expression." They note that Larned is a substantial community without a station. Also, they say, Huffman's nighttime operation would be inefficient because of high population loss within its nighttime normally protected contour, 5/ and so he should not, for this additional reason, be favored, though his application is for unlimited and theirs is for daytime-only operation.

4/ Huffman argues that the three words should be considered in combination, and not separately.

5/ They realize that as a first nighttime station it would fall within an express exception of Rule 3.28(a)(5). Morgan, however, noted in his reply (Par. 8), that the Commission is now designating for hearing applications which are within an exception to the 10% rule.

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65. Larned is unquestionably a "substantial community," if only somewhat over half the size of Pratt; it now receives only 2 daytime primary services, the closer of the stations being 23 miles away. Larned and Pratt both are county seats. The counties are only about a thousand apart in population. Unless there is a good reason for a different course, Larned should have its first local outlet, daytime only though it is, before Pratt gets its second daytime and first nighttime stations: Lawton-Fort Sill Broadcasting Co., 7 RR 1216, 1234. The chief question is whether the eradication of the nighttime white area by Huffman dictates a grant to Pratt; put to one side may be such subsidiary considerations as the greater number to be served daytime by Huffman than by the Larned proposals; and, cutting the other way, Pratt's substandard nighttime service population.

66. Huffman has cited no case in which the factors he relies upon, including the elimination of a white area, have prevailed over an application for a first local station. Moreover, it is highly doubtful that a white area, as such, is now to be given the respectful attention Huffman advocates. See Vidalia Broadcasting Co., 8 RR 1; Gillespie Broadcasting Co., 15 RR 878; 15 RR 828a, affd. by Court of Appeals sub nom. Red River Broadcasting Corp. v. FCC., 19 RR 2028. 5a/ It must be concluded that Huffman has not overcome Larned's claim to its first station, and that the Section 307(b) issue must be decided in favor of one of the Larned applicants. The additional interference Morgan would impose upon KSOK, to which that named respondent has not indicated any objection (it did not participate in the case), is so small as not to disqualify Morgan from the comparative determination which must now be made between him and Pier San.

67. Comparison of Larned Applicants. Larned being the preferred community, a choice must be made, under Issue No. 5, between Morgan and Pier San. Pier San contends it is superior to Morgan under the following standard criteria: local residence; civic participation; diversification of business interests; broadcast experience; integration of ownership and management; past record of operations; preparation of program proposals; and the program proposals themselves. It concedes a factual, though, it says, not controlling preference to Morgan in respect of diversification of ownership of communication media; and claims no preference for staff. Morgan, on the other hand, asserts that he should be favored because of local residence; integration of ownership and management; civic participation; diversification of ownership of communication media; broadcast experience; and program preparation; he realizes that since he has no prior ownership of a station, he has no past operation record to compare with "Bozeman or others at KSIR" (proposed conclusions, Par. 5), but argues that "the discrepancies between Bozeman's proposals for KSIR and actual performance do not reflect too favorably upon him" (Par. 6).

5a/ Cf. Report and Order released September 19, 1958 (Daytime Standard Broadcast Stations), 17 RR 1669, 1694.

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68. Local Residence. Both Morgan and Pyle propose to move to Larned. Neither has ever lived there. Morgan spent his youth in two towns 23 and 49 miles from Larned, and then in Pratt, 50 miles away. Pyle has lived in Wichita, 105 miles from Larned, since 1940, and before that lived and worked in Milford, Abilene, and Galina, Kansas. Bozeman has lived and worked in Wichita since 1951, and has appeared in Larned as an entertainer. Fort Early also lives in Wichita.

69. Future residence is not "entitled to the same weight as that given for present, and, particularly, demonstrated long-term residence": Triad Television Corp., 16 RR 501, 664d. To the extent that Morgan and Pyle are future residents of Larned, they are individually on a par; insofar as some superiority is claimed by Morgan because of his residence in small towns near Larned, the record does not permit an inference to be drawn that knowledge of the other communities would be useful in Larned. Since Morgan has a 100% interest in his proposed station, and Pyle's interest in Pier San is only 20%, it might be held that Morgan's future local residence, discounted though its value may be, tends more heavily in his favor than Pyle's for Pier San. And Pier San's claim that it is to be favored on local residence because of Pyle's general competence to be demonstrated in running the station, must be rejected. But it appears to the Hearing Examiner, and he concludes, that it would be an unrealistic refinement upon the usual evaluation under the present criterion, to attempt a meaningful appraisal of one fifth of a future local residence (Pyle's) against the monad Morgan's. No points are awarded in this class.

70. Civic Participation. Having never lived in Larned, the civic activities of the principals have all been in other communities; traditionally, less weight has been given to participation outside the city to be served than to local activity, but it is not to be ignored. Seizing upon the possibility of a preference by reason of outside activity, Pier San calls Morgan's civic record "slight," (proposed conclusions Par. 137), apparently either considered alone or in comparison with the Pier San principals'. Morgan's record suffers only when matched against Pyle's, the only one of Pier San's principals who has shown a fairly substantial list of civic activities (and even it hardly qualifies Pyle as one who has been in the forefront of a multitude of civic movements). Yet the fact that Morgan is far younger than Pyle must also be taken into account. It can be expected that both Morgan and Pyle would be active in Larned's civic life. In this category again, such distinctions as may be derived from the facts are not sharp enough to permit one of the Larned applicants to be preferred over the other.

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71. Integration of Ownership and Management. With 100% integration, Morgan enjoys (though Pier San only at first grudgingly concedes it, then calls the difference too small for preference, proposed conclusions, Par. 143) a quantitative superiority over Pier San. Only Pyle will devote full time to the Pier San station, and Bozeman and Early plan to spend on the average one day a week there. But Pier San contends that its integration will qualitatively be more meaningful because of "the more extensive broadcast experience of its principals who will be integrated" (proposed conclusions, Par. 143). With all due allowance, however, for the greater experience of Pyle, not to mention Bozeman and Early, it cannot be said that Morgan has demonstrated such a lack of experience as to prompt the suspicion that his proposals will not be translated into reality merely because of any alleged shortcoming on this score. The cardinal feature of integration as a criterion is its assurance that the policies of an owner will more readily be effectuated if he directly operates the station than if he is removed from the scene and acts through employees. With this in mind, it is evident that Morgan's showing on integration is definitely superior to Pier San's.

72. Diversification of Broadcast Interests. On this minor element in the comparison complex, Pier San is unquestionably preferred over Morgan. Pier San's principals have been in the following businesses in Kansas and elsewhere: broadcasting, professional entertaining, retail consulting, farming, haberdashery, law practice, music publishing, and recording. Morgan's experience, on the other hand, is limited to employment at his father's Pratt station and his current job of selling advertising specialties.

73. Broadcast Experience. Early has some experience as a time salesman for KSIR and as a member of its Board in the discussion of programing and policy; Pierce and Denny have ownership interests in stations, but the record is barren of any evidence as to their actual broadcast experience; Bozeman has been associated with broadcasting since 1938 in various capacities. Pyle is a pioneer in the broadcast industry, having started in 1924 as a radio operator. Though his experience and background have been primarily technical, they are by no means limited to that phase of operations, and he is now general manager and chief engineer of KSIR, working with Bozeman in the programing of the station. Morgan helped his father install KWSK at Pratt and worked as an announcer-operator there before he went into the service. He returned to KWSK in 1958 and for the next 22 months worked there as an announcer-operator, salesman, and chief engineer. Although he ran the station when his father was away, he could not hire or fire employees, execute contracts except for the sale of time, or sign any checks. On balance, Pier San must be awarded a substantial preference here because of the long experience in varied aspects of station operation, technical and programing, of Pyle and Bozeman. Morgan's experience has been considerably shorter, and although at a station serving a market similar in many respects to Larned, has been of a more subordinate and less responsible nature.

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74. Broadcast Record. Neither applicant as such has been the licensee of a broadcast station, but each of Pier San's principals has an interest in one or more existing stations. Morgan has had no ownership interest in a station.

75. Attention will first be directed to Pier San's proposed conclusion (Par. 145) that because the logs of KOOO, WERO, and WJAT were made available to Morgan's counsel, and he raised no question about their operations nor introduced the logs into evidence, it must be held "that they have been programed in a manner meeting the needs of their respective communities and the requirements of the Commission." This, however, would be an inadmissible inference from the mere fact that Morgan's counsel did not question the programing; the limits of the permissible deduction from his silence have been stated in Par. 29, above. To go as far as Pier San proposes would be to constitute Morgan's counsel the final judge of the stations' operations. It is noteworthy that Pier San itself did not introduce the logs of these stations to indicate their meritorious operation, but seeks instead to rely on Morgan's apparent inability to find anything detrimental in the logs as a basis for a wide-ranging affirmative conclusion. While it will be assumed, therefore, as already stated, that there has been nothing prejudicial to Pier San's qualifications in the operation of the stations, their undisclosed record as such cannot affirmatively be used here in its favor. The only one of the Pier San-identified stations whose record is in evidence is KSIR, and it is that station's operations to which the discussion now turns.

76. KSIR had been on the air for only about 2 years at the time of the hearing. Its especial pride is Great Works in Music, an admirable program described in some detail in Par. 32, above. Whether it is rightfully classified as Educational because of the tie-in with the Wichita schools is not important. Whatever the proper classification, the program evinces a concern for tastes of the community not satisfied by ordinary music offerings. The program is carefully prepared and produced by a musician engaged for the purpose, and 2000 copies of a printed schedule of forthcoming programs are distributed monthly. Perhaps Pier San can be accused of trying to exaggerate the significance of Great Works in Music to divert attention from its inability to itemize and describe particularly other KSIR "educational" programs to justify an approximation to the percentage proposed in the original KSIR application, but there is no denying the value of the program, both in itself and as a demonstration, in one instance at least, of KSIR's praiseworthy assumption of a licensee's responsibilities.

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77. a) It is not apparent from the record that, beyond some problematical loss of dignity in conducting the program outdoors rather than in a studio, there has been a considerable departure from the discussion program policy KSIR projected in its original application. On occasion "experts" do appear on the program, as they might also in a panel studio discussion program. During election campaigns KSIR has invited candidates to appear on the program at no charge. b) KSIR has a praiseworthy record of cooperation with churches in producing religious programs. c) In addition to subscribing to a wire service for national news, it employs a news director and stringers for local news, and attempts to broadcast local news as it breaks. d) The station's entertainment programs are limited to live and recorded music programs (see Par. 36, above). e) Some agricultural programs are carried (see Par. 34, above). f) The 1960 composite week analysis shows no Talk programs, and 85% of all programs during the 1960 composite week were commercial.

78. The Hearing Examiner has not been carried away by Pier San's encomiums upon KSIR's record, but has tried to make a sober appraisal. While obviously capable of improvement in several respects - among others, by a greater diversity of Entertainment programs; by the production of more true Educational programs; by the presentation of Talk programs; and by a more consistently serious presentation of Discussion programs rather than resting content with trivialities occasionally, and apparently haphazardly, relieved by more important content - KSIR's record nevertheless tends in Pier San's favor for reasons apparent in these conclusions.

79. Program Preparation. Bozeman was "encouraged" to apply for a Larned station by local residents who liked him as an entertainer. Apart from some visits by its principals to Larned, the direct program preparation of Pier San was compressed within a one-day campaign on May 2, 1960, after its application was filed, when Pyle made some 8 contacts. Morgan's direct preparations were also made after his application was filed; his contacts, by phone and in person, total considerably more than Pier San's. But in this nebulous area it is difficult to assess the relative value of preparatory efforts merely by the frequency of contacts. Beyond concluding that both applicants made earnest efforts to sound out community sentiment, no ruling will be made.

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80. Proposed Programs. Pier San proposes to operate 83 hours a week, - Morgan 70. Morgan explains the difference "on the fact that Morgan was not certain whether the station would be able to operate pre-sunrise under Sec. 3.87 of the Rules" (reply, Par. 16). There are differences in the percentages devoted to each program category by the two applicants, but the variations appear within the area of licensee discretion, all interests subsumed under the standard classifications being represented in the formal analysis to a greater or lesser degree except for Talks by Pier San, where no percentage is shown (Pier San, as already noted, does propose Talk programs, however). In the following paragraphs brief observations will be made of pertinent features of the two proposed program schedules, in an attempt to determine which applicant has demonstrated the greater ability to ascertain, meet, and even elevate, the needs, interests, and tastes of Larned. It should be emphasized that the Hearing Examiner's aim has been to judge not the quality of the programs, as such, but the qualifications of the applicants. 6a/

81. Morgan's Entertainment programs appear limited by Morgan's own uneducated musical tastes (see Par. 40, above). The only reference in his proposal to "good music" is hidden away in the Discussion program, Open for Discussion (Par. 46, above), but this is at best a vague promise. 6/ Pier San's Entertainment programs, though restricted to music, are not afraid to tread into regions which Morgan has shied away from. "Classical" music, already played over KSIR, is proposed for Larned. To the extent that Pier San has indicated that it does not hesitate to recognize interests above the popular level, and will attempt to raise the cultural level of Larned, if only homeopathically, its entertainment programs are to be accorded some preference.

82. Agricultural proposals of both applicants indicate a careful attempt to meet the demands of farmers. To this, one reservation may be made. Morgan's 3 p.m. Farm Hour, though a commendable program, seems awkwardly timed. Pier San's timing appears better suited to the usual hours of farmers. While an indication that Morgan overlooked an important feature of a good farm line-up, the timing of programs is so readily changed in actual operation that the demerit is minimal. It is held that both applicants have demonstrated, in the content of their proposed farm programs, an approximately equal understanding of and ability to meet the needs of their rural audiences.

6/ A 1/2-hour Sunday afternoon program, Salon Orchestra Music, proposes "Music by the Hollywood Salon Orchestra, and other large string orchestras," but there is no indication that the music would be different from the usual Morgan fare.

6a/ It is believed that the present treatment is consonant with the discussion in Commission Policy on Programming, issued July 29, 1960, 20 RR 1901.

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83. Only Pier San has described an actual teaching Educational program, KU Classroom, designed for in-school listening. Attractive though the prospect of this program is, it is problematical whether the county schools can cooperate. The Hearing Examiner has not forgotten Morgan's observation that a similar program was not offered by KSIR in Wichita, nor Morgan's suspicion that KU Classroom is only a comparative case bait; nor, in addition, the fact that 6.82% of Educational programs had been promised for KSIR, a level never reached by that station. Another Pier San "Educational" program, With the Classics (Par. 57, above), is similar to KSIR's Great Works in Music. Morgan's proposed local Educational programs have only been generally described, and represent more a hope than a well-planned project. If it could confidently be expected that Pier San's Educational proposals would actually be fulfilled, it would be entitled to a very definite preference over Morgan's proposals. But because of the strong possibility that in practice the Pier San Educational offerings will be whittled down to approximate those now heard over KSIR, the paper preference for Pier San is considerably diminished if it does not entirely vanish.

84. News programs of both applicants appear to take care of this area of interest with fairly equal adequacy, though Morgan's greater percentage of newscast time has not been overlooked.

85. Morgan's proposed Discussion program, Open for Discussion, is long enough and has a paper format adapted to the consideration of local issues. He does not appear overly sanguine, however, that there will be sufficient material every day for discussion. In addition, Morgan would editorialize on his station.

Except for the possible participation by officials on On the Editorial Page, Pier San's discussion programs, as is most often the case with the KSIR "Discussion" program, would consist largely of listeners' comments and chit-chat. It is not apparent from the description of Morgan's program whether he plans local panel-type discussions of the type usually associated with this category, but there is no indication that he has been content, as Pier San generally has been, to sacrifice the opportunity to furnish a dignified forum for learned to supposed audience appeal. It is felt that the applicants are on a par in this area: Morgan's proposal is more attractive on paper but lacks details of implementation; Pier San's is more explicit, but is aimed too low, though the criticism on this score is substantially tempered by the realization that Larned is a small town and a limited source of controversial problems, so that Pier San's proposal is probably, day in and day out, realistically adjusted to the area's capacities.

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86. In Morgan's proposed Talk programs he conceivably could score a cultural advantage over Pier San comparable to the one enjoyed by the latter by reason of its promise to broadcast "classical" music. One of his programs would consist of verse reading, but because the nature of the verse is not disclosed it is impossible to know the level of taste to which the program would appeal. Pier San has no similar program, but it proposes sportscasts and Morgan does not, thus achieving a physical offset to Morgan's at least quasi-intellectual verse reading. No preference is awarded.

87. Pier San's religious programming would be more extensive than Morgan's. Morgan, however, though he has not been lavish, has not been remiss in this category. He recognizes religion as a matter of listener interest, and proposes to devote appreciable time to it, if less than Pier San. No choice is expressed in this delicate area. Both applicants have indicated an awareness of an important audience concern and have reasonably attempted to meet it.

88. From the foregoing discussion of program proposals, it is apparent that only with respect to Entertainment programs does Pier San enjoy a preference, to any appreciable degree, over Morgan's proposals. The greater number of hours Pier San proposes is a minor consideration, though obviously one by which it benefits in a comparison.

89. Staff. The Hearing Examiner agrees with Pier San (proposed conclusions, Par. 150) that the projected staffs are adequate to effectuate the respective proposals. Consequently, no choice is made.

90. Before considering the impact of the media diversification criterion, 7/ which must be considered in a comparison along with the others, another look at the foregoing conclusions will be helpful. Evidently Pier San hoped to build up such a commanding lead on the other criteria that its admitted inferiority in media diversification could not conceivably have affected its claim. It conceded nothing to Morgan, even in an area like integration. Pier San has not succeeded, however, in planting its flag upon every strip of visible territory. Nonetheless, it must be held that its advantage over Morgan is sufficiently wide under the other criteria to survive further scrutiny.

7/ As noted in the Preliminary Statement, the Hearing Examiner asked and was furnished additional briefs on this subject by Morgan and Pier San.

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91. If in assessing the parties' cases the Hearing Examiner has been compelled to discount Pier San's bland assumptions of superiority in practically every field, he has also not been blinded to Morgan's limitations. Certainly if this were a head-to-head struggle between Morgan, on the one hand, and Pyle and Bozeman, on the other, free of any question of media diversification on either side, but with Pyle's and Bozeman's record and experience credited to them, Morgan would finish second. Pyle for 2 years has managed a Bozeman station with a fairly good though by no means outstanding general operating record (in the case of one program, however, it is entitled to particular commendation), and their experience surpasses Morgan's. Morgan, with what appears to be an almost unrelieved (except for military service) small-town background, has some broadcasting but little managerial experience. Never having owned a station, he cannot offer a record of operations. He betrayed gaps in his professional knowledge by confessing ignorance of an important Commission report and of the contents of the Blue Book. Only by an overemphasis of the integration criterion would Pier San's lead be affected. It is true that Morgan's operation would be more integrated than Pier San's, but the beneficial effect of integration is restricted by the qualifications of the owner-manager; ^{8/} it is not a situation which through its own magic produces inspired programs.

92. In the majority of cases the Commission has not held a policy of media diversification to be so demanding a factor as to offset the immediate benefits of good programming assured a community by a better qualified applicant. It seems undeniable to the Hearing Examiner that the experience and the record (though the latter is not unimpeachable) of the Pier San principals are an augury of a continuation of more imaginative, less pedestrian, programming, than Larned could expect from Morgan, and that this is the determinative consideration here.

93. Bozeman is 100% owner of KSIR and has a 33-1/3% interest in KOCO, Omaha. Pyle and Early are on the Board of Directors of the licensee corporation of KSIR and have each now a 33-1/3% interest in KOCO. Pierce and Denny, the money men in the present Kansas application and Tennessee residents, have each a 50% interest in WERO, WJAT, and WSNT (the last acquired since the present record was closed), all in Georgia. Pyle, the proposed general manager of the Larned station, will sever his present association with KSIR if the Pier San application is granted. There is no overlap of the service contours of any of these existing stations. However, about 35% of the area within the Larned proposal's 0.5 mv/m contour would be overlapped by the 0.5 mv/m contour of KSIR; this overlap area is sparsely settled and much closer to Larned than to Wichita;

^{8/} The present observation must be distinguished from the conclusion drawn in the section awarding Morgan preference for integration.

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and there are from 15 to 24 services available at any one point in the area. KSIR would not serve Larned, nor the Larned proposal Wichita. While this overlap would not in itself be a disqualifying factor under Rule 3.35, it is unquestionably a matter to be considered in a comparison. In this connection, however, it should be noted that it was not covered by a special issue, and, indeed, seems to have become an item of concern only because Pier San first raised it in its proposed findings.

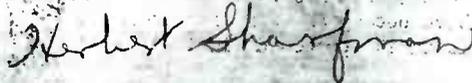
94. Morgan has never owned, and does not now own, an interest in a broadcast station. Only one of the Pier San-identified stations encroaches upon the Larned area; the others are far away, and their programming would have no conceivable influence upon the thought and cultural outlook of the Larned area. Apart from the possible effect of the KSIR-Larned proposal overlap - and there the Wichita station does not serve Larned and the overlap area has numerous other services - there would be no concentration of Pier San interests within the Larned service area. The question, then, is whether it is in the public interest to award an additional facility to a group of entrepreneurial principals among whom there are 5 widely distributed stations, only one, however, in the same State as the proposal. There is no reasonable ground for belief that Pier San will not attempt to meet the program requirements of Larned and the surrounding area; on the contrary, there is a substantial ground for belief that it would operate meritoriously. Under the circumstances it is concluded that the acquisition of another station by the Pier San principals would not result in an injurious concentration of broadcast facilities; and that Larned should not be deprived of programming from an applicant which has demonstrated qualifications superior to its opponent, merely to vindicate the virtues of a policy of diversification. To hold otherwise would be to elevate diversification to a level of precedence which the Commission does not accord it. 9/

95. Accordingly, because public interest, convenience, and necessity will be served thereby, IT IS ORDERED, This 27th day of March, 1961, that unless an appeal from this initial decision is taken by a party to the Commission or the Commission

9/ The Hearing Examiner has decided this case by the application of what he understands is the prevailing Commission policy in consideration of the significance of diversification in the comparison complex. See, however, 66 Yale Law Journal, 365, 377.

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reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.153 of the Rules, the application of Pier San, Inc., for a construction permit for a new standard broadcast station at Larned, Kansas, to operate on 1290 kc, with 500 watts power, daytime only, is GRANTED, and that the competing applications of Wilmer E. Huffman and Francis C. Morgan, Jr. are DENIED.



Herbert Sharfman
Hearing Examiner
Federal Communications Commission

Released: March 29, 1961

and effective 50 days thereafter, subject to the provisions of the Rule (1.153) cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

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Huffman

***"Exceptions To
Initial Decisions"***

May 8, 1961

May 8, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)

WILMER E. HUFFMAN
Pratt, Kansas)

FRANCIS C. MORGAN, JR.
Larned, Kansas)

PIER SAN, INC.
Larned, Kansas)

For Construction Permits)

DOCKET NO. 13469
File No. EP-12021

DOCKET NO. 13470
File No. EP-12749

DOCKET NO. 13471
File No. EP-12750

EXCEPTIONS OF WILMER E. HUFFMAN TO INITIAL DECISION

Wilmer E. Huffman, applicant in the above-entitled proceeding, by his attorneys, and pursuant to Section 1.154 of the Commission's Rules and Regulations, respectfully submits the following Exceptions to the Initial Decision of Hearing Examiner Herbert Sharfman, released March 29, 1961, proposing to grant the above-numbered application of Pier San, Inc. for a new standard broadcast station at Larned, Kansas.

ORAL ARGUMENT on these Exceptions is respectfully requested, and notice is hereby given of the intention of Wilmer E. Huffman to participate in such argument.

FINDINGS OF FACT

Community of Pratt, Kansas

Exception No. 1. To the failure to find and to include the following facts which are established by the evidence and are necessary to a determination of the need of Pratt for a fulltime broadcast service:

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May 8, 1961 Page 1

- A. Pratt is at the center of a rapidly growing economic area. Livestock, wheat, railroads, oil, and gas account for the greatest volume of activity. Area livestock sales produce annual revenues averaging about \$5,000,000.00. The 1958 wheat crop was valued at \$36,000,000.00. The 1959 assessed valuation, for tax purposes, of the oil industry around Pratt totaled \$7,165,190.00, up \$139,195.00 from the previous year. (Huffman Ex. 1)
- B. Considerable new building and renovation in Pratt is reflected by the following table: (Huffman Ex. 7)

Building Permits Issued In Pratt, Kansas,
From 1950 To July 1, 1960

<u>Types</u>	<u>Estimated Valuation</u>	<u>No. of Permits</u>
New Residences	\$3,235,700.00	433
Repair Residences	378,069.00	513
New Business Building	1,122,489.00	63
Repair Business	461,355.00	162
Private Garages	145,325.00	294

The Western Savings & Loan Association at Pratt increased its number of home loans to residents each year from June 30, 1950, to June 30, 1960. The increase in number of loans and their value during the period were phenomenal; from 21 loans worth \$112,916.00 in 1950 to 692 loans worth \$4,569,531.00 in 1960. (Huffman Ex. 7)

- C. Consumer spending in Pratt County, as registered by retail sales volume, was a record \$23,032,000.00 for the year 1959, considerably above the previous year's \$18,149,000.00. On the basis of population, retail business should have accounted for only .0071 percent of the national volume, whereas it actually came to .0107 percent. (Huffman Ex. 7)
- D. Pratt has 22 churches representing more than a dozen different denominations. Eight schools, including a junior college, have a total enrollment of 2,390 students. (Huffman Exs. 3, 4) Numerous civic clubs, such as Kiwanis, Optimist, and Rotary, are located in Pratt. (Huffman Ex. 5)
- E. Pratt has a single 250 watt daytime-only radio station. No other station is located in the county. At night the community is part of a white area of more than 9,000 persons. (Huffman Ex. 11) The Superintendent

of Pratt Public Schools, the County Superintendents, both for Pratt County, Barber County and Kingman County, the Executive Secretary of the Red Cross (Pratt County Chapter), the County Agricultural Agent, and others point out the serious consequences of Pratt's reception and transmission shortage. (Huffman Ex. 8) These consequences include:

- (1) The impossibility of listening to any station in the area after 6:00 or 7:00 p.m. (Huffman Ex. 8, p. 2)
- (2) The impossibility of receiving local weather reports in the evening when most of the inclement weather and tornadoes occur. (Huffman Ex. 8, pp. 4, 7)
- (3) The impossibility for farmers to listen to their radios during the day while they are at work. (Huffman Ex. 8, p. 4)
- (4) The impossibility of receiving early-morning coverage of local weather conditions to direct the county's 30 school buses. (Huffman Ex. 8, p. 11)

CONCLUSIONS

Exception No. 2. To the conclusions in Paragraph 65 in their entirety, and the failure to conclude in lieu thereof the following:

Pratt has a single daytime-only radio facility and is part of a white area at night. Larned has no broadcast facility but has adequate reception service day and night. ^{1/} The differences in population, economic activity, and number of schools, churches, civic and social organizations indicate that Pratt, considering size alone, would have significantly more need for a broadcast outlet. Weighing against such an argument is the existence of a daytime broadcast outlet in Pratt in contrast to the absence in Larned of any outlet. However, such an apparent public asset at Pratt is qualified by the inherent inadequacy of a daytime-only facility in a farming area with important nighttime listening habits and requirements for evening and early-morning weather reports,

^{1/} The Pratt proposal would give an additional daytime reception service to Larned.

farm and educational programming, etc. On balance, weighing Pratt's superior transmission service, Larned's superior reception service, the relative importance of the two communities, and the peculiar needs of the area, it is concluded that Pratt shows a slight advantage on the criterion of community need. Such an advantage is not deemed conclusive for it remains to be seen how the applicants fare on the other 307(b) criteria.

Exception No. 3. To the conclusions in Paragraph 66 in their entirety, and the failure to conclude in lieu thereof the following:

Huffman proposes to eliminate a substantial white area containing 9,076 persons, including the community of Pratt itself. He, therefore (like the Broadcast Bureau), claims that considerable weight must be added to his other showings, whether under the heading of "fairness and equity" or "efficiency." In rejoinder, the Larned applicants contend that white area service is of diminishing importance and cannot overcome the superior transmission need which they posit for Larned; however, the cases cited for this proposition, for example, Vidalia Broadcasting Company (8 Pike & Fischer R.R. 1) and Gillespie Broadcasting Company (15 Pike & Fischer R.R. 878, aff'd. by Court of Appeals sub nom Red River Broadcasting Corporation v. FCC, 19 Pike & Fischer R.R. 2028), are distinguishable on their rather unusual facts and, at best, only raise further questions. More helpful to an estimation of white area service are Nick J. Chaconas (19 Pike & Fischer R.R. 100) and Alkima Broadcasting Company (Initial Decision released September 15, 1960, aff'd. on oral argument March 31, 1961). In the first of these current cases, the Commission specifically addressed itself to the argument that small white and gray areas (containing fewer than 5,000 persons) are of little importance, and replied: (Chaconas, supra, at 100f)

" . . . the crucial distinction here . . . is the rendition of primary service to populations now inadequately served at night."

In the second case, the Commission, in the process of assigning relative priorities to transmission and reception service, stated: (Alkima, Initial Decision, p. 12)

"* * * Section 307(b) of the Act has for its primary objective the allocation of broadcast facilities so that broadcast service may be made available to every person and community, relating to the need for reception service. * * * " (Emphasis supplied)

It is concluded that Huffman's white area service must be given the respectful attention that he advocates.

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May 8, 1961 Page 4

Exception No. 4. To the failure to include in Paragraph 66

the following:

The remaining criterion to be considered -- efficiency -- must also be decided in favor of the Pratt applicant. The record shows that Huffman would bring a new daytime primary service to 33,504 more persons than either of the Larned proposals, while the number of new primary services to cities of 2,500 persons or more is 3-to-2 in Huffman's favor. Furthermore, Huffman's white area service more than justifies the loss of potential population within his normally protected nighttime contour. Militating even more decisively against the Larned proposals are their provisions for daytime-only service. Having recounted above the various inadequacies of Pratt's presently existing daytime-only radio facility, it can be seen, in view of Larned's proximity to Pratt, that the Larned proposals would likewise fall somewhat short of giving their locality adequate service in terms of the nighttime transmission needs of this Kansas area. On this criterion then, the Huffman proposal shows substantially more merit than its competitors'.

Exception No. 5. To the failure to include in Paragraph 66

the following:

After considering each of the criteria, it has been concluded that the Huffman application shows a slight advantage on the criterion of community need and much stronger preferences in terms of extent and effectiveness of service, with particular regard to the rendition of primary service to over 9,000 persons presently without nighttime reception. The Section 307(b) issue, therefore, must be decided in favor of Huffman's application for Pratt.

Exception No. 6. To the Order insofar as it proposes to

grant the application of Pier San, Inc. and to deny the application of Huffman. The Order should propose the grant of the Huffman application and the denial of the applications of Pier San, Inc. and Francis C. Morgan, Jr.

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May 8, 1961 Page 5

WHEREFORE, it is prayed that the foregoing Exceptions to the Findings of Fact and Conclusions of Law as set forth in the Initial Decision of the Hearing Examiner receive due consideration by the Commission.

Respectfully submitted,

WILMER E. HUFFMAN

By (Signed) Francis X. McDonough

Francis X. McDonough

By (Signed) Thomas S. Sullivan

Thomas S. Sullivan

His Attorneys

Francis X. McDonough
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Washington 4, D. C.

Attorneys for Wilmer E. Huffman

May 8, 1961

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Huffman, "Exceptions To Initial Decisions"
May 8, 1961 Page 6

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of May, 1961,
served a true and correct copy of the foregoing, by United States
mail, postage prepaid, upon the following:

Abe L. Stein, Esquire
Warner Building
Washington 4, D. C.
Counsel for Francis C. Morgan, Jr.

Miller & Schroeder
218 Munsey Building
Washington 4, D. C.
Counsel for Pier Sar, Inc.

Chief, Broadcast Bureau
Federal Communications Commission
Washington 25, D. C.

Scharfeld & Baron
National Press Building
Washington 4, D. C.
Counsel for the KSOX Broadcasting
Company, Inc.

(Signed) Thomas S. Sullivan

Thomas S. Sullivan

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Huffman

***"Support Of Exceptions
To Initial Decisions"***

May 8, 1961

the Communications Act of 1934, as amended, to determine in the light of that section whether the Huffman proposal for the community of Pratt, Kansas, or one of the proposals for Larned, Kansas, would better provide a fair, efficient and equitable distribution of radio service.

2. The following facts were clearly established in the record:

- (1) Pratt, Kansas, has a daytime-only local station.
- (2) Larned, Kansas, has no local station.
- (3) The Huffman application for Pratt proposes daytime and nighttime service, unlimited time.
- (4) The Larned applicants propose daytime-only service.
- (5) The Huffman proposal for Pratt will eliminate a substantial "white" area nighttime by bringing a first nighttime primary and local service to 9,076 persons in an area of 159 square miles.
- (6) Neither of the Larned applicants will eliminate a "white" or "gray" area day or, naturally, night.
- (7) Huffman's proposal for nighttime operation relies on the express exemption provided for by Rule 3.28(c)(3) inasmuch as it suffers a high population loss in its normally protected nighttime contour (42.8 percent).
- (8) The Huffman application for Pratt will bring a new daytime primary service to 33,504 more persons than either of the Larned proposals.
- (9) Huffman's proposal for Pratt would cause no interference to any existing station.
- (10) Pier San's proposal for Larned would cause no interference to any existing station; Morgan's proposal would increase interference to KSOK, Arkansas City, Kansas, from 9.8 percent to 9.83 percent of its population in the normally protected contour.

3. Prescinding from comparative considerations irrelevant to the issues between the Huffman and the Larned applicants it is urged

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that the above presents concisely stated the factors of decisional significance relating to the 307(b) issue.

4. The instant proceeding involves three mutually exclusive applications, one proposing to serve the community of Pratt, Kansas, and the other two to serve the community of Larned, Kansas. Interference considerations being negligible, the issue, as between the Huffman application for Pratt and the Pier San and Morgan applications for Larned, was essentially:

"To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, whether the proposal for Pratt, Kansas, or one of the proposals for Larned, Kansas, would better provide a fair, efficient and equitable distribution of radio service."

5. In his Initial Decision, the Hearing Examiner proposed to grant the application of Pier San, Inc., one of the Larned applicants, and to deny the applications of Francis C. Morgan, Jr., the other Larned applicant, and Wilmer E. Huffman, the Pratt applicant. Wilmer E. Huffman respectfully submits that for the reasons hereinafter set forth and contained in his Exceptions, the Initial Decision must be reversed and a grant made of his application for Pratt, Kansas.

The Initial Decision Is Based Upon Four Key
Fallacies And Is Contrary To Commission
Policy And The Public Interest

6. Four key fallacies were decisive in the Examiner's Initial Decision in favor of the Pier San application for Larned, Kansas.

7. The first was in the comparison of populations of Larned and Pratt and the conclusion drawn from that comparison. It was undisputed that Pratt has almost twice the population of Larned, and

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that substantially more churches, schools, social organizations and the other social entities of greater size were shown for Pratt. Yet in the Initial Decision it was implied that because the populations of Pratt County and Pawnee County are approximately equal, the difference in community populations is insignificant.

8. In point of fact, the relative county populations are not material. Some residents of Pawnee County are more than 25 miles from Larned and could hardly consider the latter as a local broadcast outlet. Other parts of that county might find the Great Bend station (23 miles from Larned) more convenient to use for transmitting news or announcements in view of that station's high-power and full-time service. Larned will not be a local outlet for the entire county.

9. By framing the population comparison of the applicants in terms of county populations, the Examiner minimized one of the factors tending to show a superior need at Pratt for an adequate local outlet. It is obvious that, other things being equal, a larger community has inherently more problems, more news, and more voices that beg expression over a local broadcast outlet.

10. The second fallacy in the Initial Decision lay in casting Pratt in the role of a city enjoying an adequate local broadcast outlet with the result that two of the primary factors to be weighed against one another in the 307(b) determination appeared simply: city with local outlet versus city without local outlet.

11. Pratt has a single 250 watt daytime-only station and is part of a "white" area containing in excess of 9,000 persons without nighttime service. In a farming belt where the occupational pattern

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makes nighttime listening predominant, where agricultural news and educational programming are critically needed, and where tornadoes and other turbulent weather conditions frequently arise at night and compel nighttime warnings and directions for the public safety, it cannot be said that Pratt has an adequate local outlet. The existing factors are not, as the Examiner suggests — a local outlet versus no local outlet — but rather an inadequate local outlet versus no local outlet. It also follows that Lurned will not have an adequate local outlet should a grant of the Pier San application be upheld.

12. The third fallacy in the Initial Decision resulted from an underestimation of the importance of a nighttime "white" area. Two cases were cited without comment to support the contention that "it is highly doubtful that a 'white' area, as such, is now to be given the respectful attention Huffman advocates." These cases were Vidalia Broadcasting Co., 8 Pike & Fischer R.R. 1, and Gillespie Broadcasting Co., 15 Pike & Fischer R.R. 878; 15 Pike & Fischer R.R. 882a, aff'd. by Court of Appeals sub nom. Red River Broadcasting Corp. v. FCC, 19 Pike & Fischer R.R. 2028.

13. In the first case cited by the Examiner, the Vidalia station proposed to increase power and change to daytime-only operation, leaving 4,976 persons in the town without nighttime primary service. Against this, 3,093 persons would receive a first daytime primary service and 78,000 persons, including some with only one existing primary service, would receive an additional primary service. Before formally proposing the change, the station had broadcast and the local newspaper had advertised for comments and suggestions. Not a single

complaint was received, nor was any witness before the Commission opposed, to the proposal: (Vidalia Broadcasting Co., supra, at p. 14)

"* * * Thirty-seven public witnesses were heard, representing a well-balanced cross section of the people most vitally concerned with the welfare of the communities involved and each testified wholeheartedly in favor of the proposed change . . . * * * We believe that these witnesses reflect fairly the attitude of the affected public generally. * * *"

14. The reason that everyone who testified supported the change was clearly indicated in the Commission's Decision: (Ibid.)

". . . , Vidalia residents now regularly listen at night to the programs of the major networks, as well as non-network programs, over such clear channel stations as WBT, WSM, WVL, WLN, WCKY, and others, in preference to the local station at night."

15. It is submitted that this case only supports the theory that the Commission will allow a station to cease nighttime operation with the unanimous support of a community where other services exist in the face of a countervailing proposal to bring new daytime primary service to approximately 81,000 persons, including several thousand within existing "white" and "gray" areas.

16. The second case cited by the Examiner to negate the importance of "white" area service was Gillespie Broadcasting Company, supra. In this case the Court of Appeals affirmed a Commission Decision (reversing the Examiner's Initial Decision), which allowed Station KNAF to change to daytime-only operation and to increase power. Under that station's proposal, 50,000 persons would receive a new primary service while 4,000 persons in the Fredericksburg, Texas, area would lose their only nighttime primary service.

17. The Court of Appeals did not pretend to weigh the loss of the community's only nighttime primary service and the Commission

claimed to have disposed of that issue even prior to sending a 309(b) letter to KNAF! The Commission stated: (Gillespie Broadcasting Co., supra, at p. 880)

"We concluded, prior to designating the Gillespie application for hearing, that the fact that a grant of the application would mean a loss of nighttime service to Fredericksburg was not a possible basis for denial of the application and, therefore, did not make this loss a matter of inquiry in the 309(b) letter sent to the applicant or the subject of a hearing issue. No party has requested that the issues be enlarged to determine whether a grant of the application would be in the public interest because part of Station KNAF's existing service area and population would no longer receive service from its operation. We see no justification for enlarging the issues to permit such an inquiry at this stage of the proceeding."

18. It is respectfully submitted that the Commission had, in the light of the circumstances of that case, disposed of the issue prior to hearing. Commissioner Lee, dissenting to the Memorandum Opinion and Order (15 Pike & Fischer R.R. 881) denying a petition for stay of the effective date of the grant, said: (15 Pike & Fischer R.R. 882a)

"Petitioner has established that the public in the Fredericksburg area will suffer irreparable injury through the loss of its only primary nighttime service . . . * * * Finally, petitioner has shown, to my satisfaction at least, that there is a reasonable likelihood of success on the merits. * * *"

19. Turning to more definite examples of the Commission's view regarding "white" area service, two cases reflect Commission interpretation and policy.

20. In Mick J. Chaconas (19 Pike & Fischer R.R. 100) three applicants proposed a first local station at Collage Park (population 11,170), Laurel (population 4,482) and Gaithersburg (population 1,755),

all in Maryland. The College Park and Laurel applicants would serve 17 times and 11 times, respectively, the populations served by the Gaithersburg applicant daytime, and 13 times and 2 times, respectively, the population served by the Gaithersburg applicant at night. Furthermore, Gaithersburg is located a scant four miles from Rockville, the county seat, where Station WINX sometimes originates programming designed especially for Gaithersburg.

21. Against the showing of the other applicants with many times his community's populations, with vastly greater service areas day and night, the Gaithersburg applicant (Chaconas) appeared to be subordinated to the number three position. Were community need for a first local outlet decisive, Chaconas could only pit his "village" of less than 2,000 people, almost a suburb of the county seat, against the "metropolis" (by comparison) of College Park, home of the University of Maryland. However, unlike the other two applicants, Chaconas offered a first nighttime service to 45 persons and a second nighttime service to 4,700 persons. With the first local outlet question obviously, on the facts of the case, playing a negligible role, the Commission stated: (Chaconas, supra, at 100e)

". . . it is unquestionable that the Chaconas proposal would, particularly during its nighttime operation, diminish the shortage of reception service in a highly underserved area. It is our conclusion, therefore, that a grant of the Chaconas application would be more fair and equitable, for it would serve the twofold purpose of establishing a first local transmission service to Gaithersburg while providing nighttime service to populations now inadequately served." (Emphasis supplied)

22. More emphatically, the Commission answered the Laurel applicant's contention that "decisive emphasis can not be placed on

the 'white' and 'grey' areas existing within Chaconas' proposed service area because areas in the magnitude noted are of comparatively little importance, particularly when only nighttime service is involved and where multiple services daytime are available to those areas."

(Chaconas, supra, at 100f) The response was: (Ibid.)

" . . . the crucial distinction here favoring the Chaconas proposal is the rendition of primary service to populations now inadequately served at night." ^{2/}
(Emphasis supplied)

23. Turning to Alkima Broadcasting Company (Initial Decision released September 15, 1960, aff'd. on oral argument March 31, 1961), we again find mutually exclusive applications for first transmission facilities, two for West Chester, Pennsylvania, and the other for Newark, Delaware. Here, the Newark applicant labored under a community population disadvantage of almost 2-1/2 "needy" persons to one. Obviously, on the local outlet criterion, West Chester deserved the grant. However, the Newark applicant would bring a first primary service to 3,350 persons: (Initial Decision, p. 12)

"Section 307(b) of the Communications Act contemplates the allocation of broadcast facilities on the basis of need for transmission service as well as reception service. * * *

"While it would seem to be determinative under Section 307(b) that a greater need exists for West Chester than Newark for the transmission facilities sought, there is another factor relative to the second facet of 307(b) which must be weighed which appears to counterbalance and override a preference for West Chester. Section 307(b) of the Act has for its primary objective the allocation of broadcast

2/ It might be reminded at this point that Huffman would serve a "white" area of 9,076 persons and, unlike Chaconas, has great advantages in terms of community and service area populations.

facilities so that broadcast service may be made available to every person and community, relating to the need for reception service. * * * Thus the proposal of Handloff [for Newark] would . . . provide a first primary reception service to 3,350 people living in a 'white' area. It is the latter factor which would give more cogent implementation of the objectives of Section 307(b) and is decisive in this proceeding." (Emphasis supplied)

24. It appears that Huffman's "respectful attention" to "white" area service is not misdirected in view of the fact that such service is the "primary objective" of Section 307(b) and is "decisive" in a contest with transmission service. Applied to the Pratt and Larned situation, the same reasoning would dictate that, even should Larned be found to have a marginally greater transmission need, Huffman's "white" area service and greater service area will carry the burden of the overall 307(b) question.

25. The final fallacy in the Initial Decision resulted in the complete failure of the Examiner to weigh Huffman's far more efficient use of the frequency at Pratt. Not only does Huffman's proposal encompass a daytime population greater by 33,504 persons than either Larned proposal but Huffman would provide a fulltime service at Pratt in contrast to the relatively inefficient daytime-only proposals for Larned.

26. Bare consideration of this factor was ruled out by the Examiner's interpretation of the 307(b) criteria, "fair, efficient and equitable," to mean that the efficiencies of the competing proposals are only to merit attention if no proposal shows the slightest advantage in fairness and equity. For example, should an applicant propose to administer to substantial needs with efficient employment of the frequency, he must yet bow to another applicant who shows the most

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minute advantage in terms of fairness and equity, despite the latter's utter default on the efficiency criterion! Having posited a greater transmission need in Larned, the Examiner could thus feel free to dispose of the entire comparative question between Pratt and Larned in three paragraphs!

27. We respectfully suggest that this is not Commission policy. There is no formula to interpret the 307(b) mandate that precludes weighing all three criteria to determine which application is in the public interest. On several occasions, the Commission has stated: (Hick J. Chaconas, 19 Pike & Fischer R.R. 100e)

"Important and desirable as it is for every community to have a transmission facility, this consideration is not an absolute one Thus, it has been said on a number of occasions that while the Commission must and does give consideration to the three factors of 'fair, efficient and equitable' distribution of facilities, no requirement exists that equal weight be given to each criterion without regard to the facts of a particular case considered in the light of the mandate of Section 307(b) that the Commission endeavor to provide the most widespread and effective broadcast service possible." (Emphasis supplied)

28. Huffman asks only that all three factors be weighed: If a literal interpretation of the statutory mandate is required, there is authority to support a proposition directly contrary to that of the Examiner.^{3/}

^{3/} "As the Commission construes Section 307(b), it is under a duty, so far as possible, to provide at least one primary service to all the people of this country. Pursuant thereto, the Commission, in passing upon competing applications, has consistently favored those applications which propose to render primary service to listeners not receiving any such service from any other station." Scripps-Howard Radio, Inc., 3 Pike & Fischer R.R. 1796, 1802.

Conclusions

29. It is respectfully suggested that another look at the ultimate results for the public under the competing proposals, in light of what has been said, will disclose the correct verdict.

Results Under Pratt Proposal

(1) Pratt (7,523) will have, for the first time, an adequate local outlet, including nighttime service.

(2) Larned (4,447) will have no local outlet, but will receive an additional daytime primary service to those it already has.

(3) 9,076 persons, including the entire City of Pratt, will receive their first nighttime reception service.

(4) 160,857 persons daytime and 9,204 at night will receive a primary service, including three cities with populations above 2,500. ^{4/}

Results Under Larned Proposals

(1) Pratt will continue to have an inadequate local outlet, and no nighttime service.

(2) Larned will have an inadequate local outlet.

(3) No one will receive a first reception service.

(4) 127,353 persons will receive an additional primary service, including two cities with populations above 2,500, but 33,504 persons will be denied an additional primary service.

^{4/} One of the three -- Dodge City, Kansas (population 11,262) -- presently has only one daytime primary service. However, the Commission granted an application for a second station at Dodge City on November 16, 1960, after the close of the record. The station is not yet licensed.

30. Huffman's application for Pratt most completely and efficiently rectifies existing inequities in both reception and transmission service for this Kansas area. It is requested, therefore, that the Examiner's recommendations be reversed and a grant be made to Wilmer E. Huffman for a new standard station at Pratt, Kansas.

Respectfully submitted,

WILMER E. HUFFMAN

By (Signed) Francis X. McDonough

Francis X. McDonough

By (Signed) Thomas S. Sullivan

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Attorneys for Wilmer E. Huffman

May 8, 1961

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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of May, 1961,
served a true and correct copy of the foregoing, by United States
mail, postage prepaid, upon the following:

Abe L. Stein, Esquire
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Counsel for the KSOX Broadcasting
Company, Inc.

(Signed) Thomas S. Sullivan

Thomas S. Sullivan

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Morgan

***"Exceptions To
Initial Decisions"***

May 8, 1961

May 8, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

WILMER E. HUFFMAN
Pratt, Kansas

DOCKET NO. 13469
File No. BP-12021

FRANCIS C. MORGAN, JR.
Larned, Kansas

DOCKET NO. 13470
File No. BP-12749

PIER SAN, INC.
Larned, Kansas

DOCKET NO. 13471
File No. BP-12750

For Construction Permits

EXCEPTIONS OF MORGAN TO EXAMINER'S REPORT
AND REQUEST FOR ORAL ARGUMENT

Francis C. Morgan, Jr. (Larned), one of the applicants in this proceeding, submits herewith his exceptions* to the Initial Decision released March 29, 1961 (FCC 61D-36), and requests oral argument before the full Commission pursuant to Sec. 1.154 of the Rules.

Exceptions

1. (p. 4, par. 5; p. 25, footnote 5).** To the failure to point out that the Commission has been designating nighttime applications for hearing because of possible violation of Sec. 3.24(b) of the Rules despite compliance with Sec. 3.28(c). The Pratt applicant shows a nighttime loss of 43% and 84% for population and area respectively.
2. (p. 5, par. 7). To the failure to find that Concordia, Kansas, is 120 miles from Larned (Huffman Ex. 11, p. 12).
3. (p. 5, par. 7). To the failure to state that the Larned applicants will provide a signal over 2 mv/m (near primary service) to Great Bend and Hoisington, Kansas (Morgan Ex. 1, p. 4).
4. (pp. 4,5, par. 5-7). To the failure to find that the fact that the Pratt applicant serves more people daytime is not a critical factor, because there are numerous other services outside the two cities, the soil conductivity is high and that Sec. 324 of the Communications Act of 1934 sets forth a policy looking toward minimum use of power to provide the necessary service (Morgan Ex. 1, pp. 6-10).

*Time for filing exceptions extended to May 8, 1961.

**References in parentheses are to page and paragraph of the Initial Decision of the Examiner.

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5. (p. 5, par. 9). The Examiner should also have included Morgan's extracurricular activities at high school including basketball, track, glee club, choir, selection as Junior Rotarian. During weekends and the other times he worked at the Kansas State Agricultural Experiment Farm, Swisher Implement Company and the Pratt Manufacturing Company (Morgan, Ex. 3, p. 1).

6. (p. 6, footnote 2). The Examiner should have found that although Morgan had not read certain documents released by the Commission, the diverse contacts made by him at Larned in connection with his proposed programs showed that he made a detailed effort to meet the local programming needs. See Morgan Ex. 4 for list of contacts. His study was similar to that set forth in Docket 13961, Notice of Proposed Rule Making, which is related to the Report and Statement of Ruling on Programming Inquiry released July 29, 1960. The Examiner should have concluded that although Morgan has a technical background in radio, he is also familiar with various aspects of programming in a small town station. See also p. 6, par. 11. His background is practical rather than academic (tr. 145).

7. (p. 6, par. 14). The Examiner should have found that Mr. Pyle, who prepared the Pier San application and exhibits, had never met either Webb Pierce, president, or Jim Denny, treasurer, and obtained information concerning them by calling them on the phone (tr. 157, 177, 180).

8. (p. 13-15, par. 31-36; p. 30, par. 78, 79; p. 32, par 83). The Examiner should have found that since Bozeman admitted he was well informed on programming at Wichita and knew the sources of program material there (tr. 217-18), his failure to program KSIR as represented in his application requires a finding that no reliance can be placed on his representations; that although the 30-minute program, KU Classroom, prepared by the University of Kansas, is considered an excellent one with respect to Larned, it was not carried at KSIR because the Wichita classrooms are too crowded (tr. 233).

9. (p. 13, par. 31). The Examiner should have found that plans for securing daily announcements from Wichita schools by persons supposedly familiar with program sources constitute an admission that the present

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programming of KSIR in the educational field is deficient. Some other defects in the KSIR programs are set forth at page 30, par. 78.

10. (p. 16, par. 38). The Examiner should have found that Morgan made very few contacts by phone, Morgan Ex. 4; that Morgan met with some persons several times, presumably to have further discussions of proposed programs; and that the eight contacts made by Fyle on behalf of Pier San were all made on the same day (Pier San, Ex. 6).

11. (p. 16, par. 38). To the failure to find that Morgan's proposed programs were based on the large number of discussions he had with local residents between April 1959 and August 1960 (Morgan, Ex. 4).

12. (p. 16, par. 39; p. 20, par. 50). To the failure to find that Morgan would take advantage of Sec. 3.87 of the Rules and operate prior to local sunrise if possible and that the Pier San schedule is based on operations prior to sunrise (tr. 84, 89, 92).

13. (p. 17, par. 40; p. 33, par. 86). The Examiner's conclusion that Morgan proposes music of simpler categories is inconsistent with the finding on page 19, par. 46, to the effect that "various programs of good music from abroad. . . will be carried some days." See Morgan Ex. 6, p. 3. The programs would be obtained from the Broadcasting Foundation of America. See also p. 19, par 46; p. 33, par. 86. Based on the source which was not questioned, these would be orchestras such as those at London, Paris, Oslo, Vienna, etc.

14. (p. 27, par. 68-9). The Examiner should have found that Morgan's life time residence in small towns near Larned provide him with a preference on local residence; the factor of local residence is considered important because it provides one with intimate knowledge of the area and Morgan has this because he spent his entire life (except while in military service or attending school) in the Larned-Pratt-Hays-Great Bend area (Morgan, Ex. 3). Even assuming future residence is the only factor, he should have found that Morgan is to be preferred.

15. (p. 27, par. 70). The Examiner should have found that Morgan, despite his youth, shows a far superior record of civic activities than do the Pier San participants (Morgan, Ex. 3; p. 5, par 9 ff). As the Examiner

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pointed out, only Pyle's (20% interest) activities merit a comparison with Morgan's, and the latter has 100% interest. Since Morgan's activities are closely related to those of a small town radio operator, he should be preferred even over Pyle, most of whose activities have been in a large city whose problems are unlike those of a small town such as Larned.

16. (p. 28, par. 71, 72). The diversification of business interests of Pier San in broadcasting, entertaining, music publishing and recording should be considered a handicap rather than a help for Pier San, because these activities run counter to the Commission's policy of diversification of ownership of radio stations. The record playing-payola problem and its temptations are too fresh in the minds of everyone to be considered as a favorable business interest. It should also be borne in mind that Pyle's outside business interests are not at Larned and any time spent on these interests prevent him from devoting all of his time to the proposed station.

17. (p. 28, par 73). The Examiner awarded Pier San a substantial preference in the field of broadcast experience because of the experience of Pyle and Bozeman. He should have found that their experience has been in large towns where management delegates duties to subordinates; on the other hand, Morgan despite his youth has been exposed to the broadcast field most of his life; he has worked at all levels of a small town station, so his lack of years of experience is more than offset by the type of experience, including technical, civic activities related to the station, sales and management.

18. (p. 29, par. 74 ff). The Examiner should have found that KOOO, Omaha, was recently acquired by the Pier San group and therefore had no past record. The two Nashville residents who own three stations in Georgia propose to have a very limited contact with the Larned station; that leaves only KSIR to be considered. The Examiner should have found that in spite of laudatory (self-serving) statements made concerning Great Works in Music, the program has no unusual features. It is merely a recorded commercial program carried Sunday afternoon at a loss of \$10 per week due to the fact that 2,000 programs are distributed monthly--and

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possibly due to the fact that one cannot sell many commercial spots on Sunday afternoon. There is no evidence that the program is unique or that other Wichita stations do not carry comparable programs. The program appears to be carried so that the licensee will be able to show that it carries an educational program--it proposed 6.82% in the application.

18. (p. 29, par. 76). The Examiner erred in finding that Great Works in Music evinces "a concern for tastes of the community not satisfied by ordinary music offerings." But the record contains no evidence of tastes of the community or ordinary music offerings of the other stations at Wichita.

19. (p. 30, par. 77). The Examiner should have found that if KSIR desired to assume its license^{responsibility} and conform with representations in the application, KSIR should have a bona fide educational program which if not available locally can be obtained from other sources such as Kansas University, National Association of Educational Broadcasters, etc. (See Morgan, Ex. 5, p. 4.) KSIR should have endeavored to present a bona fide discussion program or offer some justification instead of contending that Man on the Street is a discussion program. Finally, the Examiner should have found that the proposals of Pier San for educational, talk and discussion programs at Larned (Pier San, Ex. 5) indicate that Messrs. Pyle, Bozeman and Early are familiar with the contents of such programs, sources, etc., but have not chosen to carry them on KSIR. The Examiner should have found on the basis of this factor alone that KSIR's record is one of promises and lack of performance without any justification. As the Examiner found at page 11, par. 80, he aimed to judge "not the quality of the programs, as such, but the qualifications of the applicants," but his conclusions do not follow that policy.

20. (p. 30, par. 79). Instead of finding that a one-day campaign by Pyle consisting of eight contacts represents an earnest effort to sound out community sentiment, the Examiner should have found that the Pier San program proposals were "paper ones" made by non-residents who made no real study of the needs of the community.

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21. (p. 31, par 81). The Examiner erred in finding that Morgan had uneducated musical tastes. No question was raised concerning his musical education and he merely referred to his participation in choir and Boys Glee Club at Hays High School in his biography (Morgan, Ex. 3, p. 1). The Examiner should have found that his program proposal was based on the local contacts (tr. 144) and that he included "good music" programs. The Examiner erred in concluding that Morgan's proposal for "good music" was a vague promise and like the usual Morgan fare, and at the same time found that the same general statements of Pier San (Pier San, Ex. 5) are to be considered valid and a basis for preference. If there is an effort to raise the cultural level at Larned, both applicants have made an effort.

22. (p. 31, par. 82). The Examiner erred in finding that Morgan's farm program is awkwardly timed. He has resided in the area and discussed the program with local people (Morgan, Ex. 3, 4). In any event, he should have found timing is a matter for managerial discretion and that Pyle of Pier San was not familiar with the habits of farmers in the Larned area (tr. 159).

23. (p. 32, par. 83). The Examiner erred in finding that Morgan's proposed educational programs were only a hope. He should have found that Morgan made local contacts for such programs and had a definite plan to supplement these if necessary by educational programs from other named sources (Morgan, Ex. 4, pp. 3, 4; Ex. 5, p. 1). He should have found that KSIR did not carry KU Classroom, because the classrooms at Wichita were crowded--at least it was so claimed (tr. 233), and that Pier San's proposal for such programs at Larned are a "paper promise" like KSIR's application--without any intent to perform.

24. (p. 32, par. 85). The Examiner erred in finding that Morgan's discussion program lacks details of implementation; he should have found that the program proposal was based on numerous discussions with local residents (Morgan, Ex. 4); and that in the event there are insufficient participants, he would meet the contingency by using other sources (Morgan, Ex. 6, p. 3). The Examiner should have found that the failure of KSIR to

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carry out its promise to carry discussion programs is evidence that Pier San will do likewise.

25. (p. 33, par 86). The Examiner should have found that the material proposed in Morgan's talk programs more than offset any possible preference to Pier San in the entertainment field (p. 31, par 81); and that if cultural quality of programs is the proper criteria, then Morgan is superior in this field.

26. (p. 33, par. 87). The Examiner failed to find that while Pier San promises to carry a different church every Sunday and rotate them (p. 23, par. 62), KSIR did not follow its representations in that respect (p. 14, par. 33).

27. (p. 34, par. 91). The Examiner should have found that while Morgan did not read some Commission publications his preparation showed that he had followed the recommended procedure. See also Exception 6, p. 2, supra. The Examiner should have found Morgan superior in all respects.

28. (p. 34, par. 91; p. 35, par. 94). The Examiner should have found that although Pier San's programming may appear to be better on paper the experience of promise vs. performance at KSIR proves that the Commission cannot rely on such promises.

28. (p. 34, par. 92 ff; p. 35, par. 95). The Examiner erred in finding that despite the ownership of other media of mass communications the grant should be made to Pier San; and that his finding is consistent with prevailing Commission policy. He should have made the award to Morgan.

Applicant requests oral argument before the full Commission.

Respectfully submitted,

FRANCIS C. MORGAN, JR.

May 8, 1961
Warner Building
Washington, D. C.

By A. L. Stein, His attorney

CERTIFICATE OF SERVICE

I certify that I have, this eighth day of May, served by hand delivery or by United States mail, postage prepaid, a copy of the foregoing to the following:

Robert Rawson
Federal Communications Commission
Washington, D. C.

Miller & Schroeder
Dow, Lohnes & Albertson
Munsey Building
Washington, D. C.

A. L. Stein

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May 8, 1961 Page 7

Pier San

***"Statement Of Support
To Decision"***

May 8, 1961

May 8, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)	
)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
)	
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
)	
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
)	
For Construction Permits)	

STATEMENT IN SUPPORT OF INITIAL DECISION
AND CERTAIN EXCEPTIONS THERETO

Comes now PIER SAN, INC., by its attorneys, and pursuant to Section 1.154 of the Commission's Rules files this (1) Statement In Support of the Initial Decision of Hearing Examiner Herbert Sharfman of March 29, 1961; (2) Exceptions to certain findings of fact and conclusions of the Initial Decision, all of which exceptions would, if granted, reinforce the Examiner's correct ultimate conclusion and decision to grant the application of Pier San; and (3) Notice of intention to participate in oral argument before the Commission in the event one is held on the Commission's own motion or upon request of one of the other parties in the case.

I PRELIMINARY STATEMENT

1. The Examiner's Initial Decision proposes a grant of the Pier San application and the denial of the mutually exclusive Huffman and Morgan applications. Pier San would not file the within pleading but would leave the Initial Decision to become effective pursuant to Rule 1.153 except for the fact that the other parties have indicated that one or more of them may file exceptions. Since the Initial Decision will

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be reviewed in light of the other parties' exceptions, Pier San believes it should present at the same time certain exceptions, none of which would change the ultimate conclusion of the Examiner but would give additional force thereto. If no other party files exceptions, however, or if such exceptions are filed and subsequently withdrawn, then Pier San would withdraw these exceptions so that the Initial Decision might immediately become effective and the construction permit for the first station in Larned, Kansas, issued to Pier San.

II STATEMENT IN SUPPORT OF INITIAL DECISION

2. The Initial Decision of Examiner Sharfman is in both form and content one which the Commission should approve, whether following or without further review, confident that the public interest, convenience and necessity would be served by the decision becoming effective at the earliest date possible. The conclusions are supported by appropriate findings of fact and the latter are based upon evidence of record.^{1/} The ultimate conclusion, viz., to grant the application of Pier San for a first station in Larned, Kansas, is consonant with and in implementation of the criteria of the Communications Act, the Commission's Rules and Regulations, and the policies established by the Commission under the statute.

3. The Examiner correctly concluded that the evidence of record demonstrated that pursuant to Section 307(b) of the Act Larned is entitled to the single frequency allocation possible in this case for the establishment and operation of a first, local station in preference to Pratt, Kansas, for a second station. Further, the Examiner correctly concluded that as

^{1/} Except as may be noted herein. However, the omitted findings or conclusions or the changes suggested by Pier San, are ones which reinforce the ultimate conclusion rather than change it.

between Pier San and Morgan, the two applicants for the frequency at Larned, the proposal of Pier San must be preferred.

4. The Proposed Findings of Fact and Conclusions of Law, together with the Memorandum Brief in support thereof, filed by Pier San on February 1, 1961, and the Reply Findings and supplementary brief subsequently filed, all demonstrate the ultimate conclusion which must be reached in this case, viz., that a grant of the Pier San application is required in the public interest. Those pleadings and documents could be repeated here in support of the Examiner's Initial Decision. However, to avoid an undue encumbrance of the record such repetition will not be made but rather the mentioned earlier filings are incorporated by reference as part of the within supporting statement. The exceptions which follow preserve Pier San's position on certain findings and conclusions not made by the Examiner which, when made, give further reason and basis for granting the contested permit to applicant Pier San and denying the proposals of Huffman and Morgan.

III EXCEPTIONS OF PIER SAN

A. Exceptions To Findings

1. Exception is taken to the Examiner's failure to find, in Finding 12, the following: Morgan testified that a family conflict gave rise to the decision to leave his father's station in July of 1960. When questioned about the conflict, he testified that in 1957 his mother passed away and his father remarried and thereafter there was disagreement among the family members (T.114). However, it was not until after the captioned proceeding was designated for hearing that, according to Morgan's view, the disagreement was such that he decided to leave KWSK. (Morgan Ex. 2, p. 3; T. 97).

2. Exception is taken to the failure of the Examiner to find, in Finding 13, that Morgan did not decide to file for Larned until after he

learned of the filing of the Huffman application for Pratt, the city where Morgan's father owns the only existing station and where Morgan was then employed and continued to be employed until after the captioned applications were designated for hearing. (T. 116-17).

3. Exception is taken to Footnote 3 (p. 7 of Initial Decision) and to the failure of the Examiner to make the findings shown by the record concerning the preparation and filing of the Morgan application. The Examiner should have found: Applicant Morgan's father, Francis C. Morgan, Sr., known as "Clem" Morgan, has owned and operated the only station in Pratt, Kansas, since 1952. (T. 112, 119, 123; Morgan Ex. 1). In May of 1958 an application for a new station in Pratt was filed by Wilmer E. Huffman, that application being one of those consolidated in this proceeding. (T. 114-5). Some six months later the captioned Morgan application for Larned was filed, specifying the same frequency as that sought by Huffman at Pratt. In portions of the application the applicant's name was shown as "Francis C. Morgan, Jr.", but the engineering sections and material stated the applicant to be "Clem Morgan". (Morgan Application, BP-12749; T. 119-122). In Sections V-A and V-G the applicant's name is "Clem Morgan"; the covering sheet on the engineering exhibit, prepared by the engineer, stated that the engineer was engaged by Clem Morgan to prepare the material, but before filing, the name "Francis C. Morgan, Jr." was "Scotch taped" over the original. (T. 120-1). Exhibits E-3, E-4, E-5, E-6, E-9, and E-10 of the application as originally filed designate Clem Morgan as the applicant. (T. 121-2).

4. Exception is taken to the failure of the Examiner to find that when Morgan, Jr., was questioned about the fact that his father's name appeared as the applicant in certain portions of the application, the former admitted that he did not have any communication with the engineer

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May 8, 1961 Page 4

until after the application was filed with the Commission on January 6, 1959 (T. 118), and the first contact followed the receipt of a bill sent thereafter. (T. 117, 135). All the discussions and communications prior to January 9, 1959, were between his father and the engineer. (T. 118). Although Morgan, Jr. executed Page 2 of the application, he apparently did not have the complete application before him at the time, for he stated that he was not aware of the fact that the engineering sections and exhibits listed his father, Clem Morgan, as the applicant until he (Morgan, Jr.) received his copy of the application after it was filed. (T. 124). Morgan testified that upon discovering the error he discussed the matter with his attorney, but no amendment was filed to specifically correct the name of the applicant in the engineering sections and exhibits. (T. 124). However, when a general engineering amendment was filed in May of 1959, the new and substitute material listed the applicant as Francis C. Morgan, Jr. (T. 122).

5. Exception is taken to certain phrases used by the Examiner in Finding 31 concerning the educational programs carried by KSIR. The excepted-to phrases are "with little documentation", "material not expressly meeting the Commission's definition (of educational program)" and "no information was vouchsafed", because the record shows that the additional educational programs and program activities referred to were developed on cross-examination and the witness was simply answering the interrogator's questions. Beyond the response to the question, no documentation was requested or required. (T. 167, 222, 257-9, 262).

6. Exception is taken to the statement in Finding 32 that the program "Great Works In Music" is a recorded program without the further finding that significant portions of the program are live. "Great Works In Music" utilizes recorded classical or symphonic music with live

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commentary of Mr. Bart or his guests. (T. 248, 250). The commentary includes an explanation and critical evaluation of the music played, and material concerning the composer or artist. (T. 248). On some programs school instructors appear, often with their pupils, to discuss the music and the composer being featured that week. The opportunities for such appearances are rotated among the schools, on a weighted basis, the University being scheduled with greater frequency than the lesser grade schools. (T. 247-50). Additionally, the conductor of the Wichita Symphony Orchestra will appear from time to time to explain that orchestra's works which are played or scheduled for later programs. (T. 169, 222).

7. Exception is taken to the failure of the Examiner to find, in Finding 33, that the "Man On The Street" program is extended in time, beyond its scheduled fifteen-minute period daily, when the subject of discussion warrants it. (T. 231, 278).

8. Exception is taken to the failure of the Examiner to find, in Finding 33, that the "Man On The Street" format is utilized rather than a studio origination because from experience KSIR found that the participants in the discussion more readily appear with the new format. (T. 271). The Examiner's use of quotation marks for the word "experts" is not understood, for the record shows that invited participants in the discussion have included city officials. (T. 272).

9. Exception is taken to the failure of the Examiner to note, in Finding 37, that the KSIR 0.5 mv/m contour is the normally protected one, but that on the basis of official notice of the Commission's files of KSIR it appears that the station is subject to interference in the direction of Larned. The interference-free contour of KSIR would thus be further from Larned than the normally protected 0.5 mv/m and the actual service overlap would be even less than the small theoretical overlap. (KSIR license files; BP-11186).

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10. Exception is taken to the last sentence in Finding 43, as it recites evidence which should not have been admitted. (T. 80-83). Exception to the Examiner's ruling overruling Pier San's objection (T. 80-83) is preserved.

B. Exceptions To Conclusions

11. Exception is taken to the failure of the Examiner to conclude, following Conclusion 66, as follows: With respect to Morgan, the evidence developed on the record concerning the preparation and filing of his (or his father's, quaere) application for Larned indicates that the initial qualification determination must be reconsidered. From Morgan's own testimony it appears that the engineer who prepared the engineering portion of the application filed on January 6, 1959, had not been engaged by him but by his father. Similarly, the attorney to whom the engineer transmitted the material for filing with the Commission had been engaged by the applicant's father. Morgan's claim that this merely means that the engineering and legal counsel had been engaged by his father on his (Morgan's) behalf cannot be accepted without some reservations in light of the further evidence which indicates that Morgan had no contact with the engineer until some time after the application was filed. On cross-examination, Morgan admitted that the first time he ever saw the engineering material (Sections V-A, V-G and exhibits) was some days after it was filed with the Commission on January 6, 1959. How much time elapsed is not definitely fixed, but a minimum of four days was involved, as indicated by the evidence which shows that the application was filed on January 6 and the first date Morgan saw the engineering was after the receipt of the communication from the engineer bearing date of January 9. Had the Commission been aware that the application was improperly executed, it would have been returned, unworthy of consideration. Beyond that fact, however,

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it is doubtful that the Commission would have found Morgan "otherwise qualified" had it been aware of the circumstances surrounding the filing of the captioned Morgan application, whether or not a subsequent re-execution or amendment removed the improper initial execution.

12. Exception is taken to the failure of the Examiner to conclude that Morgan's explanation that his father had engaged the engineer for him cannot be reconciled with the fact that the portions of the application and exhibits prepared by the engineer listed the father's name as applicant. Morgan did not produce the engineer as a witness at the hearing, however, and Morgan's version stands unsupported. Morgan did not state who "scotch taped" "Francis C. Morgan, Jr." over the name of Clem Morgan in one place in the engineering exhibit before it was filed with the Commission, nor does the hearing record show who physically filed the application and material with the Commission on January 6, 1959, except that it wasn't Morgan. When it is remembered that Morgan was working for his father, who owned and operated the only station at Pratt; that an application for a new station there which would compete with KWSK was filed seeking 1290 kc; and that the Morgan application for the same frequency at Larned precluded a grant of the Pratt application -- at least without a hearing -- the flaws in Morgan's explanation of the singular circumstances surrounding the filing of the application take on additional significance. In this light, too, Morgan's failure to produce supporting witnesses or evidence for his version must be considered. These matters transcend the comparative evaluation, although they must also be considered thereunder. On the basis of the record such conclusions can be no less than that serious questions remain as to whether the real party in interest was indicated in the Morgan application when filed with the Commission and whether the applicant is in fact otherwise qualified.

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13. Exception is taken to Paragraph 71 insofar as it suggests that Morgan's showing on quantitative integration merits his a preference over Pier San in the comparative criteria. The Examiner should have concluded that because of the qualitative superiority, mentioned in Paragraph 71, Pier San merits a preference.

14. Exception is taken to the failure of the Examiner to include in Paragraph 75 the statement that in addition to the logs of Stations WJAT and WBRO, the individuals familiar with the operations of those stations were to have been made available for examination, but their presence was waived. (T. 210-A). Mr. Bozeman, who testified, was not examined about KOOO. The Examiner should have concluded as proposed by Pier San Conclusion 145 (referred to in Paragraph 75 by the Examiner).

15. Exception is taken to the statement in Paragraph 76 that "Perhaps Pier San can be accused of trying to exaggerate the significance of Great Works In Music to divert attention from its inability to itemize and describe particularly other KSIR 'educational' programs", because the statement is not called for. See Exception 8, supra.

16. Exception is taken to the implication in Paragraph 77(a) that there is a "problematical loss of dignity in conducting the program (Man In The Street) outdoors rather than in a studio", because such suggestion is not supported by the record. The change from studio origination was made in order to better effectuate the program and meet the convenience of the participants, and no loss of dignity is involved. (T. 271-2).

17. Exception is taken to Paragraph 78 insofar as it suggests improvements in KSIR's programming, because the Examiner's suggestions are neither based on the record nor more than generalities.

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May 8, 1961 Page 9

18. Exception is taken to Paragraph 79 for the failure of the Examiner to base the conclusion on the record. Why the Examiner uses quotation marks around the word "encouraged" cannot be discerned. The Examiner should have concluded as follows: The steps taken by Pier San and by Morgan in the preparation of their respective program proposals have been described in the Findings. More adequate contacts with local civic, religious, educational and agricultural organizations and representatives were made by Pier San than by Morgan to determine the program needs of the area. Moreover, the record shows that Mr. Bozeman, of Pier San, was invited by responsible individuals in Larned to construct and operate a station there, the invitation being extended on the basis of Mr. Bozeman's reputation and known experience in broadcasting and entertaining. (T. 239-40). On the other hand, although Morgan claimed that he prepared the programming proposal himself, the circumstances surrounding the decision to file for Larned and the filing of the application therefor with the Commission leave much to be desired by way of indicating that the Larned proposal by Morgan represents any considered judgment of the needs of the community. Pier San is entitled to a preference on the factor of preparation of program proposals.

19. Exception is taken to the failure of the Examiner to conclude, in Paragraph 82, that Pier San merits a preference with respect to its proposal for agricultural programs in view of the deficiency, noted by the Examiner, in Morgan's proposal. The Examiner should have concluded that even if the specific deficiency of Morgan with respect to his agricultural programming is removed it cannot be concluded that future programming in such area would not contain similar or related elements of lack of planning and consideration.

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20. Exception is taken to Conclusion 83 as not warranted by the record. Concerning educational programming, the Examiner should have concluded that Pier San's proposal is the better one and there is nothing in the record which suggests that it will not be implemented. The Examiner should have stated that Morgan's "suspicions that KU Classroom is only a comparative case bait" are without record support and, in any event, that Morgan did not attempt to develop the question at the hearing although he had every opportunity.

21. Exception is taken to the statement in Paragraph 85 that Pier San has sacrificed the opportunity to furnish a dignified forum for Larned to supposed audience appeal, as the statement is without any foundation. The Examiner concedes that Pier San's discussion programming proposal is realistically adjusted to the area's capacities, and he concludes that Morgan's proposal lacks details of implementation. He should have made the logical conclusion that Pier San merits a preference in this area of consideration.

22. Exception is taken to Paragraph 86 insofar as it fails to note a preference for Pier San beyond entertainment programs. The Examiner should have concluded that in addition to the mentioned preference Pier San merits one for educational, agricultural and discussion programs.

C. Exceptions To Rulings

23. Exception is taken to ruling of Examiner overruling Pier San objection and admitting evidence constituting a variance in Morgan's proposal. (T. 80-83).

24. Exception is taken to ruling of Examiner overruling objection of Pier San and admitting incompetent evidence. (T. 78-79).

IV NOTICE OF INTENTION TO PARTICIPATE
IN ORAL ARGUMENT

Pier San, pursuant to Section 1.15^b of the Commission's Rules, hereby gives notice of its intention to appear and participate in any oral argument which may be held before the Commission. However, if the other parties to this proceeding do not file exceptions or request oral argument, then the Initial Decision should become final and effective without further proceedings and the grant of the permit proposed by the Initial Decision should forthwith be made.

Respectfully submitted,

PIER SAN, INC.

By:
MILLER & SCHROEDER
Its Attorneys

/s/ Arthur H. Schroeder
ARTHUR H. SCHROEDER

218 Munsey Building
Washington 4, D. C.

May 8, 1961

/s/ John B. Kenkel
JOHN B. KENKEL

CERTIFICATE OF SERVICE

I, Alice F. Hopper, hereby certify that on this 8th day of May, 1961, a copy of the foregoing was delivered to the following at their respective offices indicated:

Francis X. McDonough, Esquire
Dow, Lohnes & Albertson
600 Munsey Building
Washington 4, D. C.
Counsel for Wilmer E. Huffman

A. L. Stein, Esquire
Warner Building
Washington 4, D. C.
Counsel for Francis C. Morgan, Jr.

Chief, Broadcast Bureau
Federal Communications Commission
Washington 25, D. C.

/s/ Alice F. Hopper
Alice F. Hopper

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Broadcast Bureau

***"Exceptions To
Initial Decision"***

May 9, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

4496

In re Applications of:)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
PIERSAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
For Construction Permits)	

BROADCAST BUREAU'S EXCEPTIONS TO INITIAL DECISION

The Initial Decision in the above-captioned proceeding granting the application of Pier San, Inc. and denying the applications of Wilmer E. Huffman and Francis C. Morgan, Jr. was released on March 29, 1961. The Chief, Broadcast Bureau, respectfully submits that the Initial Decision erroneously concluded that the statutory mandate for a fair and equitable distribution of facilities, as set forth in Section 307(b) of the Act, would best be served by a grant of one of the applications for Larned rather than the Huffman proposal for Pratt, Kansas. For the reasons more fully set forth in Brief in Support of Exceptions, we believe a grant of the Pratt application would best serve the public interest, and for this reason file the following Exceptions to the Conclusions of the Initial Decision:

Exception No. 1

To all of paragraphs 65 and 66 for the reasons set forth in the accompanying brief and to the failure to conclude as follows: Initially, it must be determined whether a new station at Pratt or Larned would better fulfill the statutory mandate of Section 307(b) of the Communications Act of

Broadcast Bureau, "Exceptions To Decision"
May 9, 1961 Page 1

1934, as amended, with regard to providing a fair, efficient, and equitable distribution of radio service. Should Huffman's proposed station be authorized, the city of Pratt (7,523) would be the recipient of a second daytime and a first nighttime transmission facility.^{1/} A new primary service would be made available daytime to 160,857 persons in 20,796 square miles wherein the rural areas have reception in any one part from a minimum of four to a maximum of 23 stations. At night, a new primary service would be furnished a total of 9,204 persons in 175 square miles wherein no other service is available except for 128 persons in 16 square miles which are provided an only service by KOMA, Oklahoma City, Oklahoma. The proposed station would also represent during daytime hours a second service to Dodge City (11,252), a third service to Larned, and a fourth service to part of Pratt and a fifth service to the remainder of the city. On the other hand, the daytime station proposed at Larned (4,447) would represent a first transmission facility and a third primary service to Larned and a new primary service to 127,353 persons in 11,959 square miles wherein the rural areas receive other service in any one part from a minimum of seven and a maximum of 23 stations.

A weighing of foregoing factors leads to the conclusion that authorization of the new facility proposed at Pratt would better fulfill the mandate of Section 307(b) than would the proposed new station at Larned. Although the need for a first transmission facility in Larned is of considerable weight, nevertheless, the need for a first primary service which Huffman's station would provide nighttime to more than 9,000 persons including a first nighttime facility for Pratt and a second daytime primary service to

^{1/} According to the 1960 U.S. Census, Pratt and Larned have a population of 8156 and 5001, respectively.

Dodge City, with a population of 11,262 is a more persuasive consideration. Furthermore, a grant to Huffman would provide a new reception service daytime to a larger number of persons in a greater area than would result from a grant at Larned and in addition the station proposed at Pratt would also furnish a new primary service to Larned.

Exception No. 2

To all of paragraphs 67 through 94 as unnecessary.

Exception No. 3

To the decretal paragraph 95 and to the failure to conclude that a grant of the Huffman proposal for Pratt, Kansas will best serve the public interest and to the failure to include that the applications of Francis C. Morgan, Jr. and Pier San, Inc., should be denied.

Respectfully submitted,
Kenneth A. Cox
Chief, Broadcast Bureau


by Robert J. Rawson
Chief, Hearing Division


Thomas B. Fitzpatrick
Attorney
Federal Communications Commission

May 9, 1961

Broadcast Bureau, "Exceptions To Decision"
May 9, 1961 Page 3

CERTIFICATE OF SERVICE

Rose Garfinkle, a secretary in the Hearing Division, Broadcast Bureau, certifies that she has this 9th day of May, 1961, sent by regular United States mail, U. S. Government frank, a copy of the foregoing "Broadcast Bureau's Exceptions to Initial Decision", to:

Francis X. McDonough, Esq.
Dcw, Lohnes & Albertson
Munsey Building
Washington 4, D. C.
Counsel for Wilmer E. Huffman

A. L. Stein, Esq.
Warner Building
Washington 4, D. C.
Counsel for Francis C. Morgan, Jr.

Arthur H. Schroeder, Esq.
Miller & Schroeder
Munsey Building
Washington 4, D. C.
Counsel for Pier San, Inc.

Scharfeld & Baron, Esqs.
National Press Building
Washington 4, D. C.
Counsel for The KSOK Broadcasting Company, Inc. (KSOK)

Rose Garfinkle

Broadcast Bureau, "Exceptions To Decision"
May 9, 1961 Page 4

Broadcast Bureau

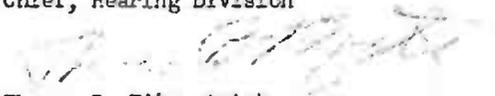
"Support To Initial Decision"

May 9, 1961

better fulfill the mandate of Section 307(b) than would the proposed new station at Larned. Also to be considered in favor of a grant of the Pratt application, but not of decisional significance, is the fact that Huffman would provide a new reception service daytime to a larger number of persons in a greater area than would result from a grant of either the Larned proposals, and would also furnish a new primary service to Larned. The importance of these latter factors are diminished considerably by the fact that there are a number of services in the proposed daytime service area and the additional fact that the bringing of a service to a community cannot be a substitute for the establishment of a first local outlet. The controlling factor, we re-iterate, is that the Huffman proposal will bring a first nighttime service to some 9,000 people. The importance of this factor cannot be minimized and we submit the need for an establishment of a first local outlet at Larned does not outweigh this fact.

Respectfully submitted,
Kenneth A. Cox
Chief, Broadcast Bureau


by Robert J. Rawson
Chief, Hearing Division


Thomas B. Fitzpatrick
Attorney
Federal Communications Commission

May 9, 1961

Broadcast Bureau, "Support To Decision"
May 9, 1961 Page 2

CERTIFICATE OF SERVICE

Rose Garfinkle, a secretary in the Hearing Division, Broadcast Bureau, certifies that she has this 9th day of May, 1961, sent by regular United States mail, U. S. Government frank, a copy of the foregoing "Broadcast Bureau's Brief in Support of Exceptions", to:

Francis X. McDonough, Esq.
Dow, Lehn & Albertson
Munsey Building
Washington 4, D. C.
Counsel for Wilmer E. Huffman

A. L. Stein, Esq.
Warner Building
Washington 4, D. C.
Counsel for Francis C. Morgan, Jr.

Arthur H. Schroeder, Esq.
Miller & Schroeder
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National Press Building
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Counsel for The KSOK Broadcasting Company, Inc. (KSOK)

Rose Garfinkle

Broadcast Bureau, "Support To Decision"
May 9, 1961 Page 3

Pier San

"Reply To Exceptions"

May 26, 1961

May 26, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
For Construction Permits)	

PIER SAN'S REPLY TO EXCEPTIONS

PIER SAN, INC., by its attorneys, files this Reply, pursuant to Rule 1.154, to the exceptions and supporting briefs of Wilmer E. Huffman (Huffman), Francis C. Morgan, Jr. (Morgan), and the Broadcast Bureau. The mentioned parties contend that the Initial Decision of the Hearing Examiner, which proposes a grant of the Pier San application and a denial of the two mutually exclusive proposals, should be reversed upon review by the Commission. Pier San submits that the Initial Decision in this proceeding reflects an unusually thorough consideration of the record and a logical evaluation of the various criteria established by the Commission and it should be affirmed upon review. As the within Reply will demonstrate, the Initial Decision does not contain the errors claimed by the above mentioned exceptors and all the matters presented by the exceptions of those parties have previously been considered by the Examiner. His consideration was nowise erroneous, and the exceptions must be denied.

I PRELIMINARY STATEMENT

A. The Exceptors' Positions

1. As the record and the pleadings filed to date in this proceeding indicate, this case involves three mutually exclusive applications. Two

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of the proposals, those of Pier San and Morgan, are for the establishment of a first station in Larned, Kansas, and the third application, that of Huffman, proposes a second station in Pratt, Kansas. The two basic questions involved, in the order of how they must be determined, are: (1) whether under Section 307(b) of the Act Larned, Kansas, or Pratt, Kansas, the two communities here being considered, should have the contested facility, and (2) if Larned, Kansas, is the preferred community, whether the proposal of Pier San or that of Morgan would, on a comparative basis better serve the public interest, convenience and necessity.

2. Huffman and the Broadcast Bureau except to the Examiner's determination that Larned, Kansas, should have its first station, those exceptors arguing that under Section 307(b) the application for Pratt should be preferred. Most of Morgan's exceptions are directed to the comparative elements of the case, that party arguing that he should be preferred over Pier San for the grant of the new station in Larned.

B. Scope of Reply

3. Inasmuch as the Broadcast Bureau and Huffman direct their exceptions to the 307(b) issue determination the general arguments running through their exceptions could be answered at the same time. However, for the sake of continuity, Pier San will direct a reply to each of those parties' exceptions and supporting arguments (Broadcast Bureau, 2 exceptions; Huffman, 6 exceptions), with a cross-reference where appropriate to the reply on the same point elsewhere contained herein. Morgan's exceptions on 307(b) matters are not opposed by Pier San, and his exceptions concerning the Pier San - Morgan comparative matters will be taken up in the latter portion of this Reply. By reference to both the record and Commission precedent, it will be demonstrated that none of the exceptions here considered can be granted.

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May 26, 1961 Page 2

II REPLY TO BROADCAST BUREAU EXCEPTIONS

4. Bureau Exception No. 1 is directed to the Conclusions of the Initial Decision wherein the Examiner sets forth the determinative reasons why Larned should be preferred, for its first local station, over Pratt, Kansas, for the frequency being sought herein. The Bureau does not support its arguments with any citation, nor does it controvert the cases mentioned by the Examiner in the excepted-to conclusions (Par. 65, 66). Additionally, however, Bureau Exception No. 1 is erroneous where it recites that "The proposed (Pratt) station would also represent during daytime hours a second service to Dodge City (11,262)", because, as the Examiner found on official notice of the Commission's files, on November 16, 1960, the Commission granted an application for a second station at Dodge City (BP-13039). This finding (Par. 5 and Footnote 1 of the Initial Decision) was not excepted to by the Bureau, and the Bureau cannot be permitted to suggest the above quoted conclusion.

5. The Bureau admits that the need for a first transmission facility at Larned is a significant factor under the Section 307(b) issue, but it suggests that this otherwise controlling consideration is gainsaid here because the Pratt proposal would provide a first nighttime primary service to some 9,000 and a second daytime primary service to Dodge City. However, as above shown, the latter reason is not applicable. Since the Bureau stresses the latter reason, we must conclude that had the Bureau realized that the "second daytime service to Dodge City" reason was in error, it would not have excepted to the Examiner's conclusion that Larned must be preferred for its first transmission facility.

6. But going further, even if we assume that the Broadcast Bureau would urge a Section 307(b) preference for Pratt over Larned solely because the proposal for the first mentioned community would provide a first primary nighttime service to a limited number of persons while the

Pier San, "Reply To Exceptions"
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proposals for the first local station in the latter community would not include nighttime service, we must note that the Bureau nowise supports its arguments in that respect. The Bureau's exception stands simply as an expression of Bureau opinion, and in light of Commission decisions to the contrary the Bureau's views must be rejected. The Commission is recognizing the lessening importance of nighttime radio service, even where "white area" is involved. In Vidalia Broadcasting Co., 8 R.R. 1, the Commission authorized the only station in a community to change from full time to daytime-only operation, even though the change would result in the loss of the only nighttime primary service to some 5,000 persons, because the change would provide additional daytime service. Nighttime white area considerations were not controlling, the Commission held, and the case was cited with approval by the Court of Appeals in Red River Valley Broadcasting Corp. v. F.C.C., 106 U.S. App. D.C. 333, 272 F.2d 562 (1959).

7. In Gillespie Broadcasting Co., 15 R.R. 878, affirmed sub non. Red River Valley Broadcasting Corp. v. F.C.C. 106 U.S. App. D.C. 333, the Commission held that the loss of the only nighttime service to a community of some 4,000 persons was not a basis for the denial of an application where other public interest considerations, viz., gains in daytime service, for example, suggested a grant. In addition, the John K. Rogers case should be noted (20 R.R. 522). There a proposal would create a nighttime white area of 27,289, of whom 17,136 lived within the city being considered, and the Commission has issued instructions for the preparation of a Final Decision affirming the Initial Decision's proposed grant of the application (Public Notice B, Mimeo. No. 8, February 6, 1961).

8. From the foregoing, it is clear that there is no requirement under Section 307(b), or elsewhere, for the Commission to grant the Pratt proposal to fill in some interstices in existing nighttime service in

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preference to a grant for a first station at Larned. The Section 307(b) presumption for Larned (Harrell v. F.C.C., 105 U.S. App. D.C. 352, 267 F.2d 629) is not overcome or controverted, and the Bureau's unsupported suggestions to the contrary simply cannot be accepted by the Commission.

9. The Bureau simply refuses to recognize the established importance of a first station in a substantial community such as Larned. Section 307(b) directs the Commission to grant licenses "so as to provide a fair distribution among communities. Fairness to communities is furthered by a recognition of local needs for a community radio mouth-piece." F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358, 362 (Underlining supplied). Translated into a principle in proceedings such as this, where mutually exclusive proposals for different communities are involved, Section 307(b) is better served by preferring the proposal for a first local station than by preferring, to the first proposal's exclusion, one which would add an additional station in a community already possessing a local radio outlet, unless there are compelling reasons contra. Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216.

10. Without attempting to oversimplify the factual situation while yet avoiding a recitation of obfuscating statistics, the pertinent facts in this case with respect to local needs are: Larned and Pratt are both mid-western communities, located in the same general area of Kansas. They both may be considered as medium size Kansas communities, and although Pratt has a slightly larger population, the difference is not significant within the mentioned class of communities found in the mid-west. Each is a county seat, and their respective counties are within a few hundred people of being equal in population. Such differences as may exist between them in social, economic and cultural characteristics are differences without distinctions for our purposes here. However, in the area of radio services we do find a great difference, and a great distinction.

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11. Pratt has an existing radio station, KWSK. Larned does not. Pratt receives primary service during the daytime from four stations, including its local outlet, while Larned receives only two primary services, both from stations located elsewhere. The record shows that Larned is a substantial community, entitled under Section 307(b) to a first local broadcast service -- "a community radio mouthpiece". (F.C.C. v. Allentown Broadcasting Co., supra).

12. A long line of cases has established the doctrine that absent compelling contra considerations a proposal for a first local broadcast service is to be preferred over a competing proposal which would add another station in a community already possessing its "radio mouthpiece". Northwestern Ohio Broadcasting Corp., 3 R.R. 1945, 1953; Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216; Greater Newcastle Broadcasting Corp., 8 R.R. 291; Mercer Broadcasting Co., 13 R.R. 891. And see, Harrell v. F.C.C., 267 F.2d 629, 18 R.R. 2072, 2076, "...and would therefore have had to award the station to the petitioner on the basis of the Section 307(b) presumption."

13. In the Northwestern Ohio case the Commission stated:

"In this connection, our decisions have been grounded upon the Commission's belief that the public interest requires the availability of a local transmission facility to provide the people of a community with a program service adapted to their needs and with an opportunity for local self-expression." (3 R.R. at 1953).

Again, in Lawton-Fort Sill Broadcasting Co., the following appears:

"We have many times in our past decisions established the policy that the absence of a local transmission facility in a community constituted under Section 307(b), a showing by an applicant of substantial need for radio service. In this connection, our decisions have been grounded upon the Commission's belief that the public interest requires the availability of a local transmission facility to provide the population of a community with a program service adapted to their needs and with an opportunity for local self-expression." (7 R.R. at 1233).

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Further argument should not be necessary. It is clear that Bureau's Exception No. 1, which would deny the established Section 307(b) presumption for a first local station, must be overruled.

14. Bureau Exception No. 2 is simply directed to the ultimate decretal provision of the Initial Decision wherein the Examiner provides for a grant of the Pier San application and the concomitant denial of the other two mutually exclusive proposals. This exception is premised upon the Bureau's first exception and since, as we have shown, that exception must be denied it follows that Exception No. 2 cannot be allowed. The Commission should affirm the Initial Decision and deny Bureau Exception No. 2.

III REPLY TO HUFFMAN'S EXCEPTIONS

15. Huffman Exception No. 1 complains of an alleged failure of the Hearing Examiner to recite all the minutiae and evidentiary matters concerning Pratt, Kansas. The Exception presents a page and one-half single-spaced recitation of unnecessary and immaterial bits of evidence, all of which the Examiner considered and properly distilled into "findings" in his Initial Decision. The Exception should be denied because the Examiner's findings on the subject adequately reflect the material facts of record.

16. Huffman's first exception is subject to further errors and infirmities, however. Huffman points to one of his exhibits (Huffman Ex. 8) as record reference for certain findings he says the Examiner should have made, but he fails to note that the exhibit was received for a limited purpose which precludes the findings suggested by Huffman (T. 69). The referenced material is comprised of letters from representatives of certain organizations and groups in Pratt. The writers of the letters were not produced as witnesses and there was no opportunity

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of cross-examination of them. The Examiner admitted the letters for the limited purpose of showing the existence of the groups and that they would use a nighttime facility, but he stated that other portions of the letters would be disregarded (T. 69), and this ruling of the Examiner was acquiesced in by counsel for Huffman (T. 69). Consequently, Huffman Exhibit 8 as admitted into evidence cannot support such statements as "(there is) the impossibility for farmers to listen to their radios during the day while they are at work", or "the impossibility of receiving local weather reports in the evening when most of the inclement weather and tornadoes occur." (Huffman Exceptions, p. 3).

17. Finally, if the Commission should allow Huffman's first exception, and recite the detailed statistics of Pratt's economic, social and religious life, then the Commission would have to similarly "undistill" the Examiner's findings concerning Larned and in lieu thereof recite the details and items of evidence of the community's characteristics appearing on the record. Pier San does not believe it should burden this Reply with a recitation of such items, but respectfully refers the Commission to Paragraphs 11 through 18 of the Proposed Findings of Fact filed by Pier San on February 1, 1961, which material is hereby incorporated by reference for use if the Commission should grant Huffman's first exception. However, for all the foregoing reasons, Pier San maintains that Huffman's Exception No. 1 must be denied.

18. Huffman Exception No. 2 quarrels with the matters recited by the Examiner in Paragraph 65 of the Initial Decision wherein there is recited the Section 307(b) factors involved in this case, Huffman suggesting, erroneously, that additional factors are present. This exception should be denied because it is argumentative and contrary to both the record herein and Commission precedents. The exception must be denied for the following noted additional reasons.

19. Huffman claims that the Examiner should have concluded that Larned has "adequate" reception service day and night, although he does not attempt to define the quoted term. In any event, the record shows that Larned receives but two listening services during the daytime and neither of them are from a local station. Huffman's suggestion that simply on the basis of being larger in size Pratt should be held to have a greater need for a second station than Larned for a first station is contrary to established precedents. In Greater New Castle Broadcasting Corp., 8 R.R. 291, the Commission held that a proposal for a first station in a community of 13,644 was to be preferred over an application for a second station in a city of 48,834 population. In Plainview Radio, 15 R.R. 382c (Supplemental Initial Decision announced as under instruction for affirmance by the Commission) a first station in Slaton, with a population of 5,036 was preferred to a second station in Plainview where there resided 14,044 persons.

20. Huffman's statement that the existing station in Pratt, KWSK, is inherently inadequate because it is a daytime-only facility in a farming area with important listening habits during time periods in the evening and early morning is without support in the record. There is absolutely no evidence of record concerning the adequacy or inadequacy of KWSK, whether it carries evening or early morning weather reports, or indeed anything about its service. There is nothing in the record about the listening habits of Pratt. (See Paragraph 16, supra, for the limited purpose for which Huffman Exhibit 8 was admitted). Huffman's claim of inadequacy of the existing Pratt station must be rejected and his exception and arguments based thereon must be denied. However much Huffman would like to obfuscate the fact, Pratt, Kansas, has a radio station and Larned, Kansas, does not. A first local station for Larned, albeit a daytime only operation, must be preferred over a second station in Pratt even though a fulltime operation is proposed there. Lawton-Fort

Sill Broadcasting Co., 7 R.R. 1216, 1234.

21. Huffman Exception No. 3 quarrels with the Examiner's conclusion that Larned's right to its first station is not overcome by the fact that the Huffman proposal for Pratt involves a first nighttime primary service to some 9,000 persons. As the Examiner pointed out, Huffman has cited no case in which the factors he relies upon, including the elimination of a white area, have prevailed over an application for a first local station. (I.D., Par. 66). In the exceptions and supporting brief, Huffman quotes some language out of context from two cases concerning the significance of white area service, but those cases are clearly distinguishable. Nick J. Chaconas, 19 R.R. 100, involved proposals each of which were for a first local station (Gaithersburg, Laurel and College Park, Maryland) and the Commission's consideration of other 307(b) factors such as white or gray area service, size of population served, etc. was required in order to arrive at a decision as among three applications otherwise equal in the controlling 307(b) factor, viz., first local station. Thus the Chaconas case helps Huffman not at all, and the Examiner's Conclusion must be affirmed.

22. The other case mentioned by Huffman is Alkima Broadcasting Co., where the three applicants were each proposing a first local station (two specifying West Chester, Pennsylvania, and the other Newark, Delaware). There the Examiner proposed to grant the Newark proposal because in addition to making a first transmission service available to the community the applicant would serve a white area of 3,350. The Alkima case nowise stands for a proposition that the established preference for a first local station (Harrell v. F.C.C., supra) is gainsaid by some nighttime white area service. Finally, although Huffman seeks to distinguish the Gillespie (15 R.R. 878, affd. sub ncm. Red River Broadcasting Corp. v. F.C.C.) and Vidalia (8 R.R. 1) cases, on the basis that they were not

comparative ones, he does not diminish the principle of those cases, viz., that a limited nighttime white area service is not controlling under Section 307(b) in the face of daytime gains. And see, John K. Rogers, discussed in Paragraph 7, supra. In the instant case the daytime gain in the Larned proposal is the most important one, the establishment of a first local station in the community, closely followed by the factor of a third listening service in the community. In sum, Huffman has not shown, as indeed he could not, that the Examiner's decision is erroneous. Huffman's Exception No. 3 must be denied.

23. Huffman Exception No. 4 seeks to establish a determinative preference for the Pratt proposal on the ground that it is more efficient than the Larned proposals because the former would serve a greater population and would operate fulltime rather than daytime only. Huffman fares no better with his arguments in this area than he does in the others. Turning first to the question of the population which would be served during the daytime by the Pratt or Larned proposals, respectively, we find that the difference is not great. The use of 1290 kc at either Pratt or Larned will result in a new service during the day to substantial areas and populations. When it is remembered that in the places where the Pratt proposal would serve somewhat more persons than Larned with an additional service there is already available a plethora of available service, ranging up to forty-two, the difference in the size of the area (20,796 square miles vs 11,959 square miles) and the number of persons (160,857 vs 127,353) who would receive an additional service under the competing proposals is not significant. Even acknowledging a difference, however, it is established that it would not constitute a "compelling consideration" against the first local station principle, and Larned must be preferred.

Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216, 1234.

24. Huffman proposes fulltime operation while the Larned applicants propose to operate during the daytime only. Huffman attempts to elide the fact that his nighttime proposal contains serious aspects of inefficiency -- he would serve only slightly more than half (57.2%) of the population only less than 16% of the area within his normally protected nighttime contour. But even without this factor of inefficiency, it is established that a first local station, albeit daytime only, must be preferred over a second station in another community even though a fulltime operation is proposed for the latter. Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216, 1234. Huffman's Exception No. 4 must be denied and the Examiner's Initial Decision must be affirmed.

25. Huffman Exception No. 5 simply urges again that the Pratt proposal should be preferred over the first local station for Larned because the former involves elimination of some white area at nighttime. This argument has already been answered, Paragraphs 6-8, 21-22, and a repetition of the matters is unneeded. It might be worthwhile to note, however, that the Examiner's observation stands unshaken, namely, that Huffman has cited no case in which the factors he relies upon, including the elimination of a white area, have prevailed over an application for a first local station. (I.D., Par. 66). Exception No. 5 must perforce be denied.

26. Huffman Exception No. 6 excepts to the ordering clause of the Initial Decision insofar as it proposes to grant the Pier San application for Larned and deny the mutually exclusive Huffman proposal. Since, as we have shown, the Examiner's findings, conclusions and reasoning are all correct in the matters challenged by Huffman, it follows that this final exception of that party must also be denied.

IV REPLY TO MORGAN EXCEPTIONS

27. Morgan Exceptions 1, 2, 3, and 4 concern matters under the 307(b) issue, and they are not opposed by Pier San.

28. Morgan Exception No. 5 complains that the Examiner did not include "Morgan's extracurricular activities at high school including basketball, track, etc.". This exception borders on the frivolous and must be denied. The Examiner's findings could not appropriately include such immaterial matter.

29. Morgan Exception No. 6 is argumentative and conclusionary and not a proper exception concerning a finding of fact. In this exception Morgan admits the correctness of the Examiner's finding that the applicant was not aware of the Commission's guides on programming, but the exception argues that the "contacts" listed by Morgan as having been made show a detailed effort to meet local programming needs. The record, however, will not support such argument for it is clear that the "contacts" were simply "contacts" with no survey or penetrating study of the community's needs involved. Many of the "contacts" were made by telephone from Pratt or other places (T. 101, 102-4), and the "contacts" were made after Morgan's application and program proposal were filed. (See dates, Morgan Ex. 4). Finally, although Morgan claimed that he prepared the programming proposal himself the circumstances surrounding the filing of his Larned application contraindicate that Morgan's proposal represents any considered judgment of the needs of the community. (See Pier San Exceptions 2-4, incl., filed May 8, 1961).

30. Morgan Exception No. 7 proposes an immaterial and unnecessary finding, and it should be denied. The Initial Decision sufficiently recites that the proposal for Pier San's Larned station was made and developed by those members of the corporate applicant who are on the

local scene and will participate in the operation of the station when granted, particularly Mr. Pyle. (See I.D., Par. 15, 25).

31. Morgan Exception No. 8 is argumentative and conclusory and not a proper exception to findings, and it must therefore be denied. However, even absent the mentioned defect, the exception could not be granted because it suggests findings contrary to the record. Morgan argues that Bozeman failed to program KSIR as represented in his application, while the record shows comparing the 1957 proposal and 1960 operation of KSIR the station's performance cannot be criticized, changes were made being done to improve programming and to reflect the desires of the station's community. (T. 225, 227-8, 232, 259, 260-1).

32. Morgan Exception No. 9 is argumentative and conclusory, and without any record citation, and must be denied.

33. Morgan Exception No. 10 is argumentative and conclusory and not supported by the record. The suggestion that absent any record evidence the Examiner should have found that Morgan "presumably (had) further discussions of proposed programs" with the contactees borders on the frivolous. The exception must be denied.

34. Morgan Exception No. 11 is not supported by the record, and indeed no record citation is given. Morgan's application, with its programming proposal, was filed in January of 1959, and no contacts were made by him in Larned until after that date, most of the contacts being made after the applications were set for hearing. Paragraph 38 of the Examiner's Initial Decision is more than generous to Morgan, and Exception No. 11 must be denied.

35. Morgan Exception No. 12 must be denied because it suggests a finding contrary to the evidence of record. Morgan did not except to the ruling of the Examiner excluding the material upon which he would

premise an additional finding, and the exceptor's attempt to go beyond the proper evidence of record cannot be permitted by the Commission.

36. Morgan Exception No. 13 is directed to the ultimate finding of the Examiner concerning the category of music proposed by Morgan, which finding is based upon Morgan's own testimony. Morgan testified that his definition of "better class of music" which he proposed to bring to Larned is music of big bands and orchestras. (Tr. 144). The Initial Decision recites the facts and conclusions concerning Morgan's music proposals, including the correct notation that the only reference to "good music" is hidden away in the applicant's description of his Discussion program. (I.D., Par. 81, Morgan Ex. 6, p. 3). The exception should be denied because the findings and conclusions complained of do accurately and fairly reflect the record.

37. Morgan Exception No. 14 is argumentative and conclusionary and not supported by the record. The argument that Morgan's small-town residency should give rise to a presumption that he would better know the needs of Larned is too speculative to merit consideration, especially when the record shows, for example, that Morgan proposed his agricultural programs for 3:00 p.m. and then admitted that the majority of the rural audience, for whom the program was allegedly designed, would not be able to listen to the program at that time. (T. 107).

38. Morgan Exception No. 15 complains that the Examiner did not give him a preference for civic participation because he, Morgan, comes from a small town. The conclusion complained of fairly reflects the pertinent findings of fact, and the exception must be denied.

39. Morgan Exception No. 16 argues that the diversification of business interests of Pier San in broadcasting, entertaining, music publishing and recording should be considered adversely because "the payola

problem and its temptations are too fresh in the minds of everyone to (have such interests) considered as a favorable business interest" is completely without support in this record or anywhere else. The half-veiled accusation is improper and the exception must be stricken. The baseless and unfounded innuendo in the exception does not merit a reply, and the Commission must reject the exception peremptorily.

40. Morgan Exception No. 17 argues that the preference awarded to Pier San in the area of broadcast experience should be disregarded because the "experience has been in large towns where management delegates duties to subordinates". This argument is at best speculative, but more, the instant record conclusively demonstrates the contrary. (Pier San Ex. 1, pp. 1-3; T. 188, 212-213, 215-217). The exception must be denied.

41. Morgan Exception No. 18 should be denied as it suggests a conclusion contrary to the record. The argument that KSIR program "Great Works In Music" is merely a recorded commercial program flies in the face of the evidence of record. The program includes live commentary of the specially-engaged music critic and his guests. (T. 248, 250). The commentary includes an explanation and critical evaluation of the music played and biographical information concerning the composer or artist being featured. (T. 248). On some programs school instructors appear, often with their pupils, to discuss the music and the composer being featured. The opportunities for such appearances are rotated among the schools, the University of Wichita being scheduled with greater frequency than the lesser grade educational institutions. (T. 247-250). Additionally, the conductor of the Wichita Symphony Orchestra will appear from time to time to explain that orchestra's works which are aired or scheduled for subsequent programs. (T. 169, 222).

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42. Morgan Exception 18(a)^{1/} must be denied as contrary to the record.

The Examiner's ultimate finding that KSIR's "Great Works In Music" evinces a concern by the licensee for tastes of the community not satisfied by ordinary music offerings is based on the record. The unique position of the program and the need and desire of the community, both educators and other listeners, which it satisfies is apparent from the response of the community and the encouragement given the station for its continuation. Some 2,000 printed schedules are distributed by KSIR monthly on the basis of requests therefor, including the distribution to the schools for use in music appreciation classes. (T. 167, 221-222). The students utilize the program in connection with their classwork (T. 249). Morgan's attempt to avoid the record must be rejected, and his Exception 18(a) must be denied.

43. Morgan Exception No. 19 is argumentative and cannot be accepted in light of the record. Morgan argues that the non-use by KSIR of recorded programs from educational program producers somehow discredits Pier San's proposals for Larned. He overlooks the record evidence which shows that the decision to use "KU Classroom" at Larned but not at Wichita was based upon a consideration of the relative needs of the two communities, and that the decision was a reasonable one. (T. 233-234). And see T. 212-213, 214-215, 259, 261. Morgan attempts to hide the fact that an analysis of the most recent composite week for the operation of KSIR was adduced on the record (Pier San Ex. 11, T.273-283), and Morgan did not apparently believe it reflected any significant variation from the analysis appearing in the original application for the Wichita station. Morgan had the opportunity to examine and use the logs of KSIR, but he did not introduce any of the logs or analyses thereof into evidence, and

^{1/} Morgan has two exceptions bearing number 18. The latter of these is here treated as "18(a)".

it must be concluded that the past broadcast record of KSIR, as well as of the other stations examined by Morgan, indicate that they have been programmed in a manner meeting the needs of their respective communities and their proposals to the Commission.

44. Morgan Exception No. 20 must be denied in light of the record. Morgan overlooks, or chooses to obscure, the record evidence which showed that Pier San's proposal for Larned had its inception in discussions between Mr. Bozeman and the community's leaders. (T. 239-240, 244-245). The proposal was prepared by Mr. Fyle, who will be the general manager of the station and live in Larned, on the basis of discussions with persons in the community. (Pier San Ex. 2; T. 160-161). From the inception that Larned station was planned as one which would be professional in every aspect so as to give Larned the same benefits from a local station as larger city listeners obtain from their professionally operated stations. (T. 243-244). The Commission must reject Morgan Exception No. 20.

45. Morgan Exception No. 21 must be denied in light of the record. Morgan quarrels with the Examiner's ultimate findings and conclusions of his (Morgan's) music proposal, but he refuses to recognize that such findings were based on Morgan's own testimony. (T. 144).

46. Morgan Exception No. 22 must be denied in light of the record. Morgan argues about the time of day his farm program is scheduled, but he avoids mentioning that on the record he admitted that the scheduling was awkwardly done and that the rural audience, for whom the program would be aired, would probably not be listening. (T. 107).

47. Morgan Exception No. 23 must be denied, for the Examiner's ultimate findings and conclusions with which Morgan would quarrel are based upon pertinent findings which, in turn, are based on evidence of

record. Morgan's educational program plans were last minute additions to his proposal (see T.81-83), with no evidence shown as to how they would be effectuated.

48. Morgan Exception No. 24 must be denied in light of the record. Morgan argues now that his discussion program includes details of implementation, but on the record such details do not appear nor did Morgan attempt to describe them. His program description is broad and general (Morgan Ex. 6, p. 3) and he claims that some local officials "expressed willingness to participate" (Morgan Ex. 4), but how, when and where the participation would occur were not shown.

49. Morgan Exception No. 25 must be denied because the conclusion complained of fairly reflects the pertinent findings of fact.

50. Morgan Exception No. 26 must be denied because the conclusion complained of fairly reflects the pertinent findings (Far.33,I.D.), to which Morgan does not except.

51. Morgan Exception No. 27 is contrary to the record, and simply a general argument that "the Examiner should have found Morgan superior in all respects." The exception must be denied.

52. Morgan Exception No. 28 is a general argument, without reference to the record or precedent, that Pier San should be denied because of ownership interests in other radio stations. The exception must be denied. Morgan does not show in any particular how the Examiner's consideration and determination of the question is erroneous, as indeed it is not. (See "Memorandum Brief On Significance Of Media Diversification" filed by Pier San on March 20, 1961). This final exception of Morgan, as all his others, must be denied and the Examiner's Initial Decision affirmed.

V CONCLUSION

53. In light of the foregoing and in light of the matters of record it is clear that none of exceptions of the Broadcast Bureau, Huffman or Morgan can be granted. The Examiner's Initial Decision should be affirmed by the Commission, and the application of Pier San should be granted. The affirmance and grant must follow in view of the "fair, efficient and equitable" standard of Section 307(b) of the Act and the comparative superiority of Pier San over Morgan for the use of the contested facility at Larned, Kansas. The community must have its rightful opportunity for its first local station, and the opportunity will be best utilized by Pier San which will develop and operate the station in the competent, professional and meritorious manner demonstrated in this proceeding. The public interest will not be satisfied unless the Commission affirms the Initial Decision and grants the construction permit to Pier San.

WHEREFORE, the premises considered, Pier San, Inc., respectfully requests the Commission to affirm the Hearing Examiner and deny each and every exception of Wilmer E. Huffman, Francis C. Morgan and the Broadcast Bureau. The within party requests such other and further relief as may be appropriate in an expeditious affirmance of the Initial Decision and the grant of the construction permit to it.

Respectfully submitted,

PIER SAN, INC.

By:

MILLER & SCHROEDER
Its Attorneys

/s/ Arthur H. Schroeder
ARTHUR H. SCHROEDER

218 Munsey Building
Washington 4, D. C.

May 26, 1961

/s/ John B. Kenkel
JOHN B. KENKEL

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CERTIFICATE OF SERVICE

I, Alice F. Hopper, hereby certify that on this 26th day of May, 1961, a copy of the foregoing "Pier San's Reply to Exceptions" was delivered to the following at their respective offices indicated:

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Counsel for Francis C. Morgan, Jr.

Chief, Broadcast Bureau
Federal Communications Commission
Washington 25, D. C.

/s/ Alice F. Hopper
Alice F. Hopper

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Pier San

***"Motion To Reschedule
Oral Argument"***

August 29, 1961

Aug 29, 1961

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
For Construction Permits)	

MOTION TO RESCHEDULE ORAL ARGUMENT

Comes now PIER SAN, INC., one of the applicants in the captioned proceeding and, by its attorneys, respectfully requests the Commission to reschedule the oral argument en banc from its present time of 2:00 p.m. on Friday, September 15, 1961, to a slightly later hour on that date, or make other changes in the schedule of oral arguments as herein suggested. In support of this motion, Pier San shows the following:

The Commission's advance schedule of oral arguments en banc provides for such argument in five proceedings at various times on Thursday, September 14 and Friday, September 15. The oral argument in the captioned proceeding is scheduled to commence at 2:00 p.m. on Friday, September 15. Counsel for Pier San have just been advised by the United States Court of Appeals for the District of Columbia Circuit that a case in which they are counsel for the appellant in that Court has been scheduled for oral argument on Friday, September 15, to be heard as the second case on that day (Guinan v. F.C.C., Case No. 16163, U.S.C.A.).

The attorney who will make the argument for Pier San in the captioned proceeding is also the attorney who will make the argument for the

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appellant in the referenced case in the Court of Appeals. Depending on the course of proceedings in the Court in both the referenced case and the first-scheduled case on September 15, it may be that the attorney will be in the Court of Appeals at the time the oral argument in the captioned proceeding is presently scheduled. In order to provide against unforeseen delays in the Court on September 15 and to assure an orderly commencement of oral argument before the Commission in the captioned case, it is suggested that the oral argument before the Commission be rescheduled to commence at 3:00 p.m. or perhaps at 2:30 p.m. The slightly later hour of commencement is necessary to permit counsel to review the captioned proceeding prior to oral argument after the completion of business in the Court of Appeals that day. It is submitted that if the argument commenced at 3:00 p.m., or perhaps at 2:30 p.m., the Commission's schedule would not be unduly affected. A commencement of the argument at the somewhat later hour will still permit a conclusion thereof, considering the allotment of eighty minutes (twenty minutes to each party), before the ordinary close of the Commission's business day. The attorneys for the other parties in this proceeding have graciously consented to a later hour of commencement, assuming it meets the Commission's convenience.

As an alternative, the movant suggests that the oral argument in the captioned case be added to the schedule for argument on September 14, 1961. The advancement of the argument by one day would not require a change in the argument in any other proceeding. If the Commission's own schedule permits the assignment of an additional argument for hearing on September 14, and the first request, above, cannot be granted, then it is requested that the oral argument in the captioned proceeding be rescheduled from Friday, September 15 to an hour convenient to the Commission on Thursday, September 14.

Pier San, "Motion To Reschedule"
August 29, 1961 Page 2

If the Commission's convenience does not permit either of the foregoing suggested reschedulings of the argument in the captioned case, the movant will attempt to effectuate a switch of scheduled dates and hours for argument with parties in one of the other proceedings now scheduled for oral argument en banc on Thursday, September 14. Counsel for the parties in the other proceedings have been contacted and several offers of cooperation have been received. However, because of vacation schedules, a definite agreement for a switch is not available on the date of filing of the instant motion. Therefore, if either the first request for a one hour delay of commencement, or the alternative request for advancement by one day of the oral argument in the captioned proceeding cannot be granted, the movant would appreciate early notice so that other arrangements can be instituted.

WHEREFORE, the premises considered, Pier San, Inc. respectfully requests that the oral argument in this proceeding be rescheduled according to one of the following modes:

- a. Hour of commencement on Friday, September 15, be postponed to 3:00 p.m., or, if required by the Commission's other commitments, to 2:30 p.m.; or
- b. Rescheduled to commence at an hour convenient to the Commission on Thursday, September 14, 1961; or
- c. Rescheduled in conjunction with the rescheduling of one of the proceedings now specified to be held on September 14, the argument in the instant case and the argument in the second case to be switched on the oral argument calendar as to assigned dates and times for commencement.

Pier San, "Motion To Reschedule"
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And, the movant requests such other and further relief as may be necessary or appropriate.

Respectfully submitted,

PIER SAN, INC.

By:

MILLER & SCHROEDER
Its Attorneys

/s/ Arthur H. Schroeder
ARTHUR H. SCHROEDER

/s/ John B. Kenkel
JOHN B. KENKEL

218 Munsey Building
Washington 4, D. C.

August 29, 1961

CERTIFICATE OF SERVICE

I, Alice F. Hopper, hereby certify that on this 29th day of August, 1961, a copy of the foregoing was sent by first class United States mail, postage prepaid, to the following:

Francis X. McDonough, Esquire
Dow, Lohnes & Albertson
600 Munsey Building
Washington 4, D. C.
Counsel for Wilmer E. Huffman

A. L. Stein, Esquire
Warner Building
Washington 4, D. C.
Counsel for Francis C. Morgan, Jr.

Robert J. Rawson, Esquire
Chief, Hearing Division
Federal Communications Commission
Washington 25, D. C.

Donald J. Berkemeyer, Esquire
Chief, Office of Opinions and Review
Federal Communications Commission
Washington 25, D. C.

/s/ Alice F. Hopper
Alice F. Hopper

Pier San, "Motion To Reschedule"
August 29, 1961 Page 4

***Oral Arguments
Before FCC,
All Parties***

HAMPTON & HUFFMAN
PUBLIC ACCOUNTANTS & TAX CONSULTANTS
1000 K STREET, N.W.
WASHINGTON, D.C. 20004

ORAL ARGUMENT

Before the FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. September 15, 1961.

The above-entitled matter came on for oral argument before Commissioners Newton N. Minow (Chairman), Frederick W. Ford, Rosel H. Hyde, Robert T. Bartley, Robert E. Lee, T. A. M. Craven, and John S. Cross, in Room 7134, New Post Office Building, Washington, D. C., at 11:35 o'clock, a.m.

PROCEEDINGS

THE CHAIRMAN: The commission will hear argument in Docket Nos. 13469, 13470, and 13471. The Initial Decision proposed to grant the application of Pier San, Inc. It would deny the applications of Wilmer E. Huffman and Francis C. Morgan, Jr.

Huffman, Morgan and the Broadcast Bureau have filed exceptions to the Initial Decision. Pier San filed a supporting statement along with certain exceptions to that Decision.

According to the usual practice, we will hear counsel's oral argument in the following order: for Francis C. Morgan, Jr; for Wilmer E. Huffman; for Chief, Broadcast Bureau; and for Pier San, Inc. Counsel for each party will be allowed 20 minutes.

If counsel for Francis C. Morgan, Jr., Wilmer E. Huffman, or Chief, Broadcast Bureau wants to reserve part of his time for rebuttal, he should indicate that fact at the opening of his argument and the timekeeper will give a blue light signal when rebuttal time begins. Otherwise, the blue light will mean that five minutes remain. A red light will indicate that time for oral argument has expired.

May I please have the appearances of counsel?

For Wilmer E. Huffman?

MR. MC DONOUGH: Francis W. McDonough of Dow, Lohnes and Albertson.

THE CHAIRMAN: For Francis C. Morgan, Jr?

MR. STEIN: A. L. Stein.

THE CHAIRMAN: For the Chief, Broadcast Bureau?

*Huffman should set out of - Minow
Ford
Cross*

<i>Against</i>	<i>?</i>
<i>Craven</i>	<i>Hyde</i>
	<i>Bartley</i>
	<i>Lee</i>

MR. RAWSON: Robert J. Rawson.

THE CHAIRMAN: And for Pier San, Inc.?

MR. KENKEL: John B. Kenkel 66 Miller & Schroeder.

THE CHAIRMAN: Do any of the parties object to any Commissioners participation in the proceedings' final decision if that Commissioner does not hear all or part of the oral argument? Do you, Mr. McDonough?

MR. MC DONOUGH: No.

THE CHAIRMAN: Do you, Mr. Stein?

MR. STEIN: No, sir.

THE CHAIRMAN: Do you, Mr. Rawson?

MR. RAWSON: No, sir.

THE CHAIRMAN: Do you, Mr. Kenkel?

MR. KENKEL: With the understanding that the absent Commissioner will read the transcript of the oral argument, I have no objection.

THE CHAIRMAN: You may proceed, Mr. McDonough.

MR. MC DONOUGH: I would like to reserve five minutes.

ARGUMENT ON BEHALF OF WILMER E. HUFFMAN
by

Francis E. McDonough *4 pages + 1 page*

MR. MCDONOUGH: Mr. Chairman and members of the Commission: This proceeding involves the application of Wilmer E. Huffman for a construction permit on the frequency of 1290 kilocycles with power of five kilowatts day and five-hundred watts night, employing a directional antenna.

The applications of Francis C. Morgan, Jr., and Pier San, Inc., also requested a facility and the frequency of 2290 kilocycles but specifying operation during daytime hours only and with a non-directional antenna at Larned, Kansas.

The applications being mutually exclusive, the question presented squarely to the Commission is whether under Section 307 (b) of the Communications Act it dictates grant of the application of Wilmer E. Huffman, who will bring the second daytime and the first night-time service to Pratt, Kansas, or one of the applications at Larned, Kansas, which will bring that community its first transmission facility.

Our findings, reply findings, and exceptions have cited the details and the pertinent factors involved in the 307(B) question, and they are respectfully incorporated by reference. We will address ourselves here to two considerations which we feel will help make the Commission make the right disposition of the case.

In general terms, these points are; one, there is actually no precedent case cited by any party to the proceeding or by the Examiner in which the same primary basic factors are involved as in this proceeding. Despite the diligent effort of all involved, we have simply not found a comparative case where an applicant for a town with a local daytime outlet, but having no nighttime service and offering service to a substantial white area at night, was pitted against an applicant for a town without a local outlet either daytime or nighttime.

Our second point is that we hope to show that the case can yet be correctly decided by applying the mandate of 307(b) as it was meant to be applied.

*Questions asked by
Commissioner Green
Ford*

That is, by balancing all of the relevant factors, reception service, transmission service, and efficiency, and by making a common sense appraisal of the end result for the public under each proposal.

To return to our first point, the novelty of the instant case, we feel particularly inclined to raise this question because Huffman stands accused, as it might be, in the words of the initial decision of "citing no case in which the factors he relies upon, including the elimination of a white area, had prevailed over an application for a first local station." Page 26 of the initial decision.

Naturally, we cite no such case but where does our opposition cite a case where the establishing of a first local outlet prevailed over the bringing of a first service to a substantial white area? Let us see what they do cite.

Here is an example: The old Lawton Fort Bill Broadcasting Company. There was a town with a full-time network affiliated station, a reception service day and night, which was opposed to a town without a station (and no white area service was offered by the losing applicant.

Mercer Broadcasting Company, 13RR891. There, a town with three stations and eight to ten services, day and night, was opposed to a town without any station. No white area service was offered by the losing applicant.

We do not believe that such cases give the Larned applicant heavy presumptive advantages. Of some of the non-comparative cases cited in the proceeding, one is the Vidalia Broadcasting Company, 8RR1, where the Commission allowed the Vidalia station to increase power and change to daytime only operations, leaving about 5,000 persons in a town without local night-time primary service. And why was this done? Because the record shows the entire town favored the change, as was attested to by everyone from the mayor to the local barber.

37 public witnesses testified receiving programs of major networks at night over more than five clear channel stations, and preference to listening to their own station. Moreover, the change in facilities, while creating a white area brought a first and second daytime primary service to several thousand persons, including a white area of over 3,000.

All together a new daytime primary service was brought to approx--81,000.

A similar non-comparative case is Gillespie Broadcasting Company, 15RR878, 882(a), affirmed under the name of Red River Broadcasting Company vs. FCC, 19RR2028.

As noted in the brief supporting Huffman's exceptions, the Commission never even allowed the loss of the town's only night-time service to come into issue. In both of these cases and in the Rogers, John K. Rogers, which appears at 20RR523, involving applications for a daytime station at Bristol, Tennessee, on 1550, with power of one kilowatt, and the application of Gaston WKPT, at Kingsport, Tennessee, to go from a local full-time facility on 1400 kilocycles to 1550 kilocycles with power of ten kilowatts, the Examiner and the Commission both granted the WKPT application and denied the new application of Rogers.

COMMISSIONER FORD: Do you know of any instances in which the Commission permitted the deletion of a nighttime service on the same frequency, the only nighttime service in a community?

MR. McDONOUGH: No, sir, I do not. And I believe the emphasis has been laid by the Commission, in the Rogers case and in the Vidalia case and the Gillespie case, on the fact that if this superior daytime service was granted the night-time frequency and the facility in the community remained available for assignment if someone wished to apply for it, and if there was a need for such service.

And, in fact, in the Rogers case the Commission noted that there was a pending application for the facilities to be vacated by WKPT, but they did not accord that a great deal of weight because, of course, they couldn't determine what would happen to that application.

The same thing is true, here. There is, since this proceeding commenced,

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an application which has been filed for daytime only at Larned, Kansas, on a frequency of 1510 kilocycles. This application has been accepted for filing. Do you have any other questions, sir?

COMMISSIONER FORD: Yes, Pratt has 8,000 and Larned has about 4,000 population.

MR. McDONOUGH: Roughly speaking.

COMMISSIONER FORD: At night neither one have a local service?

MR. McDONOUGH: That is correct.

COMMISSIONER FORD: At night do either one have presently a primary service?

MR. McDONOUGH: The city of Pratt does not because the white area of the 9,000 people, that we will serve at night, includes the entire City of Pratt.

COMMISSIONER FORD: Well, now, does Larned have any primary service at night presently?

MR. McDONOUGH: I am sorry, sir, I can't seem to answer that.

COMMISSIONER FORD: Well, daytime, Pratt has one primary service only?

MR. McDONOUGH: That is correct, sir.

COMMISSIONER FORD: And that originates in Pratt?

MR. McDONOUGH: In Pratt, sir.

COMMISSIONER FORD: And does Larned have any primary service daytime?

MR. McDONOUGH: Yes. Larned -- daytime, both communities have some primary services, but they do not have their own--- I am confused between transmission facilities-----

COMMISSIONER FORD: I first asked about transmission facilities and Pratt has one primary service, originating in Pratt?

MR. McDONOUGH: Right.

COMMISSIONER FORD: And Larned does not have any?

MR. McDONOUGH: That is correct, sir.

COMMISSIONER FORD: Now, I was asking you about the number of primary services, daytime, in each of the two communities other than the one that originates in Pratt.

Well, you do not need to take your time now if on rebuttal you can supply that information for me.

MR. McDONOUGH: Oh, certainly.----The Commission, in these three cases that I have just cited, noted that there was the opportunity for someone else to apply for the vacated frequency.

The only conclusion then, if we are trying to draw un rebuttable presumptions from the cases, is that each applicant stands like a king on a chess board with all other pieces removed. Neither can conquer the other, and we reach a stalemate.

We feel, however, there is a reasonable course to take and we will suggest one. Our position then is that our white area service to 9,000 persons and the providing of a first nighttime outlet, and our opponents' providing a first daytime outlet, are both compelling reasons for a grant. And that

Oral Arguments Before FCC, All Parties
September 15, 1961 Page 4

a case involving applicants, each possessing one of these compelling assets, is a case of first impression before the Commission and cannot be solved in a fog of presumptions.

How would such a case be decided? We suggest that the very words of Section 307(b), providing for "a fair equitable--fair, efficient, and equitable distribution of facilities" provide a solution, for by setting forth, without emphasis, more than one criteria and there is implied a process of weighting and balancing the factors mentioned in reaching a decision.

In our case, if we consider the factors of fairness and equity alone we find Huffman on one side offering white area service to 9,000 persons, a first night time outlet to a community of 7,500, and Larned applicants, on the other hand, offering daytime only outlet for 4,400 persons.

In terms of numbers, only some 16,000 persons are receiving critically needed new service as against 4400 at Larned.

Even here, the scale seems to be in favor of Huffman, but it will be objected that Pratt now has a daytime station and this totally obviates Huffman's advantage.

Presumably then that the scales are evenly balanced at this point, but we are not finished. The crucial question remains, what else can Huffman or the Larned applicants offer under the third factor of 307(b), the fullest utilization of the facility and the frequency.

Huffman's proposal would bring a primary service to over 16,000 persons daytime to three cities with populations above 2,500 persons, including Larned itself.

That is, we would help to alleviate not only the dearth of daytime reception service at Pratt and Dodge City, Kansas, but also do the very same thing for Larned.

However, the Larned applicants would not do this as far as Pratt was concerned.

COMMISSIONER FORD: Has there been a recent grant in Dodge City?

MR. McDONOUGH: Yes, sir. At the time this was tried, there was one service in Dodge City and the Commission in March authorized another station there and I do not know whether it is in operation.

By comparison, the Larned applicants offer inferior services in every category mentioned. Daytime only service, service to populations less than Huffman's by a total of 42,708 persons and primary service to only one other city besides their own.

We think this comparison of a third factor clinches the 307(b) issue in Huffman's favor.

COMMISSIONER CROSS: Counsellor, how many stations are there in Pratt, now?

MR. McDONOUGH: There is one station in Pratt, sir, a daytime only station operating with a power of 250 watts.

COMMISSIONER CROSS: How long has it been there?

MR. McDONOUGH: That station has been there approximately, I would say, from memory--I was in the proceeding as an intervenor--about five or six years. I will reserve the balance of my time.

THE CHAIRMAN: All right. Mr. Rawson.

ARGUMENT ON BEHALF OF BROADCAST BUREAU, FCC.

by
ROBERT J. RAWSON *2 pages*

MR. RAWSON: Mr. Chairman, Members of the Commission, the issue in the case come down to only one thing, and that is as a matter of policy, what does the Commission believe is more important under 307(b)? Is it more

Questions asked by
Commissioner *Carley*
✓ *✓*
✓ *Ford*
✓ *Lee*

important to establish a first local transmission facility to a community or is it more important before you allocate a first transmission facility? Is it better to make an allocation that is going to provide a first primary service to substantial areas and populations?

COMMISSIONER BARTLEY: Can we ignore the efficiency portion of 307(b)?

MR. RAWSON: Commissioner Bartley, we are dealing here with two facets of 307(B). One is the long established and very important facet considered by the Bureau of reception service. This is the Commission's number one priority. First, a first reception service to people in the United States. There was a branch of 307(B) that developed approximately in 1945 in a case handed down by the Commission in Cleveland Heights where for the first time it held that there is a second facet, also to 307(B) and the second facet is the allocation of a transmission facility to communities for the purpose of using it as an outlet for local self expression.

We believe the Commission has already decided this policy question. The Commission has decided that it is more important that they allocate a frequency where it will provide a first primary service in preference to an allocation which simply will provide a first local outlet, namely--

COMMISSIONER CRAVEN: I think you are getting me a little bit confused. If you refer to paragraph 5 of the Examiner's decision, it seems to me Pratt has several primary service.

MR. RAWSON: I am not talking about Pratt, sir, in this case. Oh, Pratt, Kansas has no primary service at night, sir. The entire area in population except for 228 people nighttime are without any primary service.

The grant to Pratt will provide these 9,076 people with their first primary service. They are now without it.

The Pratt, Kansas daytime does have primary service from two existing stations as does Larned, Kansas, also.

So, as I say, the Examiner himself, the Examiner in this case, threw the gauntlet at the Commission when he said that since the Commission doesn't consider white area important in view of the fact that it has authorized stations to change frequency from unlimited time to daytime only on another frequency resulting in a loss of the only service nighttime to the community, that the Commission obviously then doesn't consider white area important.

We think the Examiner's reasoning is quite fallacious and rather presumptuous because the Commission's decision is not based upon that consideration, namely, that it doesn't consider the white area unimportant.

COMMISSIONER CRAVEN: Mr. Chairman, I didn't realize that this was going to be called today, and I made an engagement for 12:00 with respect to an important matter concerning space communications and I must leave.

THE CHAIRMAN: All right.

COMMISSIONER CRAVEN: I will read the record.

THE CHAIRMAN: All right. Thank you.

MR. RAWSON: In other words, I am referring to paragraph 66 of the Examiner's initial decision where he discards the entire proceeding as far as Pratt is concerned in view of the Commission's previous decisions in Rogers Broadcasting, Gillispie Broadcasting and Red River Broadcasting Corp.

We think the Commission, as I said earlier, has actually decided this case. They decided it really in Valley Broadcasting company, Lehighon versus Miners Broadcasting Company, involving a 307(b) proceeding between Lehighon, Pennsylvania and Kingston, Pennsylvania.

They decided it also in the Monocacy Broadcasting Company, which decision of the Commission went off solely on the question of white area,

where the Commission preferred an applicant for Gettysburg, rather than to make a grant of a second transmission facility in Fredrick, Pennsylvania, and that case, of course, was affirmed by the United States Court of Appeals.

It is the Broadcast Bureau's position that, as in the cases already decided by the Commission, Valley Broadcasting, Monocacy and Islip, New York, that it is more important to provide a community nighttime, not only with its first outlet for local self-expression but also to provide that community nighttime with its only primary service before authorizing a first transmission facility to a community that is already with primary service.

Thank you.

COMMISSIONER FORD: Is there anything in the record as to why the two Larned applicants didn't apply for nighttime?

In other words, as I understand it, they are applying for daytime only and Pratt is applying for full time.

Is there anything in the record to explain that?

MR. RAWSON: No, sir. Well, there may be something in the record but I was not counsel in the proceeding. I am not that familiar with the record, sir.

COMMISSIONER LEE: Are there FM stations in Larned and Pratt? Or is that reflected?

MR. RAWSON: The other parties may know that answer to that, sir, I don't.

THE CHAIRMAN: Any question? Thank you, Mr. Rawson.
Mr. Stein.

ARGUMENT ON BEHALF OF FRANCIS C. MORGAN, JR.

by
A. L. STEIN *4 pages*

MR. STEIN: Mr. Chairman and gentlemen of the Commission, I would like to reserve about six minutes for rebuttal.

At the outset, I would like to try to respond to the questions raised by Commissioner Ford.

One of the questions is, "How many primary serviced daytime does Pratt receive at present?" That is answered in the middle of page 4 of the Examiner's report.

There are three services that cover all of Pratt daytime. One service covers part of Pratt daytime. So, with this new station they will have a fourth daytime to all the city and a fifth to the remainder, as I gather.

The stations that serve Pratt at present are the local stations there, WFRM, Concordia, KFBI, Wichita, in toto, the one service part is KVGB, Great Bend.

I believe there is nothing in the record to show why the Larned applicants did not file for unlimited time. There is a possibility--and I say only a possibility--economic did affect the considerations. So far as I know, there are no FM stations there. With respect to Larned, the outside daytime services at present are two, one from Great Bend about 22 miles, with the other from Concordia, about 125 miles away.

Does that answer your questions?

COMMISSIONER FORD: Yes, except for night.

MR. STEIN: Yes. I have no information with respect to the nighttime services at Larned. I would assume as a guess, and only as a guess, that there are none in view of the fact there are only two daytime services there. Those stations that serve daytime are probably too far away. Twenty-two miles would seem to me too far away to provide nighttime service from

*Questions asked by
Commissioner Ford
Hyde*

Great Bend. I have no information on that specifically.

I would like to devote most of my time to a comparison of the two Larned applicants. Both of them filed the same day. The Examiner compared the two on the basis of various criteria. He said with respect to local residents, neither should be preferred. The members of Pier San resided at 100 miles from Larned and some of them 800 miles away.

Morgan has resided in small towns 24 and 50 miles away from Larned most of his life.

On the issue of integration of ownership and management, Morgan, of course, has 100 percent. Pier San has one person to devote full time. He has 20 per cent interest.

On the question of Broadcast interest, the Examiner awarded to Pier San because of the many years of experience. Of course, Morgan doesn't have the experience. He is much younger. However, he has had experience in a small town about 50 miles from Larned, namely, Pratt, where his father has a station.

On the question of proposed programming, the Examiner again awarded a preference to Pier San. This related solely to the entertainment types of programs. He said that Morgan's entertainment programs were limited to his own undeducated tastes. He said, on the other hand, Pier San provides some classical music which represents an attempt to raise the cultural level at Larned. But the Examiner did admit that Morgan included a proposal for good music from abroad and he also admitted that Morgan proposed a half hour Sunday afternoon program for music by the Hollywood Salon Orchestras and other large string orchestras.

Nobody ever challenged the statement. Frankly, I think the Examiner is in error on that point.

Now, there may be a question of degree with respect to classical music. Maybe ours is better. Maybe ours is worse. Maybe ours is good. I don't know, but I don't think you gentlemen want to sit here and try to decide who has the best kind of classical music. At least, I wouldn't if I were in your position.

COMMISSIONER HYDE: You are not a musician.

MR. STEIN: Now, on the question of diversification, the Pier San's group has five stations. Morgan has none. The Examiner said diversification doesn't mean anything here. He said that a far more important thing is that so-called superior programming and the greater experience of the Pier San's group.

Of course, you must also remember in considering diversification, if diversification is aimed at bringing newcomers in this field and I think all of us will admit perhaps this field does need some newcomers with new blood, then, obviously, any man that has the benefit of diversification has very little, if any, experience, because the man who has a large number of stations has more experience, or has has large numbers, has much more experience and gets benefit out of experience, but the man who has had no experience loses as a result of that and yet he should be entitled to the preference on diversification.

So to me it looks like a matter of policy. If you feel that the present people who run this business are doing a good job, you think they are and you think these people are doing a good job, then I think a certain amount of weight can be attached to it. On the other hand, if you think this area needs youth, new blood, something different, and you want diversification, then you ought to take a new advocate who has had no ownership at all.

I would like to spend a few minutes reviewing the background of each of these groups.

This Pier San's group consists of five persons. Each of them put up \$200. In addition, to that, the two that reside at Nashville agreed to advance the corporation \$20,000 and of this sum they have already advanced \$3,000. The three participants from Wichita will provide services, etc.

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Now, these two at Nashville are engaged in publishing and the recording business; they are so-called artists and entertainers. Between them each has a half interest in three other radio stations located in Georgia.

Now, with respect to the three Wichita participants, they are Bozeman, Pyle and Early.

Each of them has a one-third interest in a station at Omaha, KOOO.

Bozeman also has a 100 per cent interest in KSIR, Wichita.

Now, Bozeman has employed with him the other two Larned participants, namely, Pyle and Early. They are officers and directors and work together daily at the station.

Bozeman himself has been employed at radio stations in various areas since about 1938.

In particular, he has been at Wichita since 1951. During the period 1951 to '58, he was an entertainer, free lancer, program man, did almost everything in the program field at various stations in Wichita.

Mr. Early is an attorney at Wichita. He spends quite a bit of time at the station. He claims he will spend an hour a week going to Larned and Mr. Bozeman says he will do the same thing.

The third participant, Mr. Pyle, is a station manager and chief engineer of KSIR, Bozema's station. He has been in the radio business many, many years, probably 35 to 40 years. He is about twice as old as Morgan. He expects to leave the Wichita station where he is an officer and director and spend all his time at Larned because he says he now wants to take things a little easier.

Now, let's go to Morgan.

He was born in 1932 in a small town of Kansas. His father has been in the radio business off and on for about 25 or 30 years. As a youth, he moved to Great Bend. That is about 23 miles north of Larned. He remained there for a short period of time while his father managed the station. During his year at high school he participated in football, basket ball and various jal alai events. Then, at 16 years of age, his father became a manager at Hays which is about 45 or 50 miles from Larned. While at Hays, Morgan participated in high school events, activities, basket ball, track, member of the courtesy committee, choir, Boys' Glee Club, etc. He also received some honors such as being the Junior Leaguer. During the summer he would work at the state agricultural farm.

In 1952, his father received a grant for Pratt. The boy went with his father. He graduated from high school, attended Pratt Junior College for a year and worked at his father's station part time. He operated as a salesman.

In about 1953, he went to the military service, remained there a couple of years. During that period, he had discussed with his father and his wife the possibility of going into a station for him. They discussed Larned. Neither of them had any money at the time and so nothing was done.

Now, after Morgan returned from military service, he went to his father's station, gained some experience there, copy writing, news gathering, news casting and helping all the way around.

A couple of years later -- I should add this -- I am sorry.

While he was in the military service, he took a course by correspondence in order to become a first class engineer. Several years after he returned from the service he went to Dallas, took a course and became a first class engineer, returned to the station and became Chief Engineer.

But, in addition to being Chief Engineer at the station, selling, sort of an assistant manager, he did something else. He did news writing, newscasting and then he organized some radio production classes at the Pratt Junior College and High School. He took these students to the station and they produced programs. In particular, one program -- the one day during American Education Week the students practically ran the station.

And then there were a group of pre-engineering students at the Junior Coegee and High School. He assisted them and lectured to them but even of greater importance he participated in numerous civic activities, such as

Kiwanis, Junior Chamber of Commerce, etc. at Pratt.

He handled various drives for these groups. He held the publicity, did work for the Rotary Club, Luon's Club, x-ray matters, mobile units, TB units. He went to the State Fair, set up things, did practically everything that could have been done even by an experienced broadcaster. There is a case where a young man was ambitious and energetic and wanted to do something in the radio business in a small town and as a result he participated in everything.

Now, his mother passed away several years ago. Thereafter, his father remarried and some friction developed in the station which I guess happens in every family that that problem arises. He left his father's station in about July, 1960 due to personal differences and he became a salesman in the Larned-Pratt area selling certain specialties. He said that is a job he had at the time but he hopes to go back in the radio business and I think your record will show--I think there is a report by a station at Hutchinson, Kansas, to the effect that he is now Chief Engineer. I haven't looked at the thing but I am informed it is there. However, that is not in the record and I want to make it very clear to you, gentlemen.

THE CHAIRMAN: I want to call your attention to the blue light, so you can plan your argument.

MR. STEIN: Thank you, I just want to spend one minute on the past program of KSIX, the Wichita station.

Mr. Bozeman, as I said before, has had a great deal of experience at Wichita, seven or eight years at the station, supposed to know what is going on, know the source of programs and everything else. Yet, when he put a station on the air and since then, he didn't seem to have any educational programs. He put on a program for a couple of hours which he called "Classical Music." They distributed a large number of pamphlets giving the programs, etc. They claim it is an education program. They have no other educational program.

In the meantime, they proposed about six per cent educational programs.

Incidentally, that some time classical music program in the Larned schedule is referred to, not as educational, but as entertainment. That program, incidentally, is also commercial. I think they claim because they do a large amount of printing for the program, they lose about \$10 a week on it. It is carried two hours Sunday afternoon.

Now, at Larned, it is altogether different. There is experience at Wichita but no used. At Larned, experience is used to put on a nice show, on papers, of course. There you have a KU class program, 30 minutes a day. So I asked Mr. Bozeman why don't you have that program at Wichita?

Well, he said that Wichita classrooms are crowded. Anyway, we don't think the Wichita people care for it. The Larned people do. He has one or two other educational programs proposed for Larned, but as far as I can see and maybe counsel will dispute me, no educational programs at Wichita, so far as we can see. They may have a few school announcements and things like that, but that is it.

Also, he had proposed one of these half hour forum programs for Wichita. I assumed a man with that experience would know where he could get the material and what he could do. But that he claimed the so-called forum program or discussion program, whatever he called it, is met by a so-called 15 minute program per day on the street where the announcer asks the man a few questions, why do you shop down town, and things like that.

Of course, they do have a few little discussion points. One is that while you have a political campaign, they let people speak, but that is it.

That is the story on the famous--on the other hand, we will have all kinds of discussion programs for Larned.

Then, I would like to add in addition to that, if I can, on this diversification matter, that the half millivolt per meter contour of the Wichita station covers about 35 to 40 per cent of the area of the half millivolt per meter contour of the proposed Larned station.

Now, let's take Morgan. He went out and saw a large number of people.

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At least 28, he said, at different times, and some were repeated. He went to various people several times. I don't see anything wrong with that. In fact, I think it is better. Maybe people get new ideas a second time. So he took his program schedule.

On the other hand, what did Pyle do? He spent one day there as far as programming was concerned. He was there other times, no doubt, looking for sites and made about eight or ten contacts and these were all made after the applications were designated for hearing, and that was the end of it.

So far as preparation is concerned, maybe they do use experience. So far as actual production at Wichita, the experience doesn't seem to me very much. I would like to reserve the balance of time, thank you.

THE CHAIRMAN: Thank you, Mr. Stein.

THE TIMEKEEPER: You have one minute.

THE CHAIRMAN: Mr. Kenkel.

ARGUMENT ON BEHALF OF PIER SAN, INC.

by
JOHN B. KENKEL

5 pages

MR. KENKEL: My brothers, may it please the Commission, after having heard the three exceptors argue, I am quite sure you know now what the issues in the case are.

Number one, under Section 307(b) of the Act, which is to be preferred, the Huffman proposal for the use of 1290 at Pratt or one of the Larned applicants proposal for the use of the frequency at Larned?

The second issue is the comparative one between the two Larned applicants, Francis C. Morgan and Pier San.

Taking up briefly the Section 307(b) issue, there have been a number of statements here as to the service available to the several communities involved, and I have heard two or three figures mentioned and to bring together in one place exactly what we have, may I perhaps repeat what is said.

At the present time, Larned has no radio station, Pratt does: Station KWSK. KWSK operates during the daytime. Larned has no station. At the present time, Larned has listening service during the daytime from two stations, one some 24 miles away, one in excess of that up to 100 miles away.

At the present time, Pratt, on the other hand, has four listening services, one of them not quite covering all the city but there are four there. One of them, of course, from its own local station.

Pratt and Larned are substantially similar in size, economic, social, cultural indicia. Both of them are typical, I think, Mid-Western Kansas communities. Both of them are in counties. Both are the county seats of their respective counties and the two counties are not dissimilar. I think there is less than a thousand population between the two.

The Huffman proposal would utilize 1290 KC day and night and in that way would bring to Pratt a first listening nighttime service.

The Larned proposal, on the other hand, over daytime, only. I think the Broadcast Bureau unfairly categorized the initial decision when he says to you in rather startling terms, "The Examiner has thrown to the Commission the gauntlet."

I think if you read the initial decision you will not find that. The Examiner very carefully went through the evidence of record, made his findings, and on the basis of those findings, proposed his conclusions.

The initial decision shows you that the Examiner gave considerable thought to the question under Section 307(b), which is to be preferred, one of the proposals for Larned, which would bring a first station to that substantial community or the proposal for Pratt which would bring a second station there and supply a first nighttime listening service.

The Examiner, I think, correctly reached the decision that as between the two, the proposal for Larned was to be preferred under Section 307(b). This

*Questions asked by
Commissioner Cross
Ford
Battley*

I don't think, is throwing a gauntlet down to the Commission. Let us see why the Examiner -- I say correctly -- some reference has been made here to the question of the Commission's policy in the matter. Quite frankly, the Broadcast Bureau and the applicant could not come to the Commission with any case involving this choice. Admittedly, we don't come to you with a case on all fours either.

However, in our statement in support of the initial decision, in our reply to the exceptions, I think we have set forth a number of cases from which we can see the correct policy or the correct principles which should be applied in the instant factual situation.

COMMISSIONER CROSS: Counsellor, do you know whether or not there is anything on the record, and the question has been asked of other counsel, as to why your applicant, for instance, didn't apply for nighttime?

MR. KENKEL: There is nothing on the record, no, Commissioner Cross.

COMMISSIONER CROSS: Thank you.

COMMISSIONER FORD: I tried to find if there is any primary service to be learned at night. Is there? Do you know?

MR. KENKEL: I don't know.

COMMISSIONER FORD: I couldn't find anything.

MR. KENKEL: I don't believe the record shows one way or the other, Commissioner.

I think the Commission quite rightly has recognized the declining importance of nighttime radio listening. I know that you have said radio and television are two separate services. Certainly, they are two separate services, but let me just say this. Thinking back in my own rather limited experience, if you would utilize the same number of years in your larger experience, you will remember that ten years ago, 15 years ago, nighttime radio listening was important. I dare say more people knew the names and biographies of the personalities appearing on a Sunday night time radio program than they did of their own Congressman or perhaps even their Senator, or Governor. Think about that today.

Nighttime radio listening is declining in importance, and I think you will have to recognize that. Now, still, there is some significance to it and I am sure that you, no less than the Examiner, would weight that facet in this case in making the decision.

But when you talk about first primary listening service at night, it does not have the same significance that it had some years ago.

On the other hand, your transmission, the first transmission facility, if anything, is increasing in importance. The community mouthpiece, so-called, by the Supreme Court, in the eastern Allentown case, is more important today than it has ever been, especially in the light of the decline of newspapers.

Secondly, don't forget that when we were talking about nighttime signals in this case, we were talking about primary service signals. That is the only thing that your issue permitted us to explore.

Your are familiar with the Skyway proceedings, the Clear Channel cases, and you know that the secondary service rendered by Clear Channel cases, especially to areas like this, is actually service in many, if not all, cases. So that we are not talking here about a situation, or if we are talking about a first listening service, let us remember that you are talking about a computed primary listening service and that by granting Larned so that it can have a station and denying the Pratt applicants, you are not saying, "Well, Pratt, is not going to get any radio service at night".

Unfortunately, we did not go into that on the record because the issues, as I say, talked only about primary service.

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So the initial decision in this case presents the Commission with an opportunity to a firm, I think, as well reasoned decision which will bring to Larned a first radio station, and as the record shows, one professionally right.

As a matter of fact, one of the witness said that the primary purpose here and the intent of the Pier San's applicant was to bring to this smaller community the type of radio operation that it more often associated with the larger cities and, as a matter of fact, the witness said that he has heard the small radio stations or small town radio stations, very often the news announcers simply reads some news and cannot even pronounce the names of personalities in foreign news. That is not what Larned is going to get. Larned is going to get a first class professionally run radio station. That is the initial decision that you can approve and that is the benefit that you can bring to Larned, Kansas.

Now, turning to the question of comparison between Pier San and Morgan.

Pier San is a group of five men, three of which will be directly concerned with the operation at Larned and even as among those three, one, Mr. Kay Pyle, will be the on-scene resident manager of the station. Mr. Kay Pyle has 35 years in radio broadcasting. He has operated in Kansas. He has been Chief Engineer at stations. He has done engineering work. He is a member of the State Industry Advisory Committee, a member of the National Executive Reserve, both outfits under the aegis of the FCC.

He is an experienced and well qualified broadcaster. An examination of the record where he was examined can leave no doubt in your mind with Mr. Kay Pyle operating the station at Larned, the community will, in fact, have a fine, well rounded operation.

Another of the three is Mr. Bozeman. Mr. Bozeman, at the present time, owns KSIR, Wichita.

I think if you examine the initial decision, examine the few exceptions that we filed in connection with that, and perhaps even go further and examine the record, you will find that there is nothing derogatory that can be said about the operation of KSIR, either actually, or comparatively against its promise to the Commission in its application in 1957.

One or two changes have been made, but I would suggest to the Commission that had not those changes been made, then, you might find some fault with Mr. Bozeman or Station KSIR.

As he pointed out, for example, when the initial proposal for Wichita was made, it contemplated a forum type discussion program. KSIR is one of five or six stations in Wichita and as the station operated they found they could not get the participants for a forum thing.

However, they found that they could, and he told the Examiner on the record, get the person, the type of person, the experts, the political contender, those interested in public issues, he could get them briefly on a program on the street. If he could meet them on the street, the participants liked the program better. This "Man on the Street" is not limited to those things because every day there is not a controversial issue. Don't forget this "Man on the Street" is a daily program. Sometimes as a matter of fact, as the record shows when there is a substantial controversy issue the "Man on the Street" program goes beyond its allotted 15 minute period and the station keeps it on as long as the participants in the discussion of that day can carry forward with the participants.

EXAMINER CROSS: This is in Wichita?

MR. KNEKEL: This is in Wichita. Now, when they went to Larned, and this is important and this is where I take issue with Mr. Stein, who I think misread the record in the initial decision, in connection with the proposal for Larned, the discussion program is similar to the "Man on the Street" because as the applicant pointed out, number one, Larned being a smaller town, it is not likely that there are going to be controversial issues arising every day that would require a weekly or daily forum debate.

Secondly, it has been their experience that if, in fact, you want to

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bring to the listeners the important things that are hanging in the community, the better way to do it is the "Man in the Street" programs; you can more easily get participants and you can also encourage listener interest.

I think there is a clear indication of the a radio operator utilizing, relying upon and implementing his experience in the field to come up with a proposal for another station.

The other member from Wichita, Mr. Port Early, is an attorney. He presently works also at KSIR and it is proposed that he will spend approximately a day a week, and not an hour, but a day a week, Mr. Stein, at Larned.

Also, Mr. Bozeman, he will also spend a day a week. More in the initial stations, but from time to time it is expected to be a day a week. He too has had experience in radio broadcasting.

Those two, presently living in Nashville, Tennessee, have put together a proposal, which promises, I think, a substantially good and commendable operation at Larned, Kansas. This will be the first station for Larned.

Just briefly, an agent on that point. I found somewhat puzzling my brother's reference to a pending application for another station in Larned. That application was filed some ten days and it is filed contingent of a grant of either of the Larned applicants, not of a denial, and perhaps your eyebrows raise and you wonder why contingent on a grant?

One of the partners in that is a Mr. Hoagland, who is the son of the Mr. Hoagland who is financing the Pratt proposal. So the case of the overlap situation, obviously, the son could not have a station at Larned.

There may be some other problems involved there which the faces of the two applications in the record here do not show but suggest.

For example, in the docket, in the Pratt case, there is a letter from Mr. Hoagland to one of the Congressional representatives inquiring about-- and I am speaking now of the Hoagland who is financing Pratt -- there is a letter inquiring about the status of "my" application. Perhaps there was a choice of language on his part. Perhaps it has some other significance, but I don't know. I think these things should be mentioned since my brother raised the question of a new application having been filed for Larned.

Briefly, there was a question, or there is a question of the diversification issue. Now, we rely in part on the experience gained by the members of Piler San. Primarily, we rely on the experience and the qualifications of Mr. Kay Pyle because he will be the person running the station at Larned for the corporation.

Now, the others, of course, are going to confer with him from time to time. They are going to put time in on it. Their policies will be developed as they have been in the past by all of them, but Mr. Pyle is going to be the on-the-scene manager and run the station.

He has an interest in the Omaha station. That is the extent of the diversification problem with respect to the man principally involved in Larned.

The other members, as Mr. Stein pointed out to you, have interests in other radio stations. The two men from Nashville, Tennessee have interest in three Georgia stations. At the time the hearing started they had interests in two stations in Georgia and Omaha, but during the course of the hearing they withdrew from Omaha and got an interest in another station in Georgia.

Mr. Bozeman and Mr. Early have an interest in Omaha and Mr. Bozeman, as I have mentioned, owns the Wichita station.

None of the stations involved, or with respect to none of the stations involved is there going to be any question of duplication of rates or of programming, of personnel, or anything of that matter. I think the record is abundantly clear that the stations are separately operated and particularly with respect to this Larned station, it will be completely separately operated from any of the others and Mr. Pyle, as I say, will operate that station.

Perhaps, at this point, we can turn back again to the Section 307(b) issue, that is, whether one of the Larned applicants or whether the Pratt applicant should be favored.

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should be favored.

Counsel for the Broadcast Bureau mentioned two cases to you purporting to suggest the importance of white area service. In neither of those cases was there this choice, some white area service versus a first station in a community. Cases cited and perhaps attempted to be distinguished by counsel for Huffman did involve a loss of an only nighttime service. The three cases we have mentioned, and I think they have probably attempted to reply to in our several pleadings, are Vidalia Broadcasting, Gillespie Broadcasting, which was affirmed by the Court of Appeals under the name of Red River Broadcasting Company, against the FCC, that is in 106-FEC, and John K. Rogers, which is in 20RR.

In each of those cases, the Commission felt that daytime again outweighed the loss of an only primary nighttime service.

As a matter of fact, in the Red River case -- that was the Gillespie case before you -- the Court of Appeals in a footnote noted that what you were talking about was the loss of a first primary service but that there was this recognized possibility of actual service from the secondary signals from third channel stations.

That brings us back to that one point that I made before that what you are talking about is a computed primary service and you can't forget, or in trying to weigh and balance and determine the weight to be given to this, you must remember two things: One, the increasing importance of nighttime radio listening; secondly, that you are talking about only a primary service, and that you are not talking about a complete absence of service in any respect.

To conclude and to sum up, the Commission has before it an opportunity to present Pratt, Kansas, with a first local station. Admittedly, each of the other proposals involved have some meritorious facets.

COMMISSIONER BARTLEY: I believe you meant Larned.

MR. KENKEL: I beg your pardon.

COMMISSIONER BARTLEY: I believe you meant Larned.

MR. KENKEL: Yes, I certainly did, Commissioner. Thank you.

The other proposals have some meritorious facets.

When you talk about the two Larned applicants, compare the two, and as the Examiner pointed out with respect to Morgan, the comparison weighs heavily in favor of Pier San.

One thing, my brother, counsel for Morgan, did not mention, and it goes quite directly to the question of planning, was this matter that the record shows on how his application for Larned was filed. He did not even see the application. I am talking about the entire application which included financing and programming. He did not even see that application until after it was filed with the Commission.

COMMISSIONER CROSS: Who is he?

MR. KENKEL: The applicant, Morgan, young Morgan. The record shows that the application was filed and the first time he saw it was sometime afterwards. He doesn't say exactly when but it looks like several days after he got the material from Washington.

As a matter of fact, the planning portion of the application when first filed with the Commission were in the name of his father, Clem Morgan. In some portions that name was left out. In other portions it was later scotch-taped over. None of this was very sufficiently explained on the record, and the Examiner said that the record was not sufficient to hold that young Morgan was not the real applicant, but he missed entirely the point of the significance of these facts with respect to the question of planning.

How can the Commission rely for future operation on an applicant who has

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not sufficiently planned his application to ever see it before it is filed.

Thank you.

THE CHAIRMAN: Are there any questions? Mr. McDonough.

THE TIMEKEEPER: You have six minutes.

REBUTTAL ARGUMENT ON BEHALF OF WILBER E. HUFFMAN

By

FRANCIS X. MCDONOUGH

MR. MCDONOUGH: We believe, after listening to the argument of counsel, that our initial approval is still correct. We believe that there is a difference between Pratt and Larned, Kansas in that Pratt is a larger community by having a population of about 7,500 persons and Larned having a population of about 4,447, according to the 1950 census used in the proceeding.

Be that as it may, I am somewhat amazed at counsel's insistence that this Commission should recognize that nighttime radio is not important, or it has deteriorated since the advent of television. There is nothing in the record to indicate in this proceeding that there is any television service in Pratt or Larned, for that matter. Whether or not there is reception, whether it is high quality reception or whether there is a need for radio listening is something I think we must assume.

I also think we must give Mr. Huffman credit in proceeding to file his application which was filed well ahead of either of the Larned applicants of making a determination before he invested his money for a full time operation involving a directional antenna that there was a certain need in Pratt and the surrounding area for nighttime radio.

Perhaps, he found that the residents of the area were interested in local events after the day was over, the local sport events, or other needs that emanated from the community. We just can't assume that there wasn't a purpose, if we wish to give him any credit at all.

In the record, of course, no program showing on behalf of Huffman was permitted under the issues. It was strictly a 307(b) participation.

I mentioned the filing of a new application at Larned, Kansas. This matter came to my attention on public releases or in broadcasting magazines.

I merely verified this morning that it had been accepted for filing.

I do not know, maybe counsel for Pier San is correct and maybe Mr. Hoagland is financing Pratt. There is no financial issue in this proceeding and I am unaware of any significance of this statement.

My I mentioned the Larned applicant, second application, was to emphasize the point I tried to make in my argument that in the three cases primarily relied on by other counsel, that is, the Vidalia case, the Gillespie case and the Rogers case, that in each of those cases the commission in reaching its final decision emphasized that the transmission facility that was being abandoned, that is, the nighttime facility that was being abandoned to permit vast daytime power increase would be available for us by some other party or applicants if a local need for such service induced anyone to apply for it. I still think that is a very important factor, in determining that an increased daytime service should outweigh the continuation of a nighttime primary service.

In summary we have tried to show that this is a question that must be determined by the Commission on the basis of the facts of this particular case, that we just can't arbitrarily say, well, in other cases the establishment of a first local service must prevail, that here we must weigh that against the establishment of a first nighttime primary service to a substantial community and a certain portion of the surrounding area.

We believe that the communication should and must treat the criterion of Section 307(b) of the Communications Act on a basis of equality, that is, treat each element giving efficiency as much weight as the fairness and equitable factors, and on the basis of the willingness of this applicant

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to make an efficient utilization of the frequency, we believe that tips the balance, if there is any substantial question, squarely in favor of the application of Wilmer E. Huffman at Pratt, Kansas.

Thank you, gentlemen.

THE CHAIRMAN: Are there any questions? Thank you, Mr. Stein, I believe you have one minute.

MR. STEIN: Right.

REBUTTAL ARGUMENT ON BEHALF OF FRANCIS C. MORGAN, JR.

by
A. L. STEIN

MR. STEIN: I did make a mistake if I said the Messrs. Bozeman and Early expect to spend an hour a week at Larned. It was a day a week and that is what my intention was.

Now, at the end of his argument, Mr. Kenkel tried to indicate the possibility that the Morhan application might be a block application. Of course, the matter was raised before the Examiner at great length and it is answered by the Examiner on page 7 of the footnote of his initial decision.

If anyone has ~~any~~ any questions, I will be glad to try to answer them.

THE CHAIRMAN: Any question? thank you.

(Whereupon, at 12:30 p.m., oral argument in the above-entitled matter was concluded.)

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Huffman Granted
Pier San-Morgan Denied
1st Decision By FCC
January 3, 1962

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

FCC 62-13
13085

JAN 10 1962

In re Applications of

WILMER E. HUFFMAN
Pratt, Kansas

FRANCIS C. MORGAN
Larned, Kansas

PIER SAN, INC.
Larned, Kansas

For Construction Permits

DOCKET NO. 13469
File No. BP-12021

DOCKET NO. 13470
File No. BP-12749

DOCKET NO. 13471
File No. BP-12750

Reed

Appearances

Messrs. Francis X. McDonough and Thomas S. Sullivan for Wilmer E. Huffman; Mr. A.L. Stein for Francis C. Morgan, Jr.; Messrs. Arthur H. Schroeder and John B. Kenkel for Pier San, Inc.; and Messrs. Robert J. Rawson and Ray R. Paul for the Chief, Broadcast Bureau, Federal Communications Commission.

Decision

By the Commission: Chairman Minow absent; Commissioner Bartley abstaining from voting; Commissioner Ice dissenting; Commissioner Cross dissenting and issuing a statement.

1. This proceeding involves three mutually exclusive applications for Class III facilities. Wilmer E. Huffman (Huffman) has applied for a new broadcast station construction permit at Pratt, Kansas. He would operate on 1290 kc, 5 kilowatts, day and 500 watts, night, unlimited time. He would use a directional antenna with different patterns for day and night. Francis C. Morgan, Jr. (Morgan) and Pier San, Inc. (Pier San) have each applied for construction permits at Larned, Kansas. Each seeks to operate on 1290 kc, 500 watts, daytime only.

2. The Commission's designation Order (FCC 60-386, released April 18, 1960) found each applicant legally, technically, financially and otherwise qualified. Such Order specified, among others, an issue under Section 307(b) of the Communications Act of 1934, as amended. It also contained a contingent comparative issue (if Larned was favored under such 307(b) issue) as to which Larned proposal would better serve the public interest, convenience and necessity. Hearing Examiner Sharfman's Initial Decision (FCC 61D-36, released March 29, 1961) proposed to grant the Pier San application. The Examiner favored Larned on the 307(b) issue and preferred (on the basis of the standard comparative criteria) Pier San's application over that of Morgan.

Huffman Granted, Pier San-Morgan Denied
January 3, 1962 Page 1

3. Huffman, Morgan and the Broadcast Bureau filed Exceptions to the Initial Decision. Essentially, Pier San supports that Decision. The Commission, en banc, heard oral argument on September 15, 1961. The Commission's rulings on the filed Exceptions are in the attached Appendix. The Commission has also considered the Initial Decision's findings of fact in the light of the filed Exceptions. They are adopted as modified in the Appendix. The Commission disagrees with the Examiner's conclusions.

4. The essential 307(b) findings are recapitulated. Larned, Kansas has a population of 4,447 (1950 U.S. Census). It is located in south-central Kansas, in the midst of farm country, and is the county seat of Pawnee County. Grain, livestock, gas and oil are important factors in the area's economy. Larned has a daily newspaper. It supports the usual civic, fraternal, social and educational organizations. As far as daytime radio service is concerned, Larned has no local transmission service, i.e., no outlet for local self-expression. It has two primary daytime reception services (2 mv/m or greater). One is KFRM, Concordia, Kansas, the other, KVGB, Great Bend, Kansas. The rural area surrounding Larned presently receives primary service (0.5 mv/m or greater) in any one part from a minimum of 7 to a maximum of 23 stations.

5. The Larned proposal ^{1/} would provide interference-free service (0.5 mv/m or greater) to 127,353 people in an area of 11,959 square miles. It would provide a first daytime outlet for local self-expression for Larned, as well as a third primary daytime reception service. It would also provide a new service (2 mv/m or greater) to Great Bend and Hoisington, Kansas.

6. Pratt, Kansas, located 50 road miles southeast of Larned, is the county seat of Pratt County. It has a population of 7,523 (1950 U.S. Census). The economic factors important to Pratt (and its surrounding area) are similar to those supporting Larned's economy. Pratt, too, supports the usual civic, fraternal, and social organizations. In addition to the standard educational facilities, a junior college is located there. Pratt has a daily newspaper. The Hutchinson (Kansas) News Agent also maintains an agency there. As far as daytime radio service is concerned, Pratt has one local transmission service. Station KWSK (1570 kc, 250 w, D), established in 1952, serves the community in that regard. Pratt presently receives primary daytime service from KFRM, Concordia, Kansas; KFBI, Wichita, Kansas; and from KWSK (the local station). Part of the city also receives primary daytime service from KVGB, Great Bend, Kansas. The rural area surrounding Pratt presently has other primary service (0.5 mv/m or greater) available in any one part from a minimum of 4 to a maximum of 23 stations. Looking at nighttime radio service,

^{1/} The small mileage separation between the Morgan and Pier San proposed transmitter sites is not significant in terms of coverage or interference considerations. Accordingly, when we refer to "the Larned proposal", we are referring equally to both the Pier San and Morgan proposals.

Huffman Granted, Pier San-Morgan Denied
January 3, 1962 Page 2

Pratt is without either a primary reception service or a nighttime outlet for local self-expression.

7. Huffman's daytime proposal would provide interference-free service (0.5 mv/m or greater) to 160,857 persons in an area of 20,796 square miles. It would provide a primary daytime service (2 mv/m or greater) to both Larned and Dodge City, Kansas. It would bring a second competitive daytime transmission service to Pratt. Huffman's 500 watt nighttime proposal has a normally-protected 4.0 mv/m contour containing 16,099 people. He would serve within his interference-free 14 mv/m contour 9,204 of these people, i.e., 57.2% of the normally-protected population. 2/ 128 of the 9,204 people already receive primary nighttime service from Station KOMA, Oklahoma City. The other 9,076 (including the entire city of Pratt), would receive their first nighttime primary service. Huffman's 500 watt proposal would also serve as a first nighttime outlet for the Pratt community.

8. Both the Pratt and the Larned proposals merit serious consideration. On the one hand, the Larned proposal would provide that community with a first outlet for local self-expression. Important and desirable as it is for every community to have such a transmission facility, this consideration is not an absolute in light of the mandate of Section 307(b) that the Commission endeavor to provide the most widespread and effective broadcast service possible. Nick J. Chaconas, 29 F.C.C. 1226, 19 RR 100 (1960). On the other hand, while Huffman's proposal would not provide Pratt with a first outlet for local self-expression during the daytime, it would provide Pratt with a second competitive daytime station and a first transmission facility during the nighttime hours. Most important, it would bring a first primary nighttime service to over 9,000 persons including the population of Pratt. Thus, a substantial white area would be removed. 3/ These are the crucial matters for evaluation. Both applicants submit that the Commission has never decided a case involving the exact combination of factors involved here.

9. We have compared the resulting benefits each proposal offers. As far as the "fair and equitable" aspects of Section 307(b) are concerned, it is our composite judgment that Pratt (the larger community) and the contiguous rural area thereto demonstrates a need greater

2/ Huffman's Class III nighttime proposal comes within one of the exceptions to Section 3.28(d) of our Rules (10% Rule).

3/ Conversely, on occasions the Commission has permitted a nighttime white area to be re-created, Vidalia Broadcasting Co., 8 RR 1 (1952); Gillespie Broadcasting Co., 26 F.C.C. 1, 15 RR 882a, affirmed sub. nom. Red River Valley Broadcasting Co. v. FCC, 106 U.S. App. D.C. 333, 272 F.2d 562, 19 RR 2028 (1959); and John K. Rogers, 30 F.C.C. 785, 20 RR 522 (1961). But each of these cases involved the abandonment of nighttime operations in favor of expanded daytime operations on different frequencies, a situation not present here.

Huffman Granted, Pier San-Morgan Denied
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than that of Larned and its rural area. Taken together, the need for a second competitive daytime transmission service, a first nighttime outlet for local self-expression, and the removal of a "substantial" white area of over 9,000 persons (including the entire city of Pratt) outweighs in relative importance Larned's need for a first outlet for local self-expression.

10. We have also weighed in the other factors urged by the parties. For examples, the fact that Huffman's proposal would bring a fourth primary daytime reception service to all of Pratt and a fifth such service to part of Pratt was considered; the fact that the Larned proposal would bring a third primary daytime reception service to that community was considered; and the fact that the Pratt proposal would provide Larned (the competing community) with a third primary daytime reception service was also considered. However, these benefits played a lesser role in our comparative judgment here. Thus, we hold that the "fair and equitable" considerations of Section 307(b) can best be served by granting the Pratt applicant.

11. Looking at the "efficiency" aspects of Section 307(b), we see that the Larned 500 watt daytime proposal would provide interference-free service (0.5 mv/m or greater) to 127,353 people in an area of 11,959 square miles. Huffman's 5 kw daytime proposal would provide interference-free service (0.5 mv/m or greater) to 160,857 persons in an area of 20,796 square miles. Thus, the Pratt proposal will not only serve 33,000 more people over a greater area, but will also make full use of the power (at 5 kilowatts) authorized Class III stations under the Commission's Rules. In addition, Huffman will use the frequency at night with the previously described results (see par. 7). Thus, we conclude that the "efficiency" aspects of Section 307(b) also favor Huffman. We have considered the Examiner's conclusion that the Pratt proposal has a substandard nighttime service population. It does not change our views regarding the efficiency aspects herein. Huffman's Class III proposal comes within an exception to Section 3.28(d) of our Rules and will eliminate a substantial nighttime white area. This more than justifies the loss in nighttime potential.

12. Thus, although both proposals are meritorious, it is apparent that a grant of the Pratt application will best result in a fair, efficient, and equitable distribution of the radio service involved; and that such a grant will thereby serve the public interest, convenience and necessity.

ACCORDINGLY, IT IS ORDERED, This 3rd day of January, 1962, That Milner E. Huffman's application for a new standard broadcast station construction permit (BP-12021) at Pratt, Kansas, IS GRANTED; and that the applications of Francis C. Morgan, Jr. (BP-12749) and Pier San, Inc. (BP-12750) for construction permits at Larned, Kansas, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

Attachment: Appendix

Released: January 9, 1962

*See attached Dissenting Statement of Commissioner Cross.

Ben F. Waple
Acting Secretary

Huffman Granted, Pier-Morgan Denied
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APPENDIX

Commission's Rulings on Exceptions to the Initial Decision

Exceptions of Wilmer E. Huffman

<u>Exception No.</u>	<u>Ruling</u>
1	<u>Denied</u> except for reference to the junior college located in Pratt (Exception ID). Otherwise, the Examiner's findings are adequate.
2	<u>Granted</u> insofar as the conclusions in paragraph 65 are deleted. <u>Denied</u> insofar as the proposed substitute language is not accepted. See the decision herein.
3	<u>Granted</u> insofar as the conclusions in paragraph 66 are deleted. <u>Denied</u> insofar as the proposed substitute language is not accepted. See the decision herein.
4	<u>Partially granted in substance</u> . See paragraph 11 of the decision herein. Remainder <u>denied</u> in view of our Ruling on Exception 1 and our decision.
5	<u>Denied</u> . See the decision herein.
6	<u>Granted</u> . See the ordering clause of the decision herein.

Exceptions of Francis C. Morgan, Jr.

1-2	<u>Denied</u> . No decisional significance.
3	<u>Granted</u> . See paragraph 5 of the decision herein.
4	<u>Denied</u> . While not "critical" that fact is an important "efficiency" consideration.
5-28	<u>Denied</u> . Not relevant to the holding herein.

Exceptions of Pier San, Inc.

1-22	<u>Denied</u> . Not relevant to the holding herein.
23	<u>Denied</u> . Unnecessary in view of our holding herein.
24	<u>Denied</u> . Unnecessary in view of our holding herein. (Also note that the objection refers to Page 3 of Exhibit 2. Exhibit is a one-page Exhibit.)

Huffman Granted, Pier San-Morgan Denied
January 3, 1962 Page 5

APPENDIX - Page 2

Exceptions of the Broadcast Bureau

<u>Exception No.</u>	<u>Ruling</u>
1	<u>Granted</u> insofar as the conclusions in paragraphs 65 and 66 are deleted. See rulings on Pier San Exceptions Nos. 2 and 3. <u>Denied</u> insofar as the substitute language is not accepted. See the decision herein.
2	<u>Granted.</u>
3	<u>Granted.</u> See ruling on Huffman Exception No. 6.

DISSENTING STATEMENT OF COMMISSIONER CROSS

I dissent. I would affirm the Examiner and grant the Pier San, Inc. application for Larned, Kansas. Under the provisions of Section 307(b) of the Communications Act, it is my view that Larned, which has no local station, should receive its first broadcast facility before Pratt, Kansas, acquires its second. This view is buttressed by the fact that Pawnee County, of which Larned is the county seat, also has no local transmission facility.

As between the two Larned applicants, I agree with the Examiner that a weighing of the relative merits of each on the basis of the Commission's oft-stated comparative criteria indicates a marked preference for Pier San, Inc.

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January 3, 1962 Page 6

Pier San

"Petition For Reconsideration"

February 8, 1962

Feb 8, 1962

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)	
)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
)	
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
)	
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
)	
For Construction Permits)	

PETITION FOR RECONSIDERATION

Comes now Pier San, Inc., by its attorneys, pursuant to Section 405 of the Communications Act of 1934, as amended, and Section 1.191 of the Commission's Rules and Regulations, and requests the Commission to reconsider the Decision released in the captioned proceeding on January 9, 1962, and upon reconsideration to vacate the same and to enter a new and correct decision granting the application of the petitioner and denying the mutually exclusive proposals of Wilmer E. Huffman and Francis C. Morgan, Jr. In support of this petition, Pier San respectfully shows the following:

I. THE DECISION

1. The Decision of which reconsideration is sought was made and entered on January 3, 1962, at a meeting of the Commission at which six commissioners were present and considered the case, Chairman Minow being the only absent member of the Commission. However, the Decision was made by less than a majority of the members considering the case and perforce by less than a majority of the Commission. Of the six commissioners present and considering the matter, only three voted to grant the Huffman application for Pratt, Kansas, and to deny Pier San's application for

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Larned. Two commissioners, Messrs. Lee and Cross, dissented, the latter with a statement proposing an affirmation of the Initial Decision to grant Pier San. Commissioner Partley abstained from voting on the question.

2. The 3-2-1 Decision, entered on the vote of three commissioners, overturned an Initial Decision of the Hearing Examiner which would grant Pier San's application for a first radio broadcasting station in Larned, Kansas. The three-vote Decision would grant instead the mutually exclusive application of Huffman for a second broadcasting station at Pratt, Kansas.^{1/}

3. The Decision recognizes that the instant case is one of first impression, the Commission never having decided a case involving the same combination of factors, particularly under Section 307(b) of the Communications Act, as are here involved. (Decision, Paragraph 8). Nevertheless, and in face of the fact that the question involved in this case is an important one of communications law, the Decision denying the first station for Larned, Kansas, was entered upon a vote of less than a majority of the members of the Commission present and considering the case.

4. Equally important, the Decision entered by three members of the Commission appears to suggest that the Examiner was reversed because of his conclusions concerning nighttime white area service which Huffman's use of the frequency at Pratt would provide, in face of the fact that these conclusions are consonant with cases decided by the Commission both before and after the Initial Decision in this proceeding was released. These cases are to the effect that nighttime white area service is not a

^{1/} The Decision also denies the third application herein involved, that of Francis C. Morgan, Jr. for Larned, Kansas.

controlling consideration, but is simply one element to be weighed in the over-all evaluation of a proposal, exactly the reasoning of the Examiner. The deficiency in the decisional process and the error upon which the Decision is premised require that the matter be reconsidered by the Commission and that thereupon a new and correct Decision be made.

II. THE DECISION WAS ILLEGALLY ENTERED

5. When the instant case was brought on for consideration by the Commission on January 3, six members of the Commission were present and so recorded. Of the six members, only three voted for the Decision which was entered, namely, to grant the Huffman application for Pratt and to deny the mutually exclusive proposal of Pier San for a first station at Larned, Kansas. Three is not a majority of six, and the vote of the three members was not sufficient for the entry of a legally effective Decision. That this is so is clear from WIBC, Inc. v. F.C.C., 259 F.2d 941, 943.

"When a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present." (Emphasis supplied).

6. In the WIBC case it was argued that inasmuch as Section 4(h) of the Communications Act provides that four members of the Commission shall constitute a quorum thereof, a vote of three, being a majority of the quorum specified by the statute, is sufficient to carry an action, and that three votes are all that is necessary. The Court of Appeals rejected that argument, however. Nor can it be argued that the principle of the WIBC case is inapposite here simply because in the instant matter one of the commissioners who was present and considered the matter abstained from voting rather than casting a vote for or against a grant. In the WIBC case the six commissioners present and considering the matter voted, three for a grant of the one application and three "in

other ways". (259 F.2d at 942). The Court of Appeals noted that as a result Crosley had three votes out of six. In the instant case Huffman had three votes out of the six commissioners present and considering the matter, albeit Commissioner Bartley abstained and did not vote.

7. The WIBC case is a pronouncement of the Court of Appeals of an established principle applicable to the Commission. It is not argued that a quorum was not present on January 3, and in fact the minimum (four) prescribed by the statute was met, with two additional members being present. Thus, on that date and at the time the captioned matter came on for consideration, the Commission was constituted of six members and was legally empowered to transact business. The inquiry then turns as to whether the action taken was done by a majority of those present. The fact that the number present exceeded the minimum specified by the statute does not negative the application of the principle that any valid action taken at that time had to be by a majority of those present. The number four has significance only in determining whether or not the statutory minimum has been met. Once the minimum has been satisfied, then the question turns on the actual number present.

8. The cases from which the foregoing principle is gleaned generally arose on the question of whether or not a quorum could be defeated by an abstinence on a vote of one or more of the members present. The cases hold that such abstinence from a given vote by a person physically present does not impinge upon the presence of a quorum. If an abstaining member must be considered as physically present for purposes of a quorum, a fortiori, he must be considered present in determining a "majority of those present." And since there were six members of the Commission present and considering the captioned matter on January 3, a decision by three was less than a "majority of those present". WIBC v. F.C.C., supra.

9. Pier San is aware of the possibility that the Commission, having permitted the erroneous Decision to issue, may seek to avoid reconsideration of the arbitrary action by some argument to the effect that although six Commissioners considered the matter, the abstention of one from ultimately voting permitted a Decision by less than a majority of those present. Such an argument, however, would avoid the view which follows from the WIBC language, supra, namely, that a measure is not carried unless it has the vote of a majority of those present at the meeting and consequently a refusal to vote is either equivalent to a vote in the negative or at least an indication of the failure of concurrence of a majority of those present and hence no "majority" decision. See, State ex rel. Cole v. Chapman, 44 Conn. 595; Lawrence v. Ingersoll, 88 Tenn. 52, 12 SW 422.

10. Too, the Commission's own practice precludes a defense that the procedure followed in the instant case was proper on the ground that the abstention recorded was in substance an indication of non-participation and hence the equivalent of non-presence, because the Commission has elsewhere utilized the distinguishing "not participating" for such instances. If in fact the abstaining Commissioner had not participated up until the final vote he would have been recorded as "not participating" rather than "abstaining". In this case, then, the abstaining act was an affirmative and positive indication of non-concurrence with the Decision of the three members and hence the 3-2-1 action was not a Decision of a majority of the Commission members present.

III. RECONSIDERATION WOULD BE REQUIRED BY PUBLIC POLICY EVEN IF THE LEGAL DEFICIENCIES WEREN'T PRESENT

11. It must be remembered that there were three mutually exclusive proposals before the Commission for final decision on January 3, one for Pratt, Kansas, and two for Larned, Kansas. It may be that the abstaining

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Commissioner abstained because he would have preferred the third applicant, i.e., the other Larned proposal, rather than either Pier San or Huffman, and refrained from voting simply as a matter of supposed convenience to his colleagues. In such fashion it possibly was thought that what would otherwise have been no decision, because a plurality in favor of Huffman would not have sufficed, WIBC, supra, could be offered as a majority decision of those voting, albeit six were present and considered the matter. Since, however, the decisional question arose under Section 307(b), namely, whether Pratt should have a second station or Larned its first, an abstention on the suggested ground was in effect a vote for Larned under the 307(b) issue. The suggested explanation demonstrates why the Decision should not have been entered on January 3. Nor, for that matter, is there any reason why the final decision could not have abided the presence of the seventh Commissioner to break the "tie" on the crucial 307(b) question. Reconsideration is assuredly now required to obtain a proper decision.

12. Public policy would seem to suggest, if not indeed dictate, that the Commission should not permit a decision so far-reaching as the instant one -- overruling, in effect, the Commission's established interpretation of Section 307(b) factors and the importance of a first radio station in a community -- without at least the concurrence of a majority of the members of the Commission present and considering the case. The importance of the question and its effect should have suggested the wisdom of abiding the presence of the whole Commission, especially if the abstention occurred because Commissioner Bartley would prefer Larned over Pratt on the 307(b) issue but not be prepared to prefer Pier San over Morgan for the permit at Larned (and no other explanation for his abstaining is suggested by the Commission).

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13. If Section 307(b) is to be interpreted differently from prior cases, as the instant Decision indicates, such change should not be made on a vote less than a majority of the Commission. Otherwise neither present nor prospective applicants before the Commission will be able to determine whether the January 3 Decision in this case represents "good law" insofar as the Commission as a body is concerned or whether it was simply an expedient decision to terminate this proceeding and thus is susceptible of reversal at any time. Therefore, even if the Commission would believe that the 3-2-1 vote in the captioned proceeding was legally sufficient, it should desire to reconsider the Decision as a matter of discretion and upon reconsideration make and enter a decision unaffected by the infirmities which infect the present one.

IV. THE ERRONEOUS BASIS OF THE DECISION

14. The Decision as it now stands represents an arbitrary and capricious reversal of a sound and well-reasoned Initial Decision, particularly as the Decision rejects the Examiner's conclusions on the Section 307(b) factors in the case. The 3-2-1 Decision would say that Pratt, Kansas, should have a second station before Larned, Kansas, a community of substantial size and possessing substantial needs for a local station, should have a first radio outlet.

15. To reach such a result the Decision had to misinterpret and misapply Section 307(b) of the Communications Act; had to avoid any consideration of the pronouncements of the U. S. Supreme Court in F.C.C. v. Allentown Broadcasting Corp., 349 U.S. 358, 362, and the Commission's own statements in such cases as Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216; and had to relegate to footnote treatment, with a wholly unreasonable "distinction", the cases where the Commission has indicated that so-called white area service at nighttime is not a decisional factor and is outweighed

by the benefits to the public flowing from a strong local daytime station. Vidalia Broadcasting Co., 8 R.R. 1; Gillespie Broadcasting Co., 15 R.R. 878, affd. sub. nom.; Red River Broadcasting Corp. v. F.C.C., 19 R.R. 2028; John K. Rogers, 20 R.R. 522. (Decision, Page 3). Even more, the 3-2-1 Decision rejects the Examiner's views as to the efficacy of the cited cases, without recognizing that such views were being affirmed by the Commission during the same period of time in other proceedings. Sunbury Broadcasting Corp., 31 F.C.C. 734, 737, Oct. 25, 1961.

16. In Paragraph 8 of the Decision, it is suggested that the established importance of a first transmission facility for a community is outweighed in light of a mandate which the Commission reads in Section 307(b) of the Act to provide the most widespread and effective broadcast service possible. Clearly this is a misinterpretation and a mis-application of Section 307(b). Possibly the language in Paragraph 8 of the January 3 Decision has reference to Section 303(g) of the Act, under which the Commission is "from time to time" authorized to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." It is obvious from a reading of Section 303(g) and equally obvious from the Commission's own Act in specifying Section 307(b) and not 303(g) as a decisional issue in this case, that any such study or any efforts which the Commission may make to encourage the larger and more effective use of radio is something quite different from the test of Section 307(b), namely, fairness to communities, especially when applied in an adjudicatory case. It must be remembered that the hearing issue under which the 3-2-1 Decision was made was that specifically concerning 307(b) of the Act, and no reference in either the hearing issues or at any time during the proceeding was made to some other section of the Communications Act. Section 307(b) "empowers the Commission to allow licenses so as to provide a fair

distribution among communities. Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece." F.C.C. v. Allentown Broadcasting Corp., 349 U.S. 358, 362.

17. Translated into a principle in proceedings such as the instant one, where mutually exclusive proposals for different communities are involved, Section 307(b) is better served by preferring the proposal for a first local station than by preferring, to the first proposal's exclusion, one which would add an additional station in a community already possessing a local radio outlet. Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216. A long line of cases has established the doctrine that absent compelling considerations to the contrary, a proposal for a first local broadcast service is to be preferred over a competing proposal which would add another station in a community already possessing its "radio mouthpiece". Northwestern Ohio Broadcasting Corp., 3 R.R. 1945, 1953; Lawton-Fort Sill Broadcasting Co., 7 R.R. 1216; Greater New Castle Broadcasting Corp., 8 R.R. 291; Mercer Broadcasting Co., 13 R.R. 891. Where communities are competing and one of them has an existing station and the other does not, the Commission "would therefore have had to award the station to the petitioner on the basis of the Section 307(b) presumption." Harrell v. F.C.C., 267 F.2d 629, 105 U.S. App. D.C., 352, 18 R.R. 2072.

18. It is clear from the Decision that the Examiner was reversed on the ground that the relative importance of Larned's need for a first local outlet was outweighed by the proposal for the use of the frequency at Pratt primarily because of the fact that the Pratt applicant would fill in some interstices in nighttime radio listening. However much nighttime white area service should be considered, it is abundantly clear from the Commission's own action in other cases that such service could not be deemed as a compelling consideration to overturn the 307(b) preference

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for a first radio station. Admittedly, nighttime white area service does have some significance, but the inquiry concerns the question as to whether such significance is decisional or simply a factor to be weighed in the over-all balance.

19. The Vidalia, Gillespie Broadcasting, Red River Valley, and John K. Rogers cases, supra, are clear to the effect that nighttime white area service is not viewed by the Commission as a decisionally critical matter but is simply weighed in the over-all balancing. The Commission misses the point entirely when it attempts to distinguish the cited cases, which permitted the creation of substantial nighttime white areas, on the ground that each of those cases arose upon the application of an existing station for improvement in daytime facilities and the abandonment of nighttime facilities. This is a distinction without a difference insofar as the present inquiry is concerned. The cases and the results approved in them by the Commission permit of no suggestion that nighttime white area service is decisionally critical. And that is the point that the Commission missed in the instant case. At the risk of repetition, Pier San again urges the Commission to pause and reflect on the effect of the cited cases and to then reconsider the instant Decision which proceeded from the erroneous premise that nighttime white area service was all controlling.

20. The 3-2-1 Decision says that it is a "composite judgment" of the fair and equitable aspects of Section 307(b) (Decision, Paragraph 9), but such judgment is offered without so much as a mention of either the Allentown case or the Laxton-Fort Sill case, supra, or the other cases implementing the well-established and court-approved interpretation of Section 307(b), viz., that the need of a community for a first outlet for local self-expression is controlling, absent any compelling considerations

to the contrary. The decision's failure to consider the established cases immediately raises the conclusion that the "composite judgment" (of less than a majority) was arbitrary and capricious. No other interpretation is possible.

21. The decision's attempted explanation of the Vidalia, Gillespie, Rogers line of cases falls for yet another reason. Those cases were released by the Commission prior to the Initial Decision of the Examiner in the instant proceeding, and, in fact, the Examiner relied in no small part on the Commission's views set forth in those cited cases. (Initial Decision, Page 26, Paragraph 66). It cannot be said, however, that the Commission changed its views with respect to the principle of the cited cases after the Initial Decision and that for such reason a reversal of the Examiner was required here. The oral argument in this case was heard on September 15, 1961, and thereafter, while the Commission was considering the instant matter, a Decision was released in another proceeding citing with approval the cited cases and affirming the principle thereof. Sunbury Broadcasting Corp., 31 F.C.C. 734, 737, decision made October 25, 1961. We see, then, that a nighttime white area comprised of some 4,000 persons (Gillespie and Red River, supra), a nighttime white area in which 27,289 persons lived (John K. Rogers, supra), a nighttime white area with population of 5,000 (Vidalia, supra), and finally a white area composed of 4,121 persons (Sunbury, supra) have not been viewed by the Commission as being decisionally critical in evaluating the fair and equitable provisions of Section 307(b) of the Act. In the instant case, however, the Decision would say that the white area not only is decisionally critical, but in fact controls. It was on such basis that the 3-2-1 Decision purports to award the contested frequency to Pratt for a second station while Larned continues to languish without a radio outlet.

22. From the foregoing it is abundantly clear that not only is there no requirement under Section 307(b) of the Act, or any place else, for the Commission to grant the Pratt application simply because it will fill in some interstices in existing nighttime service in preference to a grant for the first station at Larned, but the pronouncement of the courts and the Commission's own holdings are clear to the effect that albeit nighttime white area service must be considered, it is not a controlling consideration. Further argument should not be necessary; the 3-2-1 Decision of January 3 in this proceeding flies in the face of the established principles and it must therefore be reconsidered and vacated, and thereafter a new and proper decision must be entered.

V. CONCLUSION

23. Pier San, an applicant for a first radio station in Larned, Kansas, whose proposal was denied by a 3-2-1 Decision of January 3, released January 9, seeks reconsideration and vacation of the Decision and the entry of a proper decision, on the ground that the January 3 Decision was illegally entered, being made by less than a majority of the Commission present and considering the matter at that time. Even beyond the legal defect, reconsideration should be granted in view of the fact that the case represents an important question of communications law, and if allowed to stand in its present form, would suggest that Section 307(b) of the Communications Act is to be interpreted and applied differently from the established interpretations and applications elsewhere utilized. A comparison of the interpretation and application availed of to deny Pier San's application with the interpretation and applications in the other cases suggests without extensive argument that the instant result must be arbitrary and capricious. It appears that the Decision in this case was released more from a desire to terminate a

comparative proceeding than from any desire to carefully weigh and meet the public needs. The 3-2-1 device utilized would enter a "Decision" as among competing applicants Huffman, Pier San and Morgan, but it does not satisfy the Commission's responsibility under the Communications Act to provide a fair distribution of radio facilities among communities. "Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece." F.C.C. v. Allentown Broadcasting Corp., supra. If the Commission, and each member thereof, is to adequately discharge the responsibilities placed upon it by the Communications Act, it must reconsider the January 3rd 3-2-1 Decision and thereafter make and enter a new decision which reflects a consideration of the public interest and not simply a desire to end a comparative case.

WHEREFORE, the premises considered, the petitioner respectfully requests the Commission to reconsider the Decision of January 3, 1962, released January 9, 1962, in this proceeding, and upon reconsideration to vacate the same and to thereafter make and enter a proper decision. The petitioner further requests that in view of the importance of the case under Section 307(b) of the Communications Act that the Commission order re-hearing or re-argument en banc if there be any doubt in the Commission's mind that the proper Decision in the premise is to affirm the Initial Decision and grant the Pier San application for the first local station at Larned, Kansas. And, the petitioner requests such other and further relief as may be required.

Respectfully submitted,

PIER SAN, INC.
By:
MILLER & SCHROEDER
Its Attorneys

/s/ Arthur H. Schroeder
ARTHUR H. SCHROEDER

218 Munsey Building
Washington 4, D. C.

February 8, 1962

/s/ John B. Kenkel
JOHN B. KENKEL

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February 8, 1962 Page 13

CERTIFICATE OF SERVICE

I, Alice F. Hopper, hereby certify that on this 8th day of February, 1962, a copy of the foregoing "Petition for Reconsideration" was sent by first class United States mail, postage prepaid, to the following:

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/s/ Alice F. Hopper
Alice F. Hopper

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Morgan

"Petition For Reconsideration"

February 8, 1962

Feb 8, 1962

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

WILMER E. HUFFMAN
Pratt Kansas

DOCKET NO. 13469
File No. BP-12021

FRANCIS C. MORGAN, JR.
Larned, Kansas

DOCKET NO. 13470
File No. BP-12749

PIER SAN, INC.
Larned, Kansas

DOCKET NO. 13471
File No. BP-12750

For Construction Permits

Petition for Reconsideration and Rehearing

Francis C. Morgan, Jr. (hereinafter referred to as Morgan), respectfully requests that the Commission reconsider its Decision released January 9, 1962, looking toward a grant of the Huffman application for Pratt, Kansas, and a denial of the Morgan and Pier San applications for Larned;* and that after such reconsideration and rehearing it grant the Morgan application. In support thereof it is submitted:

Introduction

1. The Commission found, among other things, that Larned receives only two daytime primary services from stations KPRM, Concordia, over 100 miles away, and KVGB, Great Bend, Kansas, 20 miles away. The rural area surrounding Larned receives daytime primary service from a minimum of seven and maximum of 23 stations. Pratt now has a station, KWSK (1570 kc, 250 w daytime); it also receives daytime primary service from KPRM, Concordia, and KFBI, Wichita; and part of the city is served by KVGB, Great Bend, Kansas. The rural area surrounding Pratt receives a minimum of four and a maximum of twenty-three daytime primary services. Pratt receives no primary service at night; and the proposed Pratt operation would provide a first nighttime primary service to 9,076 persons, including the city of Pratt. The Commission also found that the Pratt proposal would serve 160,857 persons daytime, whereas the Larned proposal would serve only 127,353 persons daytime. On the basis of these facts, the Commission made the award to Pratt.

*Reported in 32 FCC 1. Commissioners Craven, Ford and Hyde voted for the grant; Commissioners Lee and Cross dissented; Commissioner Bartley abstained from voting and Chairman Minow was absent.

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Nighttime Service to Larned

2. During the course of the oral argument (Tr. 304, 313, and 326), counsel were asked whether Larned receives any primary service at night. They advised the Commission that there was nothing in the record to show this; KFRM, which serves Larned daytime, is a daytime only station. KVGB is located at Great Bend, 20 miles from Larned; it operates on 1590 kc, 5 kw, DA-N. Since it operates with a different pattern nighttime, one cannot determine from the record whether it could provide service at night to Larned. A study of the KVGB application B4-F-4459, granted about March 18, 1947 (Docket No. 7437), indicates that the 2 mv/m nighttime contour of KVGB does not include the city of Larned. Since there have been various changes in the soil conductivity map, a proof of performance and several other stations have received grants on this frequency, it is difficult to be certain whether KVGB provides primary service at night to Larned. Inasmuch as there was an indication at the oral argument that this is a pertinent fact for consideration, we believe that the record should be reopened in order to include the answer to that question. This could be accomplished without difficulty because the parties can stipulate the facts and then submit them to the Commission. It may be unnecessary to remand the matter to the Examiner, who has already decided that the award should be made to Larned on 307(b) considerations. Since the ultimate decision will be made by the Commission, time may be saved if the stipulation is presented direct to it.

Nighttime Service to Pratt White Area

3. Nighttime radio service has become less important because most people watch television during that period. Furthermore, as set forth below, the percentage of homes in Pratt County that have TV sets is virtually the same as the percentage that have radio sets. The 1960 populations of

* It has not been customary for daytime applicants to show nighttime services.

Pratt and Pawnee counties and the number of housing units with and without radio or television receivers is set forth below:

County	Population*	HOUSING UNITS WITH**			
		1 or more TV sets	No TV Sets	1 or more radio sets	No radio sets
Pratt	12,122	3,532	518	3,616	434
Pawnee	10,254	2,585	448	2,789	244

Note: In Pratt County 87% of the homes have TV and 89% have radio sets. The percentages for Pawnee County are substantially the same.

Note: The entire white area served by the Pratt applicant is in Pratt County (Huffman, Ex. 11, p. 14).

4. There are two television stations at Wichita, 70 miles from Pratt; one at Hutchinson, 47 miles away; one at Great Bend, 46 miles away; and one at Ensign, 75 miles from Pratt. The TV Fact Book (1961), p. 301, ff., indicates that at least three of these TV stations claim coverage of 90% or more of the TV homes in Pratt County, based on the 4RB weekly circulation.

5. During the course of the oral argument one of the Commissioners asked whether there were FM stations at Larned or Pratt (Tr. 312). While there is no FM station at either city, KMAH-FM, Hutchinson, Kansas, located 48 miles from Pratt and operating with 110 kw, antenna 490 feet, does provide a service to Pratt (SPH-3189). In addition, there are several FM stations at Wichita, located about 70 miles from Pratt.

6. We recognize that the Commission is not required in 307(b) cases to consider TV or FM services as the "controlling factor" in AM hearings. Suburban Broadcasters, 20 RR 52 (1960). On the other hand, it is not precluded from considering and giving some weight to another class of broadcast service; and in Easton Publishing Company v. FCC, 175F (2d) 344, 4 RR 2447, 254-56 (1949), the Court recognized that the Commission did exercise its discretion and attached some weight to the FM services at Easton. There was no showing as to number of FM receivers, but it is highly probable that few were in use at Easton in 1947. On the other hand, we know the percentage of

*U. S. Census of Population, 1960, Kansas, page 18-15.

**1960 Census of Housing, Kansas, Advance Reports, Housing Equipment, Counties, December, 1961, HC (A3)-18, p. 8. Note: This is the first time the Census Bureau has provided this type of statistic. It became available after the oral argument.

homes in Pratt County that have TV and radio sets. It should also be noted that Larned has only two daytime AM services, one from a station at Concordia, over 100 miles away, and another from Great Bend, 20 miles distant. Pratt has no service at night but receives daytime service from a station located there, plus three others (one partial) located elsewhere. Since most people view TV service at night and over 87% of the homes in Pratt County have TV receivers (89% have radio receivers), there can be little doubt that the so-called "white area" receives a variety of TV services from at least three TV stations. Therefore what was an important "white area" ten years ago has ceased to be a "white area" for all practical purposes. If the possible lack of nighttime service at Larned becomes a critical factor in this case, the Commission can easily reopen the record and request a stipulation on this point within a short period of time.

Re Pratt

7. Consideration should also be given to the fact that the daytime station at Pratt is licensed to operate as early as 5:15 a.m. and as late as 8 p.m. during June and July (KWSK license issued October 21, 1959, BR-2747).

8. The 1960 population of Pratt County is 12,122. Pratt is a small town in a sparsely populated area* that has a daily newspaper and a radio station which will be required to share available advertising revenues with a full time station. The applicant for the new station at Pratt estimated \$61,766.20 for cost of construction, with \$68,000 and \$60,000 for revenues and expenses respectively, for the first year of operation (Huffman application, Sec. III, page 1, File No. BP-12021, Docket No. 13469). The final AM-FM Financial Data--1960 (Public Notice 12337, November 8, 1961, page 1) shows that during 1960, 33% of the 3,470 AM stations reported a loss from operations. Table 10 of the report shows that for towns between 5,000 and 10,000 persons the average station had a broadcast income of \$5,518 in 1960 before federal income tax. Additional stations in small towns that already have a station must share the limited available revenues; such new operations

*Pratt County has an area of 729 square miles and a population of 12,122, or an average of 16.6 persons per square mile (U. S. Census of Population, 1960, Kansas, page 18-15).

invariably result in a loss which means poor service to the public. On the other hand, if the frequency is made available to another small town without a station, the chances of at least a break-even operation are much better. A station in the second town provides it with a local outlet whereas two stations in one town and none in the second do not provide for a fair distribution of the scarce radio facilities.* Commissioner Ford recently recognized that preoccupation by station management with economic survival must result in financial inability to concentrate on the program needs of the service area. Ford, Economic Considerations in Licensing of Radio Broadcast Stations (1961), 17 FCC Bar Journal, 191. This problem has recently been recognized by the industry. Broadcasting Magazine, February 5, 1962, p. 39.

Re Exceptions on Comparative Issue between Larned Applicants

9. In its decision of January 3, 1962, the Commission denied, among other things, Morgan exceptions 5 to 28 on the ground that they are "not relevant to the holding herein." In the event the Commission decides to award the grant to a Larned applicant, Morgan reiterates his exceptions 5 to 28, which were actually not considered by the Commission since it decided to grant the Pratt application.

10. On February 6, 1962, the Commission reaffirmed its action of November 8, 1961, wherein it granted a 15-month renewal of the license of Station WBRO, Waynesboro, Georgia, instead of a 3-year term (Public Notice B-15943, Report No. 4078, released February 6, 1962). On page 8, paragraphs 15 and 16, of the Examiner's Initial Decision, reference is made to the fact that Messrs. Pierce and Denny, president and treasurer of Pier San (total ownership, 40%), each have a 50% interest in Station WBRO, Waynesboro, Georgia. In Morgan exception 7, reference is made to Messrs. Pierce and Denny.

11. In Morgan exceptions 16 and 28, reference is made to the diversification of business interests as well as the ownership of other media of mass communications by the participants of Pier San. We submit that the Commission should adopt the policies set forth in the dissenting statement of Chairman Minow in Transcontinent Television Corporation, 21 RR 945, 960 (1961).

*It is a matter of common knowledge that due to high soil conductivity it is difficult to allocate new AM stations in Kansas.

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12. In Morgan exceptions 6, 10, 11, 20, 24, and 27, reference is made to the fact that although Morgan had not read some Commission publications, his preparation showed that he had followed recommended procedure in ascertaining the needs of his proposed service area. On the other hand, Morgan exception 10 refers to the limited contacts made by Pyle on behalf of Pier San, which indicates that he did not make a proper study to ascertain the program needs of the proposed service area. See NTA Television Broadcasting Corp., 22 RR 273, 281 (1961).

WHEREFORE, it is respectfully submitted that the Commission should set aside the decision adopted January 3, 1962, released January 9, 1962, and grant the application of Morgan for Larned and deny the other two applications; in the alternative, if the Commission feels that additional information, especially with respect to the nighttime service available for Larned, is necessary for a decision under 307(b) of the Act, then it should reopen the record and take appropriate steps looking toward a stipulation between the parties with respect to that question, or any other matters that might be raised.

Respectfully submitted,

FRANCIS C. MORGAN, JR.

By A. L. Stein, his Attorney

February 7, 1962

CERTIFICATE OF SERVICE

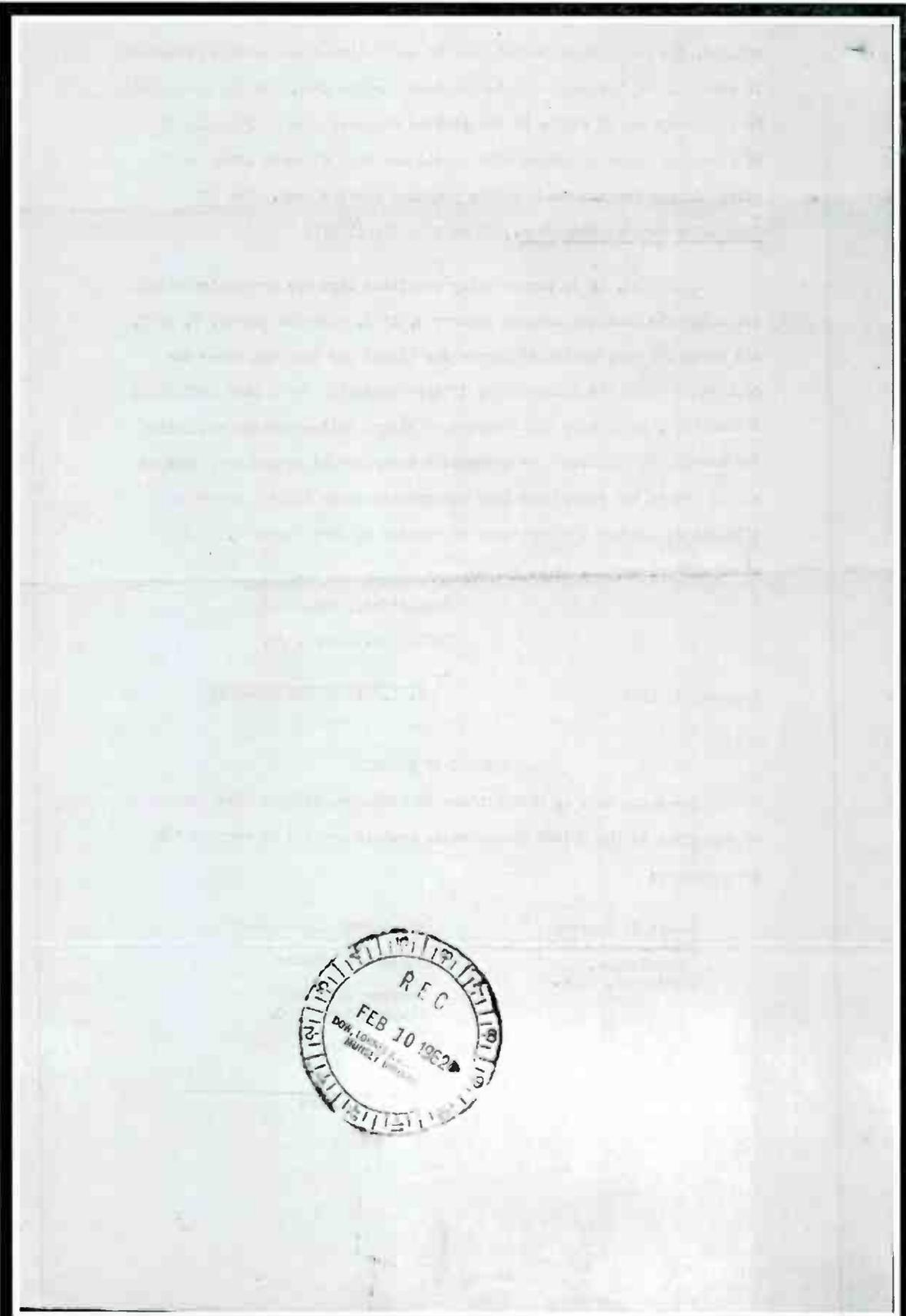
I certify that on this 8th day of February, 1962, I have delivered or deposited in the United States mail, postage prepaid, a copy of the foregoing to:

Robert J. Rawson,
Federal Communications
Commission,
Washington, D. C.

Dew, Lohnes & Albertson
and
Miller & Schroeder,
Munsey Building,
Washington, D. C.

A. L. Stein

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Broadcast Bureau

"Opposition To Petition For Reconsideration"

February 16, 1962

Feb 16 1962

16528

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
For Construction Permits)	

BROADCAST BUREAU'S
OPPOSITION TO "PETITION FOR RECONSIDERATION"

1. On February 8, 1962 a petition for reconsideration was filed herein by Pier San, Inc., Larned, Kansas, requesting that the Commission reconsider its Decision ^{1/} released January 9, 1962 (FCC 62-13; Mimeo No. 13085), and upon reconsideration to vacate the same and to thereafter make and enter a "proper decision", and to order rehearing or re-argument en banc if there be any doubt in the Commission's mind that the proper Decision is to affirm the Initial Decision and grant the Pier San application. It is our view that the petition should be denied.

2. Petitioner asserts that the Decision was illegally entered because the Commission did not act on the vote of a majority of those present. Six Commissioners were present when the vote was taken. Of

^{1/} The Commission's Decision reversed the Initial Decision, granted the application of Wilmer E. Huffman, and denied the mutually exclusive applications of Francis C. Morgan, Jr. and Pier San, Inc.

Broadcast Bureau, "Opposition To Reconsideration"
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these, three voted to grant the Huffman application, two dissented and one abstained. Petitioner contends that the three votes for Huffman do not constitute a majority of the Commissioners present and considering the case.

3. This question was considered in Federal Broadcasting System, Inc. v. FCC, 225 F. 2d, 560, 12 RR 2048 (1955), Cert. denied 350 U.S. 923), in which there was also a 3-2-1 split of the Commissioners present, the lone vote being "not participating".^{2/} The Court of Appeals held that the three votes constituted a majority, stating:

"Nothing in law or fact authorizes us to reach any other conclusion than that the action in question was taken by majority vote of the Commissioners present and voting". (Emphasis supplied).

4. The case cited by petitioner, WHEC, Inc. v. FCC, 259 F. 2d, 941, 943, differs from the instant case in that there six Commissioners voted, three for one applicant and three in different ways. The Court of Appeals stated that "when six voted it took four to control". In the instant case, only five Commissioners voted. Thus, only three votes were needed to control.

5. Petitioner would have the Commission distinguish between "not participating" and "abstaining", and to construe the abstaining act as an affirmative or positive indication of non-concurrence with the decision of the three members. We see no basis for so doing. An abstention from voting does not indicate a preference one way or the

^{2/} See Also WHEC, Inc., 14 RR 182C, and 18 RR 2161.

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other. It is clear that an abstention, for purposes of determining whether a majority vote has been obtained, is the same as non-participation. The Court of Appeals has made clear that the test is "present and voting", not the test used by petitioner of "present".

6. Aside from the legality of the vote, petitioner contends that the Decision itself was erroneous and that Larned, Kansas should have received a 307(b) preference over Pratt, Kansas. The Commission conceded that both the Pratt and Larned proposals were meritorious. However, after comparing the benefits each proposal offered, the Commission determined that "the need for a second competitive daytime transmission service, a first nighttime outlet for local self-expression, and the removal of a 'substantial' white area of over 9,000 persons (including the entire city of Pratt) outweighs in relative importance Larned's need for a first outlet for local self-expression". In its petition for reconsideration, San Pier's arguments concerning the 307(b) question merely restate matters which were fully considered by the Commission in its Decision. Wherefore, the Broadcast Bureau urges that the instant request be denied.

Respectfully submitted,
Kenneth A. Cox
Chief, Broadcast Bureau

Robert J. Rawson
By Robert J. Rawson
Chief, Hearing Division

Walter M. Strick
Walter M. Strick
Attorney
Federal Communications Commission

February 15, 1962

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CERTIFICATE OF SERVICE

Jean Berberich, a secretary in the Hearing Division, Broadcast Bureau, certifies that she has this 15th day of February, 1962 sent by regular United States mail, U. S. Government frank, a copy of the foregoing "Broadcast Bureau's Opposition to 'Petition for Reconsideration'" to:

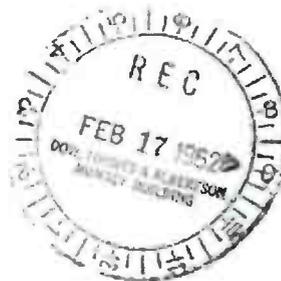
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Jean Berberich

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Huffman

***"Opposition To Petition
For Reconsideration"***

February 16, 1962

Feb 19, 1962

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

WILMER E. HUFFMAN
Pratt, Kansas

FRANCIS C. MORGAN, JR.
Iarned, Kansas

PIER SAN, INC.
Iarned, Kansas

For Construction Permits

DOCKET NO. 13469
File No. EP-12021

DOCKET NO. 13470
File No. EP-12749

DOCKET NO. 13471
File No. EP-12750

OPPOSITION TO PETITIONS FOR RECONSIDERATION
AND/OR REHEARING

Comes now Wilmer E. Huffman, an applicant herein, by his attorneys, and opposes the petitions of Pier San, Inc. and Francis C. Morgan, Jr., filed February 8, 1962, for reconsideration and/or rehearing of the Commission's Decision in the above-entitled proceeding.^{1/} That Decision, released January 9, 1962, provided for a grant of the Huffman application for a new full-time standard broadcast station at Pratt, Kansas, while denying the mutually-exclusive applications of Pier San and Morgan for daytime-only facilities at Iarned, Kansas.

The principal contention of the Morgan petition is that the nighttime white area in and about Pratt, Kansas, to receive a first nighttime radio service from the Huffman proposal, was exaggerated as

^{1/} The applicants will sometimes hereinafter be referred to as Huffman, Pier San, and Morgan.

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a comparative factor weighing in Huffman's favor. Included in the petition are statistics and speculations as to TV and FM service received by Pratt and Pratt County at night.

This argument is both tardy and ineffectual. As the Commission stated in Tupelo Broadcasting Co., Inc., 12 Pike & Fischer R.R. 1231, 1250 (1956):

"* * * That section [307(b)] contemplates an equitable distribution of broadcast service in each class of service. It cannot be contended that television is a substitute for a standard broadcast service for it is a separate, distinct and entirely different type of service. * * *"

Accordingly, in a Memorandum Opinion and Order released May 23, 1960, in Suburban Broadcasters, 20 Pike & Fischer R.R. 52, the Commission refused to enlarge the issues in an FM case to provide for a showing as to all broadcast services to the area (AM, FM and TV).

Wilmer E. Huffman has been found to be financially qualified to operate the proposed station and no question as to the merit of his program proposal has heretofore been raised. When taken in conjunction with the fact that Commissioner Ford, one of the Commission's specialists in radio station financing (Ford, Economic Considerations in Licensing of Radio Broadcast Stations), voted for the Huffman proposal, the economic doom and program deterioration forecast by Morgan for the Pratt applicant is unfounded.

The Pier San petition is largely devoted to the contention that the three affirmative votes granting the Huffman application did not constitute a sufficient number to enable the Commission to take action in the case. This contention will be answered in detail below.

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The balance of the Pier San petition merely repeats arguments which have been extensively and exhaustively reviewed in this long proceeding, particularly the relative merits of serving a nighttime white area and establishment of a first local daytime outlet. As Huffman has repeatedly argued, with the Commission itself agreeing, the case called for a balancing of numerous factors not fairly summed up by the description of white area versus first local outlet. Huffman not only would provide white area service but also a first nighttime local outlet, a greater service area, more 2.0 mv/m primary services, and full-time operation. When counterbalanced against the single virtue of the Larned applicants -- the establishment of a first, but daytime-only, local outlet -- the verdict may be close but the guidelines are clear.

The only question of any consequence is raised by the Pier San petition and relates to the effectiveness of the three-two-one vote by which the Huffman application was granted. Six Commissioners were present and considering the matter, Chairman Minow being absent. Of these six, three voted to grant the Huffman application, two dissented, and one abstained.

Section 4(h) of the Communications Act of 1934 (47 U.S.C.A. par. 154(h)) reads as follows:

"Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed."

The quoted section only makes statutory the common law requirement of a majority of the members of a governmental or private body to constitute a quorum. No section of the Communications Act of 1934

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or of the Administrative Procedure Act of 1946 defines the requisite number of Commissioners who must vote affirmatively in order to execute the power which arises when the requirement of a quorum is met.

It can first be admitted that there is no problem when four or more Commissioners vote affirmatively or negatively, or when any number of negative votes is greater than the number of affirmative votes. Questions do arise when the following combinations appear:

- (1) Three affirmative, three negative and one abstention.
- (2) Three affirmative, three negative.
- (3) Three affirmative and two negative, with one or more abstentions.
- (4) Three affirmative and three or more abstentions.
- (5) Two affirmative, two negative and one or more abstentions.
- (6) Two affirmative, two negative.
- (7) One affirmative and three or more abstentions.

In each case, the requirement of a quorum of four members present has been satisfied.

The Pier San petition advocates the following rule:

Effective action on the part of the Commission requires that a majority of those who participate in a case, provided that at least a quorum is participating, must vote affirmatively for the action.

This rule invalidates actions taken by any of the combinations of votes and abstentions set forth in the above seven examples. The rule would, incidentally, invalidate the Commission's actions in a number of recent cases, as, for example:

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B. J. Parrish, 21 Pike & Fischer R.R. 483 (1961)
[Three-one-three]

Jane A. Roberts, 18 Pike & Fischer R.R. 905 (1960)
[Three-one-two]

Young People's Church of the Air, Inc., 18 Pike &
Fischer R.R. 947 (1960) [Three-two-two]

Enterprise, Inc., 19 Pike & Fischer R.R. 67 (1960)
[Three-one-three]

Riverside Church in City of N.Y., 19 Pike & Fischer
R.R. 81 (1960) [Three-one-two]

TOT Industries, Inc., 20 Pike & Fischer R.R. 453
(1960) [Three-two-one]

As for the instant case, the rule would result in Commissioner Bartley's abstention having the effect of a negative vote, thus invalidating the Commission's action granting the application of Wilmer E. Huffman.

As will be shown below, the correct rule is that effective action may be taken by a majority of the quorum, a quorum being only four, regardless of the number of Commissioners participating but not voting. It would follow that the three affirmative votes for the Huffman application would be sufficient to effect the grant of that application because three affirmative voters is a majority of the required quorum of four, regardless of not being a majority of the six Commissioners participating.

Support for the rule advocated by Pier San is purportedly found in the case of WIBC, Inc. v. F.C.C., 259 F.2d 941. In that case, seven members of the Commission participated, three voted affirmatively, three negatively (in other ways), and the seventh vote, that of Commissioner Craven, was disputed because of a possible conflict of interest

and his absence at oral argument. It was urged, and rejected by the Court of Appeals, that by disregarding the seventh vote, the three affirmative votes still commanded the power to take positive action.

The court held:

"* * * When a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present." (Emphasis supplied) (259 F.2d at 943)

This, said the court, is based upon the common law maxim that:

"... where joint authority is involved, a quorum being present, legal action can be taken by a majority and by none less." (Ibid.)

The last statement does not necessarily support the first. As will be shown, the common law maxim is more accurately elaborated in the following language:

"... when a quorum is present, the act of a majority of the quorum is the act of the body." (Emphasis supplied) United States v. Ballin, Joseph & Co., 144 U.S. 1, 6; 36 L.Ed. 321, 325.

In the Ballin case just cited, it was claimed that a statute relating to import duties on worsted cloth was invalid because, among other things, the bill received insufficient affirmative votes when passed upon by the House of Representatives. The House vote was 138 yeas, zero nays, and 74 present but refusing to vote. The total number present in the House -- 212 -- was greater than a quorum. The Supreme Court upheld this vote, not because the number of yeas -- 138 -- was incidentally a majority of the total number present -- 212 -- but because 138 was a majority of a quorum, a quorum being at that time 164. The court reasoned as follows:

"As appears from the journal, at the time this bill passed the House there was present a majority, a quorum,

and the House was authorized to transact any and all business. It was in a condition to act on the bill if it desired. The other branch of the question is, whether, a quorum being present, the bill received a sufficient number of votes; and here the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. * * *

"It is true that most of the decisions touching this question have been in respect to the actions of trustees and directors of a private corporation, or of the minor legislative bodies which represent and act for cities and other municipal corporations; but the principle is the same. * * *" (Ballin, supra, 144 U.S. 1, 6-7; 36 L.Ed. 321, 325)

Supporting its view, the Supreme Court cited Attorney General v. Shepard, 62 N.H. 383, 384, as follows:

". . . the question was whether an amendment to a city charter had been properly adopted by the board of aldermen. All the members of the board were present but one. The ordinance was duly read and put to a vote, and declared by the chair to be passed. The yeas and nays were then called, three voted in the affirmative, three refused to vote, and the chair declared the ordinance passed. The court held, Chief Justice Doe delivering the opinion, that the amendment to the charter was legally adopted by the board of aldermen. He said: 'The exercise of law-making power is not stopped by the mere silence and inaction of some of the law-makers who are present. An arbitrary, technical and exclusive method of ascertaining whether a quorum is present, operating to prevent the performance of official duty and obstruct the business of government is no part of our common law. The statute requiring the presence of four aldermen does not mean that in the presence of four a majority of the votes cast may not be enough. * * *'"

In the Shepard case, then, with four constituting a quorum, six members were present, three voted affirmatively and three abstained. Three affirmative votes was not a majority of the total number of members present -- six -- but was a majority of the quorum -- four -- so that the vote was valid.

Returning to the seven listed combinations of votes and abstentions on Page Four hereof, it can be seen that the "majority of a quorum rule" would at least exclude examples (5), (6) and (7), involving only one or two affirmative votes. It would not exclude example (3) -- three affirmative votes, two negative, and one or more abstaining -- which is descriptive of the vote on the application of Wilmer E. Huffman.

In the WIBC, Inc. case, supra, relied upon by Pier San, examples (1) and (2) -- three affirmative, three negative and one abstention, or three affirmative and three negative -- were excluded. On the basis of the "majority of a quorum rule," since the three affirmative votes do constitute a majority of a quorum, the holding would at first appear to be wrong. However, when three affirmative votes are matched against three negative votes, there are, in a sense, two majorities -- one majority for and the other against the proposal. Even though several alternatives are being voted upon -- applications (a), (b) and (c) -- and three votes are cast for (a) and the other three split between (b) and (c), there is still an expression of negative will as to (a) on the part of the latter three voters and thus two majorities of a quorum are matched in opposition. And where only applications (a) and (b) are voted upon, and six votes are split equally -- three for (a) and three for (b) -- it is manifest that there are two majorities of a quorum and that neither can prevail. When, therefore, there is not a majority of a quorum, but rather two majorities, the rule excludes both from taking effective action, as it did in the WIBC, Inc. case. Thus, the result in that

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case was consistent with the rule advocated by Huffman and approved by the Supreme Court in the Ballin case.

The "majority of a quorum" rule, when interpreted and refined as above, is merely another way of stating that the majority of those present and voting can take action and is the same test used in Federal Broadcasting System, Inc. v. FCC, 225 F.2d 560 (1955), cert. denied, 350 U.S. 923. There it was said:

"Nothing in law or fact authorizes us to reach any other conclusion than that the action in question was taken by majority vote of the Commissioners present and voting."

The Pier San contention, which would invalidate the instant Decision and numerous prior ones by counting an abstention as a negative vote, should be rejected as without authority.

In view of the facts that the vote by the Commission for the Huffman application was valid, and the remaining contentions of the losing parties are insufficient to require reconsideration and/or rehearing, their petitions should be denied.

Under Section 1.191(c) of the Commission's Rules and Regulations, Huffman is not excused from commencing construction within two months from the date of grant and from completing construction within an additional six months. To fulfill his obligations, he is necessarily making plans and commitments looking toward timely construction of the station. Expeditious action by the Commission to finalize this grant would ease construction

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problems and enable a new broadcast service to be established in
Pratt, Kansas, at an early date.

Respectfully submitted,

WILMER E. HUFFMAN

By (Signed) Francis X. McDonough

Francis X. McDonough

By (Signed) Thomas S. Sullivan

Thomas S. Sullivan

His Attorneys

Francis X. McDonough
Thomas S. Sullivan
Dow, Lohnes and Albertson
Munsey Building
Washington 4, D. C.

Counsel for Wilmer E. Huffman

February 19, 1962

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Huffman, "Opposition To Reconsideration"
February 19, 1962 Page 10

Pier San

"Response To Morgan Petition"

February 21, 1962

Feb 21, 1962

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
)	
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
)	
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
)	
For Construction Permits)	

PIER SAN'S RESPONSE TO MORGAN'S PETITION

Comes now PIER SAN, INC., by its attorneys, and files this response to the Petition for Reconsideration and Rehearing filed herein by Francis C. Morgan, Jr., the other applicant for a permit at Larned, Kansas. Pier San submits that reconsideration and rehearing of the Commission's decision of January 9th is required, but simply on the 307(b) issue and not with respect to any of the comparative matters raised by Morgan. In response to Morgan's petition, Pier San shows the following:

1. The January 9th decision would grant the Huffman application for Pratt, Kansas on a determination of the 307(b) issue. The decision viewed as moot any of the comparative matters between Morgan and Pier San. As the Commission is aware, the Examiner's initial decision resolved the 307(b) issue in favor of Larned and then, as between the competing Larned applicants, proposed a grant of Pier San's application. Neither in his exceptions to the initial decision nor in his instant petition for reconsideration does Morgan show any reason why he should be preferred over Pier San.

2. With respect to the Morgan-Pier San comparison, Morgan seeks to raise matters not properly subject of rehearing or reconsideration and, in fact, makes allegations inconsistent with the position he took during the

Pier San, "Response To Morgan Petition"
February 21, 1962 Page 1

hearing. During the evidentiary hearing he had every opportunity to go into the operation of Station WERO, having been given the logs and tendered the witnesses with respect to the operation of WERO but he did not seek to utilize them. At this late stage any argument about WERO is dilatory and improper.

3. Pier San has filed its own petition for reconsideration of the January 9th decision pointing out therein that the decision was illegally entered and is unreasonable and improper in the resolution of the 307(b) issue. Since that pleading is on file it is not necessary to repeat that showing again. However, it is submitted that such petition shows beyond doubt that reconsideration is required.

WHEREFORE, Pier San submits that reconsideration is required and that a new and proper decision will have to be entered for the reasons heretofore shown by Pier San rather than for the comparative matters now raised by Morgan.

Respectfully submitted,

PIER SAN, INC.

By:

MILLER & SCHROEDER
Its Attorneys

/s/ Arthur H. Schroeder
ARTHUR H. SCHROEDER

/s/ John B. Kenkel
JOHN B. KENKEL

218 Munssey Building
Washington 4, D. C.

February 21, 1962

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Pier San, "Response To Morgan Petition
February 21, 1962 Page 2

CERTIFICATE OF SERVICE

I, Mary Combs Barber, hereby certify that on this 21st day of February, 1962, a copy of the foregoing "Pier San's Response to Morgan's Petition" was sent by first class United States mail, postage prepaid, to the following:

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Warner Building
Washington 4, D. C.
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Robert J. Rawson, Esquire
Chief, Hearing Division
Federal Communications Commission
Washington 25, D. C.

/s/ Mary Combs Barber
Mary Combs Barber

Pier San, "Response To Morgan Petition"
February 21, 1962 Page 3

Pier San

"Reply To Oppositions"

March 2, 1962

March 2, 1962

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of)	
)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
)	
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
)	
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
)	
For Construction Permits)	

PIER SAN'S REPLY TO OPPOSITIONS

PIER SAN, INC., by its attorneys, files this Reply to the oppositions which the Broadcast Bureau and Wilmer E. Huffman, respectively, have lodged to Pier San's pending Petition For Reconsideration. The petitioner submits that neither opposition successfully controverts the grounds and reasons portrayed in the petition as requiring reconsideration of the erroneous and illegal Decision of January 9, and the relief requested in the petition must perforce be granted. In replying to the referenced oppositions, petitioner shows the following:

A. The Bureau Avoids The Most Recent Cases, And Argues For An Improper Principle.

1. The Bureau admits unequivocally that "Six Commissioners were present when the vote was taken." (Bureau Opp. Par. 2). Nevertheless, the Bureau attempts to argue that the vote of three of the Commissioners was sufficient to reverse the Initial Decision then under consideration, and that the plain language of the Court of Appeals to the contrary in WIBC, Inc. v. F.C.C., 259 F.2d 941, 943, should somehow be avoided.

Pier San, "Reply To Oppositions"
March 2, 1962 Page 1

2. The Bureau attempts to rely on Federal Broadcasting System, Inc. v. F.C.C., 225 F.2d 560, a case both earlier in time than the WIBC case and different in the critical factual situation with respect to the number of Commissioners actually present and participating. As the Court of Appeals noted in Federal, "when the vote was taken on the grant of a license to the intervenors three Commissioners voted in favor of the application, two Commissioners voted to pass over and Commissioner Hennock did not participate." 225 F.2d at 565. Emphasis supplied. The Commission itself has admitted that with respect to the question of whether five or six participated "Commissioner Hennock was, in fact, absent from the Commission meeting room during consideration of and action on the subject applications." WHEC, Inc., 14 R.R. 182c, 182h. Emphasis supplied. It was in that factual situation where the Court opined that the absence could not be counted as a dissenting vote and the 3-2 vote of those participating was sufficient. How different from the instant situation, however, where six Commissioners were present and only three, less than a majority, voted to reverse the Initial Decision. Clearly, the Bureau's attempted reliance on Federal is wholly misplaced.

3. In the instant case one Commissioner indicated a view not to join with the three members who voted to reverse the Initial Decision by recording himself as abstaining, and two Commissioners dissented. Of the six Commissioners present and considering the matter only three, less than a majority present and considering whether or not to reverse the Initial Decision, thus voted for reversal. No argument will save a decision for reversal founded on such basis, and the January 9 Decision is a therefore nullity.

4. The Bureau appears to argue that "abstaining" is the same as "not participating", without, however, telling us why the Commission

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Pier San, "Reply To Oppositions"
March 2, 1962 Page 2

has used and does use the two different minute entries if there is no difference. It is passing strange to find the Commission's own Broadcast Bureau suggesting that the Commission does not have a reason or purpose in what it is doing. The petitioner submits that reconsideration would be required here if for no other reason than to demonstrate to the Broadcast Bureau that the Commissioner who abstained from voting to reverse the Initial Decision was in fact present and participating.

5. The Bureau is obviously in error when it claims that the Court of Appeals' test is "present and voting" rather than "present", when the latest pronouncement of the Court, in WIBC, Inc. v. F.C.C., 259 F.2d 941, 943, is clear and explicit:

"When a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present." Emphasis supplied.

The Bureau's argument is not with Pier San, but with the Court. However such the Bureau would like to change the law as found in the most recent case, the law is there. The Commission must follow the Court's most recent pronouncement and cannot accept the Bureau's views as to what it, the Bureau, would like the law to be.

6. Finally, it should be noted that the Bureau does not even attempt to answer any part of Pier San's petition concerning the mis-interpretation and mis-application of Section 307(b) found in the three-member Decision of January 9, the Bureau contenting itself with the casual suggestion that Pier San restates matters fully considered in the Decision. However, no attempt is made by the Bureau to controvert Pier San's showing that the Initial Decision in this case was being reversed because it contained conclusions which were almost simultaneously being approved by the Commission in another case. See Par. 15 of Petition and discussion of Sunbury Broadcasting Corp., 31 F.C.C. 734, 737. The Bureau's

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Pier San, "Reply To Oppositions"
March 2, 1962 Page 3

failure to disprove Pier San's showing is a strong indication of a realization that the 3-2-1 Decision to reverse the Initial Decision cannot be supported. It appears clear beyond any troubling doubt that reconsideration is required and that a correct Decision be entered affirming the Initial Decision herein.

B. Huffman's Opposition Contains Glaring Errors And Misstatements, And Cannot Be Considered.

7. The Commission cannot seriously consider the opposition of Wilmer E. Huffman because it contains glaring errors and misstatements. First: Huffman says that the rule advocated by Pier San, viz., effective action by the Commission requires that a majority of those who participate vote affirmatively for the action, would invalidate Commission actions in six listed recent cases (Huffman Opp. pp. 4-5), while an examination of those actions shows that simply isn't the case. In each of the six actions cited by Huffman, the action was taken by a majority of the Commissioners participating.

B. J. Parrish, 21 R.R. 483. Four Commissioners participated. The vote was 3-1. Three members did not participate.

Jane A. Roberts, 18 R.R. 905. Four Commissioners participated. The vote was 3-1. Two Commissioners did not participate. ^{1/}

Young People's Church, 18 R.R. 947. Five Commissioners participated. The vote was 3-2. One Commissioner was absent. ^{1/}

Enterprise, Inc., 19 R.R. 67. Four Commissioners participated. The vote was 3-1. Three Commissioners did not participate.

Riverside Church, 19 R.R. 81. Four Commissioners present and participating. The vote was 3-1. Two members did not participate and one was absent.

TOT Industries, Inc., 20 R.R. 453. Five Commissioners participated. The vote was 3-2. One member was absent; one did not participate.

^{1/} At the time the Commission consisted of only six members. Former Chairman Doerfer had resigned and his successor on the Commission had not yet been appointed and/or commenced service.

In every single case the action was that of the majority of those considering the matter then at hand. In not one of those cases did less than a majority of those participating agree on the decision to be entered. Huffman is mistaken, then, in his contention that the correct rule set forth in WIBC, supra, and in the Pier San petition would invalidate those listed actions.

8. Secondly, Huffman seeks to put forward a contention heretofore rejected by the Court, Huffman arguing that regardless of the number of Commissioners participating a majority of a quorum is the act of the Commission (Huffman Opp., p. 6, p. 9), a view held to be improper in WIBC, supra. Such suggestion was rejected by the Court, for "According to this reasoning, three votes would control, no matter how many were present and voted" (259 F.2d at 943), and it must be rejected by the Commission. The arguments along the heretofore rejected lines can neither be utilized by the Commission nor serve in any way to refute the showing of necessity for reconsideration set forth in Pier San's petition.

9. Huffman's overly long quotations from U. S. v. Ballin, 144 U.S. 1, and Attorney General v. Shepard, 62 N.H. 383, nowise help his opposition. Both cases turned on the question of the number voting for an action relative to the number specified as necessary for a quorum, an issue not present in the instant situation in light of the WIBC holding. Huffman misses the point entirely. Pier San has not claimed that a quorum was not present, nor that a quorum was defeated by Commissioner Bartley's disinclination to vote either with three members to reverse the Initial Decision or with the dissenters (he preferring, perhaps, some other course as the several Commissioners did in WIBC). Additionally, it should be noted that in the Attorney General case the question was whether an ordinance had been passed, not whether an Initial Decision was effectively reversed. In the latter situation the rule obtaining with

...
respect to judicial review is more applicable, namely, unless a majority agree to reverse, the appealed-from judgment or decision remains in effect. In the instant case, a majority of the six Commissioners present and considering whether to reverse or affirm the Initial Decision did not agree to reverse. Hence, the Initial Decision should have remained in effect.

10. Finally, it should be pointed out that Huffman makes no attempt to refute Pier San's showing that irrespective of the question of whether the 3-2-1 vote would be technically sufficient the Commission should not permit a decision so far-reaching in the interpretation of Section 307(b) to be issued without at least the concurrence of a majority of the members of the Commission present and considering the matter. Any indication of the failure of a concurrence of a majority of those present means that the action cannot be relied upon as a "majority" decision, no matter what rule of construction be utilized. The community of Larned, Kansas, no less than the parties to this case, should rightfully be able to expect more of this Commission than that an opportunity for a first radio station would be denied by a Decision legally suspect and erroneous in the interpretation of Section 307(b) asserted therein.

WHEREFORE, the premises considered, it is submitted that the oppositions of the Broadcast Bureau and Wilmer E. Huffman must be denied, and that the Petition For Reconsideration of Pier San, Inc., together with the relief prayed for in said petition, should be granted.

Respectfully submitted,

PIER SAN, INC.

By:

MILLER & SCHROEDER
Its Attorneys

/s/ Arthur E. Schroeder
ARTHUR E. SCHROEDER

218 Munsey Building
Washington 4, D. C.

March 2, 1962

/s/ John B. Kenkel
JOHN B. KENKEL

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Pier San, "Reply To Oppositions"
March 2, 1962 Page 6

CERTIFICATE OF SERVICE

I, Alice F. Hopper, hereby certify that on this second day of March, 1962, a copy of the foregoing "Pier San's Reply to Oppositions" was sent by first class United States mail, postage prepaid, to each of the following:

Francis X. McDonough, Esquire
Dow, Lohnes & Albertson
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A. L. Stein, Esquire
Warner Building
Washington 4, D. C.
Counsel for Francis C. Morgan, Jr.

Robert J. Rawson, Esquire
Chief, Hearing Division
Federal Communications Commission
Washington 25, D. C.

/s/ Alice F. Hopper
Alice F. Hopper

Pier San, "Reply To Oppositions"
March 2, 1962 Page 7

Huffman Granted
Pier San-Morgan Denied
Final Decision By FCC
May 29, 1962

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

FCC 62-580
19852

In re Applications of)	
WILMER E. HUFFMAN	)	DOCKET NO. 13469
Pratt, Kansas	)	File No. BP-12021
FRANCIS C. MORGAN, JR.	)	DOCKET NO. 13470
Larned, Kansas	)	File No. BP-12749
PIER SAN, INC.	)	DOCKET NO. 13471
Larned, Kansas	)	File No. BP-12750
For Construction Permits)	

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley abstaining from voting; Commissioner Lee dissenting; Commissioner Cross dissenting in part and concurring in part and issuing a statement.

1. The Commission has under consideration: (a) its Decision released January 9, 1962 (32 FCC 1, 22 RR E20); (b) a Petition for Reconsideration and Rehearing, filed by Francis C. Morgan, Jr. (Morgan), on February 8, 1962; (c) a Petition for Reconsideration, filed by Pier San, Inc. (Pier San), on February 8, 1962; and (d) related pleadings and all other matters of record.

2. Our Decision granted Wilmer E. Huffman's (Huffman) application to operate a Class III standard broadcast station at Pratt, Kansas (1290 kc, 5 kilowatts, day and 500 watts, night, unlimited time). It denied both Pier San's and Morgan's applications to operate a new station at Larned, Kansas (1290 kc, 500 watts, daytime only). Both Morgan and Pier San seek reconsideration of that Decision.

3. Morgan's petition is, in reality, a petition to reopen the record. He urges that the record should be reopened to: (a) determine whether Larned receives any nighttime primary service; (b) consider the FM and TV services available to the two communities; (c) weigh the fact that Pratt's existing station (KWSK) is licensed to operate as early as 5:15 A.M. and as late as 8:15 P.M. (Commission records show 8:00 P.M. as the latest hour that KWSK operates) during June and July; and (d) to determine whether Pratt is able to support a second station.

4. Morgan's petition will be denied. His contentions have no merit since: (a) neither Larned applicant proposes a nighttime operation; (b) we have previously ruled that the availability of FM

Huffman Granted, Pier San-Morgan Denied
May 29, 1962 Page 1

and TV services in AM licensing proceedings is not a controlling factor; ^{1/} (c) the fact remains that KWSK is a daytime only station; and (d) KWSK did not seek to become a party to the proceeding to challenge the alleged economic impact on the Pratt community resulting from a Huffman grant. Moreover, assuming arguendo that Morgan could show that Pratt was unable to support a second station, it does not follow that the region involved here could not support the Class III facilities sought. More important, Morgan's petition will be denied since his contentions could -- and should -- have been advanced at the proper time either as evidence under existing issues or as grounds for enlargement of issues.

5. In essence, Pier San makes two arguments. It claims that the Commission misapplied Section 307(b) of the Communications Act of 1934, as amended, when it preferred Pratt over Larned. And further, it claims that the Commission's Decision was illegally entered being made by less than a majority of the Commissioners present and considering the matter at that time. ^{2/}

6. Pier San's 307(b) claims are not new. They are almost identical to those raised in its exceptions and at oral argument. It did not then, nor does it now offer any authority for the proposition that a daytime only applicant bringing a first local transmission service to a smaller community must be preferred over an unlimited time, more efficient applicant bringing a second competitive daytime station, a first nighttime transmission service, and a first primary nighttime reception service to a larger community. In fact, Pier San has already argued that the Commission has never decided a case involving this combination of factors. Pier San now volunteers that our Decision belittles the importance of Larned's need for an outlet for local self-expression, and that it over-emphasizes the importance of the nighttime white area that the Pratt proposal would eliminate. Our Decision did neither; instead, we considered all the advantages of the Larned proposals but concluded that they were outweighed by the advantages the Pratt proposal

^{1/} See Tupelo Broadcasting Co., Inc., 12 RR 1231, 1250 (1956); and more recently Suburban Broadcasters, 20 RR 52, 53 (1960), and Monocacy Broadcasting Co., 29 FCC 717, 727, 19 RR 165, 174 (1960). In Tupelo, the Commission stated "that Section [307(b)] contemplates an equitable distribution of broadcast service in each class of service. It cannot be contended that television is a substitute for a standard broadcast service for it is a separate, distinct and entirely different type of service." In Suburban, the Commission stated: "Each of these services is a separate and distinct class of broadcast service and the availability of one class of broadcast service to an area, we have held, is not a controlling factor in determining need for another class of broadcast service to the same area."

^{2/} Three Commissioners (Hyde, Craven and Ford) voted for Huffman's application; two Commissioners (Lee and Cross) voted against Huffman; and two Commissioners did not vote (Bartley abstained and Chairman Minow was absent).

Huffman Granted, Pier San-Morgan Denied
May 29, 1962 Page 2

offered. Pier San tells us that our rationale about nighttime white areas here conflicts with our rationale in Sanbury Broadcasting Corporation, 31 FCC 734, 22 RR 383 (1961). There is no conflict in rationale. In Sanbury we described the created white area as "undesirable" but concluded that the many benefits flowing from a grant outweighed the loss. The facts there presented public interest determinations totally unlike those presented here. 2/

7. It is unnecessary to decide Pier San's contentions that our vote was illegally entered, for the Commission has considered Pier San's petition for reconsideration. Upon such consideration Pier San's petition for reconsideration will be denied and the Commission's Decision of January 3, 1962 (32 FCC 1, 22 RR 820) will be readopted.

ACCORDINGLY, IT IS ORDERED, This 29th day of May, 1962, That our Decision (32 FCC 1) adopted on January 3, 1962, IS READOPTED; and

IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed by Francis C. Morgan, Jr., and Pier San, Inc., on February 8, 1962, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Acting Secretary

Released: June 1, 1962

*STATEMENT OF COMMISSIONER GROSS DISSENTING IN PART
AND CONCURRING IN PART

I dissent to the refusal to grant the Pier San petition but concur in the denial of the Morgan petition. My reasons for so holding are set forth in my dissenting statement appended to the January 9, 1962 decision in this case.

3/ In Sanbury, the applicant proposed to change from a Class IV operation on 1240 kc, 250 w, unlimited time to a Class II operation on 1070 kc, 10 kw, daytime, and 1 kw nighttime, DA-2, with a new transmitter site. Among other things, a white area was eliminated and another created, a situation not present here.

Huffman Granted, Pier San-Morgan Denied
May 29, 1962 Page 3

KWNS

“The Mighty 1290”

“Protest Period Files”

1959-1962