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INSTITUTE FOR PUBLIC REPRESENTATION

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RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 20, 1999

Christopher Wright
General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Request for Investigation concerning Improper *Ex Parte* Communications in Connection with File Nos. BALET-970602IA, BALCT-970530IA Application for Assignment of License of WQEX(TV) Channel *16, Pittsburgh, PA from WQED Pittsburgh to Cornerstone TeleVision, Inc. and Application for Assignment of License of WPCB-TV, Channel 40, Greensburg, PA from Cornerstone TeleVision, Inc. to Paxson Pittsburgh License, Inc.

Dear Mr. Wright,

I am writing to you pursuant to 47 CFR § 1.1214, to advise you that there is substantial reason to believe that a violation of the Commission's *ex parte* rules has occurred. Because the improper *ex parte* communications occurred in connection with two applications for assignment of licenses that are likely to be consummated shortly after the Commission order is released, which I have been informed will happen this week, I request that you reply to this letter as soon as possible, and at least by the end of the week. I further request that, if appropriate, you impose sanctions as permitted under 47 CFR § 1.1216, including an order to show cause why the applications should not be dismissed or denied.

In July 1997, my clients, the Alliance for Progressive Action and the QED Accountability Project, filed a petition with the Federal Communications Commission to deny the applications for the assignment of license of Channel *16 (WQEX) to Cornerstone TeleVision, Inc., and of Channel 40 (WPCB) to Paxson Pittsburgh Licensee, Inc., on the grounds that these transfers would be inconsistent with the public interest, convenience, and necessity. Subsequently, in June 1999, these same groups petitioned to deny WQED's application for renewal of stations WQED

and WQEX. Under Commission rules, these proceedings are clearly restricted matters, and the Alliance for Progressive Action and the QED Accountability Project are parties.

As you know, FCC rules generally prohibit *ex parte* communications in restricted proceedings. 47 CFR § 1.1208. Nonetheless, I recently learned that Senator John McCain sent two letters to FCC Chairman William E. Kennard concerning the WQED proceeding. Neither letter was served on the Alliance for Progressive Action or the QED Accountability Project and thus we had no opportunity to respond before the Commission voted to grant the applications.

I first learned about these letters on December 15, 1999, after Steve Klitzman, of the FCC, faxed me all five Commissioners' responses to Senator McCain. Chairman Kennard's letter of December 14, 1999, indicates that Senator McCain's letter

comes at a sensitive time in the deliberative process as the individual commissioners finalize their views, and their votes, on this matter. I must respectfully note that it is highly unusual for commissioners to be asked to publicly announce their voting status on a matter that is still pending. I am concerned that inquiries concerning the individual deliberations of each commission could have procedural and substantive impacts on the Commission's deliberations and, thus, on the due process rights of the parties.

Commissioner Tristani indicated that she found the request improper. After receiving the letters from the Commissioners, I called Mr. Klitzman to request copies of the letters from Senator McCain. I have attached copies of these letters.

In both letters, Senator McCain expresses concern about the Commission's failure to act on the pending applications for assignment of the licenses of WQEX and WPCB. In the letter dated November 17, 1999, he requests "that the Commission act on these applications at its regularly scheduled monthly meeting in December if it has not acted on them in the interim. If in your judgment the Commission cannot meet this request, please advise me of this fact in writing, with a specific and complete explanation, no later than November 18, 1999." We are not aware of whether the Chairman responded to this request.

However, on December 10, 1999, Senator McCain again wrote to Chairman Kennard. He notes that the agenda for the Commission meeting on December 15 did not list the applications for consideration. He then requests "that each Member of the Commission advise me, in writing, no later than close of business on Tuesday, December 14, 1999, whether you have already acted upon these applications in the course of the notation voting process. If your answer to the latter question is no, please state further whether you will, or will not, be prepared to act on these applications at the open meeting on December 15. If your answer to both of the proceeding [sic] questions is no, please explain why."

Coming from the Chairman of the Senate Commerce Committee, these letters were

clearly intended to pressure the Commission to act. And indeed, they appear to have had the desired effect. On December 15, the FCC released a press release announcing approval of the transfer. *Commission Adopts An Order Approving Applications for Consent to Assign WQEX(TV), Channel *16, Pittsburgh, Pennsylvania, and WPCB-TV, Channel 40, Greensburg, Pennsylvania*, December 15, 1999. This decision will allow the applicants to close the deal before the “upset date” of December 31, 1999, specified in their contract. See Second Amendment to Asset Exchange Agreement and Amendment to Assignment and Acceptance Agreement at 2, 4.

As you know, 47 CFR § 1.120 prohibits persons from soliciting or encouraging others to make any presentation that they are prohibited from making themselves. My clients have not had any communications with Senator McCain about this matter. The fact that the applicants would clearly benefit from having the FCC rule on the applications by December 15, 1999, suggests that they solicited these letters. Moreover, we know that WQED (with Paxson splitting the cost) engaged Patton Boggs LLP to lobby the Congress and Commission to grant the transfer. See Lobby Log, Legal Times, Sept. 13, 1999, at 53; Sally Kalson, *WQED Brings Big Guns to FCC Stalemate*, Pittsburgh Post Gazette, Aug. 5, 1999, at D1. Attorneys at Patton Boggs wrote letters to the Commissioners directly urging them to grant the transfer. See Letter from Lanny Davis to Commissioner Susan Ness, July 8, 1999; Letter from Thomas Siebert to Commissioner Susan Ness, July 20, 1999; Letter from Lanny Davis to Chairman Kennard, November 5, 1999.

Moreover, it appears that the applicants or their attorneys have solicited letters of support from members of Congress. Some letters urging the FCC to grant the assignment were served on us by the applicant’s counsel. See, e.g., Letter from John R. Feore, Jr., Counsel for Paxson Pittsburgh License, Inc., September 22, 1999, enclosing for the record a Letter from Congress Ron Klink to Chairman Kennard, September 20, 1999 (urging him to “consider favorably WQED’s application to assign its license to assign its license for the unused [sic] WQEX (channel 16) to Cornerstone TeleVision and Cornerstone’s application to assign its license for channel 40 (Greensburg) to Paxson Communications.”); Letter from Steven A. Lerman, Counsel for WQED Pittsburgh, May 27, 1999, enclosing a Letter from Senator Arlen Specter and Rick Santorum to Chairman Kennard, May 21, 1999 (urging prompt grant of the assignment).

Even where the letters were served directly by the Member of Congress, the content clearly suggests a point of view and level of knowledge of the proceeding that could only have come from the applicants. For example, the Letter from Congressman Steny H. Hoyer to Commissioner Ness, August 6, 1999 states that “I am told, WQED, whose severe financial distress has resulted in staff layoffs, production cutbacks and the simulcasting of WQED(TV)’s programming on WQEX, will finally be able to pay down the massive debt incurred by its prior management, strengthen its service to Pittsburgh by implementing local programming plans that have long been ‘on hold,’ and make the transition to digital television.” These are the very same arguments made by WQED. See also Letter from Congressman Mascara to Chairman Kennard, September 22, 1999 (expressing view that FCC was misinformed about aspects of the case); Letter from Congressman Tom Udall to Commissioner Tristani, September 8, 1999 (stating his

“understanding that WQED Pittsburgh wishes to sell one of its stations” and that “I have also been told that the FCC promised the stations expedited consideration...”).

In at least two instances where members of Congress wrote to the Commission about the proposed assignment matter and failed to serve the parties, the FCC sent letters to the parties advising them of the improper *ex parte* communications and providing copies of the letters. Letter from John I. Riffer, Ass't General Counsel, December 1, 1999, to Congressman William J. Coyne (returning letter from Congressman Coyne to Chairman Kennard, October 15, 1999 for failure to serve the parties); Letter from John I. Riffer, Ass't General Counsel, August 26, 1997, (returning a letter from Congressmen Edward Markey and John D. Dingell, July 18, 1997). By contrast, the FCC failed to advise the parties of the letters from Senator McCain.

It might be argued that the McCain letters do not fall within the definition of a “presentation” under § 1.202(a) because they relate to the status of a proceeding. However, § 1.202(a) makes it clear that “a status inquiry which ... indicates a view as to the date by which a proceeding should be resolved, or which otherwise is intended to address the merits or outcome or to influence the timing of a proceeding is a presentation.” The note to that rule further explains that a “communication expressing concern about administrative delay” will be treated as status inquiry only so long as “no view is expressed as to a date by which the proceeding should be resolved.” Since the letters from Senator McCain make clear that the proceeding should be resolved by December 15, 1999, they clearly constitute presentations.

In sum, I believe that the rules have been violated in a way that has been most prejudicial to my clients and to the citizens of Pittsburgh at large. I request that you investigate this matter, and if appropriate, impose sanctions as permitted under 47 CFR § 1.1216, including an order to show cause why the applications should not be dismissed or denied. Furthermore, because the assignments are likely to be consummated in the very near term, I request that you reply to this letter as soon as possible, and at least by the end of the week.

Respectfully submitted,



Angela J. Campbell
Counsel to Alliance for Progressive Action
and QED Accountability Project

cc: attached service list

CERTIFICATE OF SERVICE

I, Angela J. Campbell, hereby certify that I have this 20th day of December, 1999, caused to be served by first class mail, postage prepaid, copies of the foregoing letter to the following:

Steve A. Lerman, Esq.
Barbara A. Gardner, Esq.
Leventhal, Senter & Lerman, P.L.L.C.
2000 K Street, NW, Suite 600
Washington, DC 20006

John R. Feore, Jr., Esq.
Dow, Lohnes & Albertson, P.L.L.C.
1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036-6802

Margaret L. Miller, Esq.
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036-6802

BY HAND:

General Counsel Christopher J. Wright
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, DC 20554

The Honorable Gloria Tristani
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

The Honorable William Kennard
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, DC 20554


The Honorable Harold Furchtgott-Roth
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, DC 20554

The Honorable Susan Ness
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Michael Powell
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554

Barbara Kreisman
Chief, Video Services Division
Mass Media Bureau
Federal Communications Commission
Washington, DC 20554



Angela J. Campbell

12/10/88 FRI 14:50 FAX

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HONORABLE WILLIAM E. KENNARD
 CHAIRMAN
 FEDERAL COMMUNICATIONS COMMISSION
 445 12TH STREET, S.W.
 ROOM 8-B201H
 WASHINGTON, D.C. 20554

United States Senate
 COMMITTEE ON COMMERCE, SCIENCE
 AND TRANSPORTATION
 WASHINGTON, DC 20510-5125

November 17, 1999

Honorable William E. Kennard
 Chairman
 Federal Communications Commission
 445 12th Street, S.W.
 Room 8-B201H
 Washington, D.C. 20554

Enclosure

Dear Chairman Kennard:

I write today to express my concern about the Commission's continuing failure to act on the pending applications for assignment of the licenses of WQEX(TV) and WPCB(TV), Pittsburgh, Pennsylvania.

I am sure you are aware of the extent of the delay at issue. Over three years ago the FCC promised WQED Pittsburgh that the FCC would give "expedited consideration to any application [WQED] might file" to sell WQEX(TV), its struggling second noncommercial station in the market. Over two years ago the applications for authority to assign the license for WQEX(TV) to Cornerstone Television and for Cornerstone to assign its license for WCPB(TV) to Paxson Communications were filed. To date, no decision has been issued, although I am advised that these applications have been awaiting final action in the notation (circulation) voting process for a lengthy period of time.

As I understand it, the Commission's process of voting by circulation is intended to accelerate agency decisionmaking, not provide a convenient method for one or more Commissioners to indefinitely block it. And I further understand that as Chairman you have the prerogative of placing circulation items on the Commission's monthly meeting agenda.

The delay that has already occurred appears incompatible with the responsible execution of the Commission's statutory duties, and further delay would be unacceptable. Please be advised, therefore, that consistent with this Committee's oversight responsibilities I respectfully request that the Commission act on these applications at its regularly-scheduled monthly meeting in December if it has not acted on them in the interim. If in your judgment the Commission cannot meet this request, please advise me of this fact in writing, with a specific and complete explanation, no later than November 18, 1999.

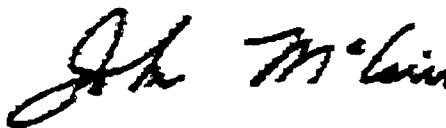
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Honorable William E. Kennard
November 17, 1999
Page 2

This letter is not written to secure a favorable resolution for any party on any substantive issue pending before the Commission. Please treat this letter in full compliance with all applicable legal, ethical, and procedural rules.

Sincerely,



John McCain
Chairman

JM/lb

12/10/99 FRI 14:50 FAX

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December 10, 1999

Page 2

This letter is not written to obtain favorable disposition of any matter on behalf of any party to any proceeding before the Commission. Please treat this letter in compliance with all applicable substantive and procedural rules.

Sincerely,



John McCain
Chairman

JM/lb
Enclosure

OFFICE OF
THE CHAIRMANFEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

December 14, 1999

The Honorable John McCain
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter of December 10, 1999 concerning the application for assignment of the licenses of broadcast stations WQEX(TV) and WPCB(TV), Pittsburgh, Pennsylvania.

As you know, this application raises important and very difficult policy issues. I wholeheartedly agree that prompt Commission action on this matter would have been preferable.

Your letter, however, comes at a sensitive time in the deliberative process as the individual commissioners finalize their views, and their votes, on this matter. I must respectfully note that it is highly unusual for the commissioners to be asked to publicly announce their voting status on a matter that is still pending. I am concerned that inquiries concerning the individual deliberations of each commissioner could have procedural and substantive impacts on the Commission's deliberations and, thus, on the due process rights of the parties.

Nevertheless, and as we have previously advised your staff, I have entered my vote on an order addressing this matter. Specifically, I entered a vote on June 29, 1999 to adopt the staff's proposed order. At the request of a majority of the commissioners, staff made revisions to the order and a new order was re-circulated to the commissioners on December 10, 1999. Under the Commission's procedures, this re-circulation requires each commissioner to re-enter his or her vote, or to modify his or her vote in light of the revisions. Accordingly, I re-voted the order on December 10, 1999.

Sincerely,

A handwritten signature in black ink, appearing to read "Will Kennard".

William E. Kennard
Chairman



OFFICE OF
THE COMMISSIONER

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

December 14, 1999

The Honorable John McCain
Chairman, Committee on
Commerce, Science and Transportation
United States Senate
254 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman McCain:

This responds to your letter dated December 10, 1999, concerning the pending applications for assignment of licenses of WQEX(TV) and WPCB(TV), Pittsburgh, Pennsylvania. Today, I voted the Memorandum Opinion and Order resolving these applications. I voted to approve an order granting the transfer of the licenses. I dissented from a portion of the order that does not affect the transfer. I anticipate that the text of the Memorandum Opinion and Order will be released very shortly.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael K. Powell".

Michael K. Powell
Commissioner

DEC. 14. 1999 7:41PM

FC LIA

NO. 4498 P. 6



OFFICE OF
THE COMMISSIONER

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

December 14, 1999

The Honorable John McCain
United States Senate
Committee on Commerce, Science,
and Transportation
Senate Russell Office Building #241
Washington, DC 20510-6125

Dear Senator McCain:

This is in response to your letter of December 10, 1999 regarding the status of the pending applications for assignment of licenses of WQEX(TV) and WPCB(TV), Pittsburgh, Pennsylvania. In that letter, you requested that each Commissioner advise you, in writing, by the close of business today whether we have acted upon these applications. Respectfully, I cannot comply with your request. In order to preserve the integrity of our processes, it is my practice not to publicly disclose whether I have voted, or when I will be voting, on items in restricted proceedings prior to their adoption by the full Commission.

Very truly yours,


Gloria Tristani
Commissioner



Federal Communications Commission
Washington, D.C. 20554

COMMISSIONER
SUSAN NESS

December 14, 1999

The Honorable John McCain
Chairman
Committee on Commerce, Science
and Transportation
United States Senate
Washington DC 20510

Dear Mr. Chairman:

I write in response to your letter of December 10, 1999, requesting that I advise you, in writing, no later than close of business today, whether I have acted upon the application for assignment of licenses WQEX(TV) and WPCB(TV), Pittsburgh, Pennsylvania. The item has been placed on circulation by Chairman Kennard, and I have voted it today. As always, I remain available to discuss this or any other Commission item with you or your staff.

Sincerely,

A handwritten signature in cursive script that reads "Susan Ness".

CC: Chairman William E. Kennard
Commissioner Furchtgott-Roth
Commissioner Michael K. Powell
Commisioner Gloria Tristani



Federal Communications Commission
Washington, D.C. 20554

December 14, 1999

VIA FACSIMILE

Honorable John McCain
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

Dear Senator McCain:

Thank you for your letter dated December 10, 1999, regarding the pendency of the applications for assignment of the licenses of WQEX(TV) and WPCB(TV), Pittsburgh, Pennsylvania.

You asked me to advise, as of the close of business today, whether I have acted upon these applications in the course of the notation voting process. I am writing to inform you that I have done so.

Respectfully,

A handwritten signature in cursive script, reading "Harold Furchtgott-Roth".

Harold W. Furchtgott-Roth
Commissioner

CC: Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Michael K. Powell
Commissioner Gloria Tristani