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January 19, 2010

Federal Communications Commission
Consumer and Governmental Affairs Bureau
Consumer Complaints
445 12th St., S.W.
Washington, DC 20554

Attn.: Sharon Bowers, Consumer Inquiries and Complaints Division

Re: Consumer Complaint against PBS licensees

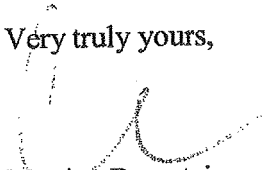
Dear Ms. Bowers:

I am counsel to People for the Ethical Treatment of Animals ("PETA") and I enclose PETA's consumer complaint against noncommercial educational broadcast stations ("PBS Licensees") identified in Appendix A of the complaint.

For the reasons specified in the complaint, PETA requests that the Federal Communications Commission ("the Commission") take action against the PBS Licensees for failing to comply substantially with the terms of their noncommercial broadcast licenses and the rules and regulations issued by the Commission. The violations occurred on or about November 23, 2009 and December 9, 2009, when the PBS Licensees aired an episode of *Sesame Street* in which commercial content of one of *Sesame Street*'s sponsors, the American Egg Board, was unlawfully embedded into *Sesame Street* programming. This violated the prohibition against promotional announcements by noncommercial licensees. Additionally, by airing the segment, the PBS Licensees breached their obligation to protect children from excessive and inappropriate commercial messages, in violation of the limits of the amount of commercial matter in children's programming as well as the Commission's policy against host-selling.

Accordingly, PETA requests that the Commission assess a forfeiture penalty or impose other fair and effective sanctions against the PBS Licensees for the violations described in the complaint.

Very truly yours,


Martina Bernstein
Litigation Counsel

{00038088}

PETA
FOUNDATION

PEOPLE FOR THE ETHICAL
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FOUNDATION

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PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS
FOUNDATION

BEFORE THE UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

CONSUMER COMPLAINT,
REQUESTING ACTION AGAINST PBS
LICENSEES FOR UNLAWFUL
ADVERTISING

Docket No. _____

Submitted to:

Federal Communications Commission
Consumer and Governmental Affairs Bureau
Consumer Complaints
445 12th St., S.W.
Washington, DC 20554

On: January 19, 2010

Submitted by:

People for the Ethical Treatment of Animals

Attn: Martina Bernstein, Litigation Counsel

PETA Foundation

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Representing more than 2 million PETA members and supporters

CONSUMER COMPLAINT

People for the Ethical Treatment of Animals ("PETA"), by its undersigned counsel, requests that the Federal Communications Commission ("the Commission") take action against the noncommercial educational broadcast stations listed in Appendix A (collectively, "PBS Licensees") for failing to comply substantially with the terms of their noncommercial broadcast licenses and the rules and regulations issued by the Commission pursuant to the Communications Act of 1934, as amended.

The violations occurred on or about November 23, 2009 and December 9, 2009, when the PBS Licensees aired an episode of *Sesame Street* in which commercial content of one of *Sesame Street*'s sponsors, the American Egg Board, was unlawfully embedded into *Sesame Street* programming. This violated the prohibition against promotional announcements by noncommercial licensees.¹

Additionally, by airing the segment, the PBS Licensees breached their obligation to protect children from excessive and inappropriate commercial messages, in violation of the limits of the amount of commercial matter in children's programming as well as the Commission's policy against host-selling.

The segment is attached hereto, in DVD format, as Exhibit 1.

STATEMENT OF FACTS

PETA is an international nonprofit corporation organized under the laws of Virginia and headquartered at 1536 16th St. N.W., Washington, DC 20036.

The PBS Licensees are licensed by the Commission as noncommercial educational television stations and members of the Public Broadcasting Service ("PBS"), a nonprofit

¹See 47 U.S.C. §§ 399a, 399b (1981); 47 C.F.R. §§ 73, 503(d).

corporation. PBS distributes noncommercial television programming, including *Sesame Street*, to the PBS Licensees for distribution to the public. As a licensee of the Commission, each PBS licensee has a nondelegable duty to assure that its broadcast program services fulfill its statutory obligations as a broadcaster. Therefore, even though PBS makes program content available to its members, each individual PBS Licensee is responsible for the quality and integrity of its broadcast services.

The American Egg Board ("the Egg Board") was created by Congress in order to promote the commercial egg industry and to maintain and expand foreign and domestic markets for eggs. The Egg Board is funded by an assessment on commercial egg producers in the continental United States that have more than 75,000 laying hens, and it maintains offices in Park Ridge, Ill.

In response to reports of widespread neglect, abuse, and disease of egg laying hens—and the resulting growing public pressure on egg producers to adopt more humane practices—the Egg Board launched *The Good Egg Project*, a multimillion dollar advertising campaign designed to rebuild consumer confidence and make consumers "feel good" about the eggs that they buy. The *Good Egg Project* logo is a "saintly" egg wearing a halo. Reduced to its essence, this advertising campaign is an effort by the egg industry to rebrand a tainted commodity by convincing consumers that egg producers are committed to ensuring that all hens live in a "humane and comfortable environment" and that producers want the hens to be "happy."²

In order to promote this newly minted "saintly" egg brand, the Egg Board became one of *Sesame Street*'s sponsors for the 2009-2010 season. From the outset, the Egg Board conceived of the *Sesame Street* partnership as extending beyond mere financial support to providing a

²See, e.g., American Egg Board, <http://www.goodeggproject.org/from-farm-to-table/animal-well-being> (last visited Dec. 7, 2009).

convenient platform for disseminating the Egg Board's commercial message to the *Sesame Street* audience. Taking advantage of the children's and their parents' trust in public educational programming, the Egg Board intended to—and did—infiltrate its commercial propaganda into the content of *Sesame Street*, in the guise of “[educating] kids and moms about how eggs get from the farm to their breakfast table.”³

The Egg Board made no secret of this self-serving intent behind the *Sesame Street* sponsorship, which, according to the Egg Board, “provides an ideal avenue to reach both kids and moms.”⁴ As the Egg Board boasted to its members, “Utilizing such a focused sponsorship allows [the Board] to communicate the Good Egg Project message to Sesame Street's longstanding and far-reaching audience.”⁵

According to the Egg Board's plan, on or about November 23, 2009 and December 9, 2009, PBS Licensees aired a *Sesame Street* episode that promoted—not just any type of egg—but the Egg Board's particular brand of a feel-good, “saintly” egg. The episode features a segment in which kids purportedly learn how eggs get from the farm to their breakfast table but which in truth parrots the Egg Board's misleading propaganda about “humane” modern egg farming, disguised as educational content.

The segment shows a group of children visiting an old-fashioned farm where chickens roam free and contentedly forage in a grassy pasture. The farmer explains to the children that the chickens “like to lay their eggs in a really nice, quiet spot where it's nice and cozy,” and he takes the children to an old-fashioned chicken coop, where chickens are able to lay their eggs in old-fashioned nest boxes that assure them the necessary comfort and privacy. The children delightedly search for and collect eggs from the nesting boxes. One child happily carries a plump

³See, e.g., PR Newswire, Sept. 14, 2009 (9/14/09 PRWIRE 13:30:00).

⁴AEB Newsletter, President's Message, Nov. 2009

⁵PR Newswire, Sept. 14, 2009 (9/14/09 PRWIRE 13:30:00).

brown hen in her arms. The segment then switches over to a fully automated, modern processing plant, where eggs are washed, sorted, and packaged. There is no mention of the fact that the eggs processed in these plants are not laid in coops with nesting boxes but rather were dropped on the barren floor by reluctant, scared, and stressed chickens crammed into battery cages.

The final scene depicts the children in the kitchen fixing an omelet with the help of a chef and then eating it. To reinforce the message that the eggs on the children's plates came from the kinds of chickens they just saw (i.e., chickens who enjoy the natural and nurturing life on the farm), the chef says: "Pretty amazing that just a little while ago you guys were collecting these eggs, and here we are eating these incredible scrambled eggs. What do you guys think?" The children enthusiastically respond: "We love eggs! We love chickens!"

The *Sesame Street* segment is a textbook example of embedded advertising, the purpose of which is "to draw on the program's credibility in order to promote a commercial product by [seamlessly] weaving the product into the program."⁶ However, what looks to the audience like independent educational content is not an unbiased, factual account that teaches kids about the modern egg industry. Rather, it is a thinly veiled attempt to plug the commercial interests of the Egg Board and to disseminate the promotional message of the *Good Egg Project*.

This conclusion is not only supported by the Egg Board's own statements of how it viewed its association with *Sesame Street*—but by the fact that the segment perpetuates the same "feel good" myth about "happy hens" that is the hallmark of the *Good Egg Project*.

What is particularly telling is that the segment uses detailed video footage from modern egg-processing plants to show children how eggs are washed, sorted, and packaged according to

⁶ See *In the Matter of Sponsorship Identification Rules and Embedded Advertising*, 23 FCC Rcd., at 10682, 10684 (2008).

modern industry practices (and proudly exhorts those practices)—but does not show them how this same industry houses and treats the animals who provide those eggs.

The producers clearly understood that it would be extremely traumatic for children to see how a typical commercial laying hen is housed and treated. What other reason would the producers have for combining video footage from a modern egg-processing plant with that of an old-fashioned chicken coop in a segment intended to teach children where their eggs come from and to show them the technical advantages and virtues of modern egg farming?

In truth, a typical laying hen never gets to see a single blade of grass, nor is she permitted to engage in basic instinctive behaviors, such as flapping her wings, resting on a perch, or laying her eggs in a quiet spot where she feels safe.

As detailed in PETA's Federal Trade Commission Complaint against the Egg Board, (filed contemporaneously with the instant complaint), commercial laying hens have parts of their beaks amputated with a hot blade without anesthesia, and the wounded stump is acutely (and often chronically) painful and sometimes bleeds for weeks.

Furthermore, the hens are forced to lay so many more eggs than their bodies can naturally handle that their bones become brittle and even break at the slightest pressure; the hens' diet—which is designed to maximize their "production"—causes many hens to become gravely ill or even die from painful fatty liver disease and other metabolic sicknesses.

A scared, featherless, and emaciated commercial laying hen is a truly heartbreaking sight and looks nothing like the plump, fluffy hens who were deceptively paraded in front of the delighted *Sesame Street* audience.

These same children who enthusiastically professed that they "love" these animals would be shocked and sickened to learn that when commercial hens cannot lay any more eggs, they are

barbarically killed by being thrown into a shredder while still alive, being gassed, or having their throats cut while they are still conscious.

While it is one thing to want to shield young children from the unsettling truth about commercial egg farming and not show them video footage of hens in battery cages, it is quite another to purport to teach them about commercial egg farming and then proceed to lie about it.

CONCLUSIONS OF LAW

By airing the aforementioned programming, the PBS Licensees (1) violated the terms of their noncommercial broadcast licenses, which prohibit making promotional announcements in exchange of consideration;⁷ (2) failed to comply with the limitations on commercial matter in children's programming; and (3) violated the Commission's long-standing policy against host-selling.

LEGAL ANALYSIS

1. The PBS Licensees violated the requirements of their noncommercial broadcast licenses.

It is a bedrock principle that noncommercial educational broadcast stations are licensed in order to furnish educational, nonprofit, and noncommercial broadcast service. The Commission's purpose in creating noncommercial service was to "remove the programming decisions of public broadcasters from the normal kinds of commercial market pressures under which broadcasters in the unreserved spectrum usually operate." *In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 86 FCC 2d 141 (1981).

In furtherance of this purpose, the Commission has freed noncommercial broadcasters from many of the strictures imposed upon commercial stations and provides greater flexibility

⁷See 47 U.S.C. §§ 399a, 399b (1981); 47 C.F.R. §§ 73, 503(d).

for public broadcasters. On the other hand, the Commission relies upon the "good faith efforts of licensees to prevent abuses and to maintain the essential character of the noncommercial service." *Id.*

As noncommercial stations, the PBS Licensees have the obligation to act in the public interest, and they breach the public trust by broadcasting biased, distorted content. As the Commission has stated, "Commercial operation by educational institutions would tend to vitiate the differences between commercial operation and noncommercial educational operation" and to permit educational stations to operate in substantially the same manner as commercial stations would thwart the "achievement of the objective for which special educational reservations have been established, i.e., the establishment of a genuinely educational type of service." *In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 86 FCC2d 141 (1981).

Therefore, to help ensure that programming decisions of public stations are consistent with the intended status of public broadcasting, public-broadcasting licensees are not allowed to promote the goods or services of an entity or person in return for consideration. (*Id.*; see also 47 C.F.R. § 73.503(d) (providing that "[n]o promotional announcement on behalf of for profit entities shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees"). By inserting the Egg Board's promotional content into its broadcast, the PBS Licensees violated these requirements.

It is no excuse to say that the advertisement was "educational" in nature and that teaching children "where eggs come from" is consistent with the goals of public educational programming. As previously pointed out, the segment *did not* educate children about modern egg farming, but unabashedly promoted the Egg Board's "saintly" egg brand and repeated the

Egg Board's deceptive propaganda that the eggs children see on their breakfast tables were laid by "happy" hens living in a comfortable, nurturing environment, laying their eggs in the manner that nature intended.

Nor does it exculpate the PBS Licensees that it cannot be "definitively established" that an arrangement existed whereby the Egg Board "could expect bonus [advertisement] spots" during *Sesame Street* programming where—as here—it is clearly established that *Sesame Street* received consideration from the Egg Board in the form of a sponsorship arrangement. *See KTBV, Inc.*, 11 FCC Rcd., at 13871.

Furthermore, as the Commission has stated, given the sponsorship of the entity who is interested in promoting a particular product, it is "unlikely" that the hosts of the sponsored program would have mentioned the name of a competing product—instead of the sponsored product. *Id.* In this case, the "particular product" that *Sesame Street* promoted was the "good" or "saintly" egg laid by happy hens living in a natural, nurturing environment, i.e., the Egg Board's *Good Egg Project* brand. The "competing product," which the segment *went out of its way not to mention*, is the egg that comes from hens living in battery cages in abhorrent conditions in actual "modern" egg farms.

These circumstances more than suffice to establish that Egg Board's message was promoted in exchange for consideration. *See id.*

2. The PBS Licensees failed to comply with the limitations on commercial matter in children's programming by embedding advertising into programming content.

Furthermore, even if the PBS Licensees were permitted to advertise, they would still be subject to the Commission's rules that regulate the amount and type of children's advertising. The Commission has several longstanding policies that are specifically designed to protect

children from confusion that may result from the intermixture of program and commercial material in children's television programming.

Among other things, the Commission requires that broadcasters use separation or "bumpers" between programming and commercials during children's programming to help children distinguish between advertisements and program content. *See, e.g., Children's Television Programming*, 6 FCC Rcd., at 2117-18.

Children's programming associated with a product, in which commercials for that product are aired, are deemed to be a "program-length commercial." *Id.*

As the Commission has stated, the program-length commercial policy applies to "programs in which a product or service is advertised within the body of the program and not separated from program content." *See id.* at 2118 (citing *Weigel Broadcasting Company*, 41 F.C.C. 2d 370 (1973) (eight-minute segment in a half-hour program on chinchilla ranching inviting viewers to contact sponsor about entering a chinchilla-ranching business)).

When such program-length commercials exceed the Commission's time limits on commercial matter in children's programming, they expose the station to enforcement action. *See id.*

The Commission has made it clear that advertising by stealth, such as occurs in product placement or program-length commercials, by its very nature, is an extremely serious violation of the children's television commercial limits because "children who have difficulty enough distinguishing program content from unrelated commercial matter [are] all the more confused by a show that interweaves program content and commercial matter." *Children's Television's Programming*, 6 FCC Rcd at 2118. Commissioner Adelstein has noted in particular that "children are ill-equipped to identify advertising, especially when it is embedded in a program

with their favorite character.” *In the Matter of Sponsorship Identification Rules and Embedded Advertising*, 23 FCC Rcd. at 10702 (Statement of Commissioner Jonathan S. Adelstein).

In this regard, Commissioner Copps has also expressed his “strong belief” that embedded advertising in children’s programming “run[s] afoul of our existing requirement that there be adequate separation between programming content and advertising. The Commission’s existing policies in this area—which also include a ban on host-selling and tie-ins on children’s programming—target those practices that unfairly take advantage of the inability of children to distinguish between programming and commercial content.” *Id.* at 10701 (Statement of Commissioner Michael J. Copps).

3. The PBS Licensees violated the rule against host-selling in children’s programming by embedding advertising into programming content.

Commissioner Copps has noted that the Commission’s concern over adequate separation between programming content and advertising is also at the heart of the prohibition against “host-selling.” The “host-selling” rule prohibits the use of “program talent or other identifiable program [characters]” to deliver commercial pitches during a program. *See Policies and Rules Concerning Children’s Television Programming, Order on Reconsideration*, 6 FCC Rcd., at 5097; *see also Action for Children’s Television*, 50 FCC 2d at 1, 8, 16-17 (1974).

Specifically, in 1985, the Commission advised broadcasters to prohibit program hosts, personalities, or characters from commenting on products or in any manner suggesting endorsement. *Action for Children’s Television v. KTTV*, 58 RR 2d 61, 65 (1985), *rev’d* on other grounds, *National Association for Better Broadcasting v. FCC*, 830 F2d 270 (D.C. Cir. 1987).

The Commission has denounced the practice of host-selling because it takes unfair advantage of the trust that children place in program characters. *Children’s Television Recon.*, 6 FCC Rcd at 5097; *Action for Children’s Television*, 50 FCC 2d at 16-17; *In the Matter of*

Children's Television Obligations of Digital Television Broadcasters, 21 FCC Rcd. at 11065, 11081 (2006) (noting "the unique vulnerability of children to host selling").

As the Commission has stated, "the trust that children place in program characters allows advertisers to take unfair advantage of the relationship between the hosts and young children." *In the Matter of Children's Television Obligations of Digital Television Broadcasters*, 21 FCC Rcd. at 11,082. This, of course, is exactly what the Egg Board had in mind when it became *Sesame Street's* sponsor.

The Commission's prohibition of host-selling applies to noncommercial as well as commercial stations. *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations* ("1986 Public Notice"), FCC 86-168, released April 11, 1986, at 6; *see also WHYY, Inc.*, 7 FCC Rcd 7123 (1992).

For example, *KTBY, Inc.*, 11 FCC Rcd 13870, involved a children's program that was sponsored by the National Bank of Alaska. In the offending segment, program characters demonstrated "the virtues and values of saving money as opposed to spending it foolishly on candy and junk food" and encouraged viewers to save their money at National Bank of Alaska. The Commission held that this "interstitial" material promoted the show's sponsor during sponsored programming using the program's characters, in violation of the host-selling rule. *Id.* at 13871.

Similarly, in *WHYY, Inc.*, the Commission established that a 15 seconds announcement for an upcoming performance of the "Sesame Street Live" show at the end of WHYY-TV's *Sesame Street* program was "suggestive of an endorsement" and therefore violates the Commission's prohibition of host-selling since the announcement "appears to entice the program's child viewership to attend the show."

4. The PBS Licensees breached their nondelegable duty to assure that their programming complies with the Commission's rules and regulations.

The fact that the offending video footage was provided to the PBS Licensees by PBS and was inserted into the program by the producers of *Sesame Street* does not relieve the PBS Licensees of their responsibility for the violation.

In this regard, the Commission has consistently held that a licensee's reliance on a program's source or producer for compliance with the Commission's children's television rules and policies will not excuse or mitigate violations which do occur. *See, e.g., Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd. at 8905 (MMB 1995); *Mt. Mansfield Television, Inc. (WCAX-TV)*, 10 FCC Rcd. at 8797 (MMB 1995).

It also does not mitigate the responsibility of the PBS Licensees to argue that they have not violated the Commission's rules and policies concerning children's television advertising because the Egg Board did not specifically pay for the airing of the segment. It is by now well-settled that the fact that there may have been no separate consideration for this particular segment does not mitigate a broadcaster's liability.

As the Commission has stated, "[E]ven if no separate consideration is received for such mentions," *spots that are part of a program package for which the broadcaster receives consideration are "to be treated as commercial matter."* *KTBY, Inc.*, 11 FCC Rcd at 13870, 13871 (1996); *see also SuperStation, Inc.*, 8 FCC Rcd 490 (MMB 1993) (stating that "cross-promotionals" for related for-profit business are to be counted as commercial time, even though air time was not purchased).

REQUESTED RELIEF

Accordingly, pursuant to § 503(b)(2) of the Communications Act, PETA requests that the Commission assess a forfeiture penalty or impose other fair and effective sanctions against the PBS Licensees for their repeated failures, described above, to comply substantially with the terms of their licenses, and their repeated violations of the rules and regulations issued by the Commission pursuant to the Communications Act of 1934, as amended.

Submitted this 19th day of January, 2010.

People for the Ethical Treatment of Animals (PETA)

Representing more than 2 million PETA members and supporters



Authorized Representative

By: Martina Bernstein, Litigation Counsel

Appendix A

PBS Licensees Airing Sesame Street

Alabama

Allan Pizzato, Executive Director
Alabama Public Television
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Birmingham, AL 35205

Alaska

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KAKM Public Television
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Pago Pago, AS 96799

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Tucson, AZ 85721

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Arkansas Educational Television Network (AETN)

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Mel Rogers, President & CEO
KOCE-TV Foundation
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Tom Karlo, General Manager
KPBS
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Jeff Clarke, President & CEO
KTEH
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Paula Castadio, President & CEO
Valley Public Television (KVPT)
1544 Van Ness Ave.
Fresno, CA 93721

Larry R. Ciecalone, President & General Manager

KVCR Educational Foundation
701 South Mt. Vernon Ave.
San Bernardino, CA 92410

Myron Tisdell, President & General Manager
KIXE-TV
603 North Market St.
Redding, CA 96003

Nancy Dobbs, President & CEO
KRCB
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Rohnert Park, CA 94928

Ron Schoenherr, Executive Director
KEET-TV
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Eureka, CA 95502

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Denver, CO 80205

Doug Price, President & CEO
Rocky Mountain PBS
KRMA-6
1089 Bannock St.
Denver, CO 80204

Doug Price, President & CEO
Rocky Mountain PBS
KTSC-8
2200 Bonforte Blvd.
Pueblo, CO 81001

Doug Price, President & CEO
Rocky Mountain PBS

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Grand Junction, CO 81505

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District of Columbia

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Michael Boylan, President & CEO
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Rick Johnson, General Manager
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Joe Williams, General Manager
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Milton Clipper, President
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Illinois

Daniel J. Schmidt, President & CEO
WTTW11 and 98.7WFMT
The Chicago Production Center
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Mark Leonard, General Manager
WILL-TV
300 N. Goodwin
Urbana, IL 61801

Chet Tomczyk, President & CEO
WTVP 47
101 State St.
Peoria, IL 61602-1547

Greg Petrowich, Executive Director
WSIU Public Broadcasting
1100 Lincoln Dr., Ste. 1003

SIU Mailcode 6602
Carbondale, IL 62901-4306

Rick Best, President & General Manager
WQPT
6600 34th Ave.
Moline, IL 61265-5899

Denis Roche, General Manager
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Dr. Jerold Gruebel, President & CEO
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Dr. Jerold Gruebel, President & CEO
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Mary Pruess, President & General Manager

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David Dial, President & General Manager
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Evansville, IN 47708

Thomas E. Carroll, President & CEO
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Exhibit 1