

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



In re Application of)
WGBH EDUCATIONAL FOUNDATION)
For Minor Change in Licensed Facilities)
of License WCAI8566)

File No. BPED-20130809ABZ

ACCEPTED/FILED

OCT 18 2013

Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION

Cape Cod Regional Technical High School (“WCCT”), pursuant to Section 1.106 of the rules and regulations of the Federal Communications Commission (“Commission” or “FCC”),^{1/} hereby seeks reconsideration of the grant of the above-captioned application (the “Application”) submitted by WGBH Educational Foundation (“WGBH”).^{2/} WCCT submitted an informal objection (the “Informal Objection”) demonstrating why grant of the Application was not in the public interest. The Media Bureau did not consider the Informal Objection prior to granting the Application. Because, as the Informal Objection demonstrates, grant of the Application is contrary to Commission rules and policies, the Media Bureau’s action was in error and the public interest would be served by reconsideration of that action and setting aside of the grant of the Application.^{3/}

^{1/} See 47 C.F.R. § 1.106.

^{2/} See File No. BPED-20130809ABZ (“Application”).

^{3/} See *Broadcast Applications*, Public Notice, Report No. 28078, at 7 (rel. Sept. 20, 2013) (“*Informal Objection Public Notice*”); see also *Application of WGBH Educational Foundation for Minor Change in Licensed Facilities of License WCAI8566*, Informal Objection (filed Sept. 13, 2013) (“*Informal Objection*”), attached as Exhibit 1 and incorporated herein. The Public Notice listing the Informal Objection incorrectly characterized the pleading as having been filed by WGBH Educational Foundation. A corrected notice was issued on September 25, 2013. See *Broadcast Applications*, Public Notice, Report No. 28081, at 6 (rel. Sept. 25, 2013).

I. BACKGROUND AND INTRODUCTION

WCCT is operated by Cape Cod Regional Technical High School in Harwich, Massachusetts. The station is licensed as a Class A non-commercial educational FM station that covers mid-Cape Cod with a population of 47,658 within its 60 dBu contour.^{4/} WCCT carries the programming of WBUR-FM, a National Public Radio member station owned by Boston University that produces news and information programming covering topics of interest to listeners across Massachusetts and throughout the region.

On September 13, 2013, WCCT filed the Informal Objection urging the FCC to dismiss the Application because it was contrary to the letter and the spirit of the Commission's rules regarding grant of construction permits and because it limited WCCT's ability to better serve the public.^{5/} Specifically, WCCT asserted that the Application attempted to extend the period of the construction permit beyond the scope of its initial grant, directly contravening the Commission's rule establishing a uniform three-year period for construction permits.^{6/} WCCT also demonstrated that the Application violated the intent of the rules because filing an application for modification of a construction permit should not extend the expiration date of the construction permit.^{7/} WCCT stated that grant of the Application would not serve the public interest, convenience, and necessity, and should therefore be dismissed with prejudice.^{8/}

^{4/} See File No. BLED-19890905KA (granting WCCT's application for a license to cover construction permit BPED-19871118MA).

^{5/} See Informal Objection; *see also* *Informal Objection Public Notice* at 7.

^{6/} See Informal Objection at 3-6; *see also* 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Report and Order, 13 FCC Rcd 23056 ¶ 83 (1998) (“Streamlining Order”); 47 C.F.R. § 73.3598(a), (e).

^{7/} See Informal Objection at 6-7; *see also* Streamlining Order ¶¶ 80, 84-86; 47 C.F.R. § 73.3533(b).

^{8/} See Informal Objection at 1; *see also* 47 U.S.C. § 309(a) (providing that an application shall be granted only if, upon consideration of the application and pleadings and other such matters of which the

On September 13, 2013 – the same day the Informal Objection was filed – the Media Bureau granted the Application, giving WGBH an additional three years to construct its facilities. A Public Notice announcing grant of the Application was released on September 18, 2013.^{9/} The Media Bureau did not reference the Informal Objection in either the grant or in the Public Notice announcing that the Application had been approved. Because the Media Bureau should not have granted the Application for the reasons stated in the Informal Objection, it should grant this Petition for Reconsideration and set aside its grant of the Application.^{10/}

II. DISCUSSION

A. WCCT Has Standing to File a Petition for Reconsideration.

The Commission’s rules allow the submission of a petition for reconsideration by any party to the original proceeding or any party whose interests will be adversely affected by the action taken by the Commission.^{11/} Although Commission rules did not provide WCCT with the opportunity to file a petition to deny the Application, WCCT is nonetheless “aggrieved or adversely affected” by the Media Bureau’s action and timely participated in the underlying proceeding to the extent possible by filing the Informal Objection.^{12/} It therefore has standing to file this petition for reconsideration.

Commission may officially take notice, the Commission finds that the public interest, convenience, and necessity will be served by the granting of such application).

^{9/} See *Broadcast Actions*, Public Notice, Report No. 48076, at 3 (rel. Sept. 18, 2013).

^{10/} See 47 C.F.R. § 1.106(p)(1).

^{11/} See *id.* § 1.106(b)(1).

^{12/} See *id.*; see also *Cloud Nine Broadcasting, Inc.*, Letter, 10 FCC Rcd 11555, 11556 (1995) (“*Cloud Nine Broadcasting*”) (citing, *inter alia*, *Applications of Rainbow Broadcasting Co.*, Memorandum Opinion and Order, 9 FCC Rcd 2839, 2844, n.24 (1994)).

1. *WCCT's Interests Are Adversely Affected by Grant of the Application.*

As explained in the Informal Objection, WCCT is adversely affected by grant of the Application.^{13/} The first WGBH construction permit prevented WCCT from modifying its own license to improve its facility to one that operates as a Class B1 station, and grant of the second construction permit has prevented WCCT from evaluating this opportunity for expansion for another three years. This combined six-year construction permit has allowed WGBH to warehouse spectrum in a competitive environment, the result of which is a loss of coverage by WCCT of between 14,730 and 15,060 people. WCCT is therefore adversely affected by grant of the Application and thus has sufficient standing to file a petition for reconsideration under the Commission's rules.

2. *WCCT Preserved Its Reconsideration Rights by Filing an Informal Objection.*

The Commission has held that where there is no statutory opportunity to file a formal petition to deny, the filing of an informal objection will preserve the objector's reconsideration rights.^{14/} In this case, the Application was characterized as an application for minor modification against which petitions to deny could not be submitted.^{15/} Consequently, WCCT only had the option to file an informal objection against the Application. By filing the Informal Objection, WCCT participated in the underlying proceeding to the fullest extent available and therefore preserved its right to file a petition for reconsideration.^{16/}

^{13/} See Informal Objection at 5-6.

^{14/} See, e.g., *The Last Bastion Station Trust, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 4941, 4942 (2008).

^{15/} See 47 C.F.R. § 73.3584(a) (stating that any party in interest may file with the Commission a petition to deny any application for which local notice is required); 47 C.F.R. § 73.3580(a)(1) (stating that local public notice is not required for applications for minor change in the facilities of an authorized station).

^{16/} See, e.g., *Cloud Nine Broadcasting* at 11556.

3. *WCCT Timely Participated in the Underlying Action.*

Although the FCC's rules do not prescribe a filing deadline for informal objections, they do state that informal objections must be filed before the Commission acts on the application.^{17/} However, because there is no waiting period before the Commission may act in granting applications for minor modification, parties are unable to predict the deadline for submitting informal objections. Nevertheless, the Commission has afforded reconsideration to petitioners where grant of an application occurred shortly after the application was filed, stating in such instances that an expeditious grant of the application had not allowed sufficient time for potential objections to be filed and that it was in the public interest to allow parties to file petitions for reconsideration.^{18/} Under such circumstances, the Commission has found that filing an objection within 30 days is sufficient to preserve standing for seeking reconsideration.^{19/} Accordingly, the Informal Objection – which was filed within 30 days of public notice of the submission of the Application – was sufficiently timely to support this request for reconsideration.^{20/} Therefore, because WCCT timely participated in the underlying proceeding, and because its interests are

^{17/} See 47 C.F.R. § 73.3587.

^{18/} See, e.g., *Applications of Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854-55 (1997); *Applications of Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816, 2816 (1989).

^{19/} See, e.g., *Siga Broadcasting Corp.*, Letter, 23 FCC Rcd 1823, 1824 (2008) (“In cases where the grant of an application has occurred over 30 days from the filing of the application, the Commission has found that late filers do not have standing to file petitions for reconsideration because they failed to participate in the earlier proceeding, despite having had adequate time to do so.”).

^{20/} Moreover, the Informal Objection was filed within the window that the Commission specifies for filing *formal* objections to applications. See, e.g., 47 C.F.R. § 1.939(a)(2) (providing that petitions to deny wireless applications “must be filed no later than 30 days after the date of the Public Notice listing the application or major amendment to the application as accepted for filing”); *id.* § 25.154 (establishing that petitions to deny satellite applications must be “filed within thirty (30) days after the date of public notice announcing the acceptance for filing of the application or major amendment thereto,” unless extended); *id.* § 73.3584 (establishing a 30-day window for filing petitions to deny broadcast applications).

adversely affected by the grant of the Application, it would be in the public interest for the Media Bureau to consider this petition for reconsideration.

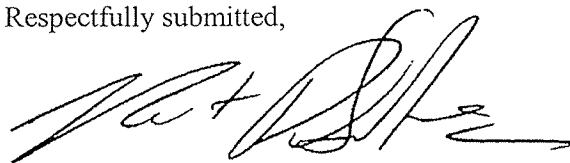
B. Reconsideration Is Warranted for the Reasons Stated in the Informal Objection.

The Media Bureau must reconsider grant of the Application because it acted contrary to its rules and policies, as demonstrated in the Informal Objection. Having acted prior to considering the Informal Objection, the Media Bureau should now correct its error by granting this petition for reconsideration. Indeed, as demonstrated above, Commission decisions specifically contemplate that the Media Bureau may reconsider its actions when it did not consider challenges made in timely filed informal objections. Had the Media Bureau considered the Informal Objection, it would have denied the Application as contrary to Commission rules and policies. Accordingly, the Media Bureau should grant this Petition for Reconsideration so that it may do so now.

III. CONCLUSION

For the foregoing reasons, WCCT respectfully requests that the Media Bureau grant the petition for reconsideration and set aside its grant of the Application based on the arguments presented in the Informal Objection.

Respectfully submitted,



**CAPE COD REGIONAL TECHNICAL
HIGH SCHOOL, WCCT**

By: Robert P. Sanborn, III

Title: Superintendent/Director

351 Pleasant Lake Ave.
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Tel: 508-432-4500

Dated: October 17, 2013

EXHIBIT 1

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

ACCEPTED/FILED

SEP 13 2013

In re Application of)
WGBH EDUCATIONAL FOUNDATION) File No. BPED-20130809ABZ
For Minor Change in Licensed Facilities)
of License WCAI8566)
Federal Communications Commission
Office of the Secretary

INFORMAL OBJECTION

Cape Cod Regional Technical High School ("WCCT"), pursuant to Section 73.3587 of the rules and regulations of the Federal Communications Commission ("Commission" or "FCC"), hereby submits this Informal Objection to the above-captioned application (the "Application") submitted by WGBH Educational Foundation ("WGBH").^{1/} The Application is contrary to the letter and the spirit of the FCC's rules regarding grant of construction permits and limits WCCT's ability to better serve the public. Accordingly, the public interest, convenience, and necessity will not be served by grant of the Application and the Application should be promptly dismissed.^{2/}

^{1/} See 47 C.F.R. § 73.3587. WCCT submits this request as an informal objection – and not as a petition to deny – because WGBH asserts that the Application is for a minor modification to its licensed facilities. While FCC rules allow entities to file petitions to deny applications for major modifications, a petition to deny is not the appropriate vehicle for challenging an application for a minor change in the facilities of an authorized station. See 47 C.F.R. § 73.3584(a) (stating that any party in interest may file with the Commission a petition to deny any application for which local notice is required); 47 C.F.R. § 73.3580(a)(1) (stating that local public notice is not required for applications for minor change in the facilities of an authorized station). Consequently, entities that wish to challenge minor amendments only have the option of filing an informal objection against such an application.

^{2/} See 47 U.S.C. § 309(a) (providing that an application shall be granted only if, upon consideration of the application and pleadings and other such matters of which the Commission may officially take notice, the Commission finds that the public interest, convenience, and necessity will be served by the granting of such application).

I. BACKGROUND AND INTRODUCTION

WCCT is operated by Cape Cod Regional Technical High School in Harwich, Massachusetts and is licensed as a Class A non-commercial educational FM station.^{3/} WCCT carries the programming of WBUR-FM, a National Public Radio member station owned by Boston University that produces news and information programming covering topics of interest to listeners across Massachusetts and throughout the region. WCCT covers mid-Cape Cod with a population of 47,658 within its 60 dBu contour.

On January 5, 2010, WGBH was granted a construction permit which would have allowed it to modify its licensed facility for FM station WCAI in Woods Hole, Massachusetts. That construction permit expired on August 17, 2013.^{4/} On August 12, 2013, WGBH filed the above-referenced Application, surrendering the earlier granted construction permit and concurrently seeking a new construction permit covering facilities it claimed were nearly identical to those permitted under the surrendered permit.^{5/} WGBH stated that it had experienced unexpected delays and obstacles in its build-out efforts that resulted in the need for additional time to complete construction.^{6/}

By WGBH's own admission, the Application seeks to do what the Commission has expressly stated licensees cannot, namely extend the deadline of a construction permit beyond

^{3/} See File No. BLED-19890905KA (granting WCCT's application for a license to cover construction permit BPED-19871118MA).

^{4/} See File No. BPED-20091027ABU.

^{5/} See File No. BPED-20130809ABZ ("Application"); see also Application at Exhibit, *WCAI Engineering Exhibits 07-29-2013* ("In advance of the [construction permit]'s expiration, [WGBH] will request that the [construction permit] be cancelled and will contemporaneously file this application which proposes facilities nearly identical to the [construction permit]."). The Application was referenced in a Public Notice on August 14, 2013. See *Broadcast Applications*, Public Notice, Report No. 28052, at 11 (rel. Aug. 14, 2013).

^{6/} See Application at Exhibit, *Surrender of Construction Permit*.

the uniform three-year period.⁷⁷ It would not be in the public interest to permit WGBH to take advantage of filing procedures that effectively end-run the Commission's rules and policies. Those rules and policies were designed to protect, among others, licensees like WCCT, which has been prevented from modifying its own station in order to protect WCAI's proposed operations. Now, WGBH proposes to continue to prevent WCCT from upgrading its station and serving additional listeners. Instead of allowing WGBH to effectively freeze the landscape for a six-year period, the FCC should promptly dismiss the Application.

II. DISCUSSION

A. The Application Should Be Dismissed Because It Seeks to Extend the Expiration Date of a Construction Permit Beyond the Uniform Three-Year Period, Contrary to Commission Rules.

As WGBH states, the Application is nearly identical to the construction permit that has now lapsed. The Application attempts to extend the period of the construction permit beyond the scope of its initial grant. Such action directly contravenes the Commission's rules and the policies behind those rules, and thus should not be permitted.

In its 1998 Report and Order revising the rules governing broadcast construction permits, the Commission established a uniform three-year construction period for broadcast licensees – which it called “an adequate and realistic time to construct” – and adopted a rule requiring that a construction permit for which construction has not been completed shall be automatically forfeited upon expiration.⁸⁷ In so deciding, the Commission eliminated its previous rule permitting filing of an application to replace an expired permit up to 30 days after the permit

⁷⁷ See 47 C.F.R. § 73.3598(a), (e).

⁸⁷ See 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Report and Order, 13 FCC Rcd 23056 ¶ 83 (1998) (“Streamlining Order”); see also 47 C.F.R. § 73.3598(a), (e).

expired.^{9/} The *Streamlining Order* even eliminated permittees' ability to request additional time to complete construction when they could demonstrate one of three narrowly tailored conditions.^{10/} As the Commission stated, the new rules were designed "to strike a balance between our fundamental interests in expediting new service to the public and preventing the warehousing of scarce spectrum, and our recognition that there are legitimate obstacles that may prevent the rapid construction of broadcast facilities."^{11/} The rules also satisfied the goal of reducing the large number of extension applications that occupied substantial staff resources.^{12/}

The public interest would not be served by granting the Application. WGBH has not provided sufficient justification for its failure to abide by the Commission's rules and construct in a timely fashion. The Application points to what it deems "serious impediments" to construction, namely that delivery times were difficult to predict and that WGBH had difficulty coordinating vendors. WGBH also pointed to initial structural failures of its tower.^{13/} These shortcomings do not excuse WGBH from constructing its facilities in a timely manner.^{14/}

^{9/} See *Streamlining Order* ¶¶ 86; see also 47 C.F.R. § 73.3534(e) (1998).

^{10/} See *Streamlining Order* ¶ 77. Prior to the *Streamlining Order*, permittees were allowed to request additional time to complete construction when they could demonstrate: "(1) construction is complete and testing is underway looking toward the prompt filing of a license application; (2) substantial progress has been made, i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (3) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems), but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction." See *Streamlining Order* ¶ 77; 47 C.F.R. § 73.3534(b) (1998).

^{11/} See *Streamlining Order* ¶ 90.

^{12/} See *Streamlining Order* ¶ 79 (stating that one of the Commission's goals in eliminating the provisions that allowed permittees to request additional time to construct was "to substantially reduce paperwork and administrative burdens on permittees and the number of requests for additional time to construct while promoting the expeditious construction of stations").

^{13/} See Application at Exhibit, *Surrender of Construction Permit*.

^{14/} See, e.g., *Estate of Jose J. Arzuaga*, Letter, 27 FCC Rcd 13214, 13219 (2012) (stating that neither a difficult economic environment nor an inability to reach agreement with other parties relieves a

Further, they do not constitute the high standard of legitimacy which the Commission requires in order to toll the three-year construction period, which include instances where the permit itself is the subject of administrative or judicial review or where construction delays have been caused by an act of God or delays in international coordination, none of which are asserted here.^{15/} Thus, there is no justification for WGBH's failure to construct its facility during the time the Commission provided, and the Commission should not permit WGBH to attain additional time beyond the period of the initial construction permit.

While the Application seeks a new construction permit, the effect is no different than what the Commission intended to prohibit in the *Streamlining Order* – a request to extend an existing construction permit. Although not directly forbidden by its rules, the Commission disfavors what is effectively a surrender-and-reapply approach.^{16/} WGBH should not be permitted to do indirectly what the Commission prohibits directly.

If the Commission grants the Application, it will frustrate one of the primary purposes of the rules it adopted in the *Streamlining Order* – allowing holders of construction permits to freeze the spectral landscape to the detriment of new applicants and existing licensees. In this case, WGBH has prevented WCCT from modifying its own license in order to protect the

permittee from its obligation to complete construction in a timely fashion); *KNOR(FM), Krum, TX Facility ID No. 36289 Liberman Broadcasting of Dallas License, LLC*, Letter, 25 FCC Rcd 4765, 4768 (2010) (“*KNOR Letter*”) (stating that a change in business plans regarding the build-out of the facilities does not relieve a permittee from its obligation to complete construction by the established deadline); *Applications of Pathfinder Communications Corp.; Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, Report and Order, 58 Rad. Reg. 2d (P&F) 776, ¶ 21 (1985) (adopting a “hard look” processing policy for FM and TV broadcast applications).

^{15/} See 47 C.F.R. § 73.3598(b); see also *Streamlining Order* ¶ 84 (“Act of God encumbrances will be narrowly construed and include only those periods where the permittee demonstrates that the construction progress was impossible, notwithstanding diligent efforts.”).

^{16/} See 47 C.F.R. § 73.3598(b); see also *KNOR Letter* at 4767-4768 (reminding a permittee that the Commission has stated that “implicit in the filing of any facility application is that the applicant stands ‘ready, willing, and able’ to construct and operate as proposed”).

operations proposed by the now-cancelled WGBH construction permit. WCCT has been discussing plans to improve its facility to one that operates as a Class B1 station. In order to achieve this expansion, WCCT is exploring a strategy that would allow it to increase its power level to 12 kW while still protecting against interference with existing licensees. However, WCCT has been unable to explore this option further because of the existence of the now-expired WGBH construction permit. When taking into account the impact caused by the Application, WCCT would be forced to reduce the power of its proposed modifications by half, resulting in a Class A facility. In terms of real-world impact, the limitations resulting from grant of the Application would result in a loss of coverage by WCCT of between 14,730 and 15,060 people. WGBH now proposes to prevent WCCT from evaluating this opportunity for expansion for another three years. That result is contrary to the public interest. As the Commission has observed, warehousing spectrum in a competitive environment does not serve the public interest.^{17/} Instead of receiving no service for six years, based on two construction permit periods, the public would be better served by allowing WCCT an opportunity to propose expanding *its* service to listeners.

B. The Application Should Be Dismissed Because It Violates the Intent of the Rules Prohibiting Extension of a Construction Permit by Modification.

In addition to violating the Commission's rules against extension of construction permits beyond the uniform three-years, the Application also violates the intent of the rules that prohibit extension of construction permits by modifying them. Specifically, the Commission's rules are clear that filing an application for modification of a construction permit "does not extend the

^{17/} See *Streamlining Order* ¶ 90; see also *KNOR Letter* at 4768 (stating that continued warehousing of spectrum in the face of long-standing competing demand "is plainly contrary to the public interest").

expiration date of the construction permit.”^{18/} Although the Application covers facilities nearly identical to those specified in the construction permit, WGBH made slight changes to the facilities proposed in the Application from that covered by the now-expired construction permit.^{19/} Nevertheless, regardless of whether the Application is characterized as a request to modify the previous construction permit or an application for a new construction permit, the result should be the same. The Commission should dismiss the Application as an attempt to warehouse spectrum and prevent others from serving the public.

III. CONCLUSION

For the foregoing reasons, WCCT respectfully requests that the Commission promptly dismiss the above-captioned Application with prejudice.

Respectfully submitted,

**CAPE COD REGIONAL TECHNICAL
HIGH SCHOOL, WCCT**

By: 

Title: Superintendent/Director

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Dated: September 12 2013

^{18/} See 47 C.F.R. § 73.3533(b). In the *Streamlining Order*, the Commission determined that the new procedures providing for a three-year construction period, coupled with procedures allowing permittees to seek tolling of the construction period when it was encumbered by a narrowly construed Act of God or subject to administrative or judicial review, provided ample time to complete construction. In light of these revised procedures, the Commission eliminated the prior practice of providing extra time for construction after a permit had been modified. See *Streamlining Order* ¶¶ 80, 84-86.

^{19/} For instance, the Application proposes to cover a portion of land near Hyannis, Massachusetts that the expired construction permit did not cover. Additionally, the Application made a slight change to the pattern angle. See Application at Exhibit, *WCAI Engineering Exhibits 07-29-2013*.

CERTIFICATE OF SERVICE

I, Kara D. Romagnino, hereby certify that on this 18th day of October, 2013 a copy of the foregoing Petition for Reconsideration was served on the following by the method indicated below:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Via Hand Delivery

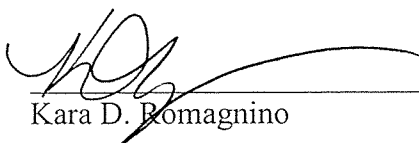
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