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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In re Application of)
VALLEY PUBLIC TELEVISION, INC.) File No. BPET-900904KF
For Construction Permit for a)
New Television Station on)
Channel *39 in Bakersfield,)
California)

To: Chief, Mass Media Bureau

REPLY TO OPPOSITION TO PETITION TO DENY

Community Television of Southern California ("CTSC") hereby replies to the Opposition to Petition to Deny filed by Valley Public Television, Inc. ("VPT") in the above-captioned proceeding. In its Petition to Deny, CTSC maintained that VPT's application should be denied or dismissed on the grounds that (1) VPT's application was short-spaced to Channel *25 in Ridgecrest, California, and VPT had not requested a waiver of the Commission's short-spacing rules, (2) VPT's request for a waiver of the Commission's Advanced Television Freeze Order was inadequate, and (3) VPT had

I. **The Short-Spacing to Channel *25 Requires
The Dismissal of VPT's Application**

A. **VPT Has Not Justified Its Failure
to Comply with the Commission's Rules.**

VPT does not deny that its application is short-spaced to Channel *25 in Ridgecrest, nor does it argue that it requested a waiver of the mileage separation rules. Rather, it advances two arguments as to why those rules should not apply and then announces that, in any event, it will seek a waiver of those rules shortly. VPT's arguments

(Application dismissed as inadvertently accepted for filing when short-spaced to reference point.)1/

VPT also argues that it is unclear whether Channel *25 or Channel *41 will be allocated to Ridgecrest since a Petition for Reconsideration of the Commission's decision retaining the Channel *25 allocation is pending. Opposition at 3. However, as VPT admits, the proceeding in which the Commission had proposed the possibility of substituting Channel *41 for Channel *25 was terminated without adoption of this proposal. While Petitions for Reconsideration of that Order were filed in 1987, there has been no Commission action on those petitions in three years nor has the Commission stayed the effectiveness of its Order. Under Section 405 of the Communications Act and Section 1.106(n) of the Commission's rules, a Petition for Reconsideration does not stay the effectiveness of the original decision. Thus, unless and until the Commission grants those Petitions for Reconsideration, Channel *25 remains allotted to Ridgecrest, and VPT is required, under Sections 73.610 and 73.611, to take that allotment into account in preparing its applica-

1/ VPT's alleged showing that fully spaced sites are available to the rest of Ridgecrest does not cure the basic defect in its application. Moreover, it is not clear how much of that area is suitable as a site since a substantial portion of the area meeting the mileage separation requirement is part of the China Lake Weapons Center -- a military test range. It is likely that the government will object to proposals to locate television towers there.

tion. Cf., Paxton Community Antenna System, Inc., 52 FCC 2d 568, 569 (1975).

Finally, VPT maintains that, if a waiver is required, it will file one shortly. VPT filed that waiver request, along with a request for leave to amend, on November 14th. CTSC will respond to those pleadings within the time period allowed under the Commission's rules. However, a waiver request made more than two months after the filing of an application, and subsequent to the "B" cut-off date, does not comply with the Commission's rules or cure the fatal defect in VPT's initial application.

Under Section 73.3564 of the Commission's rules, applications are required to be substantially complete and in compliance with the Commission's rules at the time they are

comply with the Commission's rules.^{2/} Emmy Hahn Ltd. Partnership, 4 FCC Rcd 8336 (1989).

B. Dismissal of VPT's Application Is Consistent with Commission Precedent.

In its Petition to Deny, CTSC cited Family Television, Inc., 85 FCC 2d 986 (1981), as supporting its assertion that VPT's failure to comply with the mileage separation rules required that its application be dismissed as inadvertently accepted for filing. VPT's attempt to distinguish this case is unpersuasive.

First, VPT contrasts the lack of diligence of the applicant in Family with its claim that there "is legitimate uncertainty surrounding the Channel *25 coordinates." Opposition at 4. However, it is far from clear what "uncertainty" there is regarding the coordinates of Channel *25. Even assuming that VPT meant that there was uncertainty concerning whether Channel *25 or Channel *41 would be allocated to ~~the applicant~~, that dubious "uncertainty" cannot excuse VPT's

failure to even note the potential problem, nevermind its failure to request a waiver.^{3/}

Second, VPT attempts to distinguish Family by noting that the applicant in that case failed to amend its application until after dismissal, while it proposes to file an amendment "shortly." Opposition at 4. However, nothing in the Commission's decision turned on the lateness of the amendment, nor does VPT explain why an untimely amendment to its application should be allowed to cure a patent defect in its initial application.^{4/} As noted above, such an untimely amendment improperly burdens the staff and unfairly prejudices others.

VPT also argues that it should be allowed to amend its application now because Commission precedent shows that "the Commission wisely permits applicants to amend their applications to request short-spacing waivers if the public interest is furthered." Opposition at 4. The single case cited for this principle, Pappas Telecasting, Inc., 49 RR 2d 1688 (1981), is inapposite. In that case, the short-spaced

^{3/} If VPT means that there was some uncertainty as to the Channel *25 coordinates because there is no existing or proposed station operating on the channel, the position is specious. Section 73.611 clearly requires that, where no station is operating on a channel the reference point is to be used in calculating whether an application complies with the mileage separation rules. Section 73.611(b) spells out in detail how to calculate the coordinates for the reference point.

^{4/} Under Section 73.3522, VPT was required to amend its application by the "B" cut-off date, October 22, 1990.

applicant filed its request for a waiver with its amendment to change transmitter sites and prior to the cut-off date. It did not wait until its opponent brought the short-spacing to its attention and then seek a waiver, nunc pro tunc.^{5/}

Moreover, even assuming arguendo that a waiver request can be filed at this late date, VPT cannot meet an essential element of a successful waiver request. It is a well-established principle that an applicant seeking a waiver of the minimum spacing rules must, as an initial matter, establish the fact that alternative fully-spaced sites are not available. Orange Park Florida TV Inc. v. FCC, 811 F.2d 664,669 (D.C. Cir. 1987). In the present case, CTSC's proposal demonstrates that such fully-spaced sites are in fact available.^{6/}

II. VPT May Not Rely on CTSC's ATV Waiver Request

VPT maintains that it should be allowed to rely on the grant of CTSC's request for a waiver of the ATV freeze

^{5/} In Pappas, the Commission also granted the short-spacing waiver request because the proposed short-spacing was de minimus: 2.4 miles out of the required 175, i.e., 1.4% of the required separation, Id. at 1689. In the present case, VPT's proposed short-spacing, 9.8 out of the required 95.7 kilometers (10.24% of the required distance), is far from de-minimus.

^{6/} VPT appears to imply that, because its proposal will serve more people than CTSC's, a waiver is justified. Even assuming arguendo that VPT is correct about the populations served by the two proposals, that fact does not warrant favorable consideration of its waiver request unless it can show that its proposed site is the only site from which that audience can be served -- a showing it has not made and cannot make.

because it too will provide public television service to Bakersfield and the Tehachapi Mountain range will also limit the potential that its station will cause interference to Channel 39 in Los Angeles. Opposition at 8-9. This attempt to gain a free ride on CTSC's waiver request is no more persuasive than the VPT's initial effort. First, it is clear that the need for public television service in Bakersfield was not the sole consideration underlying the Commission's action. As the letter granting that request makes clear, the Commission granted the waiver based on the totality of the circumstances.

Second, the existence of the Tehachapi Mountain range in the abstract cannot be used to support VPT's claim that its operation will not cause interference to the use of Channel *39 in Los Angeles. As CTSC noted in its Petition to Deny, VPT is proposing to operate from a different transmitter site -- one 13 kilometers east of CTSC's site -- and from a different center of radiation -- approximately 4,000 feet higher than CTSC's. One simply cannot assume, given those differences, that the Tehachapi Mountain range will block VPT's proposed station to the same degree it will block CTSC's. Indeed, a review of the topographical map for the Tehachapi range indicates that VPT's antenna site is generally higher than the Tehachapi range, with only a few scattered mountains higher. Consequently, there is no assurance that the engineering study CTSC filed provides any

assurance as to the signal strength in Los Angeles of VPT's proposed station.

III. The Ex Parte Issue

VPT attempts to defend CTSC's claims that VPT violated the ex parte rules by asserting (1) that the proceedings were not contested because CTSC did not have

parte rules are applicable. See, Id. at n. 20; Letter dated May 18, 1989 from Edward Minkel, Managing Director, FCC to Michael L. Glaser, Esq. & David Tillotson, Esq., DA 89-550.

Conclusion

For the reasons set forth herein, CTSC requests that the Commission deny or dismiss VPT's application as unacceptable for filing.

Respectfully submitted,



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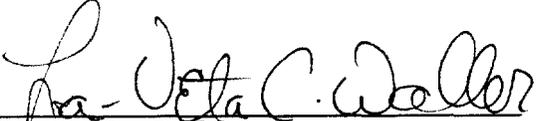
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Dated: November 19, 1990

CERTIFICATE OF SERVICE

I, La-Veta C. Waller, hereby certify that I have on this 19th day of November, 1990, caused copies of the foregoing "REPLY TO OPPOSITION TO PETITION TO DENY" to be served by first class U.S. mail, postage prepaid, upon the following:

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