

ORIGINAL

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

RECEIVED
JUN 13 1997

DOCKET FILE COPY ORIGINAL
Federal Communications Commission
Office of Secretary

In the Matter of)
)
Advanced Television Systems and)
Their Impact Upon the Existing)
Television Broadcast Service)
)
To: The Commission)

MM Docket No. 87-268

PETITION FOR RECONSIDERATION

PAXSON COMMUNICATIONS CORPORATION
THE CHRISTIAN NETWORK, INC.
ROBERTS BROADCASTING COMPANY
MINORITY BROADCASTERS OF SANTA FE, INC.
COCOLA BROADCASTING COMPANIES
DP MEDIA OF MARTINSBURG, INC.

By: John R. Feore, Jr.
Thomas J. Hutton

Their Counsel

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 776-2000

June 13, 1997

No. of Copies rec'd
F B A B C D E

0211

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.	2
II. The Commission's DTV Channel Assignments Should Replicate the Ease of Reception Within Stations' NTSC Grade A Contours.	3
III. The Commission Should Afford Parties a Further Opportunity to Comment on the DTV Table after its Methodology Is Made Available.	15
IV. DTV Allocations for Pending Construction Permit Applications	17
V. Conclusion.	26

SUMMARY

The Commission's decisions in the *Fifth Report and Order* and the *Sixth Report and Order* in the digital television ("DTV") rulemaking advance important goals but must be revised in certain respects in order to effectuate the transition from NTSC service to DTV service in a manner that preserves service to the public in stations' core service areas and affords similar treatment to similarly-situated applicants for modified television facilities.

The Grade B service replication policy adopted for DTV service will not work with the assumptions of receiver sensitivity employed by the Commission. Those assumptions caused the Commission to adopt disparate power levels for analog UHF stations with digital UHF allotments ("UHF/UHF") and analog VHF stations with digital UHF allotments ("VHF/UHF"). UHF/UHF stations have been allotted only a fraction of the power levels allotted for VHF/UHF stations. Rather than replicating existing coverage areas, the DTV allotments will put UHF stations at a competitive disadvantage of a type not seen since the 1960's.

The Commission also needs to give comparable treatment to parties that had applied to modify their television station facilities during the pendency of the DTV proceeding. In the *Sixth Report and Order*, the Commission removed for some applications (those granted between July 25, 1996 and April 3, 1997) a condition stating that any grant was subject to the outcome of the DTV table of allotments. At the same time, however, the Commission imposed that condition on applications that were pending in the same period but not granted in the period in question. This

disparate treatment is not only unlawful, it is also unfair to the viewing public as well as the stations frustrated in their attempts to improve their coverage.

The Petitioners also seek additional time to review and comment on the DTV table after the release of *OET Bulletin No. 69*. Without this *Bulletin*, which has not yet been released, the Petitioners and other interested parties are not able to assess the reasonableness of their DTV allotments or compare their allotments with those of other stations in their markets. The parties should be given additional time after the release of the *Bulletin* to review and comment further on the DTV table of allotments.

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

In the Matter of)
)
Advanced Television Systems and) MM Docket No. 87-268
Their Impact Upon the Existing)
Television Broadcast Service)
)
To: The Commission)

PETITION FOR RECONSIDERATION

Paxson Communications Corporation, through its licensee subsidiaries ("PCC"), The Christian Network, Inc., through its licensee subsidiaries ("CNI"), Roberts Broadcasting Company and its affiliated companies ("RBC"), Cocola Broadcasting Companies ("CBC") Minority Broadcasters of Santa Fe, Inc. and DP Media of Martinsburg, Inc. ("DP Media") (collectively the "Petitioners")^{1/} pursuant to 47 C.F.R. §1.429(a) (1996), hereby petition the FCC for reconsideration of the *Fifth Report and Order* (FCC 97-116, released April 21, 1997) and the *Sixth Report and Order* (FCC-97-115, released April 21, 1997) in the Commission's digital television (DTV) rulemaking proceeding.^{2/}

^{1/} The Petitioners' television stations are listed in Attachment 1.

^{2/} *Fifth Report and Order*, MM Docket 87-268, FCC 97-116 (rel. Apr. 21, 1997) ("*Fifth R&O*"); *Sixth Report and Order*, MM Docket No. 87-268, FCC 97-116 (rel. Apr. 21, 1997) ("*Sixth R&O*") collectively, the "*R&Os*").

I. Introduction.

PCC has assembled an extensive nationwide broadcast television group. With pending acquisitions, PCC, the largest owner of full-power broadcast television stations in the U.S., owns, operates or affiliates with 55 full-power television stations in markets containing over 56.6 million television households (58.0% of all U.S. television households). Including all announced acquisitions, PCC's television group owns, operates and affiliates with stations in 19 of the 20 largest television markets and 24 of the 30 largest television markets with the overwhelming majority of the stations being UHF facilities.

It is PCC's stated strategy to expand its nationwide broadcast television network into each of the top 50 U.S. television markets and to extend its distribution system to reach 70% of the U.S. television households. PCC will augment this strategy by extending its broadcast reach through technical upgrades at each station and extending its cable reach by aggressively enforcing its cable "must carry" rights.

PCC's television group is currently broadcasting long-form paid programming, including local merchant and national consumer product advertising, as well as selected political, religious, and ethnic programs. Discussions with regard to niche or mainstream programming alternatives for broadcast over PCC's distribution system are continuing with major broadcast television networks, Hollywood television and movie studios, television programming syndicators, and cable network programmers with a view to creating the nation's seventh over-the-air broadcast network. Full and

fair implementation of DTV is essential to the creation and success of this new television network.

CNI owns four UHF television stations and provides its nationally distributed programming by affiliation with 140 cable systems and television stations, many of them UHF stations. RBC owns and operates five UHF television stations, holds permits to build two UHF television stations and is seeking to purchase additional stations. CBC owns two UHF television stations and has agreements in place to acquire two additional UHF stations. DP Media owns one UHF television station, is the FCC-approved assignee of another UHF television station and is in the process of acquiring additional television stations.

II. The Commission's DTV Channel Assignments Should Replicate the Ease of Reception Within Stations' NTSC Grade A Contours.

A. Background. Since the adoption of the original NTSC Table of Allotments in 1952, the Commission's primary regulatory goal with respect to television service has been to expand the range of viewing options for the public by increasing competition. The Commission has promoted this goal successfully on numerous fronts by adopting rules and policies to: (a) foster UHF broadcasting; (b) permit the development of cable television service; (c) foster translator and low power television service; and (d) enable video satellite service to be provided to cable systems and directly to the home.

In fact, the Commission's policies have helped change the competitive landscape so dramatically that it is difficult to envision how that landscape could be threatened by the rules for digital television operation. Yet that is exactly what the

policies adopted in the *Sixth R&O* would do, because they would create a substantial new power disparity between analog VHF stations with digital UHF allotments ("VHF/UHF") and analog UHF stations with digital UHF allotments ("UHF/UHF"). This disparity arises out of the Commission's decision to adopt a DTV table of allotments that attempts to replicate, to the extent possible, existing stations' analog Grade B service areas with DTV service.

The historic imbalance between VHF and UHF television stations is well known to the Commission. In fact, the Commission recently acknowledged the imbalance and described its causes in MM Docket No. 91-221, the rulemaking addressing the Commission's television ownership rules (the "*Television Ownership Rulemaking*"):

UHF stations . . . are often handicapped by less favorable signal propagation characteristics and higher technical operating costs than VHF stations and . . . tend to be less profitable than their VHF competitors. Moreover, these stations are generally newer and not affiliated with one of the national broadcast networks.^{3/}

These handicaps exist despite a long history of Commission efforts to enable UHF stations to compete effectively with VHF stations. For instance, in the early 1960's, the Commission urged Congress to pass the All-Channel Receiver Act and conducted a rulemaking to assist UHF stations to compete effectively with VHF stations.^{4/} The Commission recognized a pressing need for these measures because

^{3/} *Television Ownership Rulemaking*, 7 FCC Rcd 4111, 4115 (1992) (footnote omitted).

^{4/} See *Fostering Expanded Use of UHF Television Channels*, 21 RR 1711 (1961), and 23 RR 1576 (1962).

of the limited number of over-the-air television signals available even in the most populated areas of the country.^{5/}

The competitive landscape may have changed substantially since then, but the importance of free, over-the-air television service has not. With the NTSC Grade B signal replication policy embodied in the *Sixth R&O*, the Commission has embraced a new power disparity between VHF/UHF stations and UHF/UHF stations that threatens irreparable harm to existing UHF operators such as the Petitioners.

The following analysis shows that the Commission should revise its DTV table of allotments to replicate the ease of reception within television stations' current NTSC Grade A contours, rather than Grade B contours, based on realistic assumptions as to viewers' reception capabilities. The Petitioners are not arguing for elimination of the advantage that VHF stations now have over UHF stations in the NTSC environment, because VHF stations' Grade A contours generally exceed those of UHF stations and would continue to do so under the Petitioners' proposal. Rather, the Petitioners seek to eliminate a new competitive disparity that the Commission's Grade B replication policy has introduced. That disparity would threaten the ability of UHF/UHF stations to provide DTV service to all viewers in their current core Grade A contour areas.

^{5/} *Id.*, 23 RR at 1576.

B. The DTV Report and Orders. Prior to the July, 1996 *Sixth Further Notice of Proposed Rulemaking* in the DTV docket,^{6/} the Commission had rejected the concept of replication of service areas of existing NTSC stations.^{7/} Instead, the Commission had proposed to use an allotment approach intended to maximize the service areas of all DTV allotments.^{8/} However, in the *Sixth Further Notice*, the Commission reversed course and stated that it agreed with those in the industry (primarily VHF stations and their supporters) who had argued for a system of service replication:

[W]e agree with those in the broadcasting industry who have argued that replication of existing service areas in the new DTV allotments offers important benefits for both viewers and stations. Replication would generally maintain the service areas of existing NTSC stations, thereby preserving viewers' access to off-the-air TV service and the ability of stations to reach the audiences they now serve.^{9/}

Numerous commenters, including PCC, argued that attempting to replicate on a digital UHF channel the analog Grade B coverage advantage that VHF stations now enjoy (for VHF/UHF stations) would require "brute force" multi-megawatt power allocations for those stations, at the expense of UHF/UHF stations. This would leave VHF/UHF stations with DTV allotments of as much as **100 times more power** than

^{6/} *Sixth Further Notice of Proposed Rulemaking*, 11 FCC Rcd at 10968 (1996) ("*Sixth Further Notice*").

^{7/} *Sixth Further Notice*, 11 FCC Rcd at 10974.

^{8/} See *Second Report and Order/Further Notice of Proposed Rulemaking*, 7 FCC Rcd 3340, 3348-49 (1992).

^{9/} *Sixth Further Notice*, 11 FCC Rcd at 10974-75 (footnotes omitted).

UHF/UHF stations. Several parties therefore argued that the Commission should address the potential competitive disparity between these types of stations by assigning DTV allotments that replicate the ease of reception in Grade A, rather than Grade B, contour areas.

Notwithstanding those arguments, the Commission formally adopted the Grade B replication policy in the *Sixth R&O*. The Commission offered no explanation for this decision. However, it did partially reduce the power disparity by adopting a 50 kilowatt minimum power level and a 1000 kilowatt maximum power level for UHF DTV allotments. Unfortunately, this still leaves VHF/UHF stations in major markets with on average **twenty times more power** than UHF/UHF stations.

One important factor that appears to have supported the Commission's decision is its assumption concerning receiver noise figures. Appendix A to the *Sixth R&O* incorporates a receiver noise figure of just 7 dB for UHF receivers, which assumes a receiver with excellent sensitivity. This figure seems to be based on an assumption that television manufacturers will produce a DTV receiver that is much more sensitive to UHF signals than analog receivers currently on the market, or that viewers will purchase and install outdoor receiving antennas to overcome the signal loss caused by walls, roofs, and other structural features. By contrast, the Commission used a receiver noise figure of 10 dB (approximately half the sensitivity of the UHF figure) for digital VHF receivers. These assumptions are inconsistent with the current analog situation, where UHF receivers generally are not even half as

sensitive as VHF receivers. The Commission demonstrated no basis for these noise figure assumptions.

The Commission's noise figure assumptions have led it to conclude that the power levels allotted to UHF/UHF stations will enable them to replicate their present quality of service in their Grade B coverage areas. The Petitioners submit this will not be the case. The Petitioners expect that only a fraction of viewers will employ outdoor antennas or highly sensitive TV receivers. Not only would such equipment increase the cost of switching to DTV service, but many people cannot use outdoor antennas because they live in apartments, condominiums or other multiple-resident buildings or in subdivisions or planned communities with restrictive covenants precluding outdoor antennas. In addition, those with cable service may not consider it worth the time and expense to install an outdoor antenna for purposes of off-air DTV reception.

The Commission's receiver noise assumptions need to reflect current real-world factors, particularly the need for sufficient signal strength for building penetration and to provide a usable signal to receivers using simple indoor antennas. The Petitioners recommend that the Commission adopt regulations setting forth minimum standards of DTV receiver selectivity and sensitivity. Without such minimum standards, a substantial number of viewers, perhaps even a majority, will not have any greater DTV reception capability than they currently have for off-the-air NTSC reception. Those viewers are far more likely to receive a high-power VHF/UHF signal than a low-power UHF/UHF signal.

The signal strength disparity is particularly important due to the nature of DTV reception. As the Commission is aware, a weak DTV signal will cause the picture to disappear altogether, rather than be visible but subject to noise or interference as is the case with NTSC signals. In addition, the programming features of many television sets cause "vacant" channels to be skipped over until the set is re-programmed. If a UHF/UHF signal is too weak to be received when the set is programmed, that signal will not appear at all, even if the reception is improved subsequently through installation of an outdoor antenna or adjustment of an indoor antenna, until the set is re-programmed. Not allowing UHF/UHF stations to operate with a strong enough signal to be received on all DTV receivers within their core Grade A service areas would put those stations at a serious disadvantage in competing with VHF/UHF stations.

C. The DTV Table Should Be Based on Ease of Reception Within Current Grade A Contours. The minimum and maximum power levels adopted in the *Sixth R&O* reduce the imbalance between VHF/UHF stations and UHF/UHF stations created by the DTV table of allotments, but the basic problem remains. In the interest of attempting to provide VHF-level service areas to VHF/UHF stations, the Commission has sacrificed the power levels available to UHF/UHF stations.

The Petitioners submit that the best resolution to this issue is to seek to replicate current ease of reception of NTSC stations' Grade A contours, rather than their Grade B contours, based on realistic assumptions of noise levels and receiver capabilities. To the extent that the Commission can at the same time replicate Grade

B contours in certain markets, it should do so, but the overriding goal should be to provide each station with a receivable DTV signal throughout its core Grade A service area.

On its surface, the argument for Grade A contour replication rather than Grade B contour replication looks like a step in the wrong direction, toward reduced DTV service. However, this is not the case. As indicated above, the Commission should replicate Grade B contours in those areas where doing so would not impinge upon Grade A reception. In areas where the Grade B replication model would impinge upon Grade A reception, Grade A replication should prevail because service in the core Grade A market is more important than service in the outlying Grade B contour area.

The Commission recently acknowledged the Grade A service area as a television station's "core market" in its *Television Ownership Rulemaking*.^{10/} This is consistent with prior Commission decisions holding Grade A service to be more important than Grade B service.^{11/} The *Sixth R&O* fails to recognize the importance of allowing UHF/UHF stations to serve their core markets with signals of sufficient strength to be received in less-than-optimal circumstances.

^{10/} See *Television Ownership Rulemaking*, 7 FCC Rcd 4111, 4115, 10 FCC Rcd 3524, 3575.

^{11/} See, e.g., *Table of Television Channel Allotments*, 83 FCC 2d 51, 117, 120-21 (1980) (addition of service from new VHF stations outweighs Grade B service losses for certain stations); *Warner Amex Cable Communications, Inc.*, 75 FCC 2d 393, 399 (1979) (cable systems within television station's Grade A contour are within the core service area of the station).

The Commission should reconsider the *Sixth R&O* first by re-examining its underlying assumptions as to appropriate receiver noise figures. The Commission should impose minimum standards for DTV receiver selectivity and sensitivity. Absent such standards, the figures used should account for the real world conditions described above, particularly the need to penetrate buildings with a signal strong enough to be received with a simple indoor antenna. The Commission then should base its table of DTV allotments on ease of reception within current Grade A, rather than Grade B, service contours. Finally, this table should be examined to determine whether, in certain markets, Grade B replication can be achieved without threatening the ability of any station to provide a receivable DTV signal throughout its core Grade A service area. Absent these adjustments, the Commission will have created a competitive imbalance of a magnitude not experienced since the 1960's. The importance of a vital, competitive environment for free, off-the-air television requires that UHF/UHF stations be able to provide consistent and reliable service throughout their core markets, which are their current Grade A contours.

D. Stations Should be Allowed to Maximize their Coverage. In any event, the Commission should relax its standards to allow stations to increase power. Where a station is now precluded from increasing its power when such increase would cause additional interference to another broadcaster anywhere within the other station's Grade B contour, the Commission should instead weigh interference to another station where such interference occurs **inside the affected broadcaster's**

DTV Grade A contour. This standard will better promote the development of high-quality UHF/VHF service in stations' core business areas.

Another solution would be for the Commission to at least modify its definition of "additional interference" in areas outside stations' **Grade A** contours. Currently, the Commission utilizes a F(50,10) D/U ratio to determine whether or not additional interference has resulted from another station's maximization efforts. The Petitioners believe that in areas outside stations' Grade A contours, the Commission should move to a F(50/50) D/U ratio -- the threshold for interference in areas far removed from affected stations' core business areas.

In particular, the Petitioners believe that it is very important that the Commission grant power increases or modifications to facilities based upon a station showing that the increase or modification will ensure greater replication of the station's NTSC service area (a principal goal of the FCC). Attachment 2 is a DTV coverage comparison which demonstrates the material loss of viewers certain of the Petitioners' stations will suffer.^{12/} Furthermore, as explained below, any application seeking to attain higher replication should receive preference to any conflicting application.

^{12/} As explained in Section III below, these calculations are preliminary due to the lack of information available at this time.

E. The Commission Should Clarify Its DTV Station Modification Policies.

Certain aspects of the *Sixth R&O* require clarification in order to accomplish the Commission's objective of achieving rapid implementation of DTV service. The following sections address specific aspects of the *Sixth R&O* that need to be clarified.

1. Conflicting Applications. The Commission did not specify any procedure for resolving conflicts between or among applications seeking to modify the initial DTV allotments. As noted above, the Petitioners believe that such conflicts should be resolved by giving a preference to the application that proposes the greatest improvement in the DTV station's replication of its NTSC Grade B contour. Attachment 2 demonstrates the size of service loss in the transition from NTSC to DTV expected by certain of the Petitioners' stations under the rules adopted by the Commission. In the interests of promoting rapid implementation of DTV operation throughout all areas now served by NTSC stations and maximizing service improvements, those stations seeking the greatest improvement in the DTV station's replication of their NTSC Grade B contours should be given a preference over other applications. Such a system will provide greater public interest benefits than a race to the Commission to seek priority by filing date.

2. Elevation Changes. Section 73.622(f)(3) of the new DTV rules provides that any application to modify the initial allotment for a DTV channel "must be accompanied by a technical showing that the increase . . . will not result in new interference, or statements agreeing to the change from any co-channel or adjacent channel stations that might be affected by potential new interference." The

Commission should allow stations to adopt minimal changes to a DTV station's antenna elevation above ground level (e.g., 10 meters or less) without requiring such a showing. Many stations installing new NTSC antennas recently have purchased stacked antennas, with the NTSC antenna at the bottom and a dummy pole at the top for the future installation of the DTV antenna. Accepting such a minor antenna height change without any interference showing will help speed the implementation of DTV operation.

3. Land Mobile Interference. The *Sixth R&O* adopted distance separation standards as the basis for protection of land mobile stations from interference.^{13/} The Petitioners submit that the same type of case-by-case interference analysis used to analyze television station interference should be used to analyze land mobile interference. Interference studies can be used to the same degree of certainty in both cases.

4. DTV Allotment Protection. The *Sixth R&O* failed to state specifically that if a station should build its DTV facility with less than the full facilities allotted to it, the Commission nevertheless shall protect the station's complete allotment until the end of the DTV transition period. In other words, if a station initiates DTV service with an operation intended only to serve its city of license, it nevertheless should receive full protection for its DTV allotment until the end of the DTV transition period. This will allow the station to progress to full-scale DTV operation expeditiously, without facing the possibility of unexpected interference

^{13/} *Sixth R&O* at 76-77.

III. The Commission Should Afford Parties a Further Opportunity to Comment on the DTV Table after its Methodology Is Made Available.

Service replication is the bedrock of the Commission's DTV table of allotments. In devising the allotment table for over 1,200 full power television stations, the Commission attempted to ensure that a television station's DTV assignment would replicate the station's current NTSC coverage areas and populations. Indeed, in the *Sixth R&O*, the Commission specifically emphasized:

We believe that providing DTV allotments that replicate the service areas of existing stations offers important benefits for both viewers and broadcasters. This approach will ensure that broadcasters have the ability to reach the audiences that they now serve and that viewers have access to the stations that they can now receive over-the-air.^{14/}

However, the Petitioners have not been provided the means to evaluate in a meaningful fashion whether replication has indeed been achieved. Despite the best of intentions, and based on the limited information currently available to the Petitioners, the Commission's DTV assignments and power levels do not accomplish this. Although the negative impact on such stations will be significant, the impact on viewers will be even greater. Viewers simply will not be able to receive certain of the television signals they have been accustomed to receiving for decades.

In order to evaluate whether the DTV Table implements the Commission's objectives in specific instances, interested parties must be able to calculate the interference that is likely to result and determine the service areas of new DTV stations in accordance with the Commission's methodology (Longley-Rice). But the

^{14/} *Sixth R&O* at ¶29.

critical piece of information necessary for stations to evaluate contours -- *OET Bulletin No. 69* -- has not been timely released though the *R&Os* refer to it on several occasions. Without *OET Bulletin No. 69*, it is impossible, for example, for stations to know precisely what operation parameters for Longley-Rice methodology apply or what amount of interference is considered *de minimis*. In turn, it is impossible for stations to know how to assess the reasonableness of either their own DTV allotment or those of nearby licensees. Moreover, broadcasters are ill equipped to verify whether the DTV Table meets **any** standard of adequacy, much less whether it is **optimized** as the Commission contends.^{15/}

Therefore, before the rules and the DTV Table become final—but **after** the Commission's methodology is made available—the Commission should give interested parties a further opportunity to comment on the Table and the methodology. A brief additional comment period of 90 days will not significantly delay implementation of the transition to DTV. Indeed, to the extent that there are problems with the DTV Table, the Commission can fix those problems more efficiently and expeditiously if they are identified in a further round of comments while this proceeding remains open, than if they are identified in a plethora of separate petitions for rulemaking after the DTV Table becomes final.

^{15/} As a matter of administrative law, the Commission must, of course, set forth the basis and underlying support for its rules in a manner that is sufficiently detailed to permit judicial review. *See, e.g., National Nutritional Foods Association v. Weinberger*, 512 F.2d 688, 701 (2d. Cir. 1975), *cert. denied*, 423 U.S. 827 (1975).

IV. DTV Allocations for Pending Construction Permit Applications.

In the *Sixth R&O*, the FCC obliquely addresses the issue of DTV allocations for television licensees or permittees with pending construction permit applications. The *Sixth R&O* did not directly state whether the DTV Table of Allotments reflected existing or granted NTSC parameters in the case where a construction permit for modification of an existing station has been granted, but Appendix B, Table 2 in the *Sixth R&O* listed the coordinates proposed for each DTV station and, thus, provided an avenue for determining which set of coordinates was referenced by the FCC.

In the *Sixth R&O*, the FCC noted that "we stated [in the *Sixth Further Notice*] that we would continue to permit the filing of applications by existing or authorized NTSC television stations to modify their technical facilities, i.e., maximum effective radiated power (ERP), antenna height above average terrain (HAAT), and transmitter locations. However, in order to preserve our ability to develop the DTV Table, we stated that we would henceforth condition the grant of applications for modifications of technical facilities, including those for applications on file before the date of adoption of the *Sixth Further Notice* (i.e., July 25, 1996) but granted, after that date, on the outcome of our final decision on the DTV Table of Allotments."

In the *Sixth R&O*, the FCC concluded that it had been able to accommodate all eligible broadcasters with DTV allotments that would not conflict with any of the authorizations to modify existing NTSC facilities that had been granted subsequent to

July 25, 1996 and it was, accordingly, removing the condition from such grants.^{16/}

While the FCC did not make it clear on what basis it had chosen to grant certain construction permit applications pending as of July 25, 1996, but not others, it indicated in its *Sixth R&O* that henceforth "we will consider any impact on DTV allotments in deciding whether to grant applications for modification of NTSC facilities."

The problem with this approach is that a significant number of licensees and permittees, including many associated with the Petitioners, that had construction permit applications **pending as of July 25, 1996**, did not have those applications granted prior to April 3, 1997, with the result that these pending applications remain at the mercy at the FCC's proposed DTV Table of Allotments and it is unclear when, if ever, these pending applications will be granted or under what conditions they will be granted.

Stations in which the Petitioners have an existing or potential future interest had 17 construction permit applications on file as of July 25, 1996, which had not been granted by the FCC by April 3, 1997 and which remain pending to date. Some of these applications had been filed up to one year prior to the adoption of the FCC's

^{16/} The condition that was removed from these grants read as follows:

Grant of this authorization is conditioned on the outcome of the digital television (DTV) rulemaking proceeding in MM Docket No. 87-268. To the extent that the station's Grade B contour or potential for causing interference is extended into new areas by this authorization, the Commission may require the facilities authorized herein to be reduced or modified.

Sixth Further Notice of Proposed Rulemaking and each of these 17 applications involves a substantial improvement in the station's broadcast facilities ranging from \$1.2 to \$2.8 million for each facility. A listing of those stations and applications is appended hereto as Attachment 3.

The FCC's decision unfairly prejudices those broadcasters who had applications pending on July 25, 1996, that were not granted prior to April 3, 1997 and it contravenes the FCC's long-standing policy of ensuring diversity and competition in the broadcast industry. The Commission's inconsistent action in this regard is contrary both to the dictates of the long-standing line of *Melody Music* cases and the Commission's obligation to treat similarly-situated applicants in a similar manner. Finally, it ignores the Commission's own recognition in the *Sixth Further Notice* that there should be different consequences for applications on file as of July 25, 1996 and those applications filed after that date.^{17/}

A. Conditioning Approval of Pending TV Modification Applications on DTV Impact is Inequitable. The Commission's newly announced "DTV Impact" policy for reviewing and approving these pending construction permit applications is inequitable because broadcasters relied to their detriment on the Commission's practice over the past nine years of not conditioning approval of modification applications on the outcome of the DTV proceedings. The Commission did not give notice until its July 25, 1996 *Sixth Further Notice* that it intended to alter the modification approval process as it applied to applications on file by July 25, 1996 and this was a departure

^{17/} *Sixth Further Notice* ¶63.

from previous notices in this proceeding.^{18/} This proposal was contrary to the Commission's established practice to grandfather applicants and licensees not in compliance with newly announced rules and was widely opposed.^{19/} Although the Commission had suggested this conditional grant policy in its *Further Notice*, it removed all such conditions on permits granted subsequent to July 25, 1996 in the *Sixth R&O*.

However, by now applying its DTV Impact policy to television modification applications **on file before July 25, 1996 but not yet granted**, the Commission has left broadcasters in a far worse position solely as a result of their wholly reasonable reliance on Commission's practices and procedures. The Supreme Court has recognized that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides an exceedingly persuasive justification."^{20/} Moreover, the Commission has noted that the retroactive application

^{18/} As a matter of fact, up until that time the Commission explicitly chose not to limit modifications to existing television broadcast operations. *Second Further Notice of Proposed Rule Making*, 7 FCC Rcd 5376, 5383 (1992).

^{19/} See, e.g., *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules*, 3 FCC Rcd 5024, 5025 (1988) (grandfathering the location of broadcasters' public files); *Deletion of Section 97.25(c) of the Amateur Rules*, 66 FCC 2d 1, 1 (1977) (grandfathering the right of a licensee to apply for the Amateur Extra Class license without examination); *Amendment of Part 76, Subpart J of the Commission's Rules and Regulations*, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross ownership); *Second Report and Order*, 50 FCC 2d 1046, 1074 (1975) (grandfathering broadcast-newspaper cross ownership).

^{20/} *Heckler v. Mathews*, 465 U.S. 728, 746 (1984).

of a procedure is inequitable and disruptive to business.^{21/} Here, the disruption would be significant, affecting a discrete group of broadcasters, such as the Petitioners, who had expended time and funds in planning for their proposed facilities modifications.

Conditioning approval of such pending applications on DTV Impact also would be inequitable because such a policy would injure those broadcasters who had applications pending on the adoption date of the *Further Notice* and which were not granted by the Commission prior to April 3, 1997. The decision to apply retroactively this policy clearly has no impact on those broadcasters whose modification applications were approved prior to April 3, 1997. Future DTV broadcasters also will remain unaffected because future allotments will be adjusted to accommodate the modifications at issue. Again, even if the DTV Impact policy were to affect future DTV broadcasters, the Commission's common practice is to grandfather provisions that affect current but not future licensees.^{22/} Consequently, based on the disproportionate impact the Commission's decision will have on licensees whose applications were pending on July 25, 1996, it is inequitable for the Commission to apply its DTV Impact policy to then pending applications.

Retroactive application of the DTV Impact policy serves only minimally the objectives the Commission cites in support of the policy. The Commission is concerned that if broadcasters make changes to their technical operations, DTV

^{21/} Cf. *Amendments of Parts 20 and 24 of the Commission's Rules*, 3 CR 433, 471 (1996); *CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *reconsideration denied*, 40 FCC 2d 493 (1973).

^{22/} *Supra* Note 2.