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

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Advanced Television Systems)
and Their Impact upon the)
Existing Television Broadcast)
Service)

MM Docket No. 87-268

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PETITION FOR RECONSIDERATION

**FOUCE AMUSEMENT
ENTERPRISES**

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SUMMARY

KRCA's DTV allotment is so compromised because of adjacent land mobile operations and its position outside the core spectrum that it cannot be considered a viable DTV channel. The Commission's allotment of DTV Channel 69 to KRCA is thus in error and must be modified to specify a usable channel.

The assignment of DTV Channel 69 is fundamentally at odds with the Commission's decision to eliminate DTV assignments within 10 miles of land mobile base stations. Sunset Ridge, where KRCA's transmitter is located, has numerous essentially co-located land mobile base stations operating within 6 MHz of the Channel 69 band edge.

The Commission's own findings, past experience with NTSC, and the comments in this proceeding all demonstrate that DTV Channel 69 cannot be operated in the Los Angeles market. KRCA's engineering analysis demonstrates that even the extreme measure of operating at 1 percent of its authorized power would not eliminate harmful interference.

The failure of the Commission to provide KRCA with a viable DTV assignment is flatly inconsistent with the Commission's policy criteria of full accommodation and service replication. The Commission has offered no explanation or other rational basis to justify its departure from these criteria. Fundamental fairness and principles of reasoned decisionmaking require the Commission either to modify the DTV allotment plan for Los Angeles to

accommodate all eligible stations or to institute a procedure for selecting which of the eligible stations should receive DTV channel assignments.

Finally, the Commission's decision to burden KRCA, and no other Los Angeles area broadcast station, with two non-core DTV assignments is a violation of the Communications Act and is arbitrary and capricious. KRCA, whose NTSC assignment is Channel 62, is the only Los Angeles area station that does not have at least one core channel assignment, while 11 stations have been assigned both channels within the core spectrum. The Commission fails to explain why it uniquely denied KRCA the advantages of being assigned a core channel, when numerous core channels appear to have been available.

Table of Contents

	<u>Page(s)</u>
SUMMARY	ii
PETITION FOR RECONSIDERATION	1
INTRODUCTION	1
I. KRCA'S DTV ALLOTMENT WILL PRECLUDE KRCA FROM OPERATING A VIABLE DTV CHANNEL.	2
A. KRCA's DTV Channel Assignment is Contrary to the Commission's Decision to Eliminate DTV Assignments That Are Short - Spaced With Land Mobile Operations.	3
B. The Record Demonstrates that Short-Spaced DTV Channel 69 Assignments Are Not Viable.	6
C. KRCA Could Not Operate on Channel 69.	12
II. KRCA'S DTV CHANNEL ASSIGNMENT IS ARBITRARY AND CAPRICIOUS.	15
III. THE EXCLUSION OF KRCA FROM OBTAINING A VIABLE DTV CHANNEL IS ARBITRARY AND CAPRICIOUS.	18
IV. THE APPLICATION OF THE COMMISSION'S CORE SPECTRUM POLICY TO KRCA IS CONTRARY TO THE COMMUNICATIONS ACT AND THE APA	21
A. The Commission's Requirement that KRCA Return Both its Television Channels Violates the Communications Act.	21
B. The Assignment of Two Channels Outside the Core Spectrum to KRCA Is Arbitrary and Capricious.	22
C. The Commission Has Unlawfully Precluded any Opportunity for Meaningful Review of the Basis for Its DTV Channel Assignment	23
CONCLUSION	24
EXHIBIT 1: Engineering Statement of Cohen Dippell and Everist, P.C.	
EXHIBIT 2: NTSC/DTV Channel Assignments Chart, Los Angeles Market	

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PETITION FOR RECONSIDERATION

Fouce Amusement Enterprises, by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's Sixth Report and Order in this proceeding.¹ Fouce is the licensee of television station KRCA, Channel 62 ("KRCA"), which operates in the Los Angeles television market.

INTRODUCTION

The cornerstone of the Commission's DTV allotment policy is that every eligible broadcast station receives a DTV channel assignment. Implicit in this policy is the necessary assumption that each allotted channel is usable to broadcast a DTV signal. But KRCA's DTV allotment -- Channel 69 -- is so compromised, because of adjacent land mobile operations and its position outside

¹ In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Report and Order, MM Docket No. 87-268, FCC 97-115 (released April 21, 1997). Public Notice of the Sixth Report and Order occurred on May 14, 1997. 62 Fed. Reg. 26684. This petition is therefore timely under Section 1.429.

the core spectrum, that it is not a viable DTV allotment. For the reasons stated below, this allotment is arbitrary and capricious and otherwise unlawful.² The Commission must make a proper allotment to KRCA before the DTV Table becomes effective.³

I. KRCA'S DTV ALLOTMENT WILL PRECLUDE KRCA FROM OPERATING A VIABLE DTV CHANNEL.

KRCA's DTV channel allotment on Channel 69 is located within a few hundred meters of a substantial number of adjacent channel land mobile base stations that operate at KRCA's Sunset Ridge transmitter site.⁴ This assignment is directly contrary to the Commission's finding that it had eliminated all short-spaced land mobile adjacent allotments of less than 10 miles.⁵ KRCA's obligation to protect these land mobile operations from interference would preclude KRCA from operating its assigned DTV channel. KRCA, therefore, respectfully requests that the Commission provide an alternative DTV channel on which KRCA can provide competitive DTV service.

² "DTV Allotment" and "DTV Assignment" refer to the paired channel plan contained in Appendix B of the Sixth Report and Order. KRCA requests changes to both the DTV Allotments/Assignments and the DTV Table of Allotments that is contained in 62 Fed. Reg. 26684, 26712-17 (1997). See 47 C.F.R. § 73.622(b).

³ Simultaneous with this Petition for Reconsideration Fouce is filing a Motion for Partial Stay of the Commission's Sixth Report and Order.

⁴ Engineering Statement of Cohen, Dippell and Everist, P.C., at App.A (attached hereto as Exhibit 1).

⁵ Sixth Report and Order, at ¶164.

A. KRCA's DTV Channel Assignment is Contrary to the Commission's Decision to Eliminate DTV Assignments That Are Short - Spaced With Land Mobile Operations.

In the Sixth NPRM,⁶ the FCC's draft Table of Allotments included thirteen cases where a DTV channel was "short-spaced" with co-channel and adjacent channel land mobile operations on channels 14-20.⁷ KRCA and numerous other parties representing both broadcast and land mobile interests filed comments opposing short-spaced DTV allotments.⁸ Motorola, LMCC and affected broadcasters were especially critical of proposed DTV allotments that were located within ten miles of existing land mobile operations.⁹ There were three DTV allotments, on channels 15, 19, and 21, located within 10 miles or less of adjacent

⁶ In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Further Notice of Propose Rule Making, 11 FCC Rcd 10968 (1996)

⁷ See In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Further Notice of Proposed Rule Making, Errata to the Sixth NPRM, MM Docket No. 87-268 (released September 12, 1997).

⁸ See Reply Comments of Fouce Amusement Enterprises; Comments of Association of Federal Communications Consulting Engineers (AFCCE) at 12; Comments of Association of Public-Safety Communications Officials-International (APCO) at 17; Comments of Chris-Craft/United Group at 1; Comments of KSCI-TV at 2; Comments of Land Mobile Communications Council at 12; Comments of the County of Los Angeles at 9; Comments of Motorola at 12; Reply Comments of New York Metropolitan Advisory Committee at 4; Comments of the State of California at 1; Comments of Silver King Communications, Inc. at 7; Comments of Telemundo Group, Inc. at 3; Comments of UTC at 8, see also Comments of Nextel (opposing DTV assignments on Channel 69).

⁹ See Comments of Motorola at 13; Comments of LLMC at 13, Comment of Silver King at 7; Comments of Telemundo at 4.

channel land mobile facilities in the Los Angeles market. One of these allotments, DTV Channel 19, was allotted to the Sunset Ridge transmitter site.¹⁰

In the Sixth Report and Order, the Commission acknowledged the short-spacing problem in Los Angeles and other areas and announced that the final DTV Table "resolved or substantially reduced" land mobile sharing problems.¹¹ The Commission stated that the final Table of Allotments contains *"no instances of close spacings between DTV and land mobile on adjacent channels, i.e., 10 miles [or less],* that were of concern to Motorola and other land mobile parties."¹² The Commission also noted that it was "able to provide alternative channels for the proposed DTV allotments that posed conflicts with land mobile operations in the Los Angeles area".¹³

KRCA's DTV assignment on Channel 69, however, flatly contradicts the Commission's assertion that it has eliminated all close-spaced DTV assignments within 10 miles of existing land mobile operations.¹⁴ Channel 69, at 800-806 MHz, is immediately adjacent to channels heavily used by land mobile operators for mobile and control frequencies.¹⁵ KRCA's transmitter on Sunset Ridge, in fact, is

¹⁰ See Sixth NPRM, at note 96, as corrected by Erratum to the Sixth NPRM.

¹¹ Sixth Report and Order, at ¶164.

¹² Id. (emphasis added.)

¹³ Id.

¹⁴ Id., appendix B-10.

¹⁵ See 47 C.F.R. § 90.613.

co-located with approximately twenty-four land mobile facilities operating within 6 MHz of the channel 69 band edge.¹⁶ These include land mobile operations licensed to the County of Los Angeles.¹⁷ In addition, there are a large number of additional land mobile stations operating within a 10 mile radius of KRCA's transmitter site.¹⁸

KRCA's DTV assignment thus creates virtually the identical land mobile short-spacing problem that the Commission asserts it has eliminated. KRCA's situation on Sunset Ridge, however, appears even worse than the draft Table's short-spaced DTV channel 19 allotment on Sunset Ridge because of the sheer number of 800 MHz land mobile stations adjacent to Channel 69.

The Commission may simply have overlooked the land mobile adjacency that plagues KRCA's DTV assignment, because Channel 69 was not previously allotted in the draft Table to any Los Angeles area television station, and the focus of discussion in the Sixth NPRM and the comments was on land mobile sharing on channels 14-20, not on channel 69. There is, however, nothing in the record to justify a policy that seeks to eliminate land mobile sharing problems on Channels 14-20 while ignoring the same or a greater problem for Channel 69. As discussed below, KRCA believes that the Commission's decision to eliminate all short-spaced

¹⁶ See Exhibit 1, Appendix A.

¹⁷ See id.

¹⁸ See id.

channel assignments of 10 miles or less is well founded, and KRCA's non-compliant DTV assignment is arbitrary and capricious and must be changed.

B. The Record Demonstrates that Short-Spaced DTV Channel 69 Assignments Are Not Viable.

The record in this proceeding provides strong factual support for the Commission's decision to eliminate all short-spaced DTV channel assignments of 10 miles or less. This same evidence and KRCA's own engineering analysis demonstrate that operation of a Channel 69 DTV transmitter on Sunset Ridge is not feasible.

KRCA's channel assignment is grossly inconsistent with the Commission's minimum spacing distance for land mobile adjacent DTV allotments on channels 14-20. In the Sixth Report and Order, the Commission found it necessary to adopt a minimum spacing distance of 176 km (110 miles) between DTV allotments and the city-center of land mobile operations on UHF channels 14-20.¹⁹ In practice, the 110 mile separation distance creates a 60 mile buffer between a DTV transmitter and adjacent channel land mobile base stations.²⁰ The Commission concluded that

¹⁹ Sixth Report and Order, at ¶163.

²⁰ Land mobile base stations can be licensed up to 50 miles from city center. The Commission presumably did not include a similar limitation on Channel 69 DTV allotments, because 800 MHz land mobile can be licensed anywhere, and no future DTV stations is to be licensed on Channel 69. See 47 C.F.R. § 73.622(a).

this spacing distance is "appropriate for avoiding interference and ensuring the operation of both DTV and land mobile services."²¹

KRCA's DTV allotment on Channel 69, in contrast, would have virtually no buffer between it and approximately 37 land mobile base stations. Thus, KRCA's channel assignment is inconsistent with the Commission's minimum spacing finding.

The experience of NTSC television stations operating on channels adjacent to land mobile operations demonstrates that it is virtually impossible to eliminate interference to collocated land mobile operations.²² Since the reallocation of UHF channels to land mobile radio operations in the mid-1970s, there have been numerous and persistent cases of broadcasters causing harmful interference to adjacent channel land mobile operators.²³

For example, station WVEU attempted to initiate service on Channel 69 from a location atop a downtown Atlanta hotel, where a number of land mobile

²¹ Sixth Report and Order, at ¶163.

²² The Commission has determined television-to-land-mobile interference on channels 14 and 69 has three causes: (1) desensitization of the land mobile receiver caused by the radiation of a high power television transmitter, (2) intermodulation interference caused when strong television signals mix with other signals within or external to a land mobile receiver to produce spurious signals on land mobile frequencies, and (3) out-of-band radiation that leaks beyond the television channel boundaries. See Resolution of Interference between UHF Channels 14 and 69 and Adjacent-channel Land Mobile Operations, Report and Order, (Interference Resolution Order, 6 FCC Rcd 5148, 5151 (1991).

²³ See First Report and Order and Second Notice of Inquiry, Docket No. 16262, 35 Fed. Reg. 8644 (June 4, 1970); Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974); *modified on recon.*, Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975);

stations were already located.²⁴ When the station began program tests, land mobile operators experienced debilitating interference to their operations. This interference persisted even after WVEU turned its power down to 6% of authorized power and after the "installation of six cavity filters, a high power filter on one visual transmitter, minor modifications to its transmitters, and various measures to shield the two-way receivers" of land mobile operators.²⁵ After a protracted proceeding before the FCC, the Commission determined that further equipment modifications would not be an effective method of resolving interference to land mobile facilities.²⁶

In response to the Atlanta case, the Commission suspended all new Channel 69 allotments²⁷ and later released a Notice of Proposed Rule Making proposing rules designed to resolve reduced land mobile interference problems.²⁸ The Commission found that "the Atlanta situation was not unique but merely typified the potential for interference from a station on channel 69 to adjacent-channel

²⁴ See In the Matter of Broadcast Corporation of Georgia, 91 FCC 2d 854, 855 (1982).

²⁵ See In the Matter of Broadcast Corporation of Georgia, For Authority to Resume Full Power Operation, 96 FCC 2d 901, 902 (1984).

²⁶ Id. at 909-10.

²⁷ See In the Matter of Amendment of § 73.606(b), Table of Assignments, Television Broadcast Stations in Jacksonville, FL, 51 Fed. Reg. 13263, 1986 FCC Lexis 3669 (April 14, 1986). (Order denying Petition for Rulemaking seeking assignment of Channel 69 in Jacksonville, Florida).

²⁸ Resolution of Interference Between UHF Channels 14 and 69 and Adjacent-Channel Land Mobile Operations, Notice of Proposed Rule Making, Notice of Inquiry, 2 FCC Rcd 7328 (1987).

land mobile operations."²⁹ As a result of this proceeding, the Commission imposed an obligation on any modified or new channel 14 or channel 69 station to eliminate interference prior to initiating operation.³⁰

The obligation to eliminate harmful interference to all existing land mobile users has been exceedingly difficult to meet, even when land mobile facilities are not collocated with an NTSC station. As a result, NTSC television transmitters have had to operate at substantially reduced power and take other costly measures to control adjacent channel interference. For example, as noted in the Comments of Telemundo,³¹ station WTMW(TV), Channel 14, Arlington, Virginia, has been unable to operate at greater than 50% of authorized power due to interference concerns related to adjacent channel interference to public safety radio services of the Metropolitan Police Department of the District of Columbia.³² Station KTVJ(TV), Channel 14, Boulder, Colorado, is currently operating at less than 10% of authorized power, pending resolution of an interference problem with

²⁹ Id. at 7329.

³⁰ Resolution of Interference Between UHF Channels 14 and 69 and Adjacent-channel Land Mobile Operations, 6 FCC Rcd 5148, 5153 (1991); see also 47 C.F.R. § 73.687(e)(4)(ii).

³¹ See Comments of Telemundo at 5.

³² See Station WTMW(TV), Arlington, Virginia, Construction Permit File No. BLCT-930406KF (August 3, 1993) and Construction Permit File No. BLCT-930406KF (October 15, 1993).

the City of Denver.³³ But even at this reduced power, a coalition of area land mobile users have complained of interference and have twice requested that the Commission revoke KTVJ(TV)'s program test authority.³⁴

Operation of Channel 69 on Sunset Ridge will generate similar but greater interference problems than those experienced by previous land mobile adjacent television channels. First, KRCA's transmitter will be collocated with a large number of land mobile facilities. Second, 800 MHz frequencies are heavily used in the Los Angeles area, and this congestion multiplies the potential for interference problems.

Comments filed in this proceeding further support the conclusion that it is not feasible to eliminate land mobile interference in short-spaced DTV allotments of 10 miles or less. As the Commission acknowledges in the Sixth Report and Order, land mobile interests including APCO, LMCC, Motorola and UTC all objected to the extreme short spacings proposed in the Commission's draft DTV

³³ See Letter of Thomas J. Hutton, of Dow, Lohnes & Albertson to Clay Pendarvis, Chief, Television Branch, Mass Media Bureau, Federal Communications Commission, regarding KTVJ(TV), Boulder, Colorado (June 26, 1996.)

³⁴ See Letters of Dudley P. Spiller and Andrew Cohen of Gorsuch Kirgis L.L.C. to Clay Pendarvis, Chief, Television Branch, Mass Media Bureau, Federal Communications Commission, regarding KTVJ(TV), Boulder, Colorado (March 1, 1996 and June 14, 1996).

table.³⁵ Nextel, in fact, opposed the use of Channel 69 for DTV in any market, citing the long history of land mobile interference problems.³⁶

Motorola found that operation of DTV transmitters that are virtually co-located with adjacent land mobile operations would cause "severe interference" and that "even greatly reduced DTV emissions will not eliminate adjacent channel interference problems close to (i.e., within 10 miles of) the DTV transmitter nor does it address the potential for land mobile interference to DTV receivers."³⁷ In its engineering analysis of DTV to land mobile interference, Motorola further found that where land mobile facilities are less than 10 miles from proposed DTV stations "it is not feasible from a technical standpoint to provide enough filtering to bring the interference to an acceptable level."³⁸

Many broadcasters also concluded that it is nearly impossible to eliminate land mobile interference on extreme short-spaced DTV assignments. Chris-Craft/United Group submitted an Engineering Statement demonstrating interference to land mobile facilities located well beyond 10 miles from its

³⁵ Sixth Report and Order, at ¶ 155.

³⁶ Nextel Comments at 2. Fouce understands that MSTV and others will argue in a Petition for Reconsideration that the Commission should relax the Land Mobile protection criterion in order to provide additional usable DTV allotments, including channel 69, but only to the extent that doing so will permit every DTV allotment to be viable. Given KRCA's circumstances, channel 69 is not a viable allotment.

³⁷ Motorola Comments at 15.

³⁸ Motorola Comments, Appendix B at 11.

proposed DTV transmitter and concluding that correction of this interference would not be commercially feasible.³⁹

In short, the Commission's minimum spacing requirements, past experience with NTSC-to-land-mobile adjacent channel operation and the comments filed in this proceeding all demonstrate that DTV operation will result in harmful interference to extreme short-spaced land mobile facilities. The record thus provides strong support for the Commission's conclusion to eliminate all channel allotments short-spaced by 10 miles or less. The Commission plainly erred in allotting DTV Channel 69 to KRCA.

C. KRCA Could Not Operate on Channel 69.

In the Sixth Report and Order, the Commission states that it "will be the initial responsibility of the DTV licensee to protect against or eliminate harmful interference to land mobile services that have commenced operations and that are operating in accordance with our rules at the time the DTV licensee goes on the air."⁴⁰ The statement apparently leaves unchanged the current rule applicable to channels 14 and 69, which would obligate KRCA to resolve all interference to

³⁹ Comments of Chris-Craft, Engineering Statement at 3. See also Comments of Telemundo at 4 (opposing the draft DTV table allotment of channel 15 station to KVEA(TV) Corona, California.) Telemundo explained that this assignment adjacent to land mobile channels 14 and 16 in the Los Angeles market would destroy its ability to have competitive facilities in its market.

⁴⁰ Sixth Report and Order, at ¶ 164.

adjacent land mobile operations prior to initiating DTV service.⁴¹ Compliance with this standard will preclude KRCA from operating a viable DTV Channel 69.

First, as the attached Engineering Statement demonstrates, KRCA's signal at full-power with a minimum mask attenuation of 46.005 dB will produce a power density of 12.6 dBm at 806.0875 MHz and -10.7 dBm at 811.7875 MHz.⁴² At this level, all land mobile receivers on Sunset Ridge operating within 6 MHz of KRCA's signal will be subject to serious and harmful interference due to receiver desensitization.⁴³

Moreover, equipment solutions will not permit KRCA to eliminate harmful interference to the numerous land mobile operators located at its transmitter site.⁴⁴ The installation of high power transmitter filters, cavity filters on land mobile receivers and other measures to shield land mobile operators are not sufficient to eliminate interference to collocated land mobile facilities.⁴⁵

There is nothing in the record to suggest that digital operation will significantly lessen interference to adjacent channel land mobile receivers. Motorola and others conclude that it is simply not feasible to provide enough

⁴¹ See 47 C.F.R. §73.687(e)(4)(ii).

⁴² Exhibit 1 at 4.

⁴³ Id.

⁴⁴ Id.

⁴⁵ See Broadcast Corp. of Georgia, 96 FCC 2d at 902.

filtering to reduce interference to acceptable levels.⁴⁶ Several commenters, in fact, believe DTV systems may be more difficult to filter than NTSC transmitters. Acrodyne, a manufacturer of television transmitters, states that band edge filters cannot be used in a conventional sense and that any improvement at the band edge must be achieved through digital signal processing. Acrodyne concluded that achieving band edge performance greater than -35 dB will be exceedingly difficult, and it is highly unlikely that manufactures will be able to reasonably improve on the Commissions already stringent -45 dB requirement.⁴⁷ The AFCCE also concludes that filtering may be more difficult because of the greater out-of-band energy of the digital signal and group delay problems created by highly attenuated filters.⁴⁸

Given the severe interference created with a minimum mask attenuation of 46.005 dB and the unlikely prospects for a significant improvement mask attenuation, KRCA will either be unable to operate its DTV transmitter or be forced to operate at a very drastically reduced power.

Indeed, the attached Engineering Statement makes clear that even reduction to 1 percent of authorized power (i.e. to 1.75 kw) would not be sufficient to significantly reduce the potential for harmful interference⁴⁹. And any reduction

⁴⁶ See Comments of Motorola at 15.

⁴⁷ Comments of Acrodyne at 2. See 47 C.F.R. § 73.622(h).

⁴⁸ Comments of AFCCE at 12.

⁴⁹ Exhibit 1 at 4-5.

in power would only exacerbate the otherwise debilitating interference that DTV receives would experience as a result of land mobile transmitter operations throughout the Los Angeles market.⁵⁰

Second, KRCA does not have the option of relocating adjacent land mobile operators to another frequency, because land mobile frequencies are fully utilized in the Los Angeles market. Indeed, as the County of Los Angeles notes, there is a substantial and unmet need for additional land mobile spectrum.⁵¹

Relocation of the many existing land mobile base stations is also not a viable option. Due to the unique topography of the Los Angeles area, Sunset Ridge is one of the very few antenna sites that provides coverage both west towards Los Angeles and east to the San Bernardino Valley. There is simply no other site that would provide comparable coverage and that would be free of interference from KRCA's DTV transmitter.

Third, even if some combination of remedies to resolve all outstanding interference problems were conceivable, the significant cost and delay associated with such remedies would make them unacceptable, given that the DTV channel would be only a temporary assignment.

⁵⁰ Id. at 5.

⁵¹ Comments of the County of Los Angeles at 2.

II. KRCA'S DTV CHANNEL ASSIGNMENT IS ARBITRARY AND CAPRICIOUS.

In adopting a DTV channel assignment methodology, the Commission's primary goal was "full accommodation," that is, to "ensure that all eligible full service broadcasters are able to provide the new digital TV service."⁵² The Commission states that the DTV Table of Allotments meets this primary goal, because it assertedly "provides a DTV allotment for all eligible broadcasters."⁵³

The second principal objective was "service replication," i.e., "to provide DTV coverage comparable to a station's current [NTSC] coverage area."⁵⁴ The Commission found that service replication offered important benefits to both viewers and broadcasters by ensuring 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."⁵⁵ The Commission claims that the DTV Table fulfills this goal as well.⁵⁶

The Commission's assignment of DTV Channel 69 to KRCA is flatly inconsistent with these express DTV assignment criteria. First, as demonstrated above, operation of KRCA's DTV channel would be virtually impossible for

⁵² Sixth NPRM, ¶ 10; Sixth Report and Order, at ¶ 11.

⁵³ Sixth Report and Order, at ¶ 205.

⁵⁴ Id., ¶ 12.

⁵⁵ Id., ¶ 29.

⁵⁶ See id., ¶ 206.

technical reasons, given the requirement that it avoid harmful interference to land mobile operators.⁵⁷ Second, even if operation of KRCA's DTV transmitter were technically possible, KRCA would not meet the Commission's minimum power requirement, and would be unable to come even close to replicating its service area.⁵⁸ Thus, contrary to its stated policy objectives and assignment criteria, the Commission has effectively denied KRCA, and its viewers, access to a DTV channel.⁵⁹

It is not at all clear how the Commission could have arrived at the conclusion that assignment of Channel 69 is consistent with its policies, because the record is replete with information indicating that such an assignment is not viable. For example, the Sixth Report and Order demonstrates that the Commission is well aware of the adjacent-channel interference problems associated with land mobile stations.⁶⁰ In fact, as detailed above, the Commission eliminated DTV assignments proposed in the NPRM within 10 miles of land mobile facilities.⁶¹ Thus, the factual record indicates that operation of a

⁵⁷ See 47 C.F.R. § 73.687(e)(4).

⁵⁸ See Exhibit 1, at 4-5 (even reduction to 1 percent of authorized power would not eliminate interference).

⁵⁹ In this regard, the Commission has also failed to carry out the requirements of the Telecommunications Act of 1996. Section 336(a) of Title 47, United States Code, is premised on the Commission providing "additional licenses" to existing broadcasters. A non-functional DTV channel cannot be deemed suitable for licensing.

⁶⁰ Sixth Report and Order, at ¶¶ 152-165.

⁶¹ Id., ¶164.

Channel 69 DTV transmitter in close proximity to adjacent-channel land mobile facilities would not permit "full accommodation" or "service replication," and thus fails to satisfy the Commission's own criteria.

Information regarding the proximity of specific stations to land mobile transmitters is readily available in the Commission's records. Indeed, a simple review of the Commission's records indicates that numerous land mobile transmitters are located well within 10 miles of KRCA's transmitter site.⁶² Despite the available information demonstrating that use of Channel 69 is not viable for KRCA, the Commission neither offered an explanation of the assignment nor attempted a contrary factual determination that, in the Los Angeles market, the assignment of Channel 69 to a station essentially co-located with adjacent-channel land mobile operations is somehow viable.

Given the state of the record and the Commission's express policy objectives, the assignment of Channel 69 to KRCA is arbitrary and capricious. The record fails to support either the factual or policy conclusions necessary for the assignment of Channel 69 to KRCA, and, therefore, the Commission cannot provide a rational basis for its decision.⁶³ Accordingly, the Commission must undertake additional proceedings to modify KRCA's DTV channel assignment to specify a usable channel.

⁶² See Exhibit 1, App. A.

⁶³ See Home Box Office, Inc. v. FCC, 567 F.2d 9, 36-43 (D.C. Cir. 1977) (rules which are not supported by the factual record are invalid).

III. THE EXCLUSION OF KRCA FROM OBTAINING A VIABLE DTV CHANNEL IS ARBITRARY AND CAPRICIOUS.

By failing to provide KRCA a viable channel, the DTV allotment plan in the Los Angeles market effectively provides at least one fewer channel than there are eligible stations. Although the Commission has outlined the technical parameters that it would use to assign channels to individual stations⁶⁴ and the priority levels of permittees and licensees,⁶⁵ it did not propose a process to select among equivalently eligible stations when one or more could not be awarded a DTV channel in a certain market. If the Commission's DTV allotment plan cannot provide "full accommodation" for all eligible stations, then the Commission must propose, seek comment on, adopt and properly apply a rational selection procedure, rather than arbitrarily selecting certain stations not to receive a viable DTV channel.

In this circumstance, fundamental fairness requires that the Commission either modify the DTV allotment plan for Los Angeles to accommodate all eligible stations or institute and apply a procedure for selecting which of the eligible stations would receive a DTV channel assignment. In this, as with any decision on the record, the Commission is obligated to examine all relevant data and to

⁶⁴ See Sixth Report and Order, at ¶ 90.

⁶⁵ See id., ¶ 8.

articulate a rational explanation for its decision based on the material before it.⁶⁶ The Sixth Report and Order clearly does not comply with this standard because it fails to recognize the nonviability of the assignment of DTV Channel 69 to KRCA and fails to explain why KRCA -- as opposed to other equally eligible stations in the market -- was not awarded a viable DTV channel.

The Commission's obligation in this respect is akin to that articulated in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). In Ashbacker, the Supreme Court held that, although the Commission has authority to grant a broadcast station application without a hearing, it may not lawfully do so where the grant would effectively deny a mutually-exclusive application. In this proceeding, KRCA has been denied a viable DTV channel as a result of the exclusive assignment of all apparently viable channels to others.

In conferring licenses, the Commission must use a rational selection procedure among the eligible applicants whether there is only one license for multiple applicants⁶⁷ or "n minus 1" licenses for "n" applicants.⁶⁸ The Commission

⁶⁶ See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Florida Cellular Mobil Communications Corp. v. FCC, 28 F.3d 191, 197 (D.C. Cir. 1994).

⁶⁷ See Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).

⁶⁸ See Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service, 9 FCC Rcd 5936, 5963-5972 (1994) (discussing selection procedure to be used to award licenses where spectrum plan could accommodate only five of six applicants).

has not articulated such a procedure in this proceeding.⁶⁹ If the Commission cannot modify the allotment plan for the Los Angeles market to achieve "full accommodation," it should not accept any DTV channel applications for the Los Angeles market until it undertakes a further NPRM to determine what procedure will be used to select among eligible licensees.

IV. THE APPLICATION OF THE COMMISSION'S CORE SPECTRUM POLICY TO KRCA IS CONTRARY TO THE COMMUNICATIONS ACT AND THE APA.

The Commission's decision to assign to KRCA, whose NTSC assignment is Channel 62, a DTV channel outside the core spectrum imposes a substantial and unequal burden on KRCA.⁷⁰ In the Los Angeles market, KRCA is the only broadcast station that does not have at least one channel assignment within

⁶⁹ In the case of Puerto Rico, the Commission explained the procedure it used to assign DTV channels where there were not enough DTV channels for the eligible stations. See Sixth Report and Order, note 367. The Commission identified operating stations as receiving priority, and ultimately gave only two DTV allotments to one community with three NTSC stations. Unless a viable assignment is made to KRCA, the Los Angeles market presents a similar situation, and yet, the Commission apparently failed to apply the same priorities in assigning DTV channels.

⁷⁰ The Sixth Report and Order (¶¶ 76-83) affirmed the Commission's proposal to relocate all television channels to a core spectrum and to initiate a separate proceeding to provide for the early recovery of channels 60 to 69. While KRCA is not seeking reconsideration of the Commission's core spectrum policy, it strongly objects to the Commission's failure to provide it with at least one core spectrum channel assignment.