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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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To: The Commission

MOTION TO STRIKE AND RESPONSE TO "REPLY TO OPPOSITION TO SUPPLEMENT TO PETITION FOR RECONSIDERATION"

Univision Communications Inc. ("Univision"), by its attorneys, hereby moves to strike, or alternatively, to respond to, the "Reply to Opposition to Supplement to Petition for Reconsideration" filed by America 51, L.P. ("America 51"), permittee of KAJW(TV), Tolleson, Arizona, in the above-referenced proceeding.[1/]

Background

Univision owns and operates low power television ("LPTV") station K52AO, Tucson, Arizona. It is the most popular Spanish-language television station -- full power or low power -- serving Tucson. K52AO provides service to the over a quarter of a million Hispanics that reside in Tucson.[2/] See SMI's MarketQuest, 1996; Tucson Nielson NSI Metro Ratings, July 1997.

1/ Good cause exists for the Commission to accept this filing for, as discussed herein, Univision only recently learned of America 51's unauthorized pleading because America 51 failed to serve Univision with a copy of the document.

2/ Between 1990 and 1996, Tucson's large Hispanic population grew by 25% and, between 1996 and 2000, Tucson's Hispanic population growth is expected to more than double non-Hispanic growth. See SMI's MarketQuest, 1996.

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As raised in Univision's Petition for Reconsideration filed in this proceeding, the Commission's allotment of DTV channel 52 to KAJW will displace K52AO and threatens to deprive Tucson of Univision's top-rated Spanish-language programming. To avoid this, Univision proposed in its June 13, 1997 Petition for Reconsideration that KAJW be allotted DTV channel 47. However, as set forth in Univision's August 22, 1997 Supplement to Petition for Reconsideration ("Supplement"), the release of OET Bulletin No. 69 allowed Univision to determine that DTV channel 53 was more suitable for KAJW's DTV operations.

Univision's Supplement was opposed by Brooks Broadcasting, LLC ("Brooks"), the permittee of KASW(TV), Phoenix, Arizona, because the allotment of DTV channel 53 to KAJW would cause KASW de minimis interference over about fifteen square kilometers of its coverage area. In order to avoid even this negligible level of interference, Univision filed a reply to Brooks' Opposition which provided engineering indicating that the allocation to KAJW of either DTV channel 38, 53, 55 or 56 would, at a minimum:

- Provide over 100 percent replication of KAJW's authorized NTSC coverage area and population;
- Significantly decrease predicted interference to KAJW's NTSC coverage;
- Protect K52AO from displacement; and
- Cause no new interference to any NTSC or DTV assignment.[3]

Univision Reply, Exhibit 1 at 3.

Recently, Univision became aware of a "reply" filed by America 51 purportedly responding to Brooks' Opposition to Univision's Petition for Reconsideration Supplement. The America 51 reply stated that the Commission should reject any change to KAJW's DTV allotment and, accordingly, "the Commission should deny Univision's petition for

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[3] The minimal amount of interference DTV channel 53 would cause to KASW falls far below the amount predicted for most other NTSC stations in the Commission's Table of Allotments. See Univision Reply, Exhibit 1.

reconsideration and the supplement thereto." America 51 Reply at 5. Inexplicably, this pleading was not served on Univision, nor was Univision listed on the Certificate of Service.

I. The America 51 "Reply" Should be Stricken as an Unauthorized Pleading Because It was Filed Late, Improperly Served, and Inaccurately Titled a "Reply"

Even a cursory review of America 51's filing reveals that the document is an extremely untimely opposition to Univision's Petition for Reconsideration and Supplement thereto. As succinctly summarized by the concluding sentence of America 51's pleading, "America 51 supports Brooks'Opposition to the extent stated herein, and the Commission should deny Univision's petition for reconsideration and the supplement thereto." America 51 Reply at 5. This concluding sentence accurately reflects the America 51 filing as a whole, which focuses on opposing Univision and mentions the Brooks Opposition only in passing.

As an opposition to Univision's Petition for Reconsideration and Supplement thereto, America 51 was required to timely file its pleading by the opposition deadline and serve a copy on Univision. America 51 did neither. Instead, America 51 missed the deadline for oppositions and then, under the guise of a reply pleading, filed its opposition late. Moreover, because the Brooks Opposition itself was filed late, America 51's efforts to bootstrap its way into this proceeding by casting its opposition as a reply to Brooks have resulted in a pleading being filed long after the date by which even reply pleadings were due in this proceeding. Univision has been prejudiced by that untimeliness and lack of service, requiring it to exercise an intense level of vigilance and to expend additional resources long after the conclusion of the pleading cycle in order to protect its interests and the interests of Spanish-speaking viewers in Tucson.

Considering that America 51's filing completely opposes Univision's position and specifically requests that the Commission deny Univision's Petition for Reconsideration and

Supplement thereto, the Commission cannot countenance America 51's deliberate decision (as evidenced by its certificate of service) not to serve a copy of its filing upon Univision. America 51's filing is clearly not a reply but an opposition, and accordingly, pursuant to Section 1.429(f) of the Commission's Rules, America 51 should have served a copy of its filing on Univision. Merely titling an opposition as a "reply" should not allow a party to evade the Commission's filing deadlines and service requirements.

The Commission has in the past stricken an opposition where the party attempted to inappropriately file it as a "reply." In Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), 59 R.R.2d 278, 282 (1985) ("Second Computer Inquiry"), the Commission struck a "reply" as an improper pleading because "although styled as a reply to the AT&T Opposition, and purportedly filed in a timely manner under Section 1.429 of the Commission's Rules, the text of NATA's "Reply" addresses and opposes the merits of the OTC's Petition for Clarification." Looking beyond the title of the pleading and judging its merits, the Commission concluded that "the 'Reply' is an untimely filed Opposition to the Petition for Clarification, submitted in a manner which prohibits the OTC from responding to it. Accordingly, we will grant the OTC's Motion to Strike NATA's Reply Comments on the basis that the NATA filing is an improper pleading." Id. The case here is identical. The "reply" of America 51 fundamentally opposes Univision's Supplement and refers to the Brooks Opposition only in passing. In fact, both the stricken "reply" in the Second Computer Inquiry and America 51's "reply" conclude by asking the Commission to deny the respective petition, and not the opposition to which the "reply" purportedly responds. Id. Accordingly, as was done to the similar pleading in the Second Computer Inquiry, the

Commission should strike America 51's pleading as an untimely and improperly served opposition.

II. The Position Taken in America 51's "Reply" Conflicts with Commission Policy and Precedent and Is Contrary to the Public Interest

In its reply, America 51 contends that the Commission should not assign a new DTV channel to its unbuilt station, KAJW. In support, America 51 argues that (1) as LPTV stations operate on a secondary basis, "there is no regulatory basis for changing KAJW's Tolleson DTV allotment to accommodate K52AO" and (2) America 51 "has already set in motion the process of building and operating on DTV channel 52 [and] . . . . Any change to KAJW's DTV allocation at this point would disrupt America 51's ability to convert to DTV on an expedited basis . . . ." America 51 Reply at 2-3. Neither of these arguments is tenable.

First, the Commission's primary mandate to serve the public interest provides the regulatory basis for changing KAJW's DTV allotment. Any of Univision's alternative DTV allotment proposals for the Tucson, Arizona market would satisfy the Commission's express desire to "minimize the impact of [its] DTV allotment and spectrum recovery proposals on low power TV operations." Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 7 CR 994, 1026 (1997). Paxson Communications LPTV, Inc., a corporate affiliate of the 49% interest holder in KAJW, has stated in this very proceeding that "whatever meaning 'secondary' status has had for low power stations, it surely cannot include the effective obliteration of low power operations." See Petition for Reconsideration and Partial Clarification Submitted by Paxson Communications LPTV, Inc. at 3.

Second, there is no merit to America 51's claim that it has proceeded so far in building its DTV facilities that any change to its allotment at this stage would "disrupt [its] ability to convert

to DTV on an expedited basis." America 51 Reply at 3. As an initial matter, America 51 has provided no documentation to support this contention, nor mentioned a single specific action (i.e., ordering a channel-specific antenna) that would be affected by allotment of a different DTV channel.[4] In fact, America 51 has not provided any explanation as to why a change in its DTV channel allotment would slow its DTV implementation. It has been seven years since the Commission affirmed the grant of KAJW's construction permit and the NTSC station itself has still not been built.[5] According to America 51's most recent construction permit extension request, filed in July 1997, it was still awaiting delivery of its NTSC transmission equipment. Given this, it is difficult to imagine that its DTV equipment has already been ordered, manufactured, and cannot be modified for use on a nearby channel with minimal effort or sold by the manufacturer to one of the many other stations assigned to DTV channel 52. According to the Commission's records, KAJW has not yet even filed for its DTV authorization. Moreover, because one of the DTV channels proposed by Univision for KAJW is in the "core" spectrum, it is quite possible that this minor pre-construction change today will avoid the need for America 51 to modify an already-built station at the end of the DTV transition to move it back into the "core" spectrum.

The Commission should not allow America 51's pleading to obscure the fact that Univision has provided uncontested engineering demonstrating that a minor change in the DTV

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[4] Significantly, Paxson Communications Corporation ("Paxson"), the 49% shareholder of KAJW, specifically requested in this proceeding a power increase or modification of KAJW's DTV facilities. See Paxson Petition for Reconsideration at 12. With such a request pending, it is unlikely that America 51 would commence construction of KAJW's DTV facilities in earnest, at least until it knows what sort of DTV facilities the Commission will authorize for the station in response to Paxson's request.

[5] See Doylan Forney, 5 FCC Rcd 5423 (1990).

allocation of KAJW will preserve the major source of Spanish-language programming in a market with over a quarter of a million Hispanics, and that it will do so without adversely affecting any other broadcaster. In fact, reallocating KAJW a new DTV channel as requested by Univision will provide over 100 percent replication of KAJW's authorized NTSC coverage area and population and significantly decrease predicted interference to KAJW's NTSC coverage that would be caused by the channel 52 DTV allocation. These improvements to KAJW's signal, permitting America 51 to serve more people while preserving existing Spanish-language service in Tucson, serve the public interest. Even if America 51 had already taken concrete steps to initiate DTV service on channel 52, the public interest equities overwhelmingly support a grant of Univision's Petition for Reconsideration and Supplement thereto. Any minor planning expenses incurred by America 51 in reliance on a contested and non-final table of DTV allotments cannot outweigh the Spanish-speaking public's need for continued service in the Tucson area.

Conclusion

For the foregoing reasons, Univision hereby urges the Commission to strike the reply filed by America 51 and to protect the service provided by LPTV station K52AO by changing the Table of Allotments as requested in Univision's Supplement to Petition for Reconsideration.

Respectfully submitted,

UNIVISION COMMUNICATIONS INC.

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Dated: November 7, 1997

CERTIFICATE OF SERVICE

I, Renee Williams, a secretary to the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., hereby certify that a true copy of the foregoing "**MOTION TO STRIKE AND RESPONSE TO "REPLY TO OPPOSITION TO SUPPLEMENT TO PETITION FOR RECONSIDERATION""** was sent this 7th day of November, 1997, by first class United States Mail, postage prepaid, to the following:

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