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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 20, 1998

BY HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: Advanced Television Systems and Their Impact
Upon the Existing Television Broadcast Service
MM Docket No. 87-268

Dear Ms. Salas:

Transmitted herewith on behalf of Pappas Telecasting of America, A California Limited Partnership, are an original and four copies of its "Petition for Reconsideration," which is being filed in response to the Commission's *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, FCC 98-24 (released February 23, 1998), in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

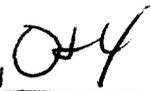
Very truly yours,



Andrew S. Kersting
Counsel for Pappas Telecasting of America,
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BEFORE THE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

PETITION FOR RECONSIDERATION

Pappas Telecasting of America, A California Limited Partnership ("Pappas"), by its counsel, hereby seeks reconsideration of the Commission's *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, FCC 98-24 (released February 23, 1998) ("*MO&O*"), in the above-captioned proceeding. In support of this petition, the following is stated:

I. Background.

On July 22, 1996, Pappas filed a petition for rulemaking requesting the Commission to allot Channel 38 to Vergennes, Vermont, as that community's first local television service. On the same date, Pappas filed an accompanying application for a new television station to operate on Channel 38 at Vergennes, Vermont.¹

In its *Sixth Report and Order* in this proceeding, 12 FCC Rcd 14588 (1997), the Commission noted that, in its *Sixth Further Notice of Proposed Rulemaking*, it stated that it would not accept

¹ Pappas' rulemaking petition and accompanying application included a request for waiver of the Commission's order in *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987), 52 Fed.Reg. 28346 (1987) ("Freeze Order"). Pappas' application, however, specifies a transmitter site that is located outside the Boston freeze zone.

additional applications for new NTSC stations that were filed after September 20, 1996.² The Commission also noted, however, that it would continue to process applications already on file and those that were filed on or before September 20, 1996, because the Commission did not believe that these applications would have a “significant negative impact” on the development of the DTV Table of Allotments. *Sixth Report and Order*, 12 FCC Rcd at 14635, ¶104. The Commission further noted that it also stated in its *Sixth Further Notice* that it would continue to accept petitions for rulemaking proposing to amend the existing TV Table of Allotments in Section 73.606(b) of the rules through July 25, 1996. *Id.* at ¶105. Any petitions that were on file and any rulemaking proceedings that were pending on that date would be addressed on a case-by-case basis, taking into account their impact on the DTV Table.³ *Id.*

II. The MO&O Failed to Protect Pappas’ Pending NTSC Rulemaking Petition and Accompanying Application.

In its recent *MO&O*, the Commission repeatedly confirmed that it fully intended to protect pending NTSC applications filed by September 20, 1996. *See, e.g., MO&O* at ¶¶571, 575, 608, 627. Nevertheless, the DTV Table set forth in the *MO&O* fails to protect Pappas’ pending rulemaking petition seeking the allotment of NTSC Channel 38 to Vergennes, Vermont as well as Pappas’ pending application for that facility. As stated above, Pappas’ rulemaking petition and

² *See Sixth Further Notice of Proposed Rulemaking*, 11 FCC Rcd 10968, 10992 ¶60 (1996) (“*Sixth Further Notice*”). Specifically, the Commission stated that it would not accept additional applications for NTSC stations that were filed after 30 days from the publication of the *Sixth Further Notice* in the Federal Register. A summary of the *Sixth Further Notice* was published in the Federal Register on August 21, 1996. *See* 61 Fed.Reg. 43209 (1996).

³ The Commission also noted that, in those pending cases in which a new NTSC channel is allotted, it would make an exception to its September 20, 1996, deadline and accept applications for the new stations. *Sixth Report and Order*, ¶105.

accompanying application for the Channel 38 facility at Vergennes were on file with the Commission prior to the respective July 25 and September 20, 1996, filing deadlines. The Commission's failure to protect the proposed allotment of Channel 38 at Vergennes and Pappas' pending application for that facility is flatly inconsistent with the statements the Commission made in its *Sixth Further Notice* and *Sixth Report and Order*, and the Commission neglected to provide any explanation for its failure to consider Pappas' pending proposals in establishing the DTV Table. Therefore, for this reason alone, the DTV Table contained in the *MO&O* should be revised to accommodate the proposed NTSC allotment of Channel 38 at Vergennes, Vermont, and Pappas' pending application for that facility.

III. The FCC Should Coordinate With Canada to Arrange to Have One of the Many Available Vacant Canadian NTSC Channels Substituted for the DTV Channel 38 Allotment at Plattsburgh, New York.

In this case, the proposed NTSC allotment of Channel 38 at Vergennes, Vermont, is short-spaced to a co-channel DTV allotment for noncommercial educational Station WCFE-TV, Plattsburgh, New York. Assuming, *arguendo*, the Commission should determine that its failure to consider Pappas' pending rulemaking petition and accompanying application for a Channel 38 NTSC facility at Vergennes does not constitute a sufficient basis, in itself, for granting reconsideration of the DTV allotment of Channel 38 at Plattsburgh, New York, the Commission has stated throughout this proceeding that it intends to give broadcasters the flexibility to develop alternative allotment plans where they do not result in additional interference to other stations and/or allotments. In order to accommodate Pappas' pending rulemaking petition proposing the NTSC allotment of Channel 38 at Vergennes, Pappas respectfully requests that the Commission, in its coordination efforts with Canada, arrange to have one of the many available vacant Canadian NTSC channels substituted for

the existing DTV Channel 38 allotment at Plattsburgh. As noted in the attached engineering statement, a preliminary study showed that there are many vacant Canadian NTSC channels available, and that an abundance of DTV channels would remain available to Canada if one of the vacant NTSC channels were substituted for DTV Channel 38 at Plattsburgh.

IV. The Substitution of an Alternative DTV Channel at Plattsburgh, New York in Order to Accommodate the Proposed NTSC Allotment of Channel 38 at Vergennes Would Provide Substantial Public Interest Benefits.

In this case, the substitution of an alternative DTV channel at Plattsburgh, New York in order to accommodate the proposed NTSC allotment of Channel 38 at Vergennes, Vermont would provide the community of Vergennes with its first local television service, which would promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various states and communities. 47 U.S.C. §307(b). See *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing goal of Communications Act to “secure the maximum benefits of radio to all the people of the United States”); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to “secure local means of expression”). In addition, the proposed allotment would promote the second television allotment priority established in the *Sixth Report and Order* in Docket Nos. 8736 and 8975, 41 FCC 148, 167 (1952), of providing each community with at least one television broadcast station.

Furthermore, the requested change in the DTV Table of Allotments would serve the public interest by promoting the emergence and development of new networks.⁴ As a far back as a 1941,

⁴ Pappas’ application for the Vergennes facility was filed in tandem with a series of other applications which, together, cover many of the top 100 markets in which there are no full power (continued...)

when the Commission adopted its Chain Broadcasting Rules,⁵ a primary goal of the Commission was to remove barriers that would inhibit the development of new networks. The Commission explained that the Chain Broadcasting Rules were intended to “foster and strengthen broadcasting by opening up the field to competition. An open door to networks will stimulate the old and encourage the new.” *Report on Chain Broadcasting* at 88.

The successful emergence of new networks, however, depends in large part upon their ability to attract and retain local affiliates, which is the life blood of any national network. Moreover, for emerging networks, it is critical that they be afforded the opportunity to compete for affiliates as quickly as a possible. Indeed, the large financial losses that confront any national network in its initial years of operation can be stemmed only by obtaining additional affiliates to carry the emerging network’s programming. In many markets, however, there simply are not enough stations

⁴(...continued)

television stations to primarily affiliate with The WB Television Network (“The WB”), with whom these respective applicants have existing affiliations. Although there is no commitment on the part of either the applicants or The WB to enter into an affiliation agreement, The WB has indicated a willingness to enter into an affiliation agreement with these applicants in the event they are successful in acquiring a station in their respective communities. It should be made clear, however, that the public interest benefit of promoting an emerging network will be achieved regardless of which applicant ultimately acquires the construction permit. The important element is that the NTSC allotment be preserved and that the station become operational and available for affiliation. By the same token, the public interest benefit of promoting emerging networks is served regardless of whether it is The WB or some other new network that gains a primary affiliate in a top 100 market.

⁵ See *Report on Chain Broadcasting*, Commission Order No. 37, Docket 5060 (May 1941) at 88 (“*Report on Chain Broadcasting*”); *Amendment of Part 73 of the Commission’s Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d 318, 333 (1970); *Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. §73.658*, 5 FCC Rcd 3211, 3211 n.9 (1990), (citing, Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation* (Vol. 1 Oct. 1980)), waiver extended, 6 FCC Rcd 2622 (1991).

to provide affiliates for emerging networks in addition to those of the more established networks. Thus, the Commission should make the requested change in the DTV Table which, by permitting an additional broadcast station to serve the Burlington-Plattsburgh television market, will help promote emerging networks.

Although the Commission has noted that it is not its function to assure competitive equality in any given market, it has acknowledged its “duty at least to take such actions as a will create greater opportunities for more effective competition among the networks in major markets.”⁶ The history of the Commission’s financial interest and syndication (“finsyn”) rules provides a good illustration of how the Commission has remained steadfast in its commitment to the goal of nurturing new networks. In 1970, when the Commission first adopted the finsyn rule, it noted that “[e]ncouragement of the development of additional networks to supplement or compete with existing networks is a desirable object and has long been the policy of this Commission.” *Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d at 333. More than two decades later, when the Commission first relaxed and later eliminated the finsyn rule, it did so at the behest of the then-newest network entrant, Fox.⁷ The FCC’s goal of fostering new networks also is reflected in

⁶ See, e.g., *Television Broadcasters, Inc.*, 4 RR 2d 119, 123 (1965) (Commission granted a short-spacing waiver to an ABC affiliate based largely upon its finding that the station had inferior facilities compared to those available to other national networks in the market, which resulted in a “serious competitive imbalance”), *recon. granted in part on other grounds*, 5 RR 2d 155 (1965); *New Orleans Television Corp.*, 23 RR 1113 (1962) (short-spacing waiver granted for the purpose of assuring the existence of a third truly competitive station in the market, thereby making available competitive facilities to the networks).

⁷ Pending its review of the finsyn rule, the Commission granted Fox’s request for a limited waiver of the rule. *Fox Broadcasting Co.*, 5 FCC Rcd at 3211 (1990). As a Commissioner Duggan explained, “Fox has been a bright and innovative force. The existence of
(continued...) ”

the Commission's relaxation of its multiple ownership rules. *See Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 FCC 2d 17, 45 (1984) (relaxing restrictions on multiple ownership advances the Commission's diversity goal by providing alternatives to the three television networks).

The Commission also has crafted other rules and granted a variety of waivers designed to foster the development of new networks over the years. In 1967, for example, the Commission granted a waiver of the dual network rule to ABC, the then-new network entrant, in connection with ABC's four new specialized radio networks. Although operation of the four networks violated the dual network rule, the Commission nevertheless concluded that waiver of the rule was appropriate because ABC's proposal "merits encouragement as a a new and imaginative approach to networking." *Proposal of American Broadcasting Cos., Inc. to Establish Four New Specialized "American Radio Networks,"* 11 FCC 2d 163, 168 (1967). The Commission explained that it was "of more than usual importance to encourage to the extent possible innovation and experimentation in the operation of networks." *Id.* at 165.

⁷(...continued)

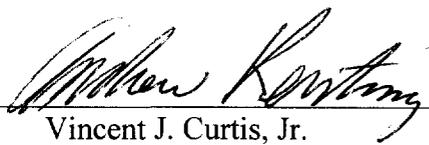
a fourth network is certainly in the public interest. . . . Fox deserves to be encouraged." *Broadcasting & Cable*, May 7, 1990, ed., p. 28; *accord, Application of Fox Television Stations, Inc. for Renewal of License of Station WNYW-TV, New York, New York*, 10 FCC Rcd 8452, 8528-29 (1995) (Commissioner Quello stating in his concurring statement, "I believe . . . that the creation of the fourth network was a compelling public interest goal."). Similarly, in deciding to phase out the finsyn rule entirely in 1995, the Commission evaluated the rule's impact on "[t]he overall business practices of emerging networks, such as a Fox, in the network television and syndication business . . . [and t]he growth of additional networks, including the development of Fox and its position vis-à-vis the three major networks." *Evaluation of Syndication and Financial Interest Rules*, 10 FCC Rcd 12165, 12166 (1995).

As these examples illustrate, the Commission has remained steadfast in its commitment to the goal of encouraging new networks. Indeed, the Commission has consistently concluded for more than fifty years that the development of new networks -- with the accompanying diversity of viewpoint that they bring -- serves the public interest. In order for emerging networks to survive, however, it is imperative that they be afforded the opportunity to compete for additional local affiliates. The requested change in the DTV Table of Allotments will help facilitate the Commission's longstanding interest in promoting the emergence of new networks by providing an additional broadcast station with which to affiliate in the Burlington-Plattsburgh market.

WHEREFORE, in light of the foregoing, Pappas Telecasting of America, a California Limited Partnership, respectfully requests that the Commission GRANT reconsideration of its *MO&O* to the extent indicated herein by substituting an alternative DTV channel for the existing Channel 38 allotment at Plattsburgh, New York.

Respectfully submitted,

PAPPAS TELECASTING OF AMERICA,
A CALIFORNIA LIMITED PARTNERSHIP

By: 

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April 20, 1998
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Engineering Statement
Vergennes VT MO Channel 38
Wes, Inc. Broadcast Consultants

I performed a preliminary NTSC and DTV study which indicated that a substitute DTV channel for 38 Plattsburgh, NY could be co-ordinated with Canada by shifting some of the vacant NTSC channels and that an abundance of DTV channels would still be available to Canada.


4/17/98

Pete E Myrl Warren, III Date
Whose qualifications are a matter of
record with the Commission

CERTIFICATE OF SERVICE

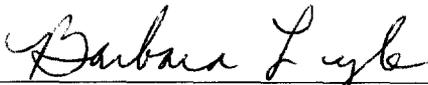
I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C, hereby certify that on this 20th day of April, 1998, copies of the foregoing "Petition for Reconsideration" were hand delivered or mailed first-class, postage pre-paid, to the following:

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