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

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MM Docket No. 87-268

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

**Advanced Television Systems and Their
Impact Upon the Existing Television Broadcast Service**

(Fredericksburg, Texas)

PETITION FOR PARTIAL RECONSIDERATION

Corridor Television, L.L.P.

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SUMMARY

Corridor Television, L.L.P. ("Corridor"), permittee of KBEJ(TV) in Fredericksburg, Texas, petitions the Commission to reconsider paragraphs 23-27 of the *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders* in MM Docket No. 87-268, in which the Commission revokes its earlier decision to give "particular consideration" for a paired digital television ("DTV") license to parties who had filed NTSC applications prior to October 24, 1991. There was no justification in the Telecommunications Act of 1996 for the Commission to delete the DTV allotment initially proposed for Channel 2 in Fredericksburg, Texas. Following that action, however, Corridor had been lulled into believing that the Commission would grant it "particular consideration" as a permittee whose application had been filed prior to October 24, 1991 and granted after April 3, 1997. Indeed, Corridor filed a Petition for Rulemaking in July 1998, seeking a paired DTV allotment on the basis of this language. It is arbitrary and capricious for the Commission to now revoke that promise.

It is particularly egregious to Corridor since its Joint Request for Approval of Settlement Agreement was filed on September 19, 1996, well before the April 3, 1997 DTV cutoff date. The grant of Corridor's permit for KBEJ was within Commission control and it is only due to sheer coincidence that it was not granted prior to April 3, 1997. Accordingly, Corridor respectfully requests reconsideration of its eligibility for a paired DTV license in Fredericksburg, Texas.

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

TO: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Corridor Television, L.L.P. ("Corridor"), permittee of KBEJ(TV) in Fredericksburg, Texas, pursuant to FCC Rule § 1.429, hereby petitions the Commission for partial reconsideration of its "*Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*" in the referenced docket, released December 18, 1998 ("*Second MO&O*"). Specifically, Corridor petitions for reconsideration of Section III-B (paras. 23-27) in which the Commission revokes its earlier decision to give "particular consideration" for a paired digital television ("DTV") license to parties who had filed NTSC applications prior to October 24, 1991. Corridor is an "interested person" under FCC Rule § 1.429(a) in that its application for KBEJ(TV) was filed prior to October 24, 1991 and granted after April 3, 1997, when the initial DTV Table of Allotments was set. Accordingly, under FCC Rule § 73.624(a), Corridor is not considered eligible for a paired digital television ("DTV") license.

Pursuant to Section 1.429(b), the following new facts merit this Petition:

1) In the *Second MO&O*, the Commission stated for the first time that it would not grant paired DTV channels to parties who had NTSC applications pending since

prior to October 24, 1991, despite having stated previously that "particular consideration" would be given to such applicants. *Second MO&O*, ¶ 26.

2) On September 4, 1998, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission Order of August 4, 1997 in MM Docket No. 87-250 (FCC 97-268), which approved the settlement agreement that led to grant of the KBEJ construction permit to Corridor. *Frontier Broadcasting, Inc. v. F.C.C.*, No. 97-1530, slip op. (D.C. Cir. Sept. 4, 1998) ("*Frontier Broadcasting*"). Thus, grant of the construction permit to Corridor did not become final and unappealable until well after the time for filing petitions for reconsideration of the Commission's "*Memorandum Opinion & Order on Reconsideration of the Fifth Report and Order*," released February 23, 1998 ("*Fifth Report & Order Reconsideration*").¹

Additionally, FCC Rule § 1.429(i) provides that "any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such a modification, subject to reconsideration in the same manner as the original order." There can be no question but that the *Second MO&O* modified Commission policy relating to FCC Rule § 73.624(a) in deciding that applicants who had filed prior to October 24, 1991 would no longer be entitled to "particular consideration" for a paired DTV allotment. Indeed, in reliance on that prior policy, Corridor filed a petition for rulemaking on

¹ The *Fifth Report and Order Reconsideration* was published in the Federal Register on April 1, 1998, requiring any petitions for reconsideration to have been filed by May 1, 1998, four months prior to the Court of Appeals decision. The Court of Appeals decision did not itself become final until December 3, 1998, the last day on which a petition for certiorari could have been filed in the United States Supreme Court.

July 13, 1998, seeking a paired DTV allotment for its station in Fredericksburg, Texas. That petition has never been acted on by the Commission and remains pending.

Corridor hereby requests the Commission to reconsider that portion of the *Second MO&O* that effectively denies a paired DTV allotment to Corridor. There is nothing in Section 336 of the Telecommunications Act of 1996 ("1996 Act") that requires use of a cutoff date to determine eligibility for a DTV allotment. The Commission's decision in this regard is both arbitrary and capricious.

Background

Corridor's application for VHF NTSC Channel 2 in Fredericksburg, Texas was filed on December 19, 1986 under the name Global Information Technologies, Inc. ("Global"), FCC File No. BPCT-861219KG. Following a lengthy (and eventually frozen) comparative hearing, Global filed a Joint Request for Approval of Settlement Agreement on September 19, 1996 ("Joint Request"), contemplating Global's merger with another applicant for this station, Fredericksburg Channel 2, and dismissal of the remaining applications. The Joint Request was granted by the Commission by *Order* adopted July 28, 1997, *Global Information Technologies, Inc.*, 12 F.C.C.Rcd. 11808 (1997).² One of the dismissed applicants, Frontier Broadcasting, Inc., appealed this *Order* to the U.S. Court of Appeals for the D.C. Circuit. The Court of Appeals affirmed the Commission in a Judgment issued September 4, 1998. *Frontier Broadcasting, supra*. While this appeal was pending, a

² Through no fault of its own, Corridor missed the arbitrary April 3, 1997 cutoff date for a paired DTV allotment by less than three months. Since its Joint Request for Approval of Settlement Agreement was filed on and had been pending since September 19, 1996, the Commission could have acted on it prior to April 3, 1997. Thus, the Commission's own inaction has cost Corridor a paired DTV channel.

construction permit was granted to the merged entity (*i.e.*, Corridor) by Commission *Order* adopted December 19, 1997, FCC 97I-40. However, grant of the construction permit did not become final and unappealable until December 3, 1998, when the time passed for filing either a request for rehearing in the Court of Appeals or a petition for certiorari to the Supreme Court.

When the Commission first considered eligibility for DTV (formerly known as "advanced television" or "ATV") channels, initial eligibility was to be limited to existing broadcasters, defined as follows:

- (1) All full-service television broadcast station licensees;
- (2) permittees authorized as of the date of adoption of the *Notice* (October 24, 1991); and (3) *all parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded full-service television broadcast station licenses.*

Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 F.C.C. Rcd. 6924, 6930 (1992) (emphases added), citing *Second Report and Order/Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 7 F.C.C. Rcd. 3340, 3343 (1992). Since Corridor's application had been on file since December 19, 1986, Corridor clearly qualified for initial eligibility under the third criterion. Indeed, the Commission's proposed allotment table allotted DTV Channel 38 as a paired channel with Channel 2 in Fredericksburg, Texas. See *Sixth Further Notice of Proposed Rule Making* in MM Docket No. 87-268 ("*Sixth Further Notice*"), 11 F.C.C. Rcd. 10968, 11053 (Appendix B).

When the Commission released its final Table of Allotments just nine months later, however, the paired DTV allotment for Fredericksburg, Texas had been mysteriously

deleted from the Table. *See Sixth Report and Order* in MM Docket No. 87-268, 12 F.C.C. Rcd. 14588, Table 1 (1997). This deletion was apparently due to the fact that Corridor's application for Channel 2 had not yet been granted by the Commission, following the Commission's new interpretation of Section 336(a)(1) of the 1996 Act. That statutory section provides that the Commission:

should limit the initial eligibility for such [DTV] licenses to persons that, *as of the date of such issuance*, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both)

47 U.S.C. § 336(a)(1) (emphasis added). Interpreting the emphasized wording to refer to the date of issuance of the initial DTV Table of Allotments (a reading NOT mandated or even contemplated by the wording of the statute), the Commission deleted the paired DTV allotment originally proposed for Channel 2 in Fredericksburg, Texas, while stating in a footnote:

We will give particular consideration for assigning temporary DTV channels to new licensees who applied on or before October 24, 1991, given the reliance that these parties may have placed on rules we adopted before passage of the 1996 Act.

Fifth Report and Order in MM Docket No. 87-268, 12 F.C.C. Rcd. 12809, 12817, n. 26

(1997) (emphases added). Similarly, in the *Sixth Report and Order*, the Commission stated as follows:

We intend to give particular consideration to those parties who had applications for a construction permit on file as of October 24, 1991, who are ultimately awarded a full-service broadcast station license, given the reliance that these parties may have placed on the scheme we established before passage of the Telecomm Act.

Sixth Report and Order, n. 161.

The Commission's revised reading of Section 336 is baffling since the 1996 Act had not only been passed prior to the Commission's adoption of its proposed DTV Table of Allotments, but the Commission had even cited to Section 336 in determining that "all parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded full-service broadcast station licenses," would be eligible for a paired DTV channel allotment. *See Sixth Further Notice*, ¶ 10, n. 14.³

**A. Corridor Should Be Considered Eligible
for a DTV Allotment Under the 1996 Act**

The 1996 Act was signed into law on February 8, 1996. More than five months later, the Commission issued its *Sixth Further Notice*, which specifically referenced Section 201 of the 1996 Act, which contains 47 U.S.C. § 336, and which states in relevant part as follows:

If the Commission determines to issue additional licenses for advanced television services, the Commission --

³ Although the Commission's initially proposed DTV Table of Allotments assigned Channel 38 to Fredericksburg, Texas, the final Table of Allotments not only deleted that channel, but made other changes that currently do not allow for any paired channel in the core spectrum in Fredericksburg, Texas in compliance with the Commission's technical criteria. However, as specified in the Commission's *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* in MM Docket No. 87-268 ("*Sixth Report and Order Reconsideration*"), F.C.C. 98-24 (released Feb. 23, 1998), there are "189 other analog stations with out-of-core DTV allotments." *Id.*, ¶ 54. Accordingly, if it is too late to further modify the DTV Table of Allotments, the Commission may specify a DTV channel outside of the core spectrum, consistent with Congressional intent, Commission policy and the public interest. On July 13, 1998, Corridor filed a Petition for Rulemaking and accompanying waiver request with just such a proposal. This Petition remains pending, and its receipt has yet to be formally acknowledged by the Commission.

(1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both)

47 U.S.C. § 336(a)(1). The Commission did not then read that statutory section as requiring the DTV Table of Allotments to exclude allotments for pending applications. To the contrary, the Commission stated that its allotment approach would consider "eligible existing broadcasters" to include "all parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded full-service broadcast station licenses." *Sixth Further Notice*, ¶ 10.

Indeed, Section 336(a)(1) does not even mention the DTV Table of Allotments. Rather, it states that "initial eligibility for such [DTV] licenses" should be those who "are licensed to operate a television broadcast station or hold a permit to construct such a station (or both)" "*as of the date of such issuance.*" In other words, it is clear that Congress thought that DTV (or then, ATV) licenses should be issued initially only to licensees or permittees. There is no reason why the Commission could not have released a DTV Table of Allotments including a DTV allotment for all NTSC channels for which applications had been filed (since the Commission has decided not to license any currently vacant and unapplied for NTSC channels), in order to provide a DTV license to the NTSC permittee or licensee, once it is determined who that party will be. Thus, the Commission's originally proposed DTV allotment for Fredericksburg, Texas was not inconsistent with Section 336, since that DTV license would not be "issued" before the NTSC permit for Channel 2 was issued to Corridor.

Despite the Commission's logical interpretation of Section 336 in July 1996, that interpretation inexplicably changed by April 1997 when the *Fifth and Sixth Reports and*

Orders were adopted. The Commission now reads Section 336 as prohibiting any DTV allotments for NTSC channels where applications were still pending as of April 3, 1997. See *Fifth Report and Order Reconsideration*, ¶¶ 4-6.⁴ The Commission accomplished this by declaring that the DTV Table of Allotments has created a "single, paired license." *Fifth Report and Order*, ¶ 59. Thus, the Commission's current position is apparently that mere creation of the DTV Table of Allotments constitutes "issuance" of the DTV license for purposes of Section 336. *Id.*, ¶¶ 68-69. This is a legal fiction which has no basis in the statute or in Commission precedent. Each DTV channel will have a separate construction period, requiring the filing of an FCC Form 301, which must be followed by a license application on FCC Form 302. *Id.*, ¶¶ 71-75. Thus, under the Commission's tangled logic, it is ostensibly issuing two "licenses" for each DTV channel -- once in the Table of Allotments and again following Form 302 construction.

Since the only licensing scheme that existed prior to creation of the DTV Table was the traditional construction permit (Form 301)/license (Form 302) scheme, Congress was almost certainly referring to that licensing scheme in Section 336. Congress did not direct the Commission to issue two DTV "licenses" and could not have anticipated that the Commission would equate creation of the DTV Table of Allotments with "issuance" of the DTV license for purposes of Section 336 eligibility. Indeed, a plain reading of the statute makes clear that Congress did *not* anticipate that the Commission would consider the NTSC and DTV

⁴ In the *Fifth Report and Order Reconsideration*, the Commission finds one NTSC permittee "eligible" by virtue of the Commission's issuance of a construction permit "on April 2, 1997, one day before the adoption date of the *Fifth Report and Order*." *Id.*, ¶ 5. Thus, the Commission declares that permittee eligible by virtue of its holding of a construction permit "as of the date of issuance of the DTV licenses." *Id.*, ¶ 6.

channels to constitute a single license: (1) Section 336(a) refers to "*additional* licenses for advanced television services"; (2) Section 336(c) requires Commission recovery of "either the additional [DTV] license or the original license held by the licensee"; and (3) Section 336(f) requires evaluations within 10 years after the Commission "first issues additional licenses for advanced television services," evaluating the willingness of consumers to purchase DTV receivers and assessing alternative uses of the frequencies. It would have made no sense to tie consumer television receiver purchases to the date the DTV Table of Allotments is established, since Congress knew no stations would be broadcasting DTV on that date. Clearly, Congress was associating "licenses" with broadcasting following construction, as the Commission has always done before.

If Congress had wanted to limit eligibility to those who held licenses or construction permits as of the date of creation of the DTV Table, it would have used the word "determination" in place of "issuance" in Section 336(a)(1) to limit initial eligibility to licensees and permittees as of the date the Commission "determines to issue additional licenses for advanced television services . . ." (rather than the date the Commission "issues" those licenses, as Congress in fact provided).⁵

Clearly, the Commission interpreted Section 336 correctly in July 1996, when it created paired DTV allotments for NTSC channels for which applications were then pending, knowing that the DTV licenses would not be issued prior to issuance of the paired

⁵ Perhaps the Commission created the fiction of equating the DTV Table of Allotments with issuance of the DTV licenses for the very purpose of reducing the number of DTV channels needed. In any event, this was a unilateral policy determination (*i.e.*, not a legal requirement) that cannot be blamed on Congress.

NTSC construction permit or license, consistent with Section 336. As discussed above, there is no support in Section 336 for the Commission's unilateral decision to delete those DTV allotments. Thus, we urge the Commission to reconsider its reading of Section 336 and to recognize that it is not inconsistent with Section 336 to allot a paired DTV channel to Fredericksburg, Texas based on the application that had been pending for the NTSC channel there since 1986.

B. It Was Arbitrary and Capricious to Withdraw "Particular Consideration" for Applications Filed Prior to October 24, 1991

Following the Commission's perplexing interpretation of Section 336, Corridor had been relying on the "particular consideration" specified by the Commission in both the *Fifth and Sixth Reports and Orders*, on the basis of its application having been pending since prior to October 24, 1991. Certainly, beginning with the Commission's *Notice of Proposed Rule Making* in MM Docket No. 87-268, adopted on that date, until the Commission's release of the *Second MO&O* on December 18, 1998, Corridor had every reason to believe that, as the permittee of NTSC Channel 2 in Fredericksburg, Texas, it would be entitled to the same paired DTV allotment as any other TV station, including its competitors in the San Antonio and Austin, Texas markets. It was not until the release of the Commission's *Sixth Report and Order* in April 1997 that Corridor discovered the Commission's new interpretation of Section 336, resulting in deletion of the DTV allotment for Fredericksburg, Texas. However, Corridor received solace from footnote 161 in the *Sixth Report and Order* and from footnote 26 in the *Fifth Report and Order* that it would receive "particular consideration" as a

party whose application for this construction permit was on file as of October 24, 1991 and who was ultimately awarded a full service broadcast station license.

Indeed, Corridor's Joint Request for Approval of Settlement Agreement was filed on September 19, 1996, well prior to the Commission's adoption of the DTV Table of Allotments on April 3, 1997. That Joint Request was granted by the Commission on July 28, 1997, less than three months later. The timing of that grant was within the Commission's control and thus, it is only through sheer coincidence that Corridor failed to have a grant prior to April 3, 1997. Corridor is aware of only two other parties who had a TV application pending as of October 24, 1991 and whose applications have been granted since April 3, 1997.⁶ Thus, Corridor is in a relatively unique position and, even if other similarly situated TV applications (*i.e.*, those pending before October 24, 1991) are hereafter granted, there are certainly no floodgates to be opened that would require multiple new DTV allotments.

In reliance on the "particular consideration" promise by the Commission, Corridor filed a Petition for Rulemaking on July 13, 1998, proposing a paired DTV allotment for its station in Fredericksburg, Texas. In now determining that it will no longer grant "particular consideration" to permittees in Corridor's position, Corridor has had the rug pulled out from under it. The Commission's "particular consideration" language lulled Corridor into believing that a paired DTV allotment would be forthcoming despite the Commission's

⁶ The two other stations are in Avalon, California (Pappas) and Sheridan, Wyoming (SJL of Montana Associates Ltd. Partnership). Pappas refers to a third such party in Charlottesville, Virginia, but it does not appear that the Commission has acted on any application there yet. However, Lindsay Television, Inc., the applicant in Charlottesville, has apparently filed an appeal with the U.S. Court of Appeals for the D.C. Circuit on this issue, D.C. Cir. No. 98-1105.

perceived statutory constraints on allotting that channel prior to grant of the KBEJ CP, and Corridor relied on that language to mean what it said. The Commission's sudden and inexplicable change of policy in its latest reconsideration is clearly arbitrary and capricious and requires reconsideration.

CONCLUSION

The Commission's stated goal with respect to DTV is to "promote and preserve free, universally available, local broadcast television in a digital world," noting that "DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers." *Fifth Report and Order*, ¶ 5. Corridor believes it is entitled to a paired DTV allotment because (1) there is nothing in Section 336 precluding such an allotment and, indeed, even the Commission did not think Section 336 precluded such an allotment when the proposed DTV Allotment Table was adopted in July 1996; and (2) Corridor is in the relatively unique position of having an application pending on October 24, 1991 and granted after April 3, 1997, thus qualifying for the "particular consideration" that had been promised by the Commission in both the *Fifth* and *Sixth Reports and Orders*. The Commission's latest decision to revoke the "particular consideration"

promised to permittees such as Corridor is arbitrary and capricious and Corridor respectfully requests the Commission to reconsider its *Second MO&O* to this extent.

Respectfully submitted,

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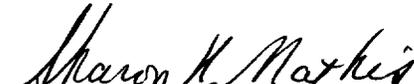
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February 26, 1999

CERTIFICATE OF SERVICE

I, Sharon K. Mathis, a secretary with the law firm of Cole, Raywid & Braverman, L.L.P., do hereby certify that copies of the foregoing "Petition for Partial Reconsideration" were sent via first class, postage prepaid, United States mail, this 26th day of February 1999, to the following:

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