

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Application of Section 73.606(b),)
Table of Allotments, Television)
Broadcast Stations and Section)
73.622(b), Table of Allotments)
Digital Television Broadcast)
Stations (Buffalo, New York))

MM Docket No. 98-175
RM-9364

To: The Commission

MOTION TO STRIKE "PETITION FOR EMERGENCY RELIEF"

Western New York Public Broadcasting Association ("Association"), licensee of noncommercial educational television Stations WNED-TV, Channel 17, and WNEQ-TV, Channel 23, Buffalo, New York, pursuant to Section 1.41 and 1.45(c) of the rules, requests the Commission to strike a self-styled pleading, "Petition for Emergency Relief" ("Petition"), filed in the above-referenced proceeding on November 30, 1999 by the Coalition for Noncommercial Media ("CNM"). In support thereof, the following is respectfully shown:

1. By a Report and Order released July 23, 1999 (DA 99-1442) in this proceeding, the Commission granted in full a petition for rule making filed by the Association to change the reserved channels at Buffalo, New York to reflect Channel *17 as the reserved channel and Channel 23 as the unreserved channel in the NTSC Table, and to reflect Channel *43 as the reserved channel and Channel 32 as the unreserved channel in the DTV Table. This Commission decision properly confirms that the Association's proposal involves merely a change in reserved channels and does not

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involve any form of dereservation of an existing reserved channel. It does not remove or add any channel and does not alter the total number of reserved channels in Buffalo. There was one reserved channel in Buffalo (Channel *23) and there is one reserved channel in Buffalo (Channel *17) as a result of the Commission's decision. The Commission also acknowledged that the Association under existing Commission policy could have converted its current operations on unreserved Channel 17 for commercial use by itself or others. This established policy likewise permits the same objective to be accomplished on an unreserved Channel 23.

2. CNM is one of four parties which filed comments opposing the Association's petition. It is a national group centered in Washington, D.C., and far removed from local public television interests and needs of the Buffalo region. On August 23, 1999, CNM filed an Application for Review of the decision in this proceeding. All responsive pleadings have been filed, the pleading cycle has ended, and the Association awaits action by the Commission to dismiss the Application for Review for all of the reasons set forth in its Opposition pleading.

3. Through its self-styled "Petition", CNM seeks to reopen the pleading cycle in this proceeding and thereby to delay final resolution of this proceeding. CNM's latest ploy is unauthorized, untimely and unwarranted. It should be summarily stricken by the Commission and rejected without further consideration.

4. The "Petition" contains nothing but a fresh reargument of its contentions in its comments below and in its pending Application for Review, including its fallacious claim that the Commission did not consider its "counterproposal" for mandatory reservation of two channels at Buffalo. That is demonstrably not the case. The Commission referred

to all of CNM's claims regarding the Buffalo proposal and carefully considered them (unlike CNM's proposals for reservation of all unreserved channels across the country being used for noncommercial operations, which were not "appropriately filed" in this Buffalo proceeding (Report and Order, fn. 2)). The Commission simply did not agree with CNM, because the public interest and applicable Commission case precedent persuasively dictated approval of the Association's proposals. CNM's shrill pleading, which claims a "preemption of Commission policymaking" by the Association ("Petition", p. 5) does not even recite the Commission's determination below or the carefully documented rationale which led to its decision. In particular, CNM in its "Petition" insists upon reiterating its specious claim that this proceeding implicates the Commission's determination in Deletion of Noncommercial Reservation of Channel *16, 482-488 MHZ, Pittsburgh, Pennsylvania, 11 FCC Rcd 11700 (1996), without any recognition whatsoever of the clear and correct holding in the Commission's decision that this proceeding does not relate to a dereservation. As the Commission's decision, par. 10, affirms, there are few pairs of public television stations co-owned in communities where, as here, one station is operating on an unreserved channel, and

These cases differ from situations in which there are two public stations in a market operating on reserved channels. Those [such as the Pittsburgh case, supra] would differ from the instant case, as they would require loss of a reserved channel in the community

5. The only conceivable item in CNM's self-styled "Petition" which is offered to justify its claimed "unexpected and dramatic new development" warranting a whole new round of pleadings is a reference to a trade press report in November 1999. That trade press report relates hearsay statements concerning possible assignment plans for an

unreserved Buffalo channel. In no way could or would the Commission rely upon any such trade press reports in its determinations, nor would such reports justify the reopening of the pleading process in this proceeding. The Commission has been well aware of the Association's intentions to sell its Station WNEQ-TV on an unreserved Channel 23 to a commercial entrepreneur (Report and Order, supra, par. 2) and its decision recognizes the right of the Association under established Commission policy to pursue such a course (Report and Order, supra, pars. 11, 13). Indeed, contrary to CNM's contention ("Petition", p. 2), and as the Commission readily acknowledges, (Report and Order, par. 3), the Association suffers financial distress through its current expensive and unproductive operation of Channel 23 which impedes the costly digital conversion and expansion of Channel 17. In the Commission's words (Report and Order, par. 3), "significant improvement in public broadcasting cannot realistically be achieved without the infusion of a substantial new funding source made possible by the proposed endowment after the reserved channel change."

6. CNM's self-styled "Petition" is grossly untimely. CNM, like the Commission, has been totally aware of the Association's perfectly proper plans for sale of Station WNEQ-TV on Channel 23 upon grant of the reserved channel exchange. Yet nowhere does CNM offer any explanation as to why the extraordinary relief it seeks now could not have been advanced and resolved at a much earlier stage of this proceeding. Instead, it proffers its "Petition" without any of the requisite showings in support of such an unusual request and long after (a) the Commission has approved the Association's petition, and (b) the pleading cycle in connection with CNM's Application for Review has been completed. Under these circumstances, serious questions are raised as to

whether its repetitious filing is primarily designed solely to cause further delay in this matter. CNM should not at this very late date be allowed to waste the time, energies and resources of either the Commission or the Association with its frivolous pleading.

WHEREFORE, for all of these reasons, CNM's "Petition" should be stricken. It should be immediately and summarily rejected by the Commission. At the same time, CNM's Application for Review, which advances no cognizable ground for objection to the Commission's decision in this proceeding, should be dismissed forthwith, so that the Association may proceed as rapidly as possible to implement its arrangement for the assignment of the Channel 23 license and for early activation of expanded and improved digital services for Station WNED-TV on Channel *17.

Respectfully submitted,

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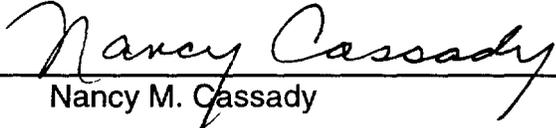
December 14, 1999

CERTIFICATE OF SERVICE

I, Nancy M. Cassady, Secretary in the law offices of Schwartz, Woods & Miller, do hereby certify that I have on this 14th day of December, 1999, sent by First Class United States mail, postage prepaid, copies of the foregoing **MOTION TO STRIKE "PETITION FOR EMERGENCY RELIEF"** to

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