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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of:	)	
	)	CS Docket No. 00-1
Amendment of Section 76.51	)	
of the Commission's Rules	)	
to include Merced and	)	
Porterville, California in the	)	
Fresno-Visalia-Hanford-Clovis	)	
Television Market	)	

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: January 4, 2000**

**Released: January 7, 2000**

**Comment Date: February 7, 2000**  
**Reply Comment Date: February 22, 2000**

By the Deputy Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. Before the Commission is a joint petition for rulemaking filed by Pappas Telecasting Incorporated ("Pappas"), licensee of television station KMPH(TV), Visalia, California, Retlaw Enterprises, Inc. ("Retlaw"), licensee of television station KJEO(TV), Fresno, California,<sup>1</sup> and San Joaquin Communications Corp. ("San Joaquin"), licensee of television station KSEE(TV), Fresno, California,<sup>2</sup> (collectively, the "Joint Petitioners") to amend Section 76.51 of the Commission's rules<sup>3</sup> to add the communities of Merced and Porterville, California to the hyphenated market of Fresno-Visalia-Hanford-Clovis (the "Fresno-Visalia" market). The petition was filed on March 16, 1988. Petitioner Pappas has recently expressed continued interest in the Commission acting on this petition. The Joint Petitioners seek to add Merced and Porterville to the Fresno-Visalia market apparently in order to be able to assert network non-duplication rights<sup>4</sup> and syndicated programming exclusivity<sup>5</sup> on a hyphenated market basis. The requested action would also permit the acquisition of broadcast territorial exclusivity rights against television station KNSO, Channel 51, licensed to Merced, and television station KPXF, Channel 61, licensed to Porterville.<sup>6</sup>

<sup>1</sup>Subsequent to the filing of the joint petition, Retlaw sold television station KJEO to Fisher Broadcasting, Incorporated.

<sup>2</sup>Television station KSEE is currently owned by KSEE License, Inc.

<sup>3</sup>47 C.F.R. § 76.51.

<sup>4</sup>See 47 C.F.R. § 76.92.

<sup>5</sup>See 47 C.F.R. § 76.151.

<sup>6</sup>See 47 C.F.R. § 73.658(m). At the time the petition was filed, television stations KNSO and KPXF were not in

2. In a related proceeding, Capital Cities/ABC, Inc. ("CC/ABC"), licensee of television station KFSN, Fresno, California, filed a request for amendment or waiver of Section 76.51 of the Commission's rules to add the community of Merced to the Fresno-Visalia market.<sup>7</sup> In this proceeding, we will also address CC/ABC's petition and consider it a request for amendment of the applicable rules as it raises the same issue raised by the Joint Petitioners with regard to the community of Merced.

## II. BACKGROUND

3. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m)<sup>8</sup> and helps define the scope of compulsory copyright license liability for cable operators.<sup>9</sup> Certain cable television syndicated exclusivity and network non-duplication rights are also determined by the presence of broadcast station communities of license on this list.<sup>10</sup> Some markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.<sup>11</sup> Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.<sup>12</sup>

4. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and

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operation but applications for construction permits had been filed with the Commission for television service in Merced and Porterville, respectively.

<sup>7</sup>See "Request for Commission Action on a Joint Petition for Rulemaking to Amend Section 76.51 of the Rules and Statement In Support of Capital Cities/ABC Application for Amendment of Section 76.51 or Waiver of Sections 76.92 and 76.151 in Merced, California," filed February 12, 1993.

<sup>8</sup>47 C.F.R. §73.658(m).

<sup>9</sup>Copyright laws provide local signal copyright liability to stations throughout their mandatory cable carriage area, that is, throughout the "area of dominant influence" or ADI of the market to which the station is assigned. We note that the Telecommunications Act of 1996, 47 U.S.C. § 534(h)(1)(C), provides that, effective January 1, 2000, a commercial broadcast television station's market shall be defined by Nielsen Media Research's designated market areas ("DMAs"). Although a station's market assignment generally reduces the importance of the Section 76.51 market list as a determinator of copyright liability, there remain situations as is apparently the case here where other factors warrant continued consideration relating to these type of proceedings.

<sup>10</sup> See 47 C.F.R. Part 76, Subpart F.

<sup>11</sup> See *CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974).

<sup>12</sup> See *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

logically, compete."<sup>13</sup>

5. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"),<sup>14</sup> which added Section 614 to the Communications Act of 1934,<sup>15</sup> requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's rules. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.<sup>16</sup>

### III. JOINT PETITION

6. The Joint Petitioners assert that, unless the communities of Merced and Porterville are added to the Fresno-Visalia market, new television services in those two communities will adversely affect the efficient functioning of the Fresno-Visalia non-network programming marketplace.<sup>17</sup> The Joint Petitioners claim that the new television services in Merced and in Porterville serve the same market as television stations in the Fresno-Visalia market. In support of their petition, the Joint Petitioners state that the community of Merced is located in Merced County, northwest of Fresno-Visalia and that the community of Porterville is located in Tulare County, southwest of Fresno-Visalia.<sup>18</sup> Joint Petitioners further state that both cities are located in the Fresno-Visalia ADI and the Fresno-Visalia DMA.<sup>19</sup> Joint Petitioners maintain that the Fresno-Visalia market is geographically well-defined with the Coast Ranges and the Sierra Nevada mountain ranges marking the western and eastern boundaries, respectively, and the Sacramento-Stockton-Modesto and the Bakersfield television markets marking the northern and southern boundaries, respectively.<sup>20</sup> Joint Petitioners further maintain that the Fresno-Visalia market consists of farming communities of the central San Joaquin Valley floor thus making agri-business the dominant force that binds the communities socially, culturally and commercially. Petitioners assert that, as a result of the common bond among the communities, all of the Fresno-Visalia ADI and DMA television stations serve common areas and compete with each other for revenues and audience share.<sup>21</sup>

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<sup>13</sup> See, e.g., *TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). See, also, *Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

<sup>14</sup> Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>15</sup> 47 U.S.C. §614.

<sup>16</sup> [R]equests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals. See *Report and Order* in MM Docket 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n. 50 (1993).

<sup>17</sup> Petition at 9.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

7. Joint Petitioners state that the actual signal coverage of the Fresno-Visalia market stations exceeds the predicted coverage by a substantial margin, which means that the actual common coverage areas of the stations are far greater than the predicted contours indicate.<sup>22</sup> Petitioners further state that the extended signal coverage is a result of the local television stations' locating their transmitting antennas on mountain peaks high above the San Joaquin valley and that, under such conditions, UHF television signals travel unobstructed well beyond their predicted contours.<sup>23</sup>

8. Joint Petitioners maintain that Porterville, which is part of the Fresno-Visalia ADI, is served by Fresno-Visalia market television stations KMPH and KSEE, both of which place a Grade A signal over Porterville.<sup>24</sup> Joint Petitioners maintain that the proposed television station would place a predicted Grade B signal over the communities of Clovis and Sanger and a significant portion of Fresno, a Grade A signal over Hanford, and a City Grade signal over Visalia.<sup>25</sup> Joint Petitioners further state that each of the Fresno-Visalia commercial television stations, except KMSG-TV, Sanger, is carried on the Porterville cable system and all are received off-air by the system.<sup>26</sup> Thus, the Joint Petitioners argue that the proposed television station belongs in the Fresno-Visalia market and would necessarily compete with other Fresno-Visalia stations for programming, advertising revenues, and audience share.

9. Similarly, with regard to Merced, Joint Petitioners state that the proposed television station would compete with television stations in the Fresno-Visalia market.<sup>27</sup> The Joint Petitioners state that the proposed television station would place a predicted Grade A signal over a significant portion of the communities of Fresno and Clovis and would place a predicted Grade B signal over the community of Sanger and the remaining portion of Fresno.<sup>28</sup> The Joint Petitioners concede that the Grade B signal would not cover the communities of Hanford and Visalia but maintain that the propagation characteristics of the terrain permits a strong signal in those communities.<sup>29</sup> The Joint Petitioners further state that each of the television stations in the Fresno-Visalia market places a predicted Grade B signal over Merced, with the exception of KMPH. With regard to KMPH, the Joint Petitioners assert that the station evidences significant viewership in Merced because it has a net weekly circulation of over 50 percent in Merced County.<sup>30</sup> The Joint Petitioners further assert that the three network affiliates, KFSN-TV, KJEO, and KSEE, and independent station KMPH, are carried on the Merced cable systems and are received off-air.<sup>31</sup> Thus, the Joint Petitioners conclude that the proposed television station would be part of the Fresno-Visalia

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<sup>22</sup>*Id.* at 6.

<sup>23</sup>*Id.* Petitioners state that the Commission granted KMPH a waiver of the Station Identification Rule based upon measurements that demonstrated that the KMPH actual city grade contour extended 42 miles further than the predicted city grade contour.

<sup>24</sup>*Id.* at 9.

<sup>25</sup>*Id.* at 10.

<sup>26</sup>*Id.* citing *Television & Cable Factbook*, 1987 Edition, B-115 and B-130.

<sup>27</sup>Petition at 11.

<sup>28</sup>*Id.*

<sup>29</sup>The petitioners state that the proposed transmitter site is 619 meters above the average terrain at Mt. Bullion, with no obstructions blocking reception of the signal in the Fresno-Visalia communities. *Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

market and would compete with other Fresno-Visalia market stations for programming, advertising revenues, and audience share.

10. In light of the foregoing, the Joint Petitioners maintain that the application of Section 73.658(m) of the Commission's rules to the subject Merced and Porterville stations will result in the fragmentation of the previously homogeneous non-network programming market in Fresno-Visalia. Joint Petitioners assert that the proposed new television stations in the communities of Merced and Porterville will adversely impact the non-network programming marketplace in Fresno-Visalia unless those communities are included in the Fresno-Visalia hyphenated market. The Joint Petitioners argue, therefore, that Section 76.51 of the Commission's rules should be amended to reflect the realities of the Fresno-Visalia market and insure that all competitors in that market are treated equally with respect to programming exclusivity.

#### IV. CC/ABC'S PETITION

11. CC/ABC, licensee of television station KFSN, Fresno, California, also requests that the Commission add the community of Merced to the Fresno-Visalia market for, among other reasons, purposes of the network non-duplication and syndicated exclusivity rules.<sup>32</sup> CC/ABC maintains that Merced is geographically part of the greater Fresno area and shares common social, cultural, trade, and economic interests with other Fresno-Visalia market communities. UA Cable Systems of California ("UA") filed an opposition to CC/ABC's petition arguing that Merced is 55 miles southeast of Fresno and thus geographically distant, and that Merced is not in the same market as Fresno-Visalia.<sup>33</sup> To support its assertion that Merced and Fresno are in different markets, UA states that the two communities are in different areas according to data from the Metropolitan Statistical Areas ("MSAs") and the Rand McNally Map of Trading Areas (Trading Areas).<sup>34</sup> UA further states the television stations in the two communities do not compete for advertising revenues as evidenced by the fact that the *Merced Sun-Star* television update, which covers the community of Merced, did not include any advertisements for Fresno for the week of January 2-8, 1993.<sup>35</sup> Conversely, UA states that, KFSN's quarterly reports, which summarizes the Fresno station's newscasts, did not identify any newscast which specifically mentions issues or programs related to the community of Merced for the two year period 1990-1992 and does not serve the area.<sup>36</sup>

12. In its reply, CC/ABC maintains that KFSN expanded its news coverage of Merced beginning in 1991, assigned a reporter and news crew to cover Merced in 1992, and listed 26 news stories concerning Merced from August to September, 1992.<sup>37</sup> CC/ABC argues that the fact that Merced and

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<sup>32</sup>CC/ABC also raises the issue of cable carriage of its affiliate, KFSN, on the cable system serving the community of Merced.

<sup>33</sup>We note that UA asserts that the sole Merced commercial television construction permit lapsed in August 1990, and cites Section 76.5(e) of the Commission's rules which states that "a television broadcast station that is authorized but not operating has a specified zone that terminates eighteen (18) months after the initial grant of its construction permit." 47 C.F.R. § 76.5(e). Apparently, UA's opposition was filed prior to the licensing of television station KNSO.

<sup>34</sup>Opposition at 12.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 13.

<sup>37</sup>Reply, p.3, n.7 *citing* affidavit of Marc Edwards, KFSN's General Manager.

Fresno are in different MSAs and Trading Areas is irrelevant to this proceeding. CC/ABC quotes the Commission's finding that MSAs "do not necessarily reflect the competitive realities of television stations located both within and outside [S]MSAs or the television viewing patterns of the populace."<sup>38</sup> CC/ABC asserts that Merced and Fresno are in the same ADI and DMA, that Fresno stations account for 82 percent of non-cable viewing in Merced, and that six of the seven Fresno-Visalia market stations place a Grade B signal over Merced.<sup>39</sup> In addition, CC/ABC argues that adding Merced to the Fresno-Visalia market benefits the public by enhancing KFSN's ability to compete for advertising revenues in the communities in which the station has significant audience viewership and thereby provide quality programming to viewers in its television market.

## V. DISCUSSION

13. We believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that television stations, KNSO and KPXF, licensed to the communities of Merced and Porterville, California, respectively, will compete for audiences and advertisers throughout much, if not most, of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed communities to be added to a market designation and the market as a whole. Moreover, the Joint Petitioners' proposal and CC/ABC's request appear to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.<sup>40</sup> Accordingly, comment is requested on the proposed addition of Merced and Porterville to the Fresno-Visalia-Hanford-Clovis television market.<sup>41</sup>

## VI. PROCEDURAL MATTERS

### A. Initial Regulatory Flexibility Analysis

14. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 603 of the Regulatory Flexibility Act.<sup>42</sup> A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

### B. Paperwork Reduction Act Statement

15. The requirements proposed in this Notice have been analyzed with respect to the Paperwork reduction Act of 1995 (the "1995 Act") and do not impose new or modified information

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<sup>38</sup>*Id.* at 4 citing *Press Television Corporation*, 6 FCC Rcd 6563, 6566 (1991).

<sup>39</sup>*Id.* at 5

<sup>40</sup>*See CATV Rules - Designation of Television Market*, 47 FCC 2d 752 (1974)

<sup>41</sup>We encourage the parties to submit upgraded information with respect to the Grade B contours of the television stations at issue, specifically with respect to Longey Rice studies of signal availability.

<sup>42</sup>5 U.S.C. § 603.

collection requirements on the public.

### C. Ex Parte Rules

16. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules. 47 C.F.R. 1.1206(b), as revised. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 C.F.R. 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

### D. Filing of Comments and Reply Comments

17. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before February 7, 2000 and reply comments on or before February 22, 2000. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.<sup>43</sup> Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form<your e-mail address." A sample form and directions will be sent in reply.

18. Parties who choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. If more than one docket or rulemaking number appears in the caption of this proceeding commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. The Cable Services Bureau contacts for this proceeding is Carolyn Fleming at (202) 418-7200, TTY (202) 418-7172, or at [cfleming@fcc.gov](mailto:cfleming@fcc.gov).

19. Parties who choose to file by paper should also submit their comments on diskette. Parties should submit diskettes to Carolyn Fleming, Cable Services Bureau, 445 12th Street N.W., Room 4-A802, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding (including the lead docket number in this case [CS Docket No. 00-1), type of pleading (comments or reply comments), date of submission, and the name of the electronic

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<sup>43</sup>See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, referable in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, 1231 20th Street, N.W., Washington, D.C. 20036.

#### VII. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i)-(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 303(c), (f), and (r), and 309(j), **NOTICE IS HEREBY GIVEN** of the proposed amendments to Section 76.51 of the Commission's rules, in accordance with the proposals, discussions, and statements of issues contained in this Notice of Proposed Rulemaking, and that **COMMENT IS SOUGHT** regarding such proposals, discussions, and statements of issues.

21. **IT IS FURTHER ORDERED** that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration, in accordance with paragraph 603(a) of this Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief  
Cable Services Bureau