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OFFICE OF THE SECRETARY

October 16, 2001

BY HAND DELIVERY
Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, DC 20554

EX PARTE OR LATE FILED

Re: The WB Television Network
Notice of *Ex Parte* Presentation
Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)
GN Docket No. 01-74

Dear Ms. Salas:

On behalf of The WB Television Network ("The WB"), submitted herewith pursuant to Section 1.1206(b)(2) of the Commission's rules are an original and one copy of this notice regarding a permitted oral *ex parte* presentation in the above-referenced proceeding. On October 15, 2001, representatives of AOL Time Warner Inc. and The WB met with Commissioner Michael Copps' office to address certain matters pertaining to the FCC's treatment of pending proposals for new NTSC stations to operate on channels 52-58. The discussion focused on (i) The WB's position as summarized in the attached outline; (ii) The WB's comments filed in this proceeding; and (iii) the attached materials concerning the proposed federal budget for fiscal year 2002.

Attending the meeting on behalf of AOL Time Warner Inc. were Steven N. Teplitz, Vice President, Communications Policy and Regulatory Affairs, and Robert L. Pettit, Esquire. The undersigned attended the meeting on behalf of The WB. Paul Margie and Susanna Zwerling attended the meeting on behalf of Commissioner Copps' office.

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

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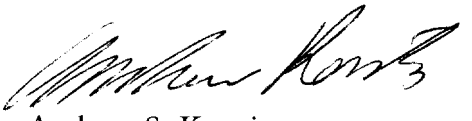
Very truly yours,

DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP



Andrew S. Kersting
Counsel for
The WB Television Network

Enclosures
cc: Mr. Paul Margie (w/ encls.) (FCC) (by hand)
Ms. Susanna Zwerling (w/ encls.) (FCC) (by hand)

THE CHANNEL 52-59 RULEMAKING AND PENDING NTSC PROPOSALS

The FCC should reverse the Mass Media Bureau's informal decision to refrain from granting pending NTSC proposals for Channels 52-58 during the pendency of the Channel 52-59 rulemaking proceeding. This matter is of significant concern to The WB Television Network ("The WB") as it strives to enhance its nationwide distribution and become a more formidable competitor to the major television networks.

OVERVIEW

Making available new television stations would advance the public interest without any corresponding public interest harm.

- Granting the additional NTSC proposals on Channels 52-58 would serve the public interest by providing an opportunity to bring a new network service to a substantial number of people in the proposed service areas, as well as foster enhanced competition among national networks.

- Due to the significant incumbency in the lower 700 MHz spectrum band (266 potential authorized stations) the pending NTSC proposals for Channels 52-58 would have, at most, a marginal impact upon the implementation of new wireless services in that spectrum band and the ability to clear that band prior to the end of the transition period.

- The budget compromise reached earlier this year between the White House and Congress strongly suggests that the auction for the lower 700 MHz spectrum band will not be held until 2006, which is near the scheduled end of the transition period.

- The Commission has made clear that any grants of these NTSC proposals would be conditioned upon the outcome of this proceeding. Thus, there is no reason for further delay.

Introduction

- The WB was launched on January 11, 1995 with 48 affiliated stations nationwide. By the end of the 1999-2000 broadcast year, The WB had 68 primary full-power affiliates. In contrast, NBC and CBS have over 200 network affiliates, ABC has nearly 200, and Fox has approximately 170 affiliates.

- The shortage of available stations with which to affiliate is a significant impediment to The WB's effort to enter the major network group. The pending NTSC proposals, especially those for Channels 52-58, present a critical opportunity for The WB to address this problem.

1996 – Present: A Tortured History

The subject NTSC proposals have been on file with the Commission since July 1996.

- Existing ATV "Freeze"
- Await Conclusion of DTV Proceeding
- Community Broadcasters Protection Act -- Afforded Eligible LPTV Stations Class A Primary Status
- Resulting Class A and DTV maximization applications have effectively precluded many pending NTSC proposals
- Many NTSC applications and rulemaking petitions were amended to specify Channels 52-59 (outside the core) in order to avoid Class A conflicts

Channel 52-59 NPRM

- While the Commission expressly froze further grants on Channel 59, the NPRM did *not* direct the staff to refrain from granting pending proposals for Channels 52-58. Instead, the Commission made clear that any grant on Channels 52-58 would be subject to the outcome of the NPRM.
- Nonetheless, the staff has taken the position that they will "process" but not "grant" pending NTSC proposals for Channels 52-58 during the pendency of the rulemaking proceeding, apparently on the basis that additional NTSC stations would impede the development of new wireless services and hamper the ability to clear the lower 700 MHz band prior to the end of the transition period.

The Informal Freeze Is Contrary to the Public Interest, Lacks a Factual Basis, and Violates the APA

The public interest benefits of immediately granting the pending proposals in order to bring new broadcast services to a substantial number of viewers and facilitate increased competition among national broadcast networks outweighs any marginal impact on the eventual provision of new wireless services.

- The Commission correctly anticipated that the pending NTSC proposals will have, at most, a marginal impact on the proposed new wireless services and the ability to clear the lower 700 MHz band prior to the end of the transition period. *See NPRM* at ¶24 (". . . [G]iven the significant number of analog and DTV incumbents that already exist on this band, *the impact on the provision of new services may be marginal.*").
- The lower 700 MHz band is significantly more congested than Channels 60-69 (upper 700 MHz band). Due to the significant number of DTV assignments in the lower 700

MHz band (165 versus 20 in the upper 700 MHz band), it will be much more difficult to clear and far more difficult for new services to operate in this band prior to the end of the transition period. *NPRM* at ¶26.

- The Mass Media Bureau has indicated that less than half (50%) of the 57 pending requests for new NTSC stations can be granted due to the unavailability of channels in many markets (*i.e.,* conflict with DTV and Class A stations). Assuming, *arguendo*, that half of the pending NTSC proposals can be granted (*i.e.*, 28 proposals), that is approximately only 11% of the 266 potential authorized stations in the lower 700 MHz band. *See NPRM* at ¶¶23, 25-26.

- The budget compromise reached in May 2001 between the White House and Congress would delay the auction for the upper and lower 700 MHz bands until 2004 and 2006, respectively (the current deadline for lower 700 MHz band auction is September 30, 2002). Therefore, the auction for the lower 700 MHz band is not likely to be held until near the scheduled end of the transition period.

- Thus, any interest in expediting the clearing of the lower 700 MHz band by refusing to grant the pending NTSC proposals is misplaced because no new service licenses will be issued in this band until near the end of the transition period.

The current review process fails to comply with the APA.

- *Galesburg, IL* Exception -- The pending application for a new NTSC station to operate on Channel 53 at Galesburg apparently is one of four otherwise unidentified NTSC proposals that the Mass Media Bureau has elected to continue to process and has proposed to grant despite its interim freeze policy.

- There is no basis for distinguishing the Galesburg NTSC proposal from other NTSC proposals, and the Mass Media Bureau has not articulated or made public the relevant criteria that it will employ in determining which NTSC proposals will be granted during the pendency of the Channel 52-59 rulemaking proceeding.

- The processing of the Galesburg NTSC proposal fails to satisfy the FCC's statutory obligations under the APA to engage in transparent and reasoned decision-making, and has resulted in disparate treatment for similarly situated NTSC proponents. This raises substantial due process and equal protection concerns.

CONCLUSION

The Commission should immediately instruct the Bureau to lift the informal freeze on granting pending NTSC proposals on Channels 52-58.

- As the Commission expressly acknowledged in the *NPRM*, due to the significant incumbency in the lower 700 MHz band, the pending NTSC proposals for Channels 52-58 will have, at most, a marginal impact upon the implementation of new wireless services in that spectrum band and the ability to clear that band prior to the end of the transition period.

- Moreover, the budget compromise reached earlier this year between the White House and Congress strongly suggests that the auction for the lower 700 MHz spectrum band will not be held until 2006, which is near the scheduled end of the transition period.

- Therefore, there is no factual predicate for the Bureau's decision to refrain from granting NTSC proposals for Channels 52-58 during the pendency of the rulemaking proceeding, especially considering the Commission's express language that any grants of these NTSC proposals will be conditioned upon the outcome of this proceeding.

FISCAL YEAR 2002

BUDGET

BUDGET OF THE
UNITED STATES GOVERNMENT

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receipts also changes with increases or decreases in the number of employees and changes in the retirement accruals charged to agencies. The agency payments and trust fund receipts are offsetting and do not affect the unified budget totals. Under the 1997 Balanced Budget Act, agency contributions for employees covered by the Civil Service Retirement System were increased from seven percent of salary to 8.51 percent beginning in 1998. These higher contributions are set to expire in 2003.

Spectrum Auction Receipts

In 1993, the President and Congress gave the Federal Communications Commission (FCC) authority to assign spectrum licenses through competitive bidding, which has proven to be a very efficient and effective way to allocate this finite public resource. Since the beginning of the auctions program, the FCC has auctioned over 14,300 licenses for over $31 billion in actual and expected cash receipts—encouraging the development of innovative telecommunications services and ensuring that the public receives compensation for the private use of a public resource. Over the next five years, spectrum auctions are expected to generate more than $25 billion in receipts.

The Administration is proposing authorization language that provides a legislative framework for FCC to develop regulations that promote clearing the spectrum in channels 60–69 (747–762 and 777–792 MHz) for new wireless services in a manner that ensures incumbent broadcasters are fairly compensated. The legislative language would also shift the statutory deadline for the 60–69 auction from 2000 to 2004 and shift the statutory deadline for the auction of channels 52–59 (698–746 MHz) from 2002 to 2006. As a result of the increased certainty about how and when the spectrum in channels 60–69 will become available for new entrants and shifting the deadlines for both auctions closer to when the spectrum is expected to become available, revenues for these auctions are expected to increase by $7.5 billion.

Arctic National Wildlife Refuge Lease Receipts

The Administration proposes to open up the coastal plain of the Arctic National Wildlife Refuge in northern Alaska to environmentally sound oil and natural gas leasing. The budget assumes leasing begins in 2004, generating $2.4 billion in lease bonus bids, with the bid receipts shared 50/50 with the State of Alaska. The remaining $1.2 billion would be dedicated for research and development of solar and renewable energy technology, to be conducted by the Department of Energy over seven years.

107TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 107–60

CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2002

MAY 8, 2001.—Ordered to be printed

Mr. NUSSLE, from the Committee on Conference, submitted the following

CONFERENCE REPORT

[To accompany H. Con. Res. 83]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the concurrent resolution (H. Con. Res. 83), establishing the congressional budget for the United States Government for fiscal year 2002, revising the congressional budget for the United States Government for fiscal year 2001, and setting forth appropriate budgetary levels for each of fiscal years 2003 through 2011, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2002.

(a) DECLARATION.—Congress determines and declares that the concurrent resolution on the budget for fiscal year 2001 is revised and replaced and that this resolution is the concurrent resolution on the budget for fiscal year 2002 including the appropriate budgetary levels for fiscal years 2003 through 2011 as authorized by section 301 of the Congressional Budget Act of 1974 (2 U.S.C. 632).

(b) TABLE OF CONTENTS.—The table of contents for this concurrent resolution is as follows:

Sec. 1. Concurrent resolution on the budget for fiscal year 2002.

TITLE I—RECOMMENDED LEVELS AND AMOUNTS

Sec. 101. Recommended levels and amounts.
Sec. 102. Major functional categories.

72–229

Conference Agreement.—The Conference Agreement revises the 2001 levels to $84.5 billion in BA and $84.7 billion in outlays. For 2002, the resolution provides −$6.0 billion in BA and −$3.7 billion in outlays. Over 10 years, it provides −$66.8 billion in BA and −$62.6 billion in outlays.

FUNCTION 950: UNDISTRIBUTED OFFSETTING RECEIPTS

Major Programs in Function.—Under current law, receipts in Function 950, Undistributed Offsetting Receipts, will total about $46.2 billion (negative BA and outlays) for 2001. Function 950 includes both on-budget and off-budget components, but the budget resolution text includes only the on-budget portion. Both on-budget and total receipts are shown, however, in the summary tables contained in this Conference Agreement. This function records offsetting receipts (receipts, not federal revenues or taxes, that the budget shows as offsets to spending programs) that are too large to record in other budget functions. Such receipts are either intrabudgetary (a payment from one federal agency to another, such as agency payments to the retirement trust funds) or proprietary (a payment from the public for some type of business transaction with the government). The main types of receipts recorded as "undistributed" in this function are: the payments federal agencies make to retirement trust funds for their employees, payments made by companies for the right to explore and produce oil and gas on the Outer Continental Shelf, and payments by those who bid for the right to buy or use the public property or resources, such as the electromagnetic spectrum.

House Resolution.—The resolution calls for −$42.3 billion in budget authority [BA] and outlays in fiscal year 2002, a decrease of 10.6 percent in BA compared with fiscal year 2001, (or an increase of 10.6 percent in receipts compared with fiscal year 2001). The 5-year function totals are −$239.8 billion in BA and outlays; and the 10-year totals are −$492.3 billion in BA and outlays.

These totals comprise entirely of mandatory spending. There is no discretionary spending in this function.

The resolution does not assume lease bonuses from the Arctic National Wildlife Refuge or an analog spectrum license fee or other spectrum offsets. It also assumes permanent extension of the Balanced Budget Act [BBEDCA] provision that increased, by 1.51 percentage points, Federal agency contributions to the Civil Service Retirement and Disability Trust Fund [CSRDF] on behalf of their CSRS-participant employees. That provision had been scheduled to sunset after fiscal year 2002.

Senate Amendment.—The Senate amendment does not revise the 2001 levels. For 2002, the resolution provides −$38.8 billion in BA and outlays. Over 10 years, the resolution provides −$495.7 billion in BA and outlays. The Senate amendment is the same as the House resolution, except that it reflects both the President's proposals to delay certain spectrum auctions and to impose a fee on broadcasters using spectrum channels for analog broadcasts to encourage the transition to digital television.

Conference Agreement.—The Conference Agreement does not revise the 2001 levels. For 2002, the resolution provides −$38.8 billion in BA and outlays. Over 10 years, it provides −$494.1 bil-

lion in BA and outlays. The conferees agree to the President's proposal to delay certain spectrum auctions that was assumed in the Senate amendment, but do not agree to the President's proposal for an analog lease fee.

REVENUES

Federal revenues are taxes and other collections from the public that result from the government's sovereign or governmental powers. Federal revenues include individual income taxes, corporate income taxes, social insurance taxes, excise taxes, estate and gift taxes, custom duties and miscellaneous receipts (which include deposits of earnings by the Federal Reserve System, fines, penalties, fees for regulatory services, and others).

Under current law, federal tax collections are projected to total $28 trillion over the next ten years. This year, total revenues are projected to equal 20.7 percent of GDP, slightly below the World War II record level of 20.9 percent. Over the projection period 2002–2011, under current law, total revenues are projected to average 20.3 percent of GDP, far above historical averages for any time period, including times of war.

House Resolution.—The House resolution provides for $1.62 trillion in tax reduction over the next 10 years. This level would accommodate the President's priority tax cut proposals: reducing marginal tax rates, doubling the per-child tax credit; providing relief from the marriage penalty, and providing death tax relief. It also provides for additional tax reduction, subject to the discretion of the Committee on Ways and Means. Such measures might include charitable deduction expansion; refundable tax credits for private health insurance; Education Savings Account expansion and other education provisions; Individual Retirement Account [IRA] increases and other pension reform; and permanent extension of the research and development [R&D] tax credit. (The refundable elements of the President's tax proposals, which are treated as spending, appear in the functional areas to which they apply.) It also assumes, but does not reconcile, the revenue effect of a proposed reduction in fees levied by the Securities and Exchange Commission, and a requirement that the Federal Reserve pay interest on deposits at the Reserve. The resolution also establishes a reserve fund for further tax reduction should the Congressional Budget Office's summer update indicate additional non-Social Security surpluses. The reserve fund could allow for measures such as extension of Medical Savings Accounts, repeal of transportation deficit reduction fuel taxes, and reduction of the capital gains rate.

Senate Amendment.—The Senate amendment revises the 2001 on-budget revenue level to $1,630.3 billion. It sets forth on-budget revenues of $1,644.8 billion in 2002, and $20,007.1 billion over the ten years 2002–2011. The Senate amendment assumes a tax reduction, relative to the CBO baseline, of $1,188.1 billion over the period 2002–2011, about $450 billion less than the tax relief assumed in the House resolution. The Senate amendment includes an allowance (in Function 920) for a surplus refund of up to $85 billion in 2001. The refund represents about 88 percent of the $96 billion non-Social Security, non-Hospital Insurance surplus projected under current law for 2001. The tax relief assumed in the Senate