

PEPPER & CORAZZINI, LLP  
ATTORNEYS AT LAW

DOCKET FILE COPY ORIGINAL

1776 K STREET, N.W., SUITE 200  
WASHINGTON, D.C. 20006-2374

RECEIVED

JAN 02 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

(202) 296-0600  
FAX (202) 296-5572  
WWW.COMMLAW.COM

VINCENT A PEPPER  
EXT. 235  
VAP@COMMLAW.COM

January 2, 2002

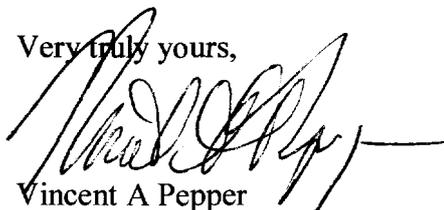
Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554

Dear Ms. Salas:

Transmitted herewith on behalf of Television Capital Corporation of Richmond is an original and four (4) copies of its Motion to Accept Previously Filed Amendment to Petition for Rule Making, in connection with its pending construction permit application for a full service NTSC television station at Richmond, Virginia (File No. BPCT-19960920WI).

Should any further information be desired in connection with this matter, please contact this office directly.

Very truly yours,



Vincent A Pepper

Enclosures

cc: Clay C. Pendarvis, Esq. (w/encl) – Hand Delivery

No. of Copies rec'd 0+4  
List A B C D E

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

RECEIVED  
JAN 02 2002  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Matter of )  
 )  
Amendment of Section 73.606(b) ) MM Docket No. \_\_\_\_\_  
Table of Allotments, ) RM- \_\_\_\_\_  
Television Broadcast Stations )  
Richmond, Virginia )

To: Chief, Television Branch, Video Services Division

**MOTION TO ACCEPT PREVIOUSLY FILED AMENDMENT TO PETITION FOR  
RULE MAKING**

Television Capital Corporation of Richmond (“TCC”), by its attorneys hereby requests that the Commission accept the Amendment to Petition for Rule Making filed on December 12, 2001 (“*December 12<sup>th</sup> Petition*”). According to Commission staff, the underlying Petition for Rulemaking that was the subject of the *December 12<sup>th</sup> Petition* had been dismissed on October 23, 2001.<sup>1</sup> However, neither TCC nor its counsel nor any other parties involved in the rule making proceeding have ever received the letter of dismissal, nor has there been any public notice of such dismissal. The *December 12<sup>th</sup> Petition* offered the Commission an alternative to TCC’s originally requested amendment of the Table of Allotments for NTSC TV Broadcast Stations. This alternative was proposed for consideration by the Commission after TCC’s counsel was informally advised by Commission staff that that they were no longer processing NTSC proposals for new stations operating in the Channel 52-58 range, in light of the

---

<sup>1</sup> See letter addressed to Vincent A. Pepper dated October 23, 2001 (Ref. No. 2-A842), from Clay C. Pendarvis, Chief, Television Branch, Video Services Division, Mass Media Bureau. (“October 23<sup>rd</sup> Letter”)

Commission's action in March of this year.<sup>2</sup> Thus, in anticipation of official Commission action announcing that such applications would no longer be processed, TCC commenced its search for an in-core (i.e., below channel 52) channel on which it could operate. Ironically, the *December 12<sup>th</sup> Petition* was filed the same day that the Commission made such an announcement.<sup>3</sup> While counsel never received any notification of the dismissal, the proffered amendment cured the defect upon which the apparent October 23<sup>rd</sup> dismissal was based. Thus, in consideration of the procedural failures to give the required notice to the public and petitioner, and in light of the public interest benefits that would result from acceptance, consideration, and grant of the Petition, TCC respectfully requests that the Commission accept for filing the Amendment to Petition for Rule Making filed on December 12, 2001. In support of this request, the following is stated:

1. By way of pertinent background, TCC in 1996 filed an application for a construction permit for a new TV broadcast station on Channel 63 at Richmond, Virginia (File No. BPCT-19960920WI). United Television, Inc. ("United") also filed an application for the same allotment (File No. BPCT-19960920IT). In 1999, the Commission released a Public Notice entitled *Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations*.<sup>4</sup> The *Public Notice* opened "a window filing opportunity to allow persons with certain pending requests for new analog (NTSC) television stations to modify their requests, if possible, to eliminate technical conflicts

---

<sup>2</sup> See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59) Notice of Proposed Rule Making*, FCC 01-91 (March 28, 2001).

<sup>3</sup> Action adopted at meeting of the full Federal Communications Commission on December 12, 2001. Report and Order not yet released as of the date of this filing.

<sup>4</sup> See 14 FCC Rcd 19559 (1999), subsequently modified by 15 FCC Rcd 4974 (2000) ("*Public Notice*").

with digital television (DTV) stations and to move from channels 60-69.”<sup>5</sup> Both TCC and United came within that eligibility category because they had both filed applications for new full service NTSC television stations on Channel 63 at Richmond, Virginia. On July 17, 2000, TCC and United filed a Joint Request for Approval of a Settlement Agreement, requesting the grant of TCC’s application and the dismissal with prejudice of United’s application. Concurrently with that filing, TCC submitted a Petition for Rule Making to amend the Table of Allotments for NTSC TV Broadcast Stations to substitute Channel 52 for Channel 63 at Richmond, Virginia (“*Channel 52 Petition*”) pursuant to the displacement provisions of the Commission’s *Public Notice*.

2. In January of this year, the Commission announced that it would seek to clear the upper 700 MHz band—occupied by television channels 60-69—by providing for the relocation of any television stations operating on those channels.<sup>6</sup> In March, the Commission released a *Notice of Proposed Rule Making* that addressed the status of stations and pending applications within the “Lower 700 MHz Band”—occupied by television channel 52-59—which the Commission intends to reallocate for non-broadcast use after the digital transition.<sup>7</sup> The *NPRM* expressed the Commission’s desire to recover the spectrum currently occupied by television operations on Channels 52-59 in the most efficient matter possible.<sup>8</sup> Thus, in an effort to provide the Commission with a viable means of effecting its band-clearing goals in the Richmond market, TCC then filed an amendment to its petition—entitled Amendment to Petition for Rule Making—which outlined an alternative allotment scheme by which the Commission

---

<sup>5</sup> See *Public Notice* at 1.

<sup>6</sup> See Third Report and Order, Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, FCC 01-25 (released January 23, 2001).

<sup>7</sup> See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59) Notice of Proposed Rule Making*, FCC 01-91 (March 28, 2001)(“*NPRM*”).

<sup>8</sup> *Id.* at para. 5.

could substitute NTSC Channel 39 for Channel 63 at Richmond, which TCC could then specify in its application. It is this petition that TCC now requests that the Commission accept for filing.

3. This motion to accept the *December 12<sup>th</sup> Petition* is necessary in that there is a question as to whether or not the underlying petition which it amends—the *Channel 52 Petition*—has been properly dismissed by the Commission. As described in the Affidavit of Vincent A Pepper, which is attached to this motion, TCC’s counsel never received notice—official or otherwise—from the Commission that the Channel 52 Petition had been dismissed. The first time TCC’s counsel was made aware of the dismissal was the result of a phone call by Nazifa Naim of the Mass Media Bureau to an associate with this firm, Mark Blacknell, on December 21, 2001. He immediately requested that she fax him a copy of the dismissal letter, which she did. To this date, this informally faxed letter remains the only evidence of dismissal that TCC possesses.

4. Normally, the perils of irregular mail service can be overcome by the fact that Commission dismissals of a petition for rule making are served on all parties to the rule making, and on the applicant itself. Thus, should one party not receive the letter in a timely fashion, he or she can normally rely on the fact that other parties have received it, who regularly then contact each other to discuss the need for response. However, none of the other parties to this proceeding were informed of the dismissal, either by letter or by telephone. Since the date of the dismissal letter, TCC’s counsel has worked extensively with other attorneys and engineers in preparing the December 12<sup>th</sup> Petition. Had counsel been aware of the dismissal, he most certainly would have responded to it.<sup>9</sup>

---

<sup>9</sup> See Affidavit of Vincent A Pepper, Esquire (attached).

5. In addition to the informal back-up notice mechanism of attorneys contacting each other, there remains a final method of notice that is central to the Commission's operations—public notice. After a significant amount of searching through paper records and electronic databases, TCC is unable to find any evidence that the Commission ever issued a public notice that the *Channel 52 Petition* had been dismissed.

6. Section 1.407 of the Commission's Rules provides that in the event that a petition is dismissed, "the petitioner will be notified of the Commission's action with the grounds therefor." As illustrated above, no such notification was actually—or constructively—received. Furthermore, Section 1.113 of the Commission's rules permits actions taken on delegated authority—such as the Bureau's dismissal of the *Channel 52 Petition*—to be reconsidered within thirty days of the public notice of the action. As a result, even if TCC desired to file a Petition for Reconsideration regarding the action taken by the October 23<sup>rd</sup> letter, it would be unable to do so without a public notice date by which to calculate the filing window.

7. Thus, in light of the fact that TCC received no notice of dismissal, no notice of dismissal was given to counsel of other parties involved in the proceeding, and as there was no public notice given regarding the dismissal, TCC respectfully submits that the dismissal of the *Channel 52 Petition* was defective, and that the December 12, 2001 filed Amendment to Petition for Rule Making should be accepted for filing.

8. It is worth noting that the predicted interference to DTV allotment of station WTVD-DT, Durham, NC—the sole reason cited for the Petition's dismissal in the October 23<sup>rd</sup> letter—is eliminated by the Amendment to Petition for Rule Making. In reaction to the Commission's action in March—and in anticipation of its actions on December 12<sup>th</sup>—TCC had been working to identify an in-core channel that it could use in Richmond. The Engineering Statement attached to the Amendment to Petition for Rule Making provides the necessary technical analysis to illustrate the technical viability of using channel 39 in Richmond—as well

as the fact that it creates no interference to WTVD-DT, Durham, NC. Had TCC been aware of the dismissal, it would have moved to *immediately* provide the Commission with this information and ask for reconsideration of the dismissal.

9. Furthermore, the equities of the present situation urge that the *December 12<sup>th</sup> Petition* be accepted. The press release describing the Commission's actions of December 12, 2001 note that while the Commission would cease processing of applications for new NTSC stations specifying channels 52-58, it would provide those applicants with an opportunity to "modif[y] pending applications for new NTSC construction permits to provide analog or digital service in the core television spectrum or digital service in the 698-740 MHz band (Channels 52-58)".<sup>10</sup> TCC respectfully notes that its *December 12<sup>th</sup> Petition* does exactly that.

10. In addition, the alternative proposed in the Amendment to Petition for Rule Making creates several public interest benefits, in that it provides the Commission with an opportunity to help foster the development of emerging national television networks by providing an additional competitive broadcast outlet in a top 100 television market<sup>11</sup> with which to establish a primary affiliation.<sup>12</sup> As noted in the Amendment to Petition for Rule Making, the allotment of Channel 39 to Richmond would (i) bring a new local television service to 489,320 viewing households in the Richmond area, (ii) promote ownership diversity in the Richmond television market, and (iii) increase competition in the local advertising market.

11. In sum, the public interest would obviously be served by accepting the Amendment to Petition for Rule Making, grant of which would allow the substitution of Channel

---

<sup>10</sup> See "FCC Reallocates and Adopts Service Rules for Television Channels 52-59" released December 12, 2001.

<sup>11</sup> The Richmond market is currently ranked as the 60<sup>th</sup> television market. See *Broadcasting & Cable*, p. B-222 (2001).

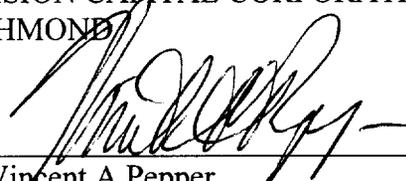
39 for the existing Channel 63 allotment at Richmond, Virginia and the subsequent designation of that channel for TCC's application, as it would clear the way for reallocation of the upper 700 MHz spectrum band, and expedite the inauguration of a new television service to Richmond.

WHEREFORE, TCC requests that the Commission accept for filing the Amendment to Petition for Rule Making received by the Commission on December 12, 2001.

Respectfully submitted,

TELEVISION CAPITAL CORPORATION  
OF RICHMOND

By:

  
\_\_\_\_\_  
Vincent A Pepper

  
\_\_\_\_\_  
Mark Blacknell

Counsel to Television Capital Corporation  
of Richmond

Pepper & Corazzini, L.L.P.  
1776 K Street, NW, Suite 200  
Washington, D.C. 20006  
tel: (202) 296-0600  
fax: (202)296-5572

January 2, 2002

---

<sup>12</sup> See Settlement Agreement filed July 17, 2000 by TCC and United (containing an option held by ACME, which provides that the constructed NTSC station may become affiliated with the WB network).

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

In re Matter of	)	
	)	
Amendment of Section 73.606(b)	)	MM Docket No. _____
Table of Allotments,	)	RM- _____
Television Broadcast Stations	)	
Richmond, Virginia	)	

**AFFIDAVIT OF  
VINCENT A PEPPER**

Before the undersigned notary, duly qualified to administer oaths, came Vincent A Pepper, who, upon penalty of perjury, said:

This Affidavit is being offered in support of the simultaneously filed Motion to Accept Amended Petition for Rule Making filed in the above captioned proceeding. The undersigned, addressee of a letter dated October 23, 2001 (Ref. No. 2-A842), from Clay C. Pendarvis, Chief, Television Branch, Video Services Division, Mass Media Bureau never actually received the letter, which dismissed a Petition for Rule Making filed on behalf of Television Capital Corporation of Richmond. The Petition for Rule Making which the letter dismissed was originally filed with respect to a pending application for a new NTSC television station at Richmond, Virginia. As evidence that I did not receive such notice, I offer the following:

1) As a routine matter, when I receive written communications from the Federal Communications Commission, I immediately contact the client to inform him that the Commission has taken an action that affects him. In this case, I would have contacted Elvin Feltner, principal of Television Capital Corporation of Richmond, to advise him of the dismissal. However, as I had no notice of such dismissal, I did not contact Mr. Feltner. In addition, I always have an additional copy of any Commission communications made and sent to our files. There is no copy of the October 23<sup>rd</sup> letter in our files.

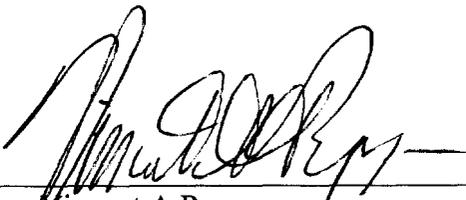
2) When written communications from the Commission regarding a proceeding in which other parties and counsel are involved, I—as a routine matter—contact the other attorneys via letter or phone to discuss what response, if any, is necessary. I did not contact Marvin J. Diamond, Esq. (counsel to United Television, Inc.) whose client is a party to the Settlement Agreement regarding the pending applications that are the subject of the rule making and thus party to this proceeding. To my knowledge, Mr. Diamond did not receive notice from the Commission of the October 23, 2001 dismissal.

3) Finally, between October 23, 2001 and December 12, 2001, I spent a significant amount of time working both with other attorneys—including Mr. Diamond and Andrew Kersting—and consulting engineers—including Mel Lieberman—in preparing the Amendment to Petition for Rule Making. Had I been aware of the dismissal, I most certainly would not have spent valuable time preparing a submission that had a questionable basis for acceptance by the Commission without first addressing the issue of the dismissal itself.

4) I was first made aware of the dismissal by an associate with this firm, Mark Blacknell, on December 21, 2001. He himself was only made aware of the dismissal when he received a call from Nazifa Naim of the Mass Media Bureau earlier that day. He requested that she fax him a copy of the dismissal letter, and then brought that fax to my attention. To this date, this remains the only evidence of dismissal that I possess or of which I am aware.

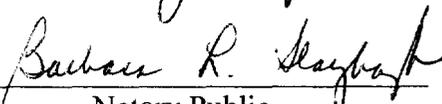
Thus, the above facts and statements considered, I submit that neither Television Capital Corporation of Richmond or I as its counsel, ever received notice of dismissal of the Petition for Rulemaking filed July 17, 2000 prior to the December 12<sup>th</sup> filing of the Amendment to Petition for Rule Making.

Further affiant sayeth not.

  
\_\_\_\_\_  
Vincent A Pepper

Sworn to before me this

2nd day of January, 2002.

  
\_\_\_\_\_  
Notary Public

## CERTIFICATE OF SERVICE

I, Lisa A. Blackburn, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 2nd day of January 2002, copies of the foregoing "Motion to Accept Amendment to Petition for Rule Making" were hand delivered to the following:

Clay Pendarvis, Esq.  
Chief, Television Branch  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
The Portals  
445 12th Street, S.W., Room 2-A662  
Washington, DC 20554

  
\_\_\_\_\_  
Lisa A. Blackburn