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MAR 15 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

March 15, 2002

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
445 12th Street, S.W., TW-A325  
Washington, D.C. 20544

**Re: Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Richmond, Virginia)**

**In re Applications of United Television, Inc. and Television Capital Corporation of Richmond for a Construction Permit for a New TV Broadcast Station on Channel 63 in Richmond, Virginia**  
**File No. BPCT-960920IT**  
**File No. BPCT-960920WI**

Dear Mr. Caton:

Enclosed please find, on behalf of Bell Broadcasting, L.L.C., the original and four copies of Opposition of Bell Broadcasting to Supplement to Petition for Rule Making for filing in the above-referenced matters.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with the undersigned.

Sincerely,

  
David Kushner

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Enclosures

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

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MAR 15 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.606(b),	)	MM Docket No. _____
Table of Allotments,	)	RM- _____
Television Broadcast Stations	)	
(Richmond, Virginia)	)	
	)	
In re Applications of	)	
	)	
United Television, Inc.	)	File No. BPCT-960920IT
	)	
Television Capital Corporation of Richmond	)	File No. BPCT-960920WI
	)	
For a Construction Permit for a New TV	)	
Broadcast Station on Channel 63 in	)	
Richmond, Virginia	)	

**OPPOSITION OF BELL BROADCASTING TO  
SUPPLEMENT TO PETITION FOR RULE MAKING**

Bell Broadcasting, L.L.C., licensee of Television Station WUPV, Ashland, Virginia ("WUPV"), by its attorneys, hereby opposes the Supplement to Petition for Rule Making ("Supplement") filed by Television Capital Corporation of Richmond ("TCC") on March 7, 2002, in the above-captioned matters.

On December 12, 2001, TCC filed an Amendment to its Petition for Rule Making which it had previously filed in connection with the above-captioned matters. Not having yet been served with TCC's Supplement of March 7, 2002, on March 8, 2002, WUPV filed an Opposition to TCC's Amendment, March 8 being the last day of the filing window permitting applicants with certain

pending requests for new NTSC stations on channels 52-59 to modify their requests.<sup>1</sup>

With its Supplement, TCC does nothing more than file a document within the Commission's prescribed filing window, since its Amendment had otherwise been fatally premature. However, all the arguments WUPV has previously made in these matters, including most recently in its Opposition of March 8, 2002, still apply. That is, TCC really does not have standing to file these myriad documents since its initial application in File No. BPCT-960920WI was fatally defective; TCC's reliance in its Amendment on *Achernar Broadcasting*<sup>2</sup> is wholly misplaced; and, critically, TCC's Amendment and Supplement specify Channel 39, which is short-spaced to WRLH-TV, Channel 35, Richmond, Virginia, which TCC concedes and for which it requests a waiver, but the Mass Media Bureau made it unequivocally clear in the *Filing Window Public Notice* that amendments had to fully comply with *all* technical rules and that waiver requests were not to be considered. Indeed, the Supplement, like the Amendment before it, clearly recognizes that "the proposed reference coordinates will result in the allotment *not being in complete compliance* with FCC Rules and Regulations Sections 73.610 and 73.698."<sup>3</sup> TCC's citation of alleged Longley-Rice interference analysis results and examples where the Commission has allegedly granted 4th channel taboo short-spacing waivers does not change the simple fact that TCC's substitution of Channel 39 for Channel 52 patently fails to satisfy the Commission's announced policy in the *Filing Window*

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<sup>1</sup> See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, FCC 01-364 (released Jan. 18, 2002) ("*Lower 700 MHz Band Order*"), at ¶ 191; Mass Media Bureau Announces Window Filing Opportunity, *Public Notice*, DA 02-270 (released Feb. 6, 2002) ("*Filing Window Public Notice*").

<sup>2</sup> 15 FCC Rcd 7808 (2000).

<sup>3</sup> TCC's Supplement, Technical Supplement of William R. Meintel, at 1 (emphasis added).

*Public Notice* that

[a]mendments and petitions for rule making during this window opportunity *must* conform with all pertinent legal and technical requirements, including criteria for interference protection to both NTSC and DTV stations. . . . NTSC allotment proposals made pursuant to this public notice *must* meet the minimum distance separations between NTSC stations (47 C.F.R. Section 73.610) . . . .<sup>4</sup>

WUPV hereby adopts the arguments it previously set forth more extensively and incorporates them herein by reference. A copy of WUPV's March 8, 2002, Opposition is attached for the Commission's convenience.

For all the reasons previously stated, the Commission should dismiss or return TCC's Supplement and Amendment, deny TCC and United Television's Joint Request for Approval of Settlement Agreement, and reject and return TCC's facially and fatally defective application for Channel 63 in Richmond.

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<sup>4</sup> *Filing Window Public Notice* at 3 (emphases added).

Respectfully submitted,

**Bell Broadcasting, L.L.C.**



---

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Its Attorneys

March 15, 2002

## Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Opposition of Bell Broadcasting to Supplement to Petition for Rule Making** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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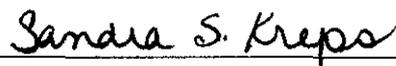
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This the 15th day of March, 2002.

  
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## **Exhibit**

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

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MAR - 8 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Amendment of Section 73.606(b), )  
Table of Allotments, )  
Television Broadcast Stations )  
(Richmond, Virginia) )

MM Docket No. \_\_\_\_\_  
RM- \_\_\_\_\_

In re Applications of )  
)  
United Television, Inc. )  
)  
Television Capital Corporation of Richmond )  
)  
For a Construction Permit for a New TV )  
Broadcast Station on Channel 63 in )  
Richmond, Virginia )

File No. BPCT-960920IT

File No. BPCT-960920WI

**OPPOSITION OF BELL BROADCASTING TO  
AMENDMENT TO PETITION FOR RULE MAKING**

Bell Broadcasting, L.L.C., licensee of Television Station WUPV, Ashland, Virginia ("WUPV"), by its attorneys, hereby opposes the Amendment to Petition for Rule Making ("Amendment") filed by Television Capital Corporation of Richmond ("TCC") on December 12, 2001, in the above-captioned matters.

In the Amendment, TCC purports to substitute Channel 39 at Richmond, Virginia, for Channel 63 at Richmond. TCC purports to do this based on a News Release announcing the Commission's reallocation and adoption of service rules for television channels 52-59 which was issued on December 12, 2001. But there is a fatal problem with TCC's Amendment: TCC, at base, has no standing to file such an Amendment, and the Amendment should be rejected.

TCC filed its initial Application for Construction Permit for Commercial Television Broadcast Station (“Channel 63 Application”) with the Commission on September 20, 1996, seeking authority to construct a new commercial television station on Channel 63 at Richmond, Virginia.<sup>1</sup> However, due to its proximity to Washington, D.C., Richmond falls within the freeze area subject to the Commission’s 1987 Freeze Order prohibiting the filing of certain applications for new analog stations.<sup>2</sup> Applications for allotments affected by the Freeze Order must have included a substantive request, with “compelling” reasons, to waive the freeze, which was to be considered by the Commission only on a case-by-case basis.<sup>3</sup> However, TCC, in its Channel 63 Application, made no such substantive waiver request. Because TCC failed to submit any reasons why a waiver should be granted, its Channel 63 Application is defective on its face and is not now and has never been properly before the Commission.

Subsequent to its facially and fatally defective Channel 63 Application, TCC purported to enter into a settlement agreement with United Television, Inc. (“United”), which had also filed an application for the Channel 63 Richmond allotment on September 20, 1996.<sup>4</sup> These parties, on July 17, 2000, sought Commission approval of their settlement agreement, the dismissal of United’s application, and the grant of TCC’s amended application for a construction permit for a new television broadcast station allotted to Channel 63 in Richmond. WUPV opposed the parties’ Joint

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<sup>1</sup> See File No. BPCT-960920WL.

<sup>2</sup> See *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, *Order*, Mimeo No. 4074 (released July 17, 1987) (“Freeze Order”).

<sup>3</sup> See Freeze Order, ¶¶ 2-3 (declaring that a party affected by the freeze has the burden of seeking a waiver).

<sup>4</sup> See File No. BPCT-960920IT.

Request and incorporates herein the arguments that it has previously made.<sup>5</sup>

In addition, TCC, concurrently with the Joint Request, filed a Petition for Rule Making to amend the NTSC Table of Allotments to substitute Channel 52 for Channel 63 at Richmond. Now TCC is seeking to amend that petition to substitute Channel 39 for Channel 63, giving up on Channel 52 in light of the Commission's reallocation of the lower 700 MHz band.

Before spending any administrative resources to examine the technical merits of TCC's latest proposal, the Commission should simply dismiss TCC's original Channel 63 Application as fatally defective. The patina of age can never add legitimacy to what has always been an obvious attempt to game the system. TCC has always been a speculator, as WUPV previously showed,<sup>6</sup> and, as the entrance of Acme Communications as a purported "white knight" demonstrates, it is now but a puppet for another master.

In any event, TCC's Amendment, to the extent it purports to be filed in response to the Commission's action no longer permitting new NTSC stations in the lower 700 MHz band, is premature and should be returned on that ground. The filing window permitting applicants with certain pending requests for new NTSC stations on channels 52-59 to modify their requests did not open until January 22, 2002, and closes on March 8, 2002.<sup>7</sup> It is customary Commission policy to

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<sup>5</sup> See Opposition of Bell Broadcasting to Joint Request for Approval of Settlement Agreement, File Nos. BPCT-960920IT & BPCT-960920WI (filed Nov. 8, 2000) (attached hereto as Exhibit A); Motion for Leave to File Supplement to Opposition of Bell Broadcasting to Joint Request for Approval of Settlement Agreement and Response to Joint Reply of United Television and Television Capital Corporation, File Nos. BPCT-960920IT & BPCT-960920WI (filed Jan. 10, 2001) (attached hereto as Exhibit B).

<sup>6</sup> See WUPV's Opposition to Joint Request at 12 & n.26.

<sup>7</sup> See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, FCC 01-364 (released Jan. 18, 2002) ("*Lower 700 MHz Band*

return premature applications.<sup>8</sup>

More substantively, TCC's reliance on *Achernar Broadcasting*<sup>9</sup> to support its substitution request is misplaced, in addition to mischaracterizing that decision. TCC falsely claims that the Commission in *Achernar* "permitted the prevailing party under the settlement agreement to amend its pending application."<sup>10</sup> The Commission did no such thing. The Commission expressly dismissed *Achernar*'s substitution amendment, and, on its own motion, modified the construction permit to specify operation on a substituted channel.<sup>11</sup>

The factual setting of *Achernar* could hardly be further from that presented here. In *Achernar*, the Commission stressed "the unique circumstances of this case" where the "equities favoring these applicants are extraordinary."<sup>12</sup> In that case, two *bona fide* and viable applications had been pending 14 years, since 1986, and the two applicants entered into an agreement providing for the 50/50 merger of the applicants into a new entity, "reflect[ing] a *bona fide* merger of the interests . . . that contemplates a genuine sharing of risks and rewards."<sup>13</sup> By contrast, there is nothing unique here—except, perhaps, the persistence with which TCC will fight for some

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*Order*"), at ¶ 191; Mass Media Bureau Announces Window Filing Opportunity, *Public Notice*, DA 02-270 (released Feb. 6, 2002) ("*Filing Window Public Notice*").

<sup>8</sup> See, e.g., 47 C.F.R. § 73.3573; Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, *First Report and Order*, 13 FCC Rcd 15920 (1998), at ¶ 138.

<sup>9</sup> 15 FCC Rcd 7808 (2000).

<sup>10</sup> TCC's Amendment at 7.

<sup>11</sup> See *Achernar* at ¶¶ 1, 13, 15 n.28, 31.

<sup>12</sup> *Achernar* at ¶ 15.

<sup>13</sup> *Achernar* at ¶ 16.

settlement dollars. TCC and United both attempted to jam their feet into the closing door of NTSC opportunity before it was shut permanently. Their settlement agreement reflects no *bona fide* merger of interests or genuine sharing of risks and rewards. Only TCC survives—and just long enough to sell out to Acme, an interloper with no legitimate claim to a construction permit in Richmond.

Most problematically, TCC's Amendment specifies Channel 39, but that channel is short-spaced to WRLH-TV, Channel 35, Richmond, which TCC concedes.<sup>14</sup> As the Mass Media Bureau made perfectly clear in the *Filing Window Public Notice*:

Amendments and petitions for rule making during this window opportunity *must* conform with all pertinent legal and technical requirements, including criteria for interference protection to both NTSC and DTV stations. . . . NTSC allotment proposals made pursuant to this public notice *must* meet the minimum distance separations between NTSC stations (47 C.F.R. Section 73.610) . . . .<sup>15</sup>

TCC is proposing a 31.4 km short-spacing. Therefore, TCC's Amendment does not comply with the requirements for amendments during the filing window, which plainly contemplate that amendments (or petitions) cannot contain waiver requests. When the Commission wishes to permit waiver requests, it knows how to do so. TCC's reliance on an alleged N-4 short-spacing waiver for WBDT(TV), Springfield, Ohio, (which, incidentally, is owned by Acme) is misplaced because Acme's station there did not submit a waiver request in conjunction with a Commission-established filing window in which the Public Notice expressly requires that amendments fully conform with all technical requirements, including all minimum distance separations.

In short, Channel 39 is simply not available in Richmond. If, however, the Commission were

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<sup>14</sup> See TCC's Amendment at 4; *id.*, Engineering Statement, at 3.

<sup>15</sup> *Filing Window Public Notice* at 3 (emphases added).

to determine that Channel 39 were available in the Richmond area, then WUPV may well be interested in substituting Channel 39 for its current NTSC allotment on Channel 65. WUPV has not sought such a substitution because it believed that the failure of Channel 39 to satisfy the Commission's short-spacing rules precluded its use in Richmond or Ashland. Instead, in order to promote band-clearing in the upper 700 MHz, WUPV previously sought to delete the noncommercial educational Channel 52 allotment at Courtland, Virginia, and substitute Channel 52 at Ashland for its current Channel 65 allotment at Ashland.<sup>16</sup> Now, however, as a result of the Commission's *Lower 700 MHz Band Order*, it is apparent that the Commission is greatly desirous of clearing the lower 700 MHz band of analog stations, just as it is of clearing the upper 700 MHz band. Therefore, in light of this policy preference, the public interest may be better served by WUPV's substitution of Channel 39 for Channel 65 in the upper 700 MHz band than by WUPV's substitution of Channel 52, in the lower 700 MHz band, for Channel 65. In addition, were WUPV able to operate analog facilities on Channel 39, both its analog and digital facilities (DTV Channel 47) would be situated on core channels. Accordingly, at the end of the DTV transition, WUPV would be permitted a choice as to which core channel to remain on, which would comport with the choices made available to the vast majority of television stations nationwide. For these reasons, WUPV may be interested in considering such a substitution were the Commission to determine that Channel 39 is somehow allocable to the Ashland/Richmond area. As TCC has itself stated, the relocation of WUPV "would serve the *substantial* public interest by clearing the upper 700 MHz band in the Richmond area and facilitating the commencement of advanced wireless services within that band as well as enabling public safety entities to use that band prior to the end

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<sup>16</sup> See WUPV's Petition for Rule Making (filed Nov. 3, 2000).

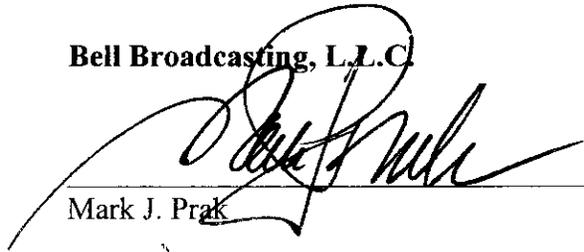
of the transition period.”<sup>17</sup>

### Conclusion

For the foregoing reasons, the Commission should dismiss or return TCC’s Amendment, deny TCC and United’s Joint Request, and reject and return TCC’s facially and fatally defective application for Channel 63 in Richmond.

Respectfully submitted,

**Bell Broadcasting, L.L.C.**



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March 8, 2002

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<sup>17</sup> TCC’s Amendment at 9 (emphasis added).

## Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Opposition of Bell Broadcasting to Amendment to Petition for Rule Making** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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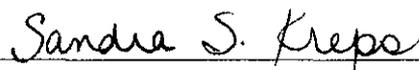
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This the 8th day of March, 2002.

  
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**Exhibit A**

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November 8, 2000

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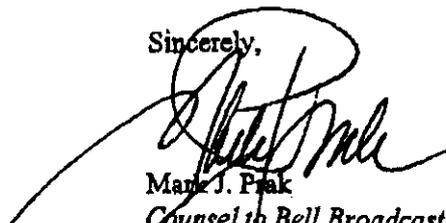
Re: In re Applications of United Television, Inc. and Television Capital Corporation of Richmond for a Construction Permit for a New TV Broadcast Station on Channel 63 in Richmond, Virginia  
File No. BPCT-960920IT  
File No. BPCT-960920WI

Dear Ms. Salas:

Enclosed please find the original and four copies of the Opposition of Bell Broadcasting to Joint Request for Approval of Settlement Agreement in the above-referenced files.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with the undersigned.

Sincerely,



Mark J. Frank  
Counsel to Bell Broadcasting, L.L.C.

Enclosures

cc: International Transcription Services (w/enc.)

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

In re Applications of	)	
	)	
United Television, Inc.	)	File No. BPCT-960920IT
	)	
Television Capital Corporation of Richmond	)	File No. BPCT-960920WI
	)	
For Construction Permit for a New TV	)	
Broadcast Station on Channel 63 in	)	
Richmond, Virginia	)	

**OPPOSITION OF BELL BROADCASTING TO JOINT REQUEST FOR  
APPROVAL OF SETTLEMENT AGREEMENT**

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November 8, 2000

## Table of Contents

Background and Summary .....	2
Argument	
I. TCC and United's Joint Request Must Be Denied Because TCC Has Not and Cannot Tender a Facially Acceptable Application for the Vacant Allotment .....	5
A. TCC's Application Is Fatally Defective on Its Face .....	5
B. Where There Is Only One Applicant, the Commission Must Open a Filing Window and Begin the Competitive Bidding Process .....	8
C. TCC's Defective Application Cannot Be Amended or Cured .....	10
II. Alternatively, the Richmond Allotment Must Be Subject to a Filing Window Regardless of the Disposition of TCC's Application .....	12
Conclusion .....	15
Bell Broadcasting, L.L.C., In the Matter of Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Ashland, Virginia), <i>Petition for Rule Making</i> (filed Nov. 3, 2000) ..... <i>Exhibit</i>	

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

In re Applications of	)	
	)	
United Television, Inc.	)	File No. BPCT-960920IT
	)	
Television Capital Corporation of Richmond	)	File No. BPCT-960920WI
	)	
For a Construction Permit for a New TV	)	
Broadcast Station on Channel 63 in	)	
Richmond, Virginia	)	

**OPPOSITION OF BELL BROADCASTING TO JOINT REQUEST FOR  
APPROVAL OF SETTLEMENT AGREEMENT**

Bell Broadcasting, L.L.C., licensee of Television Station WUPV, Ashland, Virginia ("WUPV"), by its attorneys, hereby opposes the Joint Request for Approval of Settlement Agreement ("Joint Request") filed by United Television, Inc. ("United") and Television Capital Corporation of Richmond ("TCC") in the above-captioned matters. In support thereof, WUPV shows the following:

In their Joint Request, TCC and United seek the Commission's approval of a settlement agreement, the dismissal of United's application, and the grant of TCC's amended application for a construction permit for a new television broadcast station allotted to Channel 63 in Richmond, Virginia. The Joint Request is premised on the fact that both TCC and United filed applications for construction permits for the vacant allotment on Channel 63 in Richmond on September 20, 1996.<sup>1</sup>

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<sup>1</sup> The date is significant because the Commission previously declared that it would no longer accept applications for vacant analog allotments after September 20, 1996. See *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, Sixth Further Notice*, 11

(continued...)

WUPV opposes the Joint Request because it is contrary to the public interest and to law. However, WUPV notes that it is only necessary to consider the merits of this Opposition if the Commission does not ultimately issue an order allowing WUPV to substitute Channel 52 at Ashland, Virginia, for Channel 65 at Ashland pursuant to WUPV's Petition for Rule Making filed on November 3, 2000.

### **Background and Summary**

On November 3, 2000, WUPV filed a Petition for Rule Making in which it requested that the Commission delete the vacant allotment for Channel 52 at Courtland, Virginia, and substitute Channel 52 at Ashland, Virginia, for use by WUPV in place of WUPV's current allotment on Channel 65 at Ashland, Virginia. WUPV's Petition for Rule Making is fundamentally premised upon the public policy interests in clearing the spectrum in channels 60-69 as expeditiously as possible to make way for other uses of this spectrum.<sup>2</sup> A copy of WUPV's Petition for Rule Making is attached hereto as an Exhibit.

Although neither TCC's Application in File No. BPCT-960920WI nor United's Application in File No. BPCT-960920IT nor their Joint Request nor TCC's Petition for Rule Making (attached to the Joint Request) has ever been placed on public notice or been listed on any Commission release of broadcast actions or filings, the existence of these documents has recently come to WUPV's

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<sup>1</sup>(...continued)  
FCC Rcd 10968 (1996) ("*Sixth Further Notice*"), ¶ 60.

<sup>2</sup> See Service Rules of the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, FCC 00-224 (released June 30, 2000).

attention through various reports in the media apparently originating from ACME Communications, the purported "white knight" in the proposed Settlement Agreement. WUPV respectfully requests that the Commission issue, subsequent to the requisite Notice of Proposed Rule Making, an order consistent with WUPV's Petition for Rule Making and dismiss all matters pending in the above-captioned files. In the alternative, WUPV requests that its Petition for Rule Making be conjoined with the Petition for Rule Making filed in the above-captioned matters in a Notice of Proposed Rule Making issued by the Commission.<sup>3</sup> If WUPV's Petition for Rule Making is not ultimately granted in that proceeding, then WUPV requests that the Commission open a filing window for parties to file competing applications for a Channel 52 allotment at Richmond, Virginia, as is required under the Balanced Budget Act of 1997, as demonstrated herein.

There are numerous defects in the materials submitted in the above-captioned matters. This Opposition deals with only one of these because it is a defect that appears on the face of TCC's Application in File No. BPCT-960920WI and therefore requires that TCC's Application be summarily rejected and returned. Once TCC's Application is rejected, it follows that the Joint Request cannot be approved and must be denied. As noted above, it is only necessary for the Commission to reach even this fatal procedural defect only if the Commission does not initially act favorably on WUPV's Petition for Rule Making.

TCC filed its initial Application for Construction Permit for Commercial Television Broadcast Station ("Channel 63 Application") with the Commission on September 20, 1996, seeking

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<sup>3</sup> WUPV notes that in the Petition for Rule Making attached to the Joint Request no mention is made of the allotment on Channel 52 at Courtland, Virginia, which is mutually exclusive with the request to amend the Table of Allotments to substitute Channel 52 at Richmond in place of Channel 63 at Richmond.

to enter the Richmond, Virginia market.<sup>4</sup> However, due to its proximity to Washington, D.C., Richmond falls within the freeze area subject to the Commission's 1987 Freeze Order prohibiting the filing of certain applications for new analog stations.<sup>5</sup> Applications for allotments affected by the Freeze Order must include a substantive request, with "compelling" reasons, to waive the freeze, which will be considered by the Commission only on a case-by-case basis.<sup>6</sup> However, TCC, in its Channel 63 Application, made no such substantive waiver request. Because TCC failed to submit any reasons why a waiver should be granted, its Channel 63 Application is defective on its face and is not properly before the Commission.

In its *First Report and Order* implementing the Balanced Budget Act of 1997,<sup>7</sup> the Commission interpreted the Act's language requiring that certain "auctions be limited to the pending applicants."<sup>8</sup> Under the Commission's interpretation of its authority, in order for it to be proper to limit the relevant group of applicants/bidders to United and TCC, they must both have filed facially acceptable applications for construction permits prior to July 1, 1997. Only upon satisfaction of this condition precedent could a pool of applicants meet the statutory categorization of "competing applications . . . filed with the Commission before July 1, 1997." Because the Commission must

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<sup>4</sup> See FCC File No. BPCT-960920WI.

<sup>5</sup> See *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, *Order*, Mimeo No. 4074 (released July 17, 1987) ("Freeze Order").

<sup>6</sup> See *Freeze Order*, ¶¶ 2-3 (declaring that a party affected by the freeze has the burden of seeking a waiver).

<sup>7</sup> Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920 (1998) ("*First Report and Order*").

<sup>8</sup> *First Report and Order*, ¶ 43; see 47 U.S.C. § 309(l).

reject TCC's Channel 63 Application due to its failure, on its face, to include the necessary substantive freeze waiver request, only one application, United's, was properly tendered for the Richmond, Virginia, allotment. However, where there is only one applicant, Section 309(l) does not apply, and the Commission, under its own interpretation of its auction authority, must open a window for competing applicants and, subsequently, conduct an auction of the Richmond allotment among all interested comers who file facially acceptable applications.

In fact, even if the Commission does not reject TCC's Channel 63 Application for its failure to include a substantive freeze waiver request, the Commission must still open a filing window for competing applicants for the Channel 52 allotment at Richmond. Failure to do so is a misapprehension of the requirements of the Balanced Budget Act of 1997 and will thwart the public benefits of competitive bidding which can only be served when the Commission has given all interested persons the opportunity to enter the licensing market.

### **Argument**

**I. TCC and United's Joint Request Must Be Denied Because TCC Has Not and Cannot Tender a Facially Acceptable Application for the Vacant Allotment**

**A. TCC's Application Is Fatally Defective on Its Face**

In 1987, the Commission issued its Freeze Order which manifested the Commission's intent to reject, from July 17, 1987, forward, all applications for NTSC allotments in the top thirty broadcast markets, one of which was Washington, D.C.<sup>9</sup> Because Richmond lies within the

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<sup>9</sup> See Freeze Order, ¶ 3 (ordering that "the Commission WILL NOT ACCEPT . . . applications for television construction permits for vacant television allotments within the minimum co-channel separation distance of the cities listed in the Appendix" which includes Washington, (continued...)

minimum co-channel separation distance of stations located in Washington, D.C., the applications at issue in the instant proceeding fall within the geographic area governed by the Freeze Order.

In the Freeze Order, applicants were provided with an opportunity to avoid the freeze effectuated by the Order: "The Commission will also consider waiver requests on a case-by-case basis for . . . applicants which provide compelling reasons why this freeze should not apply to their particular situations."<sup>10</sup> TCC, in its Channel 63 Application, made no such substantive waiver request. Even worse, TCC recognized that its Application was in contravention of the Freeze Order but declined to provide any reasons why a waiver should be granted, stating, instead, that "[a] full detailing will be presented as an amendment to this application."<sup>11</sup> Such a "full detailing" has never been provided; indeed, *no* details have ever been provided. This failure to provide *any* reasons, let alone "compelling reasons," leaves the Commission, by its own terms, with only one option: "Any television application received by the Commission that is not acceptable due to this freeze will be returned, along with any accompanying filing fee, to the applicant."<sup>12</sup> Furthermore, the fact that TCC failed to include any reasons why a waiver should be granted renders the Application defective on its face—since no reasons were given it is not necessary for the Commission to engage in an analysis of whether the applicant provided "compelling reasons," as the Freeze Order requires.

The Commission reaffirmed its 1987 view in the 1996 *Sixth Further Notice*. In the *Sixth*

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<sup>9</sup>(...continued)  
D.C.).

<sup>10</sup> Freeze Order, ¶ 2.

<sup>11</sup> TCC's Channel 63 Application, Engineering Report, ¶ 13.

<sup>12</sup> Freeze Order, ¶ 3.

*Further Notice* the Commission determined that to promote the implementation of digital television services, applications for new analog stations submitted after September 20, 1996, would not be accepted.<sup>13</sup> In the same paragraph that announced the September 20 deadline, the Commission reiterated, in no uncertain terms, its intent to abide by its 1987 freeze-and-waiver procedure: “As we process the applications on file now and those that are filed before the end of this filing opportunity, we will continue our current policy of considering requests for waiver of our 1987 freeze *Order* on a case-by-case basis.”<sup>14</sup> Clearly, then, in establishing the September 20, 1996, deadline, the Commission contemplated that when an application implicated a top-30 market—as does TCC’s Channel 63 Application—a substantive freeze waiver request would have to accompany the application or else be summarily rejected and returned, per the Freeze Order.

The Commission’s strict adherence to its 1987 announcement that “construction permit applications for vacant television allotments in these areas will not be accepted” unless “applicants . . . provide compelling reasons why this freeze should not apply to their particular situations”<sup>15</sup> was again even more recently reflected in the Commission’s 1998 *First Report and Order*. In the context of explaining its auction powers under the Balanced Budget Act of 1997 and responding to comments suggesting alternative interpretations of that Act, the Commission, in paragraph after paragraph, reaffirmed its commitment to the 1987 freeze-and-waiver-request process, by invoking a deliberate and descriptive locution concerning 1987 freeze applications. Indeed, one need look no

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<sup>13</sup> See *Sixth Further Notice*, ¶ 60.

<sup>14</sup> *Id.*

<sup>15</sup> Freeze Order, ¶ 2.

further than the title describing the contents of paragraphs 66 through 70 of the *First Report and Order*: "Pending Applications with Waiver Requests of the Freeze on Television Applications." Twice more in paragraph 66 the Commission invoked similar verbiage, including a review of the Commission's declaration in the 1996 *Sixth Further Notice* "that it would continue to process on a case-by-case basis pending requests for waiver of the 1987 freeze that involved the top 30 television markets, as well as any waiver requests filed during the 30-day period."<sup>16</sup> The Commission continued these "applications with freeze waiver requests" recitations in its reconsideration order on its auction authority issued just last year.<sup>17</sup> TCC's failure to submit the requisite substantive freeze waiver request with its Channel 63 Application is fatal and renders the application facially unacceptable.

**B. Where There Is Only One Applicant, the Commission Must Open a Filing Window and Begin the Competitive Bidding Process**

The Commission, in the *First Report and Order*, has explained precisely why the instant Opposition must prevail over the Joint Request—i.e. why TCC and United lack the standing even to agree to the proposed settlement—and why the Commission must open a cut-off window for the Richmond allotment:

*[I]f only one application with a freeze waiver request was filed for a single allotment, such that there would be no mutually exclusive*

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<sup>16</sup> *First Report and Order*, ¶ 66.

<sup>17</sup> See Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999), ¶¶ 19-22. The Commission's reiterations are themselves significant as they evince the Commission's continuing commitment to the freeze-and-waiver process announced in the 1987 Freeze Order.

applications, Section 309(l) would not apply because the threshold requirement for “competing applications . . . filed with the Commission before July 1, 1997” has not been satisfied. Nothing in the Budget Act or in the legislative history indicates that, where a single pre-July 1st *application with a waiver request* was filed, Section 309(l)(2) precludes the acceptance of additional applications consistent with our normal practice, that would then be resolved through a system of competitive bidding pursuant to Section 309(j). Such applications are no different under the statute than other pre-July 1, 1997 applications that were not subject to a cut-off period.<sup>18</sup>

Moreover, the Commission expressly “disagree[d] with commenters urging that we may . . . grant such single television applications as soon as we grant the freeze waiver request.”<sup>19</sup> Therefore, not only must the Commission first grant a freeze waiver request before a station may be awarded a construction permit in a market implicated by the Freeze Order—a circumstance that presupposes the existence and submission of a freeze waiver request by the relevant applicant—but the Commission must also open a filing window when only a single application accompanied by a substantive freeze waiver request was filed by the September 20, 1996, deadline.

The result in this instance is fore-ordained by the Commission’s orders. United filed a substantive freeze waiver request with its original Channel 63 Application; TCC did not. The Commission must reject and return TCC’s facially improper application, leaving only a single application with a freeze waiver request. Thus, as the Commission’s own language indicates, in the context directly applicable to the instant situation, the Channel 63 allotment must undergo the competitive bidding process after the Commission opens a filing window to solicit other interested

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<sup>18</sup> *First Report and Order*, ¶ 69 (emphases added).

<sup>19</sup> *First Report and Order*, ¶ 70.

parties to bid against the *only* application heretofore submitted with a substantive freeze waiver request—United's.<sup>20</sup>

**C. TCC's Defective Application Cannot Be Amended or Cured**

TCC's lack of a substantive waiver request and failure to provide any reasons for grant of a waiver amount to a fatal defect by the terms of the Freeze Order requiring the request.<sup>21</sup> The Freeze Order does not contemplate the Commission permitting amendments or retroactive submissions. The Freeze Order indicates only that the Commission will entertain freeze waiver requests "which provide compelling reasons," and, absent such a request, applications will be returned to the applicant. Moreover, the Commission's own interpretation of the expanded bidding authority granted by the Balanced Budget Act of 1997 indicates that TCC's failure to file a substantive freeze waiver request is an incurable defect. In explaining the parameters of a potential auction limited to mutually exclusive applicants, the Commission "note[d] that these pending, potentially mutually exclusive applicants, *who filed applications with freeze waiver requests before July 1, 1997*, would not be entitled to participate in an auction except to the extent that we grant particular waiver requests and accept the related applications."<sup>22</sup> Obviously, TCC did not file an application *with* a substantive freeze waiver request before July 1, 1997, and to allow it to cure that

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<sup>20</sup> Once TCC's Channel 63 Application drops from consideration as a result of TCC's failure to provide any reasons for grant of a waiver, United's position is comparable to that of Davis Television as discussed in the Commission's *Memorandum Opinion and Order* at ¶¶ 20-22.

<sup>21</sup> See Freeze Order, ¶ 2 ("[C]onstruction permit applications for vacant television allotments in these areas will not be accepted.").

<sup>22</sup> *First Report and Order*, ¶ 68 (emphasis added).

defect four years later only after the prompting of this Opposition would directly contradict the Commission's own explication of its relevant auction powers.

Perhaps even more revealing is the nature of a freeze waiver request itself. A substantive freeze waiver request is not an arcane, formalistic document requiring an extraordinary ability to track down, digest, and repackage inaccessible legal or technical materials; it is a persuasion piece based on "compelling" policy considerations.<sup>23</sup> If, as the Commission itself has stated, "[t]he intent of [the] 30-day period [following the *Sixth Further Notice*] was to afford an opportunity to file any applications that were currently being prepared for filing [and] not to solicit competing applications,"<sup>24</sup> then the Commission cannot permit TCC now to cure both its initial failure to file a substantive freeze waiver request and its failure to file one in the intervening *four years*.<sup>25</sup> To permit TCC to cure such a significant defect would be tantamount to treating the 30-day post-*Sixth Further Notice* period as an open filing window, contrary to the Commission's explanation. Such a treatment would sanction the circumscription of the Commission's explicit rules and policies, as any applicant could have applied for vacant allotments in top-30 or nearby markets at the last minute, without submitting the *sine qua non* of the Application—a waiver request with "compelling" reasons why a waiver should be granted. Such a result is antithetical to the Commission's representations

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<sup>23</sup> See Freeze Order, ¶ 2.

<sup>24</sup> *First Report and Order*, ¶ 70; see also *Sixth Further Notice*, ¶ 60 ("This will provide time for filing of any applications that are currently under preparation.").

<sup>25</sup> WUPV here is attacking neither the character of TCC, United, or ACME Communications (the proposed "white knight") nor the merits of TCC's and United's Channel 63 Applications. WUPV is addressing procedural issues only but reserves the right to comment on the merits of the underlying applications and the character of the parties at the appropriate time.

that the 30-day period was to accommodate nascent and extant applications rather than to prompt new applications in an attempt to “game” the system.<sup>26</sup> Either way, of course, an application that is required to contain but fails to have a substantive freeze waiver request is just that—an application without any real freeze waiver request. As such, TCC’s Channel 63 Application cannot qualify as mutually exclusive with that of United. That leaves United as a singleton applicant for the Richmond allotment, and the Commission, therefore, must “solicit additional applications, and if mutually exclusive applications are filed, resolve those applications by competitive bidding.”<sup>27</sup>

## **II. Alternatively, the Richmond Allotment Must Be Subject to a Filing Window Regardless of the Disposition of TCC’s Application**

In the event that the Commission declines to reject TCC’s Channel 63 Application as facially and fatally unacceptable, then, nevertheless, the Commission still must open a filing window for competitive bidding on the Richmond allotment. When Congress passed the Balanced Budget Act of 1997, it expanded the FCC’s competitive bidding authority under 47 U.S.C. § 309(j). Although the Commission has interpreted the reach of this authority in the *First Report and Order*, that

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<sup>26</sup> Indeed, it appears that TCC and several related entities were attempting to play just this game. For example, Television Capital Corporation of Portland filed an application on September 20, 1996, for a vacant allotment on Channel 40 in Portland, Oregon, which also fails to include a substantive freeze waiver request. See File No. BPCT-960920WH. Similarly, Television Capital Corporation of Lexington filed an application on September 20, 1996, for a vacant allotment on Channel 62 in Lexington, Kentucky, which likewise fails to include a substantive freeze waiver request. See File No. BPCT-960920WQ. All three of these applications are cookie-cutter applications and fail to provide any reasons why a waiver of the 1987 freeze should be granted. Together, they evince an intent merely to slip in applications at the deadline and game the system. In each of the cases, subsequent proposed settlement agreements have been filed, and in none of the cases will the TCC entity become the ultimate licensee, although the TCC entity will walk away with a considerable windfall.

<sup>27</sup> *First Report and Order*, ¶ 70.

interpretation partly misapprehends the Commission's authority in those cases in which the Commission had never opened a filing window for competing applicants. Indeed, the Commission itself has acknowledged the unfairness of its own interpretation of its auction authority to limit bidding to those parties that had filed mutually exclusive applications before July 1, 1997: "We recognize that there is some degree of unfairness in this result, particularly given our explicit pledge to provide an opportunity for the filing of competing applications with respect to any analog television application that we accepted."<sup>28</sup>

The Commission's own acknowledgment of the unfairness that results from its disparate treatment of singleton applications and mutually exclusive applications suggests that the Commission has misinterpreted the auction provisions of the Balanced Budget Act. That the Commission has, in fact, short-changed potential applicants is borne out by the legislative history of the Balanced Budget Act. In the Conference Report to the Balanced Budget Act, the conferees expressly discussed the opening of filing windows and

recogniz[ed] that there are instances where a single application for a . . . broadcast license has been filed with the Commission, but that no competing applications have been filed *because the Commission has yet to open a filing window*. In these instances, the conferees expect that, regardless of whether the application was filed before, on or after July 1, 1997, the Commission will provide an opportunity for competing applications to be filed . . . .<sup>29</sup>

This language evinces Congress's desire for the Commission to open filing windows in every instance to ensure that interested persons are given the opportunity to pursue an allotment and to go

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<sup>28</sup> *First Report and Order*, ¶ 68.

<sup>29</sup> H.R. Conf. Rep. 217, 105th Cong., 1st Sess. 574 (1997) (emphasis added).

to auction. The Conference Report is strong evidence that Congress sought to tie closed auctions to the opening of filing windows, for the public benefits of competitive bidding are served only when the Commission has given all interested persons the opportunity to enter the licensing market.

In its *First Report and Order*, the Commission noted that the merits of auctions “include the public interest benefits of . . . assigning the frequency to the eligible party that valued it the most and recovering for the public a portion of the value of spectrum made available for commercial use.”<sup>30</sup> If the Commission grants the Joint Request, it will frustrate congressional intent because approval of United and TCC’s proposed settlement agreement will preclude the Commission from ever determining what party values the Richmond allotment the most. By approving the Joint Request, the Commission will prevent other interested parties from bidding on the allotment. If one of the main benefits of the auction system is to maximize the likelihood that the person who values a station the most ultimately acquires the station, then the grant of the Joint Request will directly frustrate that feature, as the opportunity to bid or settle will have been limited to a mere two persons who just, by luck, happened to file their applications before July 1, 1997, before the rules of the game were changed mid-course.

Moreover, if the Commission grants the Joint Request, it would be sanctioning an end-run around the very congressional mandate it so strictly construed in its *First Report and Order*, as well as circumscription of the public interest benefits expounded in the *First Report and Order*. Indeed, approval of the Joint Request will result in a third party—one which, under the Commission’s own interpretation of its auction authority, had no standing to bid on the allotment—acquiring the

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<sup>30</sup> *First Report and Order*, ¶ 40.

construction permit; the public, which is supposed to “recover[] a portion of the value of spectrum,” recovering virtually nothing; and TCC, a private party that has filed a facially defective application, being permitted to receive a windfall. Surely neither Congress nor the Commission could have intended a result so clearly contrary to the public interest.

### **Conclusion**

Should the Commission, as an initial matter, not issue an order consistent with WUPV’s Petition for Rule Making, then, for the foregoing reasons, the Commission should deny United and TCC’s Joint Request for Approval of Settlement Agreement and reject and return TCC’s facially and fatally defective application for Channel 63 in Richmond.