ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:	)	
	)	MM Docket No. 02-113
Remedial Steps for Failure to Comply with Digital Television Construction Schedule	)	
	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: The Commission

COMMENTS OF WHITE KNIGHT HOLDINGS, INC.

White Knight Holdings, Inc. ("White Knight"), through counsel and pursuant to 47 C.F.R. §§1.415 and 1.419, hereby submits its comments in response to the *Order and Notice of Proposed Rule Making* (the "*NPRM*"), 67 Fed. Reg. 38456 (June 4, 2002), in the above-captioned proceeding. These comments are timely filed pursuant to the timetable announced in the *NPRM.*

INTRODUCTION

White Knight is the ultimate parent of the permittees of stations KSHV-DT, Shreveport, Louisiana, WVLA-DT, Baton Rouge, Louisiana, WNTZ-DT, Natchez, Mississippi, and KFXK-DT, Longview, Texas (the "Stations"). As an operator of television stations in smaller markets that is struggling to direct the financial resources necessary to construct its digital television facilities, White Knight is concerned that the Commission may institute rules and policies that put so much financial strain on smaller broadcasters that such policies will ultimately encourage even greater industry consolidation.

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In particular, White Knight is concerned that: (A) the Commission's proposed scheme of "graduated sanctions"[1] would cause further damage to smaller market licensees by potentially imposing costly penalties that will effectively pull resources needed to construct DTV facilities when a financially struggling station instead requires as much assistance as possible to complete its DTV conversion, and (B) the Commission has already imposed the same sanctions proposed in the NPRM on stations that sought and were not granted a DTV Construction Permit extension beyond the May 1, 2002 deadline. This imposition of sanctions before the rule making proceeding has been completed amounts to prejudgment of the outcome of the proceeding as well as a violation of due process that ultimately adds to the pressure on smaller station owners to sell their holdings to larger groups – thereby, increasing industry consolidation.

ARGUMENT

A. The Proposed Program of Graduated Sanctions Will Harm Smaller Market Licensees and Encourage Greater Industry Consolidation

The Commission proposes first to admonish, then to fine and finally to rescind DTV permits for stations that have not made sufficient progress and have not been found, through Commission review, to have sufficiently justified a delay. However, the Commission has already imposed the "graduated sanctions" proposed in the *NPRM* when it denied construction permit extension applications for many stations unable to complete construction by the May 1, 2002 deadline. In applying these sanctions without advance notice, the Commission has made it even more difficult for financially struggling smaller licensees to tap the financial resources needed to complete their stations' DTV buildout.

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[1] *NPRM* at ¶¶16-20.

White Knight, like many other smaller licensees, was admonished for its financial inability to meet the May 1, 2002 deadline. This admonition makes it even harder to raise capital. As part of the station's permanent record at the Commission, it suggests to potential investors and / or lenders that a licensee is not duly diligent in managing its affairs, which is not true; such a blemish on an otherwise fine record can dissuade investors or lenders from providing the capital necessary to complete the station's DTV construction costs. If the Commission is truly committed both to fostering diversity of ownership and to fostering the most expeditious DTV rollout possible, it should not take actions that make it harder for smaller licensees to make the expensive transition from analog to digital broadcasting. Moreover, the imposition of forfeitures, which is the next step imposed under the graduated sanctions regime, would further pull financial capacity from smaller, financially struggling licensees, when such capital should be left free to pay for a station's DTV buildout. In the final analysis, the graduated sanctions, as applied, are counterproductive. Instead of encouraging DTV construction, they actually hinder it. Moreover, a small scale owner of a station that finds itself in a financial pinch as it tries to construct its DTV facilities is likely, as sanctions mount, to sell rather than risk losing everything – and the most likely buyer is one of the larger station groups that account for the industry's increasing consolidation.

Although the Commission has clearly taken note in the past of the problems faced by smaller stations in constructing DTV facilities,[2] it appears to be ignoring this concern by its

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[2] For instance, in *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd, 20594 at ¶45, the Commission stated: "we recognize that some broadcasters, despite their reasonable good faith efforts, may not be in a financial position to timely complete the construction of their DTV facilities. We also recognize that, particularly for stations in smaller markets, the capital costs of conversion may be very high relative to the station's anticipated revenue. As a result, stations with

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decision to immediately apply the graduated sanctions regime, as well as proposing to impose such sanctions as a matter of course, through this rule making. As noted, the sanctions will more likely hinder smaller licensees as they struggle to build DTV facilities and, ultimately, when faced with losing all value through loss of their DTV permit as the sanctions progress, station owners will be encouraged to sell their holdings. This can only encourage further industry consolidation as only the largest, most well-endowed companies will have the ability to fund DTV construction.

Unless the Commission's ultimate goal is to slow DTV construction in smaller markets and / or increase consolidation in these markets, it should not formalize the graduated sanctions regime placed on many small broadcasters after May 1, 2002. Indeed, it should rescind those admonitions and graduated sanctions already imposed and instead make it easier, rather than harder, for smaller licensees to bring digital service to their communities.

B. The Imposition of the Proposed Sanctions Before Completion of The Rule Making Proceeding Indicates Prejudgment of the Outcome and Violates Due Process

The Commission instructed the Media Bureau to, among other things, impose the sanctions proposed in the *NPRM*[3] — even before completion of the rule making proceeding. This instruction runs afoul of restrictions on prejudgment of open rule makings. It also violates the due process rights of those sanctioned.

(1) Prejudgment: By instructing the Media Bureau to impose the progressive sanctions proposed in the *NPRM*, the Commission appears not to be presenting an option in the *NPRM*, but

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lower revenues may find it more difficult to cover these costs in time to meet the construction deadline."

[3] *See NPRM* at ¶21.

a *fait accompli* for which it only seeks to create a paper record. Compare this instruction to the abundance of caution exercised by the Commission in other proceedings to ensure that its enforcement activities do not amount to illegitimate prejudgment. For instance, in *AT&T v. Ameritech*, 13 FCC Rcd 214388 (1998), the Commission specifically chose not to issue sanctions related to a matter that was the subject of an open rule making: "[S]o as not to prejudge that future rulemaking, we choose not to decide." *Id.* at ¶ 54.

The Commission chose that course of action in *AT&T v. Ameritech* for good reason as the Administrative Procedure Act[4] and related case law requires that an agency maintain an open mind to whatever insights are generated by comments following a notice of rule making. *Cf. Association of National Advertisers v. FTC*, 627 F.2d 1151, 1165-70 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980) (holding that decision makers must not have closed minds so as to prejudge the outcome of a proceeding). The Commission should do no less here than it did in *AT&T v. Ameritech*. But instead, by imposing the *NPRM*'s proposed series of graduated sanctions immediately, the Commission is announcing that the Comments filed in the rule making do not matter; after all, the proposed rule is already in place no matter what commenters have to say.

The Commission could do much to demonstrate that it has not presented a *fait accompli* and prejudged the ongoing rule making by rescinding the admonitions and related graduated sanctions imposed on those applicants whose DTV construction permit extensions were denied.

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[4] 5 U.S.C. §553.

(2) Due Process Violations: The immediate imposition of the proposed graduated sanctions regime also violates due process requirements under well rooted principles of administrative law. Due process in administrative law requires fair notice of impending penalties. Permittees sanctioned under the proposed rule before the conclusion of the rule making lacked fair notice that they would be subject to the graduated sanctions as they were first announced in the *NPRM*. This is true for two reasons: (a) the Commission announced its enforcement policy on the eve of issuing its enforcement decision; by then, it was too late for the station to comply and, (b) the Commission's previous enforcement pronouncements did not sufficiently warn of the kind of penalty regime imposed here.

(a) Insufficient Lead Time: Fair notice requires that a regulatee not simply be informed "on the eve" of enforcement of what is required, but with sufficient time so that it can take necessary actions "to conform . . . conduct to law." *Keefe v. Library of Congress*, 777 F.2d 1573, 1582 (D.C. Cir. 1985). Although the FCC had previously noted the hardships faced by stations in complying with the May 1, 2002 DTV build-out deadline[5] and made clear that when such delays were caused by situations beyond the permit holder's control, it would issue waivers, the Commission announced *only after the May 1, 2002 deadline* that it was instructing the Media Bureau to impose the "graduated sanctions" for construction delays. Indeed, the Commission announced this enforcement measure *22 days after the construction deadline had passed and about two weeks before the Bureau issued letters admonishing stations and imposing further graduated sanctions*. This amounts to no advance notice at all – let alone fair notice. Therefore, the imposition of sanctions violates the affected Permittees' due process rights.

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[5] *See Review of the Commission's Policies Affecting the Conversion to Digital Television, supra n.2.*

(b) Penalties Imposed Without Warning: As mentioned above, the Commission has taken full notice of the difficulties stations face in constructing their digital facilities due to a myriad of factors outside of stations' control. Just last year, the Commission stated that "many stations have yet to receive their DTV permits with only a few months left before the construction deadline, which has made it difficult for broadcasters to schedule highly-demanded tower construction crews and to coordinate the purchase of costly equipment."[6] When noting these problems, the Commission also announced its intention to grant construction extensions on a case by case basis and, evidently attempting to afford fair notice, it also directed the Media Bureau "promptly to notify applicants of any denial of an extension so that the applicant can timely complete construction in order to meet the applicable construction deadline."[7]

The Media Bureau, however, failed to follow the Commission's announced guidelines and, instead, issued sanctions in June – even though affected stations generally filed their extension requests about 60 days prior to the May 1, 2002 deadline. As these events unfolded, the affected stations had no notice allowing them "to meet the applicable construction deadline,"[8] as the Commission had previously ordered. As a result, affected stations received no notice at all – and had absolutely no chance to comply. For these reasons, the Commission erred in imposing graduated sanctions pursuant to the *NPRM*. *See Keefe, supra*, and *General Electric Co v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995).[9]

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6 *Id.* at ¶41.

7 *Id.* at ¶47.

8 *Id.*

9 White Knight also notes that the reasons why a given licensee may not be able to complete construction of a DTV facility are complex and very fact-specific. The Commission can only determine whether the facts justify rescission of a permit by first holding a hearing. Nor can the FCC subject a licensee who wishes to convert to digital

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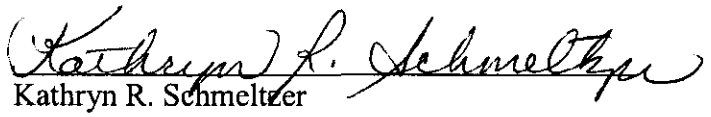
The Commission has an opportunity to correct this improper infringement of due process by rescinding the graduated sanctions imposed by paragraph 21 of the *NPRM* before fair notice was given. To do otherwise would violate established norms of administrative law and threaten to further delay the DTV transition through litigation over such violations of permittees' fundamental rights.

Respectfully submitted,



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on its analog allotment to competing applications. Conversion to digital is a minor modification which is not subject to competing applications.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July 2002, a true and correct copy of the foregoing PETITION FOR RECONSIDERATION was sent by hand delivery to:

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