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Statement in Support of **Federal Communications Commission**
Third Round DTV Channel Election **Office of the Secretary**

Telefutura Sacramento LLC, licensee of KTFK-DT, Stockton, California ("KTFK"), is submitting this statement in support of its Third Round DTV Channel Election of channel 26. KTFK is one of only seventeen stations with both its analog (64) and digital (62) channels located out-of-core.¹ Pursuant to the Commission's DTV channel election process, KTFK participated in the Second Round DTV Channel Election. More specifically, KTFK entered into a Negotiated Channel Agreement ("NCA") with five other Northern California DTV licensees: KFTY, Santa Rosa, CA; KRON-DT, San Francisco, CA; KTNC-DT, Concord, CA; KTVU-DT, Oakland, CA; and KVIE-DT, Sacramento, CA. The purpose of the NCA was to permit a final resolution of the DTV channel election process in Northern California while avoiding channel conflicts in an area of extreme spectrum crowding. The NCA specified the channels that each of the remaining stations would elect and thereby conclude the channel election process for the entire Northern California region.

KTFK, lacking any in-core channel, was not allowed to participate in the First Round channel elections. At the conclusion of the First Round, only one channel, channel 14, was available (other than low-VHF channels which the Commission has recognized are poorly suited for DTV) for use by KTFK and KTNC-DT, both of which operate from the Mount Diablo transmitter site. In the interest of resolving this conflict, these stations agreed in the NCA that KTNC-DT would elect channel 14, and KTFK would agree to change transmitter sites from Mount Diablo to Walnut Grove so that an alternate channel, channel 26, could be elected and utilized by KTFK, thereby permitting both stations to continue operation at the conclusion of the DTV transition.

On May 5, 2006, the Media Bureau released a Public Notice (the "*May 5th Public Notice*") stating that KTFK's election of channel 26 "would impermissibly change the station's geographic coverage area and violate the freeze imposed in connection with the DTV channel election and repacking process."² However, based upon subsequent discussions with Media Bureau staff, and given that KTFK has no choice but to move from Mount Diablo in order to locate a viable permanent DTV channel, KTFK is again electing channel 26 in the Third Round. As demonstrated herein, such election does not impermissibly increase the station's geographic coverage area nor does it violate the pending freeze. To the extent that the Bureau believes that KTFK's election violates any Commission rule or policy, KTFK requests a waiver of any such rule or policy necessary to effectuate its election of channel 26 and bring to a conclusion the DTV channel election process.

¹ *Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, 16 FCC Red 5946, 5951, n.25 (2001).

² *See Public Notice, Tentative Digital Channel Designations for Stations Participating in the Second Round of DTV Channel Elections and Third Round Election Filing Deadline*, DA 06-991 (MB rel. May 5, 2006) ("*May 5th Public Notice*"). The Media Bureau approved channel elections for all of the other stations that were party to the NCA, including KTNC-DT.

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BACKGROUND

KTFK is a Spanish-language station carrying the programming of the Telefutura Network. It operates on analog channel 64 and was assigned digital channel 62 by the Commission, making it one of a small number of stations with both channels located outside of the core television spectrum. Its current transmitter site is Mount Diablo, which is located between the San Francisco and Sacramento markets. However, because its community of license is Stockton, Nielsen has assigned KTFK to the Sacramento-Stockton-Modesto DMA, allowing it to be jointly owned with San Francisco-Oakland-San Jose DMA stations KDTV and KFSF-TV. KFSF-TV also carries the programming of the Telefutura Network. Both KFSF-TV and KTFK air Telefutura programming on a 24/7 basis, except for each station's local programming, which in the case of KFSF is oriented toward issues of interest to residents of the San Francisco area, and in the case of KTFK is oriented toward issues of interest to residents of the Sacramento-Stockton area. As a result of its operation from Mount Diablo, the noise-limited contour of KTFK substantially overlaps the noise-limited contour of KFSF. See Figure 3 of the attached Engineering Exhibit.

One other television station, KTNC-DT, also operates from Mount Diablo. Because KTFK and KTNC-DT are both located on a mountaintop between San Francisco and Sacramento and require a permanent DTV channel, both stations needed to locate a channel that will not cause interference to stations in either market. As demonstrated in the attached Engineering Exhibit, this requirement severely limits the potentially usable channels. In fact, other than low VHF channels, which the Commission itself has noted are not well-suited for DTV use,³ the only channel potentially available is channel 14, which KTFK's sister station KDTV surrendered in the first round of DTV channel elections in order to remain on its current DTV channel.

As only one viable channel was available for use on Mount Diablo at the conclusion of the First Round channel elections, but two stations are located there, it became clear that one of the two stations would have to relocate from Mount Diablo. More specifically, that station would need to move to the Sacramento side of the mountains where the terrain obstruction between a new transmitter site and the San Francisco market would make other channels usable so long as the station was willing to collocate with the other stations in the Sacramento market at the Walnut Grove antenna farm. Because KTFK's city of license, Stockton, is on the east side of the mountains and can be served from the Walnut Grove site, and KTNC-TV's city of license, Concord, is on the northwest side of the mountain, KTFK agreed as part of the negotiated

³ See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, at ¶ 82 (1997) (subsequent history omitted) (noting that "TV operations on the lower VHF channels 2-6 are subject to a number of technical penalties, including higher ambient noise levels due to leaky power lines, vehicle ignition systems, and other impulse noise sources and interference to and from FM radio service."); see also *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, at ¶ 63 and n.129 (2004) (permitting low VHF licensees to (i) release low VHF channels after the first round of DTV channel elections; and (ii) seek an alternate tentative channel designation in the third round of DTV channel elections, after acknowledging claims that "in some cases low VHF channels may not offer licensees the ability to provide the best DTV service to the public" and concluding that "low VHF licensees should be afforded an additional opportunity to find a channel that may better serve the public.").

channel election agreement not to pursue channel 14 and to instead select a channel (26) that could be used as long as the station relocated to the Sacramento-Stockton antenna farm.

AREAS OF CONCERN RAISED IN THE SECOND ROUND

In rejecting KTFK's election of channel 26 in the Second Round, the Media Bureau mentioned in passing a potential loss of service, but cited as its principal basis for rejection an assertion that the election "would impermissibly change the station's geographic coverage area and violate the freeze imposed in connection with the DTV channel election and repacking process." As discussed below, such concerns are misplaced, but in any event are particularly inapplicable to an election made in the Third Round.

Loss of Service

As discussed in the attached Engineering Exhibit, the required change in transmitter site necessarily results in a loss area, given that the entire reason for the move is to place terrain obstruction between KTFK and San Francisco-area stations, thereby making a permanent DTV channel available for use by KTFK. The move is necessary to implement the public interest benefits of the Northern California NCA, and more importantly, the public interest benefits of KTFK's continued operation at the conclusion of the DTV transition. Obviously, any loss of service resulting from a change in transmitter site is de minimis in comparison to the loss of service inherent in KTFK being forced to terminate operation if no viable channel exists for it to use at the conclusion of the DTV transition.⁴ However, as a practical matter, the actual loss of program service is de minimis.

As discussed in more detail below, KTFK notes that the number of viewers who would lose network service as a result of the channel 26 election/site move is only 0.6% of the population it currently serves. The population in that loss area is exceedingly well served by other stations, receiving service from between eight and twenty-one full power television stations. The channel 26 proposal also eliminates redundant network service, thereby permitting new network service to over 440,000 viewers, and approval of the election will bring to a conclusion the selection of permanent DTV channels for stations in Northern California, ensuring continued service to the public by KTFK at the conclusion of the DTV transition and allowing all stations to proceed with certainty in the planning and implementation of their permanent DTV operations.

As indicated in the attached Engineering Exhibit, the vast majority of the KTFK loss area already receives identical programming from KFSF, with the exception of KTFK's local programming. However, since the loss area is in the San Francisco market, the viewers there

⁴ The attached Engineering Exhibit discusses the numerous technical and other reasons why assigning a low VHF channel to KTFK is not an option that would serve the public interest. In particular, it notes that with the DTV channel elections coming to a conclusion, only a single California station, located in rural Eureka, will retain a low VHF channel, leaving a large contiguous block of low VHF spectrum available for reallocation by the FCC to numerous other more suitable wireless uses in California, and in the Bay Area in particular. Assigning a single low VHF channel to a station broadcasting into both San Francisco and Sacramento would unnecessarily block many of these alternate uses, particularly given that KTFK has presented a very beneficial alternative approach.

will be better served by receiving KFSF's San Francisco-oriented local programming than receiving KTFK's Sacramento/Stockton-oriented local programming in any event. As the Media Bureau stated in approving a similar site move in the San Francisco market by NBC, "[w]e are less concerned about the withdrawal of service here, because the vast majority of people located within the loss area will continue to receive NBC network service from other NBC affiliates, and are also well served by other stations." *KNTV License Inc.*, 19 FCC Rcd 15479, 15485 n.11 (MB 2004). See also *Citadel Communications Company Ltd.*, 10 FCC Rcd 11910, ¶¶ 25 and 36 (1995) (excluding from the Commission's loss calculation those viewers who would continue to receive ABC programming from other ABC stations).

The facts here are even stronger than in the *KNTV* or *Citadel* decisions, as 99.3% of the population that would no longer receive KTFK's programming already receive Telefutera programming from KFSF, and are also served by as many as 29 other stations. Of the 0.6% of the loss area population that cannot receive the KFSF signal over the air (29,691 people), only 5,778 are Hispanic viewers likely to be watching a Spanish-language program service.⁵ This minimal service loss will be further mitigated by the fact that some of these viewers will be cable or satellite subscribers that receive KFSF through their cable or satellite service.

In addition, as the attached Engineering Exhibit indicates, this very small loss area population will still receive a minimum of eight full power television signals, with some portions receiving as many as 21 such signals. The Commission has held that areas receiving five or more signals are already well-served. See *Reading Broadcasting, Inc.*, 16 FCC Rcd 8309, ¶ 20 (ALJ 2001) ("The areas and populations contained in each of these two Grade B service areas are neither unserved nor underserved inasmuch as all of the areas and populations to be served by whoever wins already receives more than five services."); *Amendment of Sections 73.606(b), Table of Allotments, Television Broadcast Stations, and 73.622(b), Table of Allotments, Digital Broadcast Television Stations (Asheville, North Carolina and Greenville, South Carolina)*, 18 FCC Rcd 15577, ¶ 4 n.3 (Vid. Div. 2003) ("reception areas that receive at least five broadcast services are considered to be well-served.") citing *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Garberville and Hydesville, California)*, 9 FCC Rcd 3125, ¶ 4 n.5 (AB 1994) ("Accordingly, within a given reception area, any count of radio services beyond five is unnecessary.").

In short, the actual loss area that will be created by the move of KTFK's transmitter site is both de minimis and already well served by other television stations. As a result, there is very little public interest detriment in permitting implementation of the channel 26 proposal, and much public interest benefit to outweigh the de minimis service loss.

However, the public interest benefits of implementing KTFK's channel 26 election are actually far greater than just allowing KTFK's continued operation and a prompt and successful conclusion to the DTV channel election process. Balanced against a possible loss of Telefutera

⁵ As discussed above and in the attached Engineering Exhibit, the only option other than channel 14 that would allow KTFK to operate from its existing transmitter site is to utilize a low VHF channel. However, the well-recognized deficiencies of low VHF DTV operation would likely result in a far higher number of viewers being unable to reliably obtain KTFK's signal than the de minimis 29,915 viewers (0.6% of the population within KTFK's current DTV contour) that would lose the Telefutera program service under KTFK's channel 26 proposal.

programming to 29,691 viewers is providing a new broadcast and network service to 443,729 viewers in the Sacramento market, where KTFK's community of license is located. In approving a proposal by NBC to move its San Francisco area transmitter site, the Media Bureau noted that:

According to NBC, over a million people will lose service from KNTV(TV) if the station is relocated. The majority of those people, however, reside within the Monterey-Salinas or Fresno-Visalia DMAs and receive a full complement of signals from full-service and Class A television stations licensed to communities in those markets, including the NBC affiliates in those markets. Although 21,170 viewers will lose their only predicted over-the-air NBC network service from the San Bruno Mountain site, KNTV(TV) will provide an over-the-air NBC network service to almost 400,000 persons who have been without that service since 2002. We believe that the public benefits in restoring network service to almost 400,000 persons outweighs the detriment caused by withdrawing network service from 21,170 persons.⁶

Here, most viewers in the loss area will continue to receive Telefutera programming from their local San Francisco Telefutera affiliate, and the differential between the 29,691 viewers that will lose over-the-air Telefutera service and the 443,729 that will gain access to the Telefutera network service is larger than the number the Bureau found so compelling in the *KNTV* decision. As a result, there are substantial public interest benefits in permitting KTFK to implement its DTV channel election proposal, and only a de minimis loss of service that would result from achieving these benefits.

Broadcast Service to New Areas

As discussed above, the shift in signal coverage is the unavoidable result of having to collocate the station's transmitter site at the Walnut Grove antenna farm in order to avoid first-adjacent channel interference. More importantly, the public notice announcing requirements for NCAs by its plain language does not prohibit coverage of a "different" area, but merely prohibits stations from "*increas[ing]* their technical operating facilities to serve larger coverage areas. Maximization of station facilities are not permitted at this time."⁷ As is evident from the discussion above addressing whether the channel 26 proposal creates loss areas, KTFK's channel 26 proposal clearly does not represent an effort to increase KTFK's technical operating facilities, and certainly does not maximize the station's facilities. Instead, it is the unavoidable result of having too many stations needing too few viable DTV channels.

To the extent that the *May 5th Public Notice* seems to suggest that a station is absolutely prohibited from shifting its coverage area, as opposed to merely prohibited from enlarging its

⁶ *KNTV License Inc.*, 19 FCC Rcd 15479, 15485 (MB 2004) (footnote omitted).

⁷ See *Public Notice, DTV Channel Election Issues – Negotiated Channel Arrangements, Establishment of Form 382 Mailbox, Revisions to FCC Form 381 Certifications, and Notification to FCC of Flash Cut Decisions*, DA 05-273, (MB rel. Feb. 1, 2005) (emphasis added).

coverage area, KTFK respectfully notes that such a requirement has no basis in Commission law or policy, and more importantly, would be contrary to the public interest.⁸

First, as discussed above, the language contained in the public notice announcing requirements for NCAs merely prohibits stations from covering “larger coverage areas” by “increasing their technical operating facilities.” That is clearly not being proposed here. To the extent that the Bureau seeks to extrapolate from this language far broader requirements for presenting an acceptable channel proposal, the U.S. Court of Appeals for the D.C. Circuit has made clear that

the *quid pro quo* for stringent acceptability criteria is explicit notice of all application requirements: ‘when the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.’⁹

In reliance on the Commission’s announced rules and policies, KTFK has put forth a proposal on channel 26 and agreed pursuant to the Northern California NCA to forego its right to pursue channel 14 so that a certain and global resolution of the DTV channel election process in Northern California can be achieved. It would be patently unfair for the Bureau to now seek to apply greater restrictions on KTFK’s proposal than have been previously adopted and announced.

DTV Freeze

Similarly, the *May 5th Public Notice*’s conclusion that KTFK’s channel election violates the pending freeze on filing of certain petitions for rulemaking and applications is also without merit. By its plain terms, the freeze does not apply to channel elections, nor could it, given that its very purpose is to facilitate the channel election process. The August 3, 2004 Public Notice announcing the freeze states that the Commission will not accept seven specific categories of petitions for rulemaking and applications.¹⁰ KTFK’s channel election and the related NCA do not fall within any of those categories subject to the freeze.

Even if that were not the case, however, and KTFK had prematurely filed a modification application rather than a DTV channel election, the *Freeze Notice* explicitly states that the freeze does not bar *all* modification applications, explicitly permitting consideration of such

⁸ As a practical matter, operation of KTFK with the reduced facilities required to stay within its existing contour while complying with the technical requirement of operating from Walnut Grove would place KTFK in a competitively untenable position. As demonstrated in the attached Engineering Exhibit, collocating at the Walnut Grove site while keeping the station’s signal contour inside its existing contour would require a reduction in power down to the low power television range of 17 kW. This power level represents less than 5% of the *lowest-powered* DTV station currently at the Walnut Grove site and is not a viable option if KTFK is to competitively survive.

⁹ *Salzer v. FCC*, 778 F.2d 869, 875 and n.26 (D.C. Cir. 1985) *citing* *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 401 (D.C. Cir. 1968) and *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir. 1976) (“elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected.”).

¹⁰ See *Public Notice, Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes*, DA 04-2446 (MB rel. Aug. 3, 2004) (citations omitted) (“*Freeze Notice*”).

applications “on a case by case basis and consistent with the public interest” where such applications “for example, resolve interference with other stations or pending applications or to resolve mutual exclusivity with other pending applications.”¹¹ KTFK’s channel election is categorically outside the freeze, but even if that were not the case, it would not be prohibited by the freeze since it resolves interference and mutual exclusivity while promoting the public interest.

Moreover, the underlying and sole purpose of the freeze is wholly inapplicable to KTFK’s channel election. In the *Freeze Notice*, the Bureau stated its purpose and reasoning for instituting the freeze:

This freeze is a necessary *first step* to ensure a stable television database *prior* to the commencement of the channel election process. Prohibiting the filing of new applications and petitions requesting new channels or service areas will allow broadcasters to evaluate stations’ technical parameters and thereby *facilitate channel elections* and the creation of a new DTV Table of Allotments.¹²

It makes little sense to invoke the freeze at the conclusion of the channel election process, where it cannot possibly affect channel election planning by any station, and would block, rather than “facilitate,” a station’s channel election.

Even if the pending freeze could somehow be read to preclude the filing of KTFK’s channel election and NCA, there is currently no public interest basis to support such a policy. The policy behind the freeze was to provide a stable engineering database at the commencement of the channel election process so that those making future channel election decisions prior to the First and Second Rounds would have reliable engineering information on which to base their decisions. As approval of KTFK’s channel election would conclude the channel election process for the entire Northern California region, and the Third Round elections conclude the election process in any event, KTFK’s proposed use of channel 26 could not possibly affect any other station’s channel election, and any possible public interest rationale to support such a restrictive policy has entirely ceased to exist. The U.S. Court of Appeals for the D.C. Circuit has made clear that the FCC may not support its actions by relying on a policy that has outlived its usefulness:

The FCC nevertheless argues that it is under no duty to explain its continued adherence to settled policy; it claims it must only explain *changes* in policy or departures from prior precedent. While the Commission is correct that changes of policy require a rational explanation, it is also true that changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so. In the rulemaking context, for example, it is settled law that an agency may be forced to reexamine its approach ‘if a significant factual predicate of a prior decision . . . has been removed.’ The Commission’s duty is even more pressing when the policy is embodied not in a binding regulation issued after public notice and comment but in a general

¹¹ *Freeze Notice* at 1.

¹² *Freeze Notice* at 2 (emphasis added).

statement of policy . . . ‘When the agency applies [a general] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.

An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.’¹³

In the present case, any possible factual or public interest predicate for limiting a station’s flexibility in locating a channel that will allow it to offer the best possible service to the public has ceased to exist. The need for an absolutely “unchanging” engineering database has passed. As a result, even if the Commission had actually adopted a policy prohibiting channel elections requiring a shift in service area, there would be no public interest rationale to support its application to KTFK’s channel election. The Bureau itself recognized as much in a Public Notice, released two and a half month before the *May 5th Public Notice*, which stated that

we now are reaching the end of the channel election process and face a relatively small number of difficult cases that remain to be accommodated with tentative channel designations. For many of these stations, the channel options are very limited. . . . Therefore, in order to resolve as many Second Round elections as possible and thus expedite the conclusion of the channel election process, we will allow limited flexibility to those licensees unable to resolve their elected-channel conflicts.¹⁴

For those exact reasons, KTFK must be permitted the flexibility to conclude its channel election process as well.

Waiver Request

Finally, *even if* the freeze were applicable to KTFK’s channel election, *and even if* there continued to be some public interest rationale supporting it, KTFK in its channel 26 election proposal requests that the Commission grant any waivers necessary to effectuate that proposal given the ample public interest benefits discussed above. There is little doubt that the public interest benefits of accomplishing a swift and certain global resolution of all DTV channel elections in the region, while minimizing service loss and bringing a new network service to 443,729 viewers, are substantial public interest benefits against which there are no significant public interest detriments to be balanced. As the U.S. Court of Appeals for the D.C. Circuit stated in *WAIT Radio v. FCC*:

The salutary presumptions do not obviate the need for serious consideration of meritorious applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver

¹³ *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) and *Pacific Gas and Elec. Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (citations omitted; emphasis, brackets, and first ellipses in original).

¹⁴ *Public Notice, Guidelines for Interference Conflict Analysis in the Second Round of DTV Channel Elections*, Public Notice, DA 06-378 (MB rel. Feb. 17, 2006).

poses legal difficulties. The Commission is charged with administration in the “public interest.” That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the “public interest” for a broad range of situations, does not relieve it of an obligation to seek out the “public interest” in particular, individualized cases.¹⁵

In addition, the *Freeze Notice* expressly provides that:

The Bureau will consider, on a case-by-case basis, requests for waiver of this freeze when a modification application is necessary or otherwise in the public interest for technical or other reasons to maintain quality service to the public, such as when zoning restrictions preclude tower construction at a particular site or when unforeseen events, such as extreme weather events or other extraordinary circumstances, require relocation to a new tower site.¹⁶

Finally, the Commission may always waive a rule or policy for good cause shown pursuant to Section 1.3 of its Rules.¹⁷ More specifically, a rule can be waived “where particular facts would make strict compliance inconsistent with the public interest” and “if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁸

In this particular, individualized case, the public interest clearly lies in the Commission’s approval of KTFK’s channel 26 proposal. Beyond the public interest benefits directly related to the DTV channel election process, the channel 26 proposal would sacrifice only redundant network service while bringing an entirely new network service to 443,729 viewers. In assessing another station’s proposal to modify its facilities, the Bureau stated that “this proposed provision of a new television service and a new network service to additional viewers, without the loss of such service to existing viewers, constitutes a significant public interest benefit.”¹⁹ The channel 26 proposal here creates a far larger public interest benefit, and should be promptly approved by the Commission.

¹⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁶ *Freeze Notice* at 2.

¹⁷ 47 C.F.R. § 1.3.

¹⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁹ *WVIT Inc.*, 12 FCC Red 18172, ¶ 5 (MMB 1997).