

BEFORE THE

*Federal Communications Commission*

WASHINGTON, DC 20554

In the Matter of )  
 )  
Advanced Television Systems )  
and their Impact upon the ) MM Docket No. 87-268  
Existing Television Broadcast Service )

To: Marlene H. Dortch, Secretary  
Attn: The Commission

**COMMENTS ON SEVENTH FURTHER  
NOTICE OF PROPOSED RULEMAKING**

Grant Educational Foundation, KVIE, Inc., LeSea Educational Broadcasting of Sacramento, Inc., Calvary Christian Center, Inc., ESP Technology Community Broadcasters, Amazing Facts, Inc., Rising Tide of Sacramento, Family Stations, Inc., and La Dov Educational Outreach, Inc. (collectively, the "Sacramento Parties")<sup>1</sup> hereby submit their comments in response to the Seventh Further Notice of Proposed Rulemaking (the "Seventh NPRM"), FCC 06-150, released October 20, 2006. The Sacramento Parties object to the omission of their allotted digital channel -- channel \*43 at Sacramento, California -- from the proposed post-transition Table of Allotments

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<sup>1</sup> Grant Educational Foundation, BNPEDT-20030922AFW (Facility Id. 159533), KVIE, Inc., BNPEDT-20030922ADW (Facility Id. 159263), LeSea Educational Broadcasting of Sacramento, Inc., BNPEDT-20030922AFZ (Facility Id. 159480), Calvary Christian Inc. BNPEDT-20030919AAV, (Facility Id. 159499), ESP Technology Community Broadcasters, BNPEDT-20030922AAX (Facility Id. 159507), Amazing Facts, Inc., BNPEDT-20030922AFV (Facility Id. 159512), Rising Tide of Sacramento, BNPEDT-20030922ADI (Facility Id. 159532), Family Stations, Inc., BNPEDT-20030922ADP (Facility Id. 159505), and La Dov Educational Outreach, Inc., BPEdT-19900312KG (Facility Id. 36148).

attached to the Seventh NPRM as Appendix A (the “Post-Transition DTV Table”). In support hereof, the Sacramento Parties state as follows:

1. The Sacramento Parties are a group of entities who are mutually-exclusive applicants for channel \*43 at Sacramento. They filed their applications in response to a Public Notice soliciting applications for DTV Channel \*43 at Sacramento, California, (see DA 03-2610), released August 8, 2003. That Notice followed a Report and Order in MB Docket No. 02-93, RM-10414, released August 9, 2002, in which the Chief of the Video Division allotted digital, non-commercial channel \*43 in lieu of NTSC channel \*52 upon the request of La Dov Educational Outreach, Inc. (“La Dov”). Therein, the Commission’s staff concluded:

“We believe that the public interest would be served by allotting DTV channel \*43 since it would allow La Dov to provide a new noncommercial DTV service to the community of Sacramento while eliminating the potential for interference to station KICU-DT, San Jose, California. DTV channel \*43 can be allotted to Sacramento, California, as proposed, in compliance with the principle community coverage requirement of Section 73.625(a) at coordinates 38-37-49 N. and 120-51-20 W. In addition, we find that this channel is acceptable under the 2 percent criterion for *de minimis* impact that is applied to requests of “TV Freeze Areas” applicants seeking to change channels pursuant to the guidelines outlined in the Commission’s November 22, 1999, *Public Notice*. DTV channel \*43 can be allotted with the following specifications:

<u>State &amp; City</u>	<u>DTV Channel</u>	<u>DTV power (kw)</u>	<u>Antenna HAAT (m)</u>	<u>DTV Service Pop. (thous.)<sup>2</sup></u>
CA, Sacramento	*43	100	304	1557.”

La Dov was ordered to file a minor change amendment to its application to specify Channel \*43 and the Table of Allotments at Section 73.622(b) of the Commission’s

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<sup>2</sup> In footnote 2 of the Report and Order, the staff noted that a co-channel proposal at San Mateo, California, was not an impediment to the Sacramento allotment despite the fact that Channel 43 at Sacramento would cause interference in excess of 2% to the San Mateo proposal, because the San Mateo proponent had agreed to accept the interference.

rules was amended to include Channel \*43. The other Sacramento Parties subsequently applied as well for Channel \*43.

2. La Dov's petition for rulemaking, which led to the allotment of Channel \*43, was filed in response to the Commission's November 22, 1999, announcement of a filing window, Mass Media Bureau Announces Window Filing Opportunity For Certain Pending Applications And Allotment Petitions For New Analog TV Stations (DA 99-2605). Therein, the FCC solicited petitions for rulemaking by, inter alia, applicants with pending applications for new full-service NTSC television stations on Channels 2-59 at locations inside of the "TV Freeze Areas." The Commission invited such applicants, like La Dov, to submit petitions for rulemaking to change their NTSC channel to a digital channel in the so-called "core." The Commission recognized that these parties had "already invested time, money, and effort into their applications and petitions." (At 3.) Therefore, they were given an opportunity to amend such applications to save them by amending them to a channel within the core. This is exactly what La Dov did. The obvious understanding was that La Dov (and later the other Sacramento Parties) would not have to endure another channel change or worse. They had followed Commission instructions and were thus safely ensconced on Channel \*43.

3. Three plus years have passed since the Sacramento applications were filed and the Commission has yet to take action on the applications. While it has recently advised that it will consider a draft order after the first of the year, there is no telling when Commission action choosing an applicant or applicants for Channel \*43 will occur.

4. In the meantime, the Commission has released the Post-Transition DTV Table. It excludes the Sacramento digital channel without direct explanation. This seems strange given that Channel \*43 was included in the initial DTV Table of Allotments and the Commission used similar software and methodology in designing the Tables. Seventh NPRM at ¶19. But this appears to be no oversight. The basis for the omission appears to be that only licenses and permittees of digital channels, not applicants, are eligible to participate in the post-transition channel selection process as contemplated by the FCC. (See ¶¶ 50-53 of the Seventh NPRM.) Informal discussions with the staff have confirmed this conclusion.

5. This approach places the Sacramento Parties and others similarly situated<sup>3</sup> at a serious and unfair disadvantage since they cannot build out their allotted facilities, once a tentative selectee is picked, with any assurance that the channel they build on will be the same channel they will be assigned post-transition.<sup>4</sup> Nor, for that matter, can the Sacramento Parties project with any certainty that they will have a channel at all post-transition. The Commission's promise in the Seventh NPRM is only that "to the extent possible, [it] will accommodate these future new permittees in our proposed DTV Table, consistent with the approach described above for existing new

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<sup>3</sup> There are at least three other applicants or group of applicants that were assigned new digital channel allotments by the Media Bureau pursuant to the procedures set forth in DA 99-2605 that were also left out off the Post-Transition DTV Table. Specifically, the proponents in Derby, Kansas (DA 02-1913), Springfield, Illinois (DA 02-1041), and Tulsa, Oklahoma (DA 04-3622) all received DTV Channels, but were omitted from the table. Conversely, at least three proponents who also received new digital channel allotments pursuant to the same procedures *did* receive protection in the Post-Transition DTV Table – Georgetown, South Carolina (DA 02-1478), Hibbing, California (DA 03-608), and Knoxville, Tennessee (DA 04-272). As discussed *infra*, it would appear that the only distinction between the two groups is that the Commission's staff has not completed processing the applications for the "have-nots".

<sup>4</sup> The Seventh NPRM recognizes how important it is to have one allotment made now and remaining the same through the post-transition period. (See last sentence of ¶52: "These stations may wish to propose an alternative channel that could be used both during the transition as well as post-transition.")

permittees.” (At ¶53.) This approach may well leave the Sacramento Parties unable to use Channel \*43. Like several of the new licensees and permittees denied channels in the Seventh NPRM (see ¶52), the Commission may determine that Channel \*43 is not appropriate for post-transition DTV operations because it would cause impermissible interference to other proposed channels. That would require a whole new process of selecting an alternative channel assignment with no guarantee of success. (See ¶¶ 25-27 of Seventh NPRM.)<sup>5</sup>

6. Further, other new permittees and licensees who receive their authorizations before the Channel \*43 proceeding is completed will be unaware of the need to protect Channel \*43 because it will not be in the final DTV Table of Allotments post-transition. They may well submit proposals preempting it under these circumstances leaving the Sacramento Parties at a distinct and again unfair disadvantage.

7. Such action by the Commission would be arbitrary and capricious given that the Sacramento Parties have already been allotted a digital channel – a digital channel for which the Commission solicited competing applications, and for which each of the Sacramento Parties filed applications. The Commission now reneges on that undertaking, ignoring the very channel it previously allotted. This “disappearing act” violates fundamental concepts of administrative law and is barred under the doctrine of *res judicata*.

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<sup>5</sup> The process outlined in these paragraphs is restrictive and discretionary. There is no assurance that the Sacramento Parties could take advantage of it successfully to find a replacement for Channel \*43. Paragraph 54, which addresses applicants who become permittees after the close of the comment period in this proceeding, clearly refers to analog permittees with analog facilities. The Sacramento Parties applied for a digital channel.

8. Specifically, the prior decision to amend the DTV Table of Allotments to add Channel \*43 at Sacramento must be followed by the Commission in this proceeding. Under the doctrine of *res judicata*, “a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.”<sup>6</sup> This doctrine has also been applied to prevent “agency re-litigation” of final decisions.<sup>7</sup> In order for this doctrine to apply, the proponent must demonstrate that: (1) an issue essential to the prior decision and identical to the one previously litigated is present; (2) the prior decision became a final judgment on the merits; (3) the estopped party was party to the prior litigation; and (4) the estopped party had a full and fair opportunity to litigate the issue in the earlier proceeding.<sup>8</sup> The Commission has applied this doctrine to ensure “[s]ome measure of finality...and...efficient use of Commission’s resources.” *Id.*

9. It is clear that both La Dov and the FCC were parties to the prior decision, and are parties in this proceeding. Moreover, the other Sacramento Parties should be seen as privy to the first allotment decision, since they filed their applications based on the Commission’s decision to allot Channel \*43 to Sacramento, California. Additionally, there can be no doubt that there was a final judgment on the allotment of Channel \*43 at Sacramento, California, as the effective date of the order was September 23, 2002, and no appeal was filed by any party.

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<sup>6</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

<sup>7</sup> *Budd Broadcasting Company, Inc.*, 14 FCC Rcd 4366 (1999)(citing *United States v. Utah Construction and Mining*, 384 U.S. 394, 422 (1966)(internal citations omitted)).

<sup>8</sup> *Budd Broadcasting Company, Inc.*, at ¶ 3 (citing *Montgomery County Media Network*, 4 FCC Rcd 3749, 3750 (Rev. Bd. 1989)).

10. Finally, it is clear that the issues surrounding the past allotment decision on one hand, and the issuance of the proposed Post-Transition DTV Table in this proceeding, are identical. In both cases, the Commission is determining on which channel a noncommercial digital television facility will operate at Sacramento, California. The Commission failed to provide any explanation as to why a prior rulemaking proceeding, in which it determined that Channel \*43 could be allotted to Sacramento, California, should be ignored in the crafting of the Post-Transition DTV Table. Instead, the Commission offers the generic explanation that only licensees and permittees are eligible for inclusion in the Post-Transition DTV Table. (At ¶50.) But the Sacramento Parties were involved in a channel selection process in 2003, and made a selection by applying for the channel for which the Commission invited them to apply. That process cannot be wished away by the agency now. Channel \*43 should be included in the Post-Transition DTV Table to ensure that the Sacramento Parties do have a digital channel when one or more emerge as a tentative selectee and later permittee.

11. Moreover, the exclusion of Channel \*43 from the Post-Transition DTV Table would result in disparate treatment among similarly situated parties. Specifically, as noted *supra*, at least seven parties filed petitions for rulemaking pursuant to the procedures set forth in DA 99-2605. While three parties received new DTV channels, and are now included in the Post-Transition DTV Table, there are at least four channels, including Sacramento, that have been omitted. The only apparent reason for this disparate treatment is that the Commission has yet to act on the pending applications that were filed in connection with the allotment of a DTV channel. While it is

understandable that the Commission's staff has been working with all due haste to guide the TV industry through the DTV transition, it can not arbitrarily leave four allotments out of the Post-Transition DTV Table solely because the pending applications have yet to be processed. Given the fact that the Commission has already made a decision that the allotment of Channel \*43 at Sacramento, California would be in the public interest, it can not force the Sacramento Parties to refile for this channel, or perhaps another, without offering a reasoned rationale that provides a justifiable distinction among the similarly situated parties.<sup>9</sup>

12. Finally, another concern motivates this pleading. Based on discussions with the Commission, it is unclear what interference standard the Commission's staff will use in evaluating whether Channel \*43 "fits" in the Post-Transition DTV Table, when a permittee is chosen for the channel. If that standard is stricter than the 2% standard applied when Channel \*43 was allotted in 2002 for *de minimis* impact, then the Sacramento Parties would again be prejudiced.<sup>10</sup> This is particularly of concern because an analysis performed by an engineering consultant for one of the Sacramento Parties indicates that the channel does fit at Sacramento in the post-transition Table with the sole exception of the San Mateo proposal (now a licensed station) to which it causes 2.2% additional interference. However, as noted, that interference was accepted by the San Mateo station in 2002. In the absence of a decision by the Commission as to whether the 2% standard will be used for the new Table, it is critically

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<sup>9</sup> *Melody Music, Inc. v. Federal Communications Commission*, 345 F.2d 730, 732 (D.C. Cir. 1965)(prohibiting disparate treatment among similarly situated parties).

<sup>10</sup> For example, the Commission has used a 0.1% new interference standard in developing the new Table of Allotments. See ¶21 of the Seventh NPRM. This much stricter standard would doom the Sacramento Parties' applications.

important to the Sacramento Parties that they be able to take advantage of the 2002 allotment decision. If they cannot, they risk preclusion of their channel by a retroactively applied, stricter interference standard, as well as new applications or petitions.<sup>11</sup>

13. The Sacramento Parties understand that the Commission's goal here is a stable, non-moving target with well-defined channel allotments. But that goal is not served by depriving the Sacramento Parties of the channel they were already allotted four years ago. Stability and fairness warrant retention of the channel going forward and post-transition as well. There is no good reason for removing that channel now, opening up a whole new channel selection process in Sacramento.

14. The major goal of the Post-Transition DTV Table -- "to ensure that broadcasters provide the best possible service to the public, including service to local communities" (Seventh NPRM at ¶21) -- would be served by protecting the Sacramento allotment in the Post-Transition DTV Table. Sacramento, California's capital city, is a fast-growing metropolis which can support and clearly deserves another non-commercial service, only its second. Indeed, it is hard to imagine an allotment more consistent with Section 307(B) principles in the absence of underserved areas or populations.

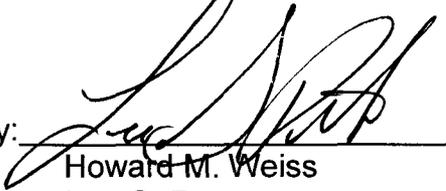
15. Therefore, the undersigned parties respectfully request that Channel \*43 at Sacramento, California, be included in the Post-Transition DTV Table adopted in this proceeding, with the technical parameters previously approved by the Commission.

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<sup>11</sup> In point of fact, Channel \*43 adds no "new" interference because it was already in the Commission's DTV Table. See n. 33 to the Seventh NPRM, requiring no new interference analysis for the stations that elected their current DTV channel because they would cause no new interference. See also ¶21. Further, the doctrine of *res judicata* would require the continued grant of the waiver with respect to the San Mateo station, as the Commission fully considered the merits of granting the waiver request in 2002.

Respectfully submitted,

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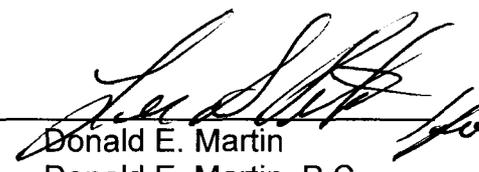
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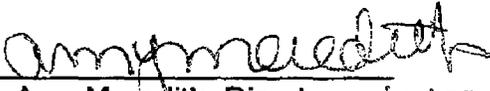
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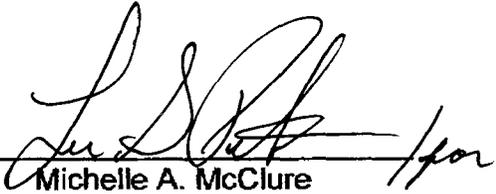
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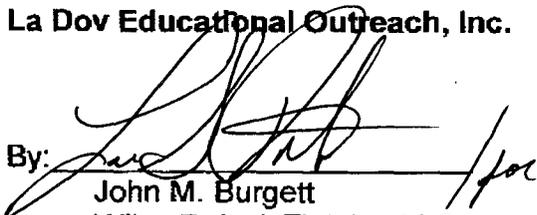
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