

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

In the Matter of:)
)
Advanced Television Services and) MB Docket No. 87-268
Their Impact upon the Existing)
Television Broadcast Service)

Directed to: The Commission

PETITION FOR RECONSIDERATION

Pappas Telecasting of America, a California Limited Partnership (“Pappas”) and South Central Communications Corporation (“SCCC”) (collectively, the “Owensboro Petitioners”), by their attorneys, hereby respectfully submit their Petition for Reconsideration with regard to a portion of the Commission’s *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order* in the above-captioned proceeding, FCC 08-72, released March 6, 2007 (“*MO&O*”). With respect thereto, the following is stated:

1. As an initial matter, Pappas and SCCC recognize that in the general case, a petition for reconsideration of an order on reconsideration would not lie. In this case, however, the *MO&O* took new action not previously within the scope of the above-captioned rule making proceeding in that the *MO&O* dismissed for the first time a pending Petition for Rule Making not filed in the above-captioned docket and the pending applications of Pappas and SCCC for construction permit for a new NTSC television station to operate on Channel 48 at Owensboro, Kentucky (File Nos. BPCT-19960722KL and BPCT-19960920IV, respectively). These new actions, which required a reach outside of the above-captioned docketed proceeding, were not matters previously addressed in any manner in this proceeding. The subject matter of the instant proceeding had previously included a discussion of whether applicants situated as Pappas and SCCC should be allowed to filed petitions

for channel substitutions prior to the general lifting of the filing freeze for petitions for rule making;¹ however, action contrary to the preferences of Pappas and SCCC in this regard did not have, and previously had not had, any negative implications with regard to the status of either the underlying Pappas and SCCC applications or their petition for rule making. Accordingly, Pappas and SCCC must be afforded the opportunity to submit this Petition for Reconsideration at this time.

2. Reconsideration must be granted in this instance due to the factual errors upon which the decision to dismiss the applications and rule making petition was based and in light of the Commission's failure to address at all the showing made by Pappas and SCCC that the Commission is required by statute to waive its rules in order to allow the grant of the Pappas application.² Specifically, the Commission indicated that the petition for rule making to substitute DTV Channel 54 for the allotted analog Channel 48 at Owensboro (the DTV Channel 54 Substitution Petition") "can only be viewed as an attempt by Pappas and SCCC to cure the problems in their original Owensboro applications and therefore cannot be considered." *MO&O* at ¶ 127. Such is not the case, however. It is important to remember that the Pappas and SCCC Owensboro applications as originally filed were not technically deficient and were grantable as filed; it was only later Commission action which created the problem which Pappas and SCCC have valiantly been attempting to solve for over a decade. Each attempt, however, has been met with changes in Commission policy which have foreclosed the successful implementation of apparent solutions. Likewise, the Commission incorrectly stated the eligibility for filing a petition for rule making pursuant to the Commission's *Public Notice*, DA 01-270, released February 6, 2002. That *Public*

¹ The Commission has indicated that it anticipates lifting this filing freeze, at least in part, in August 2008, only approximately four months from now. See, *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, FCC 07-228, released December 31, 2007.

² Pappas and SCCC are parties to a settlement agreement which contemplates the grant of the Pappas application and dismissal of the SCCC application.

Notice did not limit the parties eligible to file merely to those parties with pending applications for Channels 52-59, but also allowed parties with “pending applications on other channels that previously filed a petition for rule making for a replacement channel on channels 52-59.” *Id.* at 1. Pappas and SCCC clearly fit into the category of eligible parties, as they had a petition for rule making, as amended, which requested Channel 57 pending at the time of the *Public Notice*. Finally, as Pappas and SCCC have previously noted, they are parties to a universal settlement agreement reached and timely filed during the statutory settlement period established by the Balanced Budget Act of 1997, and thus are entitled to special consideration pursuant to Section 309(l) of the Communications Act of 1934, as amended, which directs the Commission to “waive any provisions of its regulations necessary” to permit settlements among mutually exclusive broadcast applicants to go forward. 47 U.S.C. §309(l) (emphasis added). The *MO&O* completely failed to address this argument. On that basis alone, reconsideration is warranted.

3. At this point, a review of the lengthy record pertaining to the Pappas and SCCC applications would be useful. The Pappas application (File No. BPCT-19960722KL) was filed on July 22, 1996, and specified vacant, allotted Channel 48 at Owensboro, Kentucky. To date, there has been no finding that the application as filed, which specified an existing, vacant channel listed in the TV Table of Allotments, was in any way technically deficient. The application did include a request for waiver of the filing freeze on applications for stations in the top markets, but the application was in compliance with the technical requirements for new television stations. The SCCC application (File No. BPCT-19960920IV) was filed on September 20, 1996, in accordance with policies set out in *Sixth Further Notice of Proposed Rule Making*, FCC 96-317, released August 14, 1996. As with the Pappas application, there has been no finding of any technical deficiency in this application as of the time originally filed. Thus, these two applications were filed in accordance

with Commission procedures and, indeed, in response to an express Commission invitation for parties to file for vacant channels prior to a date certain. At the time of filing, there were no technical issues with the channel specified, which, as noted above, was included in the TV Table of Allotments.

4. The first technical problem did not arise until some seven months after the filing of the SCCC application and nine months after the filing of the Pappas application. At that point, the Commission released its *Sixth Report and Order* in the above-captioned proceeding, FCC 97-115, released April 21, 1997. In that *Sixth Report and Order*, the Commission affirmed that it would “maintain and protect those vacant NTSC allotments that are the subject of pending applications and will avoid creating DTV allotments that would conflict with proposed new NTSC allotments.” *Id.* at ¶ 112. The logical conclusion would have been that Channel 48 at Owensboro, which was the subject of two pending applications at the time, would have been protected. In point of fact, however, the *Sixth Report and Order* instead allotted Channel 48 as a DTV companion channel at Bowling Green, Kentucky, thereby creating interference issues with the pending Owensboro applications. It was only at that point, due to Commission action contrary to its own stated policy, that a technical issue arose with regard to the Pappas and SCCC Owensboro applications.

5. Thereafter, in apparent recognition of the inequity of such situations, on November 22, 1999, the Commission released its *Public Notice*, “Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations,” 14 FCC Rcd 19559 (M.Med.Bur 1999), to provide an opportunity for applicants with “freeze waiver” applications and petitions to address technical conflicts. On July 14, 2000, Pappas and SCCC duly and timely filed their “Petition for Rulemaking” proposing to substitute Channel 47 for Channel 48 at Owensboro. That petition was later amended on May 25, 2001, to request Channel

57 in lieu of Channel 47 due to a conflict discovered with a then-recently granted DTV maximization application.³ Thus, the applicants followed the directives of the Commission and specified a then-acceptable replacement channel in Channel 57. While the initial replacement proposal on Channel 47 did not work out, the applicants recognized on their own that confusion in the database and with the then-new calculation methodology had led to oversight of a potential problem with Channel 47, and they located and amended their replacement channel request to specify Channel 57.

6. That channel also became untenable on January 18, 2002, when the Commission released its *Report and Order* in GN Docket No. 01-74, reallocating TV Channels 52-59 and indicating that no new analog television allotments would be granted in those channels. In light of this sudden reversal, on February 6, 2002, the Commission released its *Public Notice*, DA 02-270, to invite stations with pending applications on other channels but with pending petitions for rule making for a replacement channel in the Channel 52-59 band to file petitions for rule making to specify a new, in-core NTSC channel or a DTV channel from Channel 52 to 58. Since Pappas and SCCC then had a pending proposal for Channel 57 as a replacement channel, they were eligible to file pursuant to this *Public Notice*.⁴

7. Accordingly, on March 8, 2002, Pappas and SCCC duly filed their "Petition for Rulemaking" to specify DTV Channel 54 at Owensboro. That petition was in compliance with the

³ The Commission initially overlooked the rule making filing and dismissed the Pappas application on July 3, 2001, due to interference considerations. The application was reinstated by letter dated July 11, 2001, in light of the pending rule making proceeding. See, *Public Notice*, "Broadcast Applications," Report No. 25027, released July 16, 2001.

⁴ In the interim, on November 20, 2001, the Commission had dismissed the Pappas and SCCC "Petition for Rulemaking" due to interference issues with Channel 47 and a claimed interference problem in relation to a Class A television station, but it made no reference to the amendment to the petition which specified Channel 57 in lieu of Channel 47. On December 20, 2001, Pappas and SCCC petitioned for reconsideration of dismissal of petition for rule making, showing good cause for amending to Channel 57 and demonstrating lack of interference to the Class A television station. Thus, as of the date of the *Report and Order* reallocating Channels 52-29 and thereafter, Pappas and SCCC continued to have a pending proposal to change to Channel 57.

Commission's technical requirements at the time, and there has been no finding of any technical deficiency with that petition since its filing. While by letter dated August 23, 2003, the Commission's staff did deny reconsideration of the prior dismissal of Channel 47 petition for rule making as amended to specify Channel 57, that action was largely moot in light of the 2002 decision that no such petitions for an analog channel would be granted in any event. More importantly, the August 23, 2003, letter noted the March 8, 2002, filing and stated that the "staff has not yet completed its technical review of petitioners' latest proposal" (the DTV Channel 54 Substitution Petition). No indication of any deficiency in that DTV Channel 54 Substitution Petition was given, nor was any hint then given that this Petition might be inappropriate or would not otherwise be granted.⁵ Rather, every indication was that, upon completion of normal staff review and final determination of compliance with technical requirements, the DTV Channel 54 Substitution Petition would be processed and granted in due course.

8. It was only on September 7, 2004, when the Commission released its order in the *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, FCC 04-192, that it became clear that the DTV Channel 54 substitution petition also was likely to be unavailing. That order, which determined that pending petitions for DTV channels from Channel 52-58, such as those filed pursuant to February 6, 2002, *Public Notice*, would not be granted, left Pappas and SCCC in an untenable position. Due to the combination of the filing freeze on petitions for rule making (*see, Public Notice - Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes*, DA 04-2446, released August 3, 2004), the reallocation of Channels 52-59, and the DTV allotment of Channel 48 at Bowling Green, Pappas and

⁵ The August 23, 2003 letter decision erroneously referenced the DTV Channel 54 Substitution Petition as a supplement to the earlier petition rather than a new petition, but there appeared to be no importance attached to this classification.

SCCC could no longer pursue either the allotted channel for which they initially applied or the replacement channel for which the Commission explicitly provided the opportunity to file, nor could they seek any other replacement channel. Likewise, the *MO&O* has reiterated the Commission's position that no DTV channel can be allotted until a construction permit is granted, but the Commission has removed all opportunities to specify a channel on which a construction permit can be granted. This situation is made the more poignant in light of the fact that the parties have identified a DTV channel which would cause no interference to other DTV facilities as reflected in the Tentative Channel Designations and, on October 6, 2006, filed a "Petition for Rule Making" and request for waiver of filing freeze to request substitution of DTV Channel 35. No action has been taken on that petition.

9. This review of the actions taken demonstrates that the parties, and Pappas in particular as the proposed permittee, have struggled valiantly over the more than 11 years that the Pappas and SCCC applications have been pending in order to bring new television service to Owensboro, but they have been frustrated at every turn. It must also be remembered that the primary, underlying problem which has prevented this effort from being brought to fruition, the need for a replacement channel, is not one of the parties' own making but rather resulted from Commission action in contravention of its own stated policy. After the need for a replacement channel arose, Pappas and SCCC have followed the express invitations and directions of the Commission throughout the years that their applications have remained pending. Nevertheless, the door has been slammed in their faces with every attempt due to the numerous changes in direction as the Commission's DTV transition policy evolved. While Pappas and SCCC recognize that these changes are part of larger policy decisions and do not reflect any particular animus against them, the resulting situation is nonetheless one in which the equities demand that special consideration be given to the Pappas and

SCCC applications.

10. Moreover, the Commission has entirely failed to address the showing made by Pappas and SCCC that they are entitled to waivers of the Commission's Rules to allow the Pappas application to be granted in order to effectuate the settlement agreement between Pappas and SCCC. This failure alone is sufficient to require reconsideration of the *MO&O*. See, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (decision must be reversed if it "entirely failed to consider an important aspect of the problem"). In this case, the Commission did not address the statutory argument made by Pappas and SCCC, nor did it in any way explain why it does not consider itself to be bound by the Congressional mandate to do whatever is necessary to effectuate settlement agreements such as that involved in the instant case.

11. As noted above, Pappas and SCCC are the parties to a universal settlement agreement reached and timely filed during the statutory settlement period established by the Balanced Budget Act of 1997, and thus are entitled to special consideration pursuant to Section 309(l) of the Communications Act of 1934, as amended. For parties so situated, Congress has directed the Commission to "waive any provisions of its regulations necessary" to permit settlements among mutually exclusive broadcast applicants to go forward. 47 U.S.C. §309(l) (emphasis added). Obviously, a settlement agreement which contemplates grant of one application cannot go forward unless that application is granted. Therefore, pursuant to the dictates of statute, the Commission is required to grant waivers of its rules and policies in order to allow the Pappas application to be granted.

12. Moreover, in this case, the rules which must be waived are not rules which relate to technical matters but only to procedural issues. Indeed, the only bar to moving forward now with specification of an alternative channel, as well as past limitations on specifying a replacement

channel, are purely matters of administrative convenience. While Pappas and SCCC understand that during the DTV transition, it would have been a practical impossibility to set the DTV Table of Allotments if stations all over the country were allowed to continue seeking different channels, that general concern is not relevant to this specific instance, as the circumstances here are virtually unique at this point. The number of remaining applicants for new stations that both initially submitted applications for vacant, allotted channels only to have those channels made unavailable by Commission action and also entered into a universal settlement agreement during the period established by the Balanced Budget Act of 1997 can amount to no more than a handful, at most. Moreover, the DTV Table of Allotments is now essentially set, and any practical administrative concerns about making channel changes are thereby alleviated. Indeed, as noted above, the Commission has indicated that it will shortly allow applications for expanded service area and petitions for changes in the DTV Table of Allotments. It is therefore unclear why the Commission would have dismissed the long-pending Pappas and SCCC applications at this juncture, only a few months before they might have an opportunity to seek a new channel. Furthermore, as previously stated, Pappas and SCCC have already identified a viable DTV channel that would not cause interference to any other DTV operation. There is, therefore, no countervailing public interest concern which would argue against allowing the Pappas and SCCC applications to remain pending at this point and processing the petition for rule making to specify a replacement channel in the near future.

13. Most importantly, however, regardless of any remaining issues of agency procedure or administrative convenience, the fact remains that the Congress explicitly directed the Commission to waive whatever regulatory provisions are necessary in order to allow settlements such as that between Pappas and SCCC to be effectuated. The Commission simply does not have the discretion

to ignore that statutory dictate. The Commission is, therefore, required to reinstate the Pappas and SCCC applications and to allow a substitute channel to be specified so that the settlement agreement may be carried out.

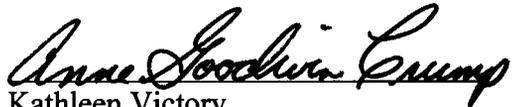
14. In sum, the Commission's decision in the *MO&O* is based upon an incorrect description of the initial status of the Owensboro applications and a misstatement of the Commission's later provision for obtaining a substitute channel. Moreover, the Commission has ignored statutory requirements to make it possible for the Pappas/SCCC settlement agreement to be effectuated. In light of these circumstances, reconsideration of the *MO&O* is required.

WHEREFORE, the premises considered, Pappas and SCCC respectfully request that the Commission reconsider the aspects of the *MO&O* identified herein, reinstate the Pappas and SCCC applications, and allow the specification of a substitute channel for those applications.

Respectfully submitted,

PAPPAS TELECASTING OF AMERICA,
A CALIFORNIA LIMITED
PARTNERSHIP

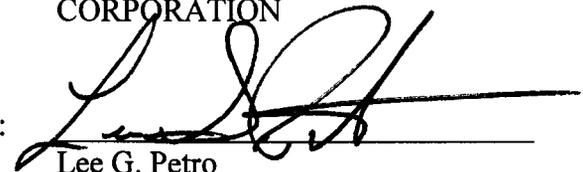
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