

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: The Commission

**REPLY TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION**

Introduction

Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, National Public Radio, Inc. ("NPR") hereby replies to two oppositions to NPR's petition for reconsideration of the Seventh Report and Order Reconsideration Order in the above-captioned proceeding.¹

The NPR Petition sought reconsideration of the portion of the Seventh Report and Order Reconsideration Order that addressed petitions proposing to eliminate the requirement in Section 73.525 of the Commission's Rules that new reserved-FM noncommercial educational stations

¹ NPR sought reconsideration of the Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order in the proceeding concerning Advanced Television Systems and Their Impact upon the Existing Television Service, MM Docket No. 87-268, rel. Mar. 6, 2008, 73 Fed. Reg. 15,284 (Mar. 21, 2008) [hereinafter "Seventh Report and Order Reconsideration Order"]. Petition for Reconsideration of National Public Radio, Inc., filed Apr. 21, 2008 [hereinafter "NPR Petition"]. ABC, Inc. and the Association for Maximum Service Television, Inc. ("MSTV") each filed oppositions to the NPR Petition. ABC, Inc., Opposition to Petitions for Reconsideration of National Public Radio, Inc. and Hammett & Edison, Inc., MB Docket No. 87-268, filed May 20, 2008 [hereinafter "ABC Opposition"]; Association for Maximum Service Television, Inc., Opposition to Petitions for Reconsideration, MB Docket No. 87-268, filed May 20, 2008 [hereinafter "MSTV Opposition"].

protect digital television ("DTV") channel 6 stations or, in the alternative, to reallocate the channels 6 and 5 spectrum to the FM service.² The Seventh Report and Order Reconsideration Order denied the petitions for reconsideration as "beyond the scope of this Reconsideration of the *Seventh Report and Order*."³ Despite this denial, the order then proceeded to address the merits of the proposals.⁴ The NPR Petition sought reconsideration of that aspect of the Seventh Report and Order Reconsideration Order because the same issues are now pending in other proceedings, the Commission has yet to collect public comment on the issues or otherwise fully consider the issues, and, therefore, the purported resolution of the issues in the Seventh Report and Order Reconsideration Order was arbitrary and capricious.⁵

Argument

Although claiming to oppose the NPR Petition, the MSTV Opposition does not actually address the merits of the Petition or explain MSTV's basis for opposing it.⁶ The MSTV Opposition acknowledges the Commission's promise to commence a proceeding to consider the continuing need for Section 73.525 and the fact that the Commission has yet to commence that proceeding. It does so, however, for the limited proposition that Section 73.525 applies to DTV channel 6, an issue that is the subject of a different reconsideration petition.⁷ The MSTV

² See Seventh Report and Order Reconsideration Order at ¶¶ 24-27.

³ Id. at ¶ 26.

⁴ Id. at ¶¶ 26-27.

⁵ NPR Petition at 3-5.

⁶ See MSTV Opposition at 1-4.

⁷ Id. at 2-3.

petition completely disregards the pending proceeding considering ways to promote diversity of broadcast ownership, including by reallocating the television channels 5 and 6 to the FM service.⁸ It treats the possible reallocation of the spectrum as a long settled matter, despite a pending Commission request for public comment on that very matter.⁹

The ABC Opposition, while marginally more responsive to the NPR Petition, nonetheless fails to rationalize the Commission's premature and wholly unnecessary attempt to resolve the issues concerning Section 73.525 and the future use of the television channels 5 and 6 spectrum.

The first half of the ABC Opposition is dedicated to the proposition that preserving the status quo is necessary to assure a smooth DTV transition and, as a related matter, that ABC relied on its continued use of television channel 6 and the continued applicability of Section 73.525 in its current form.¹⁰ The second half of the ABC Opposition contends, with respect to the NPR Petition, that the Commission is statutorily obligated to resolve petitions for reconsideration.¹¹

⁸ In the Matter of Promoting Diversification of Ownership In the Broadcasting Services; 2006 Quadrennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition Of Radio Markets; Ways To Further Section 257 Mandate And To Build On Earlier Studies, Report And Order And Third Further Notice Of Proposed Rule Making, MB Docket No. 07-294; MB Docket No. 06-121; MB Docket No. 02-277; MM Docket No. 01-235; MM Docket No. 01-317; MM Docket No. 00-244; MM Docket No. 04-228, at ¶ 100 (rel. Mar. 5, 2008).

⁹ See MSTV Petition at 3.

¹⁰ ABC Opposition at 3-5.

¹¹ Id. at 7-8.

ABC's desire for certainty is understandable, but certainty alone cannot sustain a regulation that has long ceased to serve the public interest. Section 73.525 of the Commission's Rules was promulgated in 1985 as a temporary measure, implementing a compromise among certain television and NCE radio interests to protect *analog* television reception. Whatever one may think of the approach originally taken,¹² the rule is based on a factual predicate -- the use of analog television sets manufactured as long ago as the 1960s¹³ -- which is now a fleeting memory. Other factual predicates, including the public's predominant reliance on over-the-air reception of broadcast stations, are also no longer in place. In such circumstances, we believe the Commission has an *obligation* to reconsider the continuing validity of the rule.¹⁴ Even if circumstances had not fundamentally changed, moreover, a broadcast licensee has no claim to a particular frequency or the continued application of a Commission rule in perpetuity.¹⁵ ABC's

¹² See Comments of National Public Radio, Inc., MM Docket No. 99-325, at 24-28 (filed June 16, 2004) (discussing the derivation of the rule and its flaws).

¹³ See Changes in the Rules Relating to Noncommercial, Educational FM Broadcast Stations, Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 24,144 (1982) (Commission testing of television receiver interference immunity as part of the proceeding tested sets manufactured between 1968 and 1978); In the Matter of Changes in the Rules Relating To Noncommercial, Educational FM Broadcast Stations, 58 Rad. Reg. 2d (P & F) 629, at ¶ 13 (1985) (citing consumer electronics industry data showing that 50 percent of color television sets purchased 15 years earlier were still in use and that 4 out of 5 sets are still in use after 10 years).

¹⁴ See Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979) (per curiam) (requiring the Commission to reconsider rules promulgated to implement a compromise among cable and broadcast interests in anticipation of copyright legislation, which rules were subsequently superseded by provisions of the Copyright Act of 1976); Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992) ("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.") (*quoting* WWHT, Inc. v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981)).

¹⁵ See 47 U.S.C. § 304.

reliance on its continued use of television channel 6 and the continued applicability of Section 73.525 is, therefore, misplaced.¹⁶

With regard to the Commission's statutory obligation to resolve petitions for reconsideration, NPR is not objecting to the denial of the petitions, which the Commission concluded were "beyond the scope of th[e] Reconsideration of the *Seventh Report and Order*."¹⁷ Rather, we object to the Commission's subsequent resolution of the merits of the petitions without having obtained public input and otherwise fully considered the matters as it has undertaken to do.¹⁸ Thus, it is not the fact that the Commission denied the reconsideration petitions, but the arbitrary and capricious manner in which it did so that warrants reconsideration.

¹⁶ See ABC Opposition at 5.

¹⁷ Seventh Report and Order Reconsideration Order at ¶ 26.

¹⁸ NPR Petition at 4-5.

Conclusion

For the foregoing reasons, the Commission should reconsider the Seventh Report and Order Reconsideration Order to the extent it purported to determine the applicability and continuing viability of Section 73.525 of the Commission's Rules and the possible reallocation of the television channel 5 and 6 spectrum to FM radio use.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory A. Lewis, hereby certify that a copy of the foregoing Reply To Oppositions To Petition For Reconsideration of National Public Radio, Inc. was sent this 2nd day of June, 2008, by first class mail, postage prepaid to the following:

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