

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

In the Matter of)	
)	
Petition for Rulemaking of)	RM- 11579
National Public Radio to Repeal)	
Section 73.525 of the Commission's Rules)	

REPLY OF NATIONAL PUBLIC RADIO, INC.

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Introduction and Summary

Pursuant to Section 1.405 of the Commission's Rules, 47 C.F.R. § 1.405, National Public Radio, Inc. ("NPR") hereby submits its Reply in response to comments on NPR's Petition for Rulemaking in the above-captioned proceeding ("Petition").¹

The overwhelming majority of the commenting parties supported NPR's petition, recognizing that, particularly with the transition to digital television ("DTV"), Section 73.525 is outdated and no longer necessary, and it undermines noncommercial educational ("NCE") radio service. While television broadcast interests were predictably opposed to the Petition, they offered nothing to substantiate a continuing need for the rule. They simply opposed changing or even reexamining the rule despite the drastically changed circumstances since its adoption. Based on the record in this proceeding, Section 73.525 no longer serves any useful purpose. Its existence harms NCE radio stations and the audiences they serve. Therefore, we submit, the Commission has no rational choice but to grant the Petition.

¹ *In the Matter of Petition for Rulemaking of National Public Radio to Repeal Section 73.525 of the Commission's Rules*, Public Notice, RM-11579, (rel. Nov. 2, 2009) [hereinafter *NPR Petition for Rulemaking*]. Unless otherwise indicated, all Comments cited herein were filed on Dec. 2, 2009 in response to the *NPR Petition for Rulemaking*.

I. The Record Clearly Supports A Rulemaking Proceeding to Repeal Section 73.525

As we recounted in the Petition, the Commission promulgated Section 73.525 in 1985 as a temporary solution to a “problem in the design of the television receiving system.”² Since then, the number of households using over-the-air television receivers has dropped significantly,³ there are far fewer television Channel 6 stations in existence,⁴ and, most critically, over-the-air television receiver technology has so drastically improved that DTV receivers are now essentially immune to the adjacent channel interference Section 73.525 sought to protect. Indeed, testing by NPR Labs has demonstrated that reserved band NCE-FM stations will not cause appreciable interference to reception of DTV Channel 6 stations once Section 73.525 is repealed.⁵ Repealing the rule would benefit NCE radio stations by allowing reserved band NCE-

² *FCC to Withhold Action on Certain FM Educational Applications Because of Potential Interference to Television Channel Six*, Public Notice, FCC 81-340, (rel. July 22, 1981).

³ Television Bureau of Advertising, Inc. *Media Trends Track: TV Basics: Alternate Delivery Systems – National*, http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/12_ADS-Natl.asp. As of July 2009, 62.2% of households were cable subscribers and 28.6% had satellite service. *Id.* The assertion that 15% rather than 10% of households rely on over-the-air broadcasting is based on an older 2007 Nielsen estimate, which only proves the marked trend of consumers away from over-the-air broadcasting. See Comments of Maximum Service Television, Inc. and the National Association of Broadcasters at 4 [hereinafter Comments of MSTV/NAB].

⁴ Channel 6 TV Query, <http://www.fcc.gov/mb/video/tvq.html> (select “6” as both the lower and upper channel; then select “Digital Television” under “Service”).

⁵ The NPR Labs’ studies show that a potential interference area assessed in 1985 had shrunk, typically, to nearly one-tenth its size by 2007 with the use of digital receiver technology. NPR LABS, COMPARISON OF FM BROADCAST SIGNAL INTERFERENCE AREAS WITH CURRENT DIGITAL TELEVISION RECEIVERS ON CHANNEL 6 TO ANALOG TV RECEIVERS ASSUMED IN 47 CFR 73.525, at 8 (Sept. 5, 2008) [hereinafter NPR LABS COMPARISON REPORT]. In the small areas where interference remained, interference thresholds were from 10 to 43 dB better than the studied analog interference ratios. *Id.* at 1.

FM stations to increase their service areas⁶ and expand NCE service to more people. Even for NCE radio stations precluded from increasing coverage because of other nearby NCE radio stations, repealing the rule would provide important practical benefits, such as greater flexibility in the siting of transmitting facilities.

NPR's Petition garnered great support from a varied group of commenters with a breadth of interests in the matter. Comments were filed by licensees representing nearly 500 NCE-FM stations across the country.⁷ Other supporting comments were filed by engineering firms.⁸ Even a licensee of several TV-6 stations supported the Petition.⁹ These commenters lauded the idea of revoking Section 73.525 and echoed NPR's concern that NCE-FM stations have been put at a disadvantage due to these unnecessary regulations.

The comments also confirmed what NPR has long suspected: actual adjacent channel interference is not the problem Section 73.525 assumes it to be. Commenters were "not aware of

⁶ HAMMETT & EDISON, INC. REPORT ON NONCOMMERCIAL FM STATIONS AND TV CHANNEL 6 PROTECTION (Nov. 11, 2004) (included as Appendix C in *NPR Petition for Rulemaking*).

⁷ Comments of Cedar Cove Broadcasting, Inc, Educational Media Foundation of Brazosport, Inc, KSBJ Educational Foundation, and WAY-FM Media Group, Inc; Comments of WEOS – Finger Lakes Public Radio (filed Nov. 24, 2009); Comments of Four Rivers Community Broadcasting Corporation and Bux-Mont Educational Radio Association; Comments of Grace Public Radio (filed Nov. 20, 2009); Comments of The Moody Bible Institute of Chicago, Houston Christian Broadcasters, Inc., The August Radio Fellowship Institute, Inc., Life on the Way Communications, Inc., The Sister Sherry Lynn Foundation, Inc., The Praise Network, Inc., Biblical Ministries Worldwide, Native American Christian Voice, Inc., The Ondas de Vida Network, Inc., The Positive Radio Network, Inc., and Good News Media, Inc.; The Comments of the Board of Trustees of the California State University, for San Diego State University; Comments of Smile FM and Michigan Community Radio; Comments of the Temple University of the Commonwealth System of Higher Education; and Comments of the WBEZ Alliance, Inc.

⁸ Comments of the Educational Media Foundation; Comments of Communications Technologies, Inc.; Comments of Mullaney Engineering, Inc.

⁹ Comments of Venture Technologies Group, Inc. [hereinafter Comments of VTG].

any such interference, past or present,”¹⁰ and where reports of interference were received, the cause was “actually faulty consumer television reception equipment, not interference.”¹¹ Indeed, Venture Technologies Group, the licensee of several Channel 6 stations, reported that Section 73.525 provides “almost zero benefit to television stations broadcasting on Channel 6.”¹²

On the other hand, the Board of Trustees of the University of Alabama and the Georgia Public Telecommunications Commission both operate DTV Channel 6 stations and opposed the Petition based on interference concerns.¹³ It is significant, however, that both licensees voluntarily chose to operate on Channel 6 after having been given the choice of operating on their analog UHF channel or another DTV channel,¹⁴ and even though Section 73.525 only operates prospectively, meaning those DTV Channel 6 stations are only protected from reserve band NCE-FM stations newly constructed or modified after the DTV Channel 6 stations were added to the final DTV Table of Allotments in 2008.¹⁵ Significantly, neither licensee offered any evidence of actual interference. The expressed concerns about interference notwithstanding, the

¹⁰ Comments of San Diego State University at 2.

¹¹ Comments of Temple University at 2.

¹² Comments of VTG at 2.

¹³ Comments of the Board of Trustees of the University of Alabama at 1; Reply Comments of Georgia Public Telecommunications Commission at 1 (filed Dec. 16, 2009).

¹⁴ See *In The Matter Of Advanced Television Systems And Their Impact Upon The Existing Television Broadcast Service, Sixth Report And Order*, 12 FCC Rcd. 14588 at 14698 (1997) (Appendix B, Table 1). See also Comments of the Board of Trustees of The University of Alabama, *In the Matter of Advanced Television Systems And Their Impact Upon The Existing Television Broadcast Service*, at 1 (filed Oct. 10, 2007) (“University hereby states its support for this proposed change [of WUOA-TV] to Channel 6.”)

¹⁵ See *Memorandum Opinion And Order On Reconsideration Of The Seventh Report And Order And Eighth Report And Order*, 23 FCC Rcd. 4220 (2008). Under Section 73.525, existing reserved band NCE-FM construction permit applications or licenses are not required to modify their proposed or existing facilities to accommodate a new TV Channel 6 station. 47 C.F.R. § 73.525(a)(2).

choice to forego interference protection and the absence of evidence of actual interference underscores what NPR Labs has demonstrated: NCE-FM transmissions are no longer a threat to DTV-6 reception.

II. While Television Interests Opposed the Petition, They Offered No Justification For Retaining the Rule Or Deferring its Reexamination

Only a small number of commenters opposed the Petition, and all advocated retaining Section 73.525 without any reexamination or affirmative justification. Together, these commenters put forward the following contentions, none of which justify denying the Petition.

A. The Number of Channel 6 Stations And Over-The-Air Viewers, Though Now Substantially Reduced, Is Ultimately Irrelevant

In challenging the fact that there are now far fewer television stations operating on Channel 6 and far fewer over-the-air television viewers since 1985, the opposing commenters asserted contradictory positions. Some contended that there are so many television stations that use or may use Channel 6 spectrum in the future that it is readily deserving of the Commission's protection.¹⁶ Yet other commenters argued that there are so *few* Channel 6 stations that the Commission's recent Public Notice relaxing certain NCE-FM protection obligations¹⁷ obviated the need to repeal Section 73.525.¹⁸ Even if these positions could be reconciled, they miss the main point of the Petition.

¹⁶ Comments of Association of Public Television Stations at 3 (filed Dec.11, 2009) [hereinafter Comments of APTS].

¹⁷ FCC Media Bureau, *Media Bureau Establishes October 27, 2009, Initial Filing Date for Acceptance of Certain Noncommercial Educational FM Station Minor Change Applications* October 13, 2009, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2214A1.pdf. While NPR is appreciative that the Commission is taking steps to ameliorate conditions caused by Section 73.525, there are still scores of NCE-FM stations whose signals are weakened in order to "protect" Channel 6 stations.

¹⁸ Comments of the Board of Trustees of the University of Alabama at 2.

Regardless of how many stations operate on Channel 6, none will be adversely affected by the repeal of Section 73.525. That is because the interference the rule purports to prevent would not actually occur because DTV receivers are now capable of rejecting the adjacent NCE-FM signals. While ABC claimed that its DTV-6 station experienced reception problems after the DTV transition, those are more likely due to other causes.¹⁹ Thus, whether there are a handful of DTV Channel 6 stations or 100 times that many, a rule to prevent interference that would not actually occur serves no valid purpose.

B. The Few Criticisms of the NPR Labs Testing Are Not Credible

An even small number of commenters challenged the adequacy of the NPR Labs testing based on certain specific elements of the testing. None of these criticisms withstand scrutiny. First, the Association for Maximum Service Television ("MSTV") and the National Association of Broadcasters ("NAB") filed a joint opposition, asserting that "the Commission should continue to protect channel 6 TV operations" because "millions of households rely on older, analog television sets that are connected to digital converter boxes."²⁰ Without explaining the logic, the comment appears to suggest that an analog television connected to a modern DTV converter may not "experience the same, more robust interference rejection as ... a new digital television set."²¹ It should be apparent, however, that interference rejection is determined only

¹⁹ See Comments of ABC, Inc. at 4-5. Importantly, prior to its DTV transition, WPVI operated on the same TV6 channel in NTSC, which was *more* susceptible to interference. ABC's statement, therefore, attests directly to *other* causes of digital signal degradation, namely poor antenna performance, building losses, and background noise – and not NCE-FM interference – contributing to their viewer difficulties. Maintaining or revoking Section 73.525 protections will have no appreciable impact on the viewers of WPVI.

²⁰ Comments of MSTV/NAB at 2.

²¹ *Id.*

by the converter box, and the operation of an analog television, whether old or new, has no bearing on the performance of the converter box.

Second, MSTV and NAB challenged the NPR Labs testing because of the 17 DTV receivers tested, only 2 were converter boxes. While it is true that only two of the seventeen consumer DTV receivers tested were set-top boxes, in time the proportion of converters will decline and new digital TVs will predominate. More importantly, the tested digital-to-analog boxes showed ample ability to protect from adjacent channel interference. In the NPR Lab testing, the NCE-FM interference rejection capabilities of both converters exceeded the median for all 17 receivers at each signal power tested.²² There is also no reason to expect marked variation in performance among the converter boxes NPR did not test, since all converters eligible for rebate under the NTIA coupon program were required to meet the same minimum technical standard established by the Commission for DTV receivers.²³

Third, MSTV and NAB criticize NPR's use of a full class B1 station (25 kW at 100 meters AAT) to analyze potential interference impacts. Whether intentionally or not, these commenters failed to note the explanation NPR Labs provided in the test report: new NCE-FM facilities are likely to be of this class (or smaller) because of rule provisions requiring NCE-FM stations to

²² See NPR LABS REPORT, INTERFERENCE REJECTION THRESHOLDS OF CONSUMER DIGITAL TELEVISION RECEIVERS ON CHANNEL 6 WITH FM BROADCAST SIGNALS at 8-10 (Dec. 17, 2007) [included as Appendix A in *NPR Petition for Rulemaking*].

²³ *Rules to Implement and Administer a Coupon Program for Digital-to-Analog Converter Boxes*, Docket No. 0612242667-7051-01, Fed. Reg. 12097, 12101-02 & Appendix 1 (Mar. 15, 2007). For these reasons, while it is true that cable and satellite subscribers use additional television receivers for over-the-air reception, MSTV/NAB Comments at 5, those subscribers must use converter boxes or DTV receivers and are, therefore, immune to interference from adjacent NCE-FM interference.

protect other FM stations.²⁴ Because the likelihood of new higher-class NCE-FM facilities near TV markets containing DTV channel 6 stations is highly remote, using higher-class facilities as examples would not have served a useful purpose.

Finally, ABC criticized the NPR Labs testing on the grounds that it used DTV-6 signal strengths that are stronger than those prevalent in real world conditions. However, the assertion that “DTV signal strengths . . . are commonly . . . as low as -85 dBm”²⁵ is based on a threshold signal found in the FCC DTV Planning Factors, which used an out-of-date allowance for environmental RF noise developed almost sixty years ago in the early days of analog television broadcasting.²⁶ This figure vastly understates the levels of background electrical noise present in today’s homes and businesses, which even MSTV and NAB conceded “makes reception problematic in the VHF band.”²⁷ ABC itself admitted that “[t]his low signal [-85 dBm] is barely above the noise-limited performance of a good ATSC 8-VSB receiver.”²⁸ Significantly, had NPR Labs added higher levels of background noise, it would have tended to *mask* any NCE FM interference.

More generally, ABC fails to recognize that NPR’s test of consumer threshold interference to DTV receivers is a measure of undesired-to-desired signal ratios. Thus, for the three signal powers tested, a decrease in desired signal ratio actually *reduces* the potential for interference.

²⁴ NPR LABS COMPARISON REPORT at 3.

²⁵ Comments of ABC, Inc. at 2.

²⁶ *Report to Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004: Study of Digital Television Field Strengths and Testing Procedures*, ET Docket No. 05-182, (released Dec. 9 2005), available at <http://www.fcc.gov/oet/info/documents/reports/SHVERA/SHVERA-FCC-05-199.pdf>.

²⁷ Comments of MSTV/NAB at 3.

²⁸ See Comments of ABC, Inc. at 2.

NPR Laboratories' use of -65 dBm for the lowest interference ratio in the lab report should therefore equal, if not overstate, the impact of NCE-FM interference at even lower DTV signal levels.

C. Notwithstanding Uncertainty Over the Future of Over-The-Air Television Broadcasting, Changed Circumstances, Particularly in Television Receiver Technology, Compel A Reevaluation of Section 73.525

APTS suggested that, because of a possible relocation of television broadcasters to the lower VHF band, initiating a rulemaking to repeal Section 73.525 is premature at this time.²⁹ We recognize the future of over-the-air television broadcasting is uncertain, but that uncertainty should not confuse the issue at stake in this proceeding: regardless of how many television Channel 6 stations and over-the-air viewers there may be, Section 73.525 is now irrelevant to television Channel 6 reception. For that reason, in fact, the time to conduct a rulemaking proceeding is now.

Indeed, administrative case law is clear: “[i]n the rulemaking context . . . 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.’”³⁰ Here, the factual predicate that failing television receivers required a “temporary”³¹ solution in 1985 to protect Channel 6, has been removed. The analog television receivers on which the 1985 rule was based have been replaced by far superior performing DTV receivers and converter boxes, and NCE-FM interference is no longer a problem. Accordingly, the Commission should exercise its statutory authority and “evaluate its

²⁹ Comments of APTS at 2-3.

³⁰ *Bechtel v. FCC*, 957 F.2d 873, 881 (1992) (citing *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981)).

³¹ *FCC to Withhold Action on Certain FM Educational Applications Because of Potential Interference to Television Channel Six*, Public Notice, FCC 81-340, (rel. July 22, 1981).

policies . . . to ascertain whether they work.”³² Moreover, the Commission “must be prepared to support [their policies] just as if the policy statement had never been issued.”³³ Were the Commission to try to promulgate Section 73.525 today, modern circumstances are such that there would be no factual or legal conditions to support it.

Speculation about a spectrum shift may be appropriate in some contexts,³⁴ but not to maintain a rule to protect DTV Channel 6 reception when the rule is not necessary to serve that purpose. Even worse, Section 73.525 imposes an unnecessary burden on noncommercial educational radio stations. Indeed, the rule's only consequence is to limit the ability of NCE-FM stations to serve their communities. In these circumstances, we submit, the Commission has a legal duty to grant the NPR Petition.

³² *Bechtel* at 881.

³³ *Pacific Gas & Elec. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974).

³⁴ *See* Public Notice, Data Sought on Uses of Spectrum, Pleading Cycle Established, NBP Public Notice # 26, GN Docket Nos. 09-47, 09-51, 09-137, (rel. Dec. 2, 2009).

Conclusion

For the foregoing reasons, and as demonstrated in greater detail in the Petition, NPR respectfully requests that the Commission initiate a rulemaking proceeding to repeal Section 73.525 of the Commission's Rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Claire Magee, hereby certify that a copy of the foregoing Reply of National Public Radio, Inc. was sent this 17th day of December, 2009, by first-class U.S. mail, postage prepaid, to the following:

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