

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

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Federal Communications Commission  
Office of Secretary

Second Periodic Review of the  
Commission's Rules and Policies  
Affecting the Conversion  
To Digital Television

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MB Docket No. 03-15  
RM 9832

To: The Commission

**PETITION FOR RECONSIDERATION**

ACME Communications, Inc. ("ACME"), acting pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. §1.106, hereby requests reconsideration of the *Report and Order*, FCC 04-192 (September 7, 2004) ("*Report and Order*"), in the above-captioned proceeding.

**Introduction**

In the *Report and Order*, the Commission established a procedure to ensure that the FCC's database is stable throughout the DTV channel election and repacking process. As part of that process, the Commission apparently decided to defer the processing of all pending rulemaking petitions for new NTSC stations for which a Notice of Proposed Rule Making ("NPRM") has not yet been issued, including those associated with applications for new NTSC stations filed prior to 1997.

The public interest and applicable law require that the Commission reconsider that latter decision for pre-1997 applications associated with a pending rulemaking petition requesting a different NTSC or DTV channel. As to those latter petitions which meet current protection requirements, the Commission should immediately issue an NPRM and consider the proposed allotment in connection with the channel election process. The proposed channel

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would then receive only qualified protection – if another television licensee filed comments in the proceeding indicating a need for the proposed channel, the Commission could use the proceeding to decide whether to make the channel available to that other licensee (and perhaps make the vacated channel available to the petitioner). This approach will better serve the public interest by making new television stations available at a much earlier time without compromising the Commission’s access to a stable database to develop the final DTV Table of Allotments.

**I. The *Report and Order*.**

The *Report and Order* acknowledged that there are currently pending approximately 50 applications for new NTSC stations which were filed with the Commission prior to 1997. In developing the post-transition DTV Table of Allotments, the *Report and Order* stated that the Commission would “generally protect” those NTSC allotments which are the subject of new station applications that have “cut-off” status -- *i.e.*, those for which there is no opportunity to file additional competing applications. *Report and Order* at ¶66. For mutually-exclusive groups of applications which are the subject of a pending settlement agreement, the Commission stated that it would consider the facilities proposed by the prevailing applicant in the settlement group and continue to process the protected application to the grant of an NTSC construction permit. The new permittee will then be allowed to choose between NTSC and DTV operation during the transition period, but will be required to operate a DTV facility at the end of the transition. *Id.*

The *Report and Order* further acknowledged that some pre-1997 applicants have filed rulemaking petitions requesting a different NTSC channel. These rulemaking petitions, including those seeking new DTV allotments, fall into one of the following three groups: (1) pending petitions for rulemaking which have not yet been acted on by the Commission; (2) those for which the Commission has already issued an NPRM; and (3) those that have resulted in a

*Report and Order* and the allotment of a new channel. With respect to those three categories, the *Report and Order* stated as follows:

We will attempt to protect allotments and proposed allotments in the second and third groups where we have already adopted a Notice of Proposed Rule Making or a *Report and Order* to establish a channel allotment. . . . However, we advise these petitioners that there may be a few cases where we must modify, restrict or eliminate their requested allotment in order to accommodate all eligible broadcasters with a post-transition DTV allotment. *Remaining rule making petitions will be evaluated at the conclusion of the channel election and repacking process and may be accommodated with a post-transition DTV allotment or dismissed when we issue the NPRM proposing the new DTV Table of Allotments.*

*Report and Order* at ¶67 (emphasis added). In short, the *Report and Order* appears to contemplate that no NPRM will be released for pending rulemaking petitions until the final DTV Table of Allotments is established, and, at that time, consideration will be given to releasing an NPRM which would result in the allotment of a DTV (rather than an NTSC) channel.<sup>1</sup>

## II. ACME Rulemaking Proposal.

ACME has a pending rulemaking petition for NTSC Channel 20 at Lexington, Kentucky which falls into the first category of petitions identified in the *Report and Order* and is associated with a group of mutually-exclusive pre-1997 applications for a new NTSC station to operate on Channel 62 in Lexington.<sup>2</sup> That pending rulemaking petition exemplifies the unnecessary adverse impact on the public interest if the Commission defers the processing of all

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<sup>1</sup> In the *Report and Order* the Commission stated that “all pending petitions for reconsideration or review of NTSC allotment requests that have not advanced to the Notice stage are hereby dismissed.” Although stated broadly, that directive is found in paragraph 68, which addressed rulemaking proposals other than those (like the Lexington proposal) which related to pre-1997 applications. To the extent that assumption is incorrect, the Commission should reconsider that directive for those pre-1997 applications because, as explained herein, no public interest is served by foreclosing the opportunity for the allotment of new channels that will not adversely affect the repacking process or the development of a final DTV Table of Allotments.

<sup>2</sup> See File Nos. BPCT-19960722KH; BPCT-19960920WQ; BPCT-19960920IM.

pending rulemaking petitions which have not resulted in the issuance of an NPRM or a *Report and Order*.

Subsequent to the filing of the three applications for the new Lexington television station, Congress added Section 309(1) of the Communications Act of 1934, as amended (the "Communications Act"), directing the Commission to waive its rules to encourage settlements within six (6) months among mutually exclusive broadcast applicants.<sup>3</sup> In response to that congressionally-mandated opportunity, the Lexington applicants timely filed a Settlement Agreement that proposed the dismissal of all but one of the applications and the issuance of a construction permit to a newly-formed entity.

Intervening events precluded the Commission from approving the Settlement Agreement and granting the construction permit. More specifically, the Commission issued a decision stating that it would not grant new NTSC construction permits for channels 60-69 and that applicants for any of those channels would have to file a rulemaking petition to select a new channel.

In response to a Public Notice released November 22, 1999, the Lexington applicants filed a timely Petition for Rulemaking on July 17, 2000, seeking to substitute Channel 59 for the existing Channel 62 allotment at Lexington.<sup>4</sup> The applicants also entered into an Agreement proposing to substitute ACME as the prevailing applicant under their Settlement Agreement.

The Commission never acted on the Channel 59 proposal because the Commission subsequently decided that it would not allot any new NTSC station on Channels 52-59.

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<sup>3</sup> See 47 U.S.C. §309(1). Section 309(1) was added to the Communications Act by Section 3002(a)(3) of the Balanced Budget Act of 1997 ("Budget Act"). Pub. L. No. 105-33, 111 Stat. 251 (1997).

<sup>4</sup> See Public Notice, 14 FCC Rcd 19559 (MMB 1999) ("Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations").

*Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC Rcd 1022 (2002). In response to a second Public Notice, the Lexington applicants filed an Amendment to Petition for Rulemaking on March 8, 2002, seeking to substitute Channel 20 for Channel 59 at Lexington.<sup>5</sup> That petition has been pending for over two and one-half years.

### **III. Public Interest Requires Issuance of NPRMs Now.**

The *Report and Order* emphasized the importance of a stable database during the DTV repacking and channel election process. However, the issuance of an NPRM now to allot Channel 20 to Lexington (and the issuance of other similarly-situated NPRMs) need not undermine the desire for a stable database. The Commission can issue the NPRM with the qualification that the proposed allotment of Channel 20 in Lexington, Kentucky (or the channel proposed by any similarly-situated rulemaking petition) will *not* be protected in completing the final DTV Table of Allotments if comments are filed by an existing television licensee who indicates a need for the channel. Stated another way, the pendency of the NPRM under the foregoing arrangement would not preclude a television licensee from seeking or obtaining the proposed channel if that channel were needed to fulfill that licensee's DTV conversion. The Commission would thus have access to the stable database to make whatever changes are needed to complete the DTV Table of Allotments.

The benefits of issuing the NPRM now are clear. If the Commission waits to issue an NPRM after the creation of the new DTV Table of Allotments in 2006, it would probably be 2007 before any allotment could be made to Lexington (and other similarly-situated communities). Conversely, if the NPRM is issued now, the Commission would be in a position

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<sup>5</sup> See Public Notice, 17 FCC Rcd 2155 (MMB 2002) ("Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Requests for New NTSC Television Stations on Channels 52-59").

(if the circumstances warrant it) to allot Channel 20 to Lexington and make a new outlet available to Lexington at least one year or earlier than would otherwise be the case.

Two factors make the foregoing approach particularly justified in the case of Lexington. The first factor concerns the likelihood that the Commission will not need Channel 20 to facilitate the DTV conversion of any existing television licensee in the Lexington area. Annexed hereto as Exhibit A is a preclusive study for television stations within 300 kilometers of the actual transmitter site for ACME's Lexington station which have at least one channel (NTSC or DTV) outside the core spectrum. As reflected in Exhibit A, every one of those stations has a paired channel inside the core. Therefore, the allotment of Channel 20 at Lexington should not have an adverse effect on the channel election process.

The second distinguishing factor for the Lexington proposal is Section 309(l) of the Communications Act. That section directed the Commission to waive its rules to facilitate the grant of settlements that were filed pursuant to that congressional mandate. *See* 47 U.S.C. §309(l). The statutory directive necessarily implies that the Commission may not frustrate the grant of settlement proposals filed pursuant to Section 309(l) by refusing to process the pending rulemaking petition until the "conclusion of the channel election and repacking process," a period which is likely to last at least eight (8) years after the Settlement Agreement was initially filed with the Commission.

In order to avoid a violation of Section 309(l), the Commission should reconsider paragraph 67 of the *Report and Order* and immediately issue an NPRM proposing to allot Channel 20 at Lexington as an additional analog television service. As demonstrated in the aforementioned Amendment to Petition for Rulemaking, the allotment of Channel 20 to Lexington would bring substantial public interest benefits to the Lexington television market. ACME plans to affiliate the Lexington station with The WB Television Network ("The WB")

and to air a daily news program, "The Daily Buzz," that will provide both local and national news to viewers in Lexington and the surrounding area. The Lexington allotment proposal would thus provide Lexington residents with access to a new program source and simultaneously help foster the development of an emerging national television network by providing an additional competitive broadcast outlet in a top 100 television market.<sup>6</sup> In sum, the allotment of Channel 20 to Lexington would (i) bring a new local television service to the Lexington market, (ii) promote ownership diversity in the Lexington market, and (iii) increase competition in the Lexington market. In light of public and congressional concerns with increased consolidation in the media industry, the public interest benefits of ACME's Lexington allotment proposal are that much more compelling.

Despite those public interest benefits, any existing licensee would have an opportunity to file comments in the rulemaking proceeding to express an interest in the proposed channel (which in the case of Lexington is Channel 20). The Commission could then consider that countervailing expression of interest in Channel 20 within the context of the specific allotment proceeding. If it chose to do so, the Commission might then consider deferring processing of the Lexington settlement proposal until the conclusion of the channel election process. Even then, however, the Commission would be in a position to act more quickly if it

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<sup>6</sup> The Lexington market currently is ranked as the 66th television market. *See Broadcasting & Cable Yearbook*, p. B-178 (2003-2004). As The WB has explained to the Commission in a variety of proceedings, one of its primary challenges in establishing itself as a nationwide network has been finding a sufficient number of stations with which to affiliate. *See, e.g.,* Comments of The WB Television Network, *Establishment of a Class A Television Service*, MM Docket No. 00-10 (filed Feb. 10, 2000); Comments and Reply Comments of The Warner Bros. Television Network, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 (filed Oct. 30, 1995, Nov. 27, 1995); Reply Comments of The Warner Bros. Television Network, *Reexamination of The Policy Statement in Comparative Broadcast Hearings*, GC Docket No. 92-52 (filed Aug. 22, 1994); Comments of the UPN, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, MM Docket No. 95-92 at 21-22 (filed Oct. 30, 1995).

turned out that the existing licensee did not need the proposed channel (or if the channel being vacated by the existing licensee could be made available to the petitioner).

WHEREFORE, in light of the foregoing, ACME respectfully requests that the Commission reconsider paragraph 67 of the *Report and Order*, and, upon reconsideration, direct the Media Bureau to immediately issue an NPRM proposing the allotment of the requested channel for Lexington (and other similarly-situated proposals) and not defer processing of those proposals, with the understanding that those proposed channel allotments would not be protected from existing licensees who need the proposed channel for the DTV conversion.

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# **EXHIBIT A**

## **Preclusive Study**

**PRECLUSIVE ANALYSIS OF LEXINGTON MARKET**

**Stations Assigned Channels Outside the Core That Are Located  
Within 300 Kilometers of the Proposed Lexington Transmitter Site**

<b>Station</b>	<b>Community of License</b>	<b>Analog Channel</b>	<b>Digital Channel</b>	<b>Core Channel Available?</b>
WMSY-TV	Marion, VA	52	42	Yes
WKON	Owenton, KY	52	44	Yes
WVUT	Vincennes, IN	22	52	Yes
WCTE	Cookeville, TN	22	52	Yes
WIPB	Muncie, IN	49	52	Yes
WKGB-TV	Bowling Green, KY	53	48	Yes
WWHO	Chillicothe, OH	53	46	Yes
WTTV	Bloomington, IN	4	53	Yes
WSWP-TV	Grandview, WV	9	53	Yes
WCVN-TV	Covington, KY	54	24	Yes
WPXK	Jellico, TN	54	23	Yes
WUNE-TV	Linville, NC	17	54	Yes
WHAS-TV	Louisville, KY	11	55	Yes
WDKY-TV	Danville, KY	56	4	Yes
WCLJ-TV	Bloomington, IN	42	56	Yes
WLOS	Asheville, NC	13	56	Yes
WTVF	Nashville, TN	5	56	Yes
WYMT-TV	Hazard, KY	57	12	Yes
WFTE	Salem, IN	58	51	Yes
WJHL-TV	Johnson City, TN	11	58	Yes
WPTD	Dayton, OH	16	58	Yes
WNAB	Nashville, TN	58	23	Yes
WXIN	Indianapolis, IN	59	45	Yes
WEHT	Evansville, IN	25	59	Yes
WTSF	Ashland, KY	61	44	Yes
WIPX	Bloomington, IN	63	27	Yes
WSTR-TV	Cincinnati, OH	64	33	Yes
WLJC-TV	Beattyville, KY	65	7	Yes
WJFB	Lebanon, TN	66	44	Yes
WUPX-TV	Morehead, KY	67	21	Yes
WLFG	Grundy, VA	67	49	Yes
WKMJ-TV	Louisville, KY	68	38	Yes
WTBU-TV	Indianapolis, IN	69	44	Yes
WOWK-TV	Huntington, WV	13	54	Yes
WTTK	Kokomo, IN	29	54	Yes

## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2004, a copy of the foregoing "Petition for Reconsideration" was hand-delivered or sent by first-class mail, postage prepaid, to the following:

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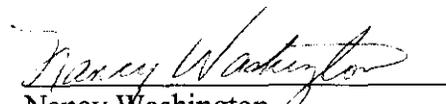
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