

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

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

To: The Commission

**OPPOSITION TO PETITIONS FOR RECONSIDERATION OF  
NATIONAL PUBLIC RADIO, INC. AND HAMMETT & EDISON, INC.**

Pursuant to Section 1.429(f) of the rules of the Federal Communications Commission (“FCC” or “Commission”),<sup>1</sup> ABC, Inc. (“ABC”), by its attorneys, submits this opposition (“Opposition”) to the petitions for reconsideration of the Commission’s *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order* (“*Seventh Reconsideration Order*”) filed by National Public Radio, Inc. (“NPR”) and Hammett & Edison, Inc. (“H&E”) regarding channels 5 and 6.<sup>2</sup> As demonstrated below, the Commission’s treatment of channels 5 and 6 was critical to facilitate the DTV transition for certain television stations on those channels and, as such, was in the public interest. Further, the arguments raised by NPR and H&E, which are wholly procedural, are without merit. Accordingly, the Commission should dismiss or deny the NPR and H&E petitions promptly to provide necessary certainty to stations on channels 5 and 6 as they approach the end of the DTV transition.

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<sup>1</sup> 47 C.F.R. § 1.429(f).

<sup>2</sup> In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order*, FCC 08-72, MB Docket No. 87-268 (rel. Mar. 6, 2008) (“*Seventh Reconsideration Order*”).

## I. Background

Seventh Reconsideration Order. In the *Seventh Reconsideration Order*, the Commission addressed several petitions for reconsideration regarding specific stations' post-transition DTV facilities and channels.<sup>3</sup> Additionally, the Commission rejected two general requests related to channels 5 and 6.<sup>4</sup> Specifically, the Commission rejected a request to reallocate channels 5 and 6 to the FM service (the "Allocation Issue").<sup>5</sup> The Commission also rejected a request to eliminate the requirement that certain noncommercial educational FM ("NCE-FM") stations protect DTV operations on channel 6, as set forth in section 73.525 of the FCC's rules (the "Interference Protection Issue").<sup>6</sup> Although the Commission found that both issues were "beyond the scope of" the proceeding, it addressed each issue in brief, and resolved them consistent with previous decisions.<sup>7</sup>

Petitions for Reconsideration. In its reconsideration petition, NPR asks the Commission to "withdraw" its determinations regarding the Allocation Issue and the Interference Protection Issue because the Commission is considering similar reallocation and interference protection issues in two other proceedings.<sup>8</sup> H&E challenges the Commission's determination regarding the Interference Protection issue based on its belief that certain "analog" rules (a category which allegedly includes section 73.525) do not apply to DTV stations after the transition.<sup>9</sup>

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<sup>3</sup> *Reconsideration Order* at ¶¶ 28-144.

<sup>4</sup> *Reconsideration Order* at ¶¶ 24-27. These requests were filed by Mullaney Engineering, Inc. and EME Communications and supported in the comments of Dan Priestley and Robert E. Lee.

<sup>5</sup> *Reconsideration Order* at ¶¶ 24-27.

<sup>6</sup> *Reconsideration Order* at ¶¶ 24-27.

<sup>7</sup> *Reconsideration Order* at ¶¶ 24-27.

<sup>8</sup> National Public Radio, Inc., Petition for Reconsideration, MM Docket No. 87-268 (Apr. 21, 2008) ("NPR Petition").

<sup>9</sup> Hammett & Edison, Inc., Petition for Reconsideration, MM Docket No. 87-268 (Mar. 25, 2008) ("H&E Petition").

**I. THE COMMISSION’S TREATMENT OF CHANNELS 5 AND 6 WAS CRITICAL TO PROMOTE THE PUBLIC INTEREST BECAUSE IT PROVIDED NECESSARY CERTAINTY AND INTERFERENCE PROTECTION TO STATIONS APPROACHING THE END OF THE DTV TRANSITION**

The Commission’s treatment of channels 5 and 6 was critical to promote the public interest because it provided necessary certainty and interference protection to stations approaching the end of the DTV transition, thus increasing the likelihood of a smooth transition for these stations’ and their millions of viewers. The Commission has worked with all stakeholders for over a decade to implement the DTV transition in a manner consistent with the public interest. One impressive achievement the Commission made was to assign a post-transition channel to each station that best balances several interests, including interference protection and continuity of service. As part of this complex, multi-step process, the Commission assigned channel 5 or 6 to more than 20 full-power television stations for their post-transition DTV operations.<sup>10</sup> Each allocation of channel 5 or 6 involved a separate balancing of interests. Reallocating channels 5 and 6 from TV to FM would upset this balance and threaten the viewers of several stations, at precisely the wrong time—when we are less than nine months from the transition date. Given the important public interest in a smooth DTV transition, the Commission was correct to reject calls for reallocating TV channels 5 and 6 at this time.

The experience of ABC station WPVI(TV), in particular, further supports the Commission’s treatment of channels 5 and 6. ABC is the licensee of full-power commercial television station WPVI(TV) and permittee of WPVI-DT in Philadelphia, Pennsylvania. WPVI(TV)’s analog channel is 6 and its allotted DTV channel is 64. WPVI-DT has been on the air with a digital signal on channel 64 since November 1998. WPVI-DT could not operate

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<sup>10</sup> *Seventh Reconsideration Order* at ¶ 25 (citing opposition of Maximum Service Television, Inc.)

permanently on channel 64, however, because channel 64 was outside the “core,” and thus unavailable for post-transition DTV operation. Because of the well-known issues surrounding the suitability of channel 6 and other low-VHF channels for DTV operations,<sup>11</sup> ABC was compelled to forego making a channel election for WPVI-DT in round one of the Commission’s channel election procedure and instead elected to participate in the second round of DTV channel elections (in lieu of selecting channel 6). ABC also protected its rights to select another channel in the second round by objecting to a negotiated channel election agreement (“NCA”) between two other Philadelphia-area stations.<sup>12</sup>

Only after completing tests showing that DTV operations on channel 6 could be technically feasible did ABC later amend its channel election for WPVI-DT and choose channel 6.<sup>13</sup> ABC reached this difficult decision only after a careful balancing of interests, including (i) the lack of any other suitable channel based on multiple technical studies, (ii) ABC’s interest in certainty and a speedy resolution, (iii) the interests of WPVI(TV)’s viewers (including continuity of service), (iv) the interests of other stations in the nation’s fourth largest television market and throughout the congested northeast corridor, (v) a negotiated channel arrangement that effectively removed the only suitable replacement channel from the pool of available channels

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<sup>11</sup> See Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Report and Order*, 19 FCC Rcd 18279, n.129 (2004).

<sup>12</sup> The NCA between NBC Telemundo License Co., licensee of WCAU, Philadelphia, Pennsylvania and permittee of DTV station WNJU-DT, Linden, New Jersey, and Independence Public Media of Philadelphia, Inc., licensee of noncommercial television station WYBE, Philadelphia, Pennsylvania, would have assigned one of WYBE’s in-core channels to WCAU, and thus prevented WPVI from selecting that channel in the second round. The Media Bureau rejected this NCA in part due to the effect it would have on WPVI given the few available channels in the congested northeast corridor.

<sup>13</sup> The Commission approved this amendment and awarded WPVI a tentative channel designation on channel 6. See Tentative Channel Designations for Stations Participating in the First Round of DTV Channel Elections and Second Round Election Filing Deadline, *Public Notice*, 20 FCC Rcd 15735 (2005).

(which ABC initially opposed),<sup>14</sup> and (vi) the general public interest. ABC also relied upon the continued application of section 73.525 post-transition in reaching its decision to request channel 6. Elimination of section 73.525 or re-allocation of channel 6 would upset this delicate balance and leave WPVI and its viewers in limbo. Any such decision likely would have similarly devastating effects on other stations and their viewers. Accordingly, because the Commission's decision rejecting calls for reallocating channels 5 and 6 or eliminating interference protection for DTV operation on channel 6 was critical to facilitating the transition to DTV operation and, thus, in the public interest, it should be upheld.

## **II. PETITIONERS' PROCEDURAL ARGUMENTS ARE CONTRARY TO LAW AND ARE WITHOUT MERIT**

As shown above, the Commission's treatment of channels 5 and 6 in the *Seventh Reconsideration Order* is critical to the upcoming transition to DTV service and, thus, unquestionably was in the public interest. The petitions for reconsideration of NPR and H&E fail to show otherwise. Additionally, the procedural arguments raised in the NPR and H&E petitions are without merit.

H&E Petition for Reconsideration. In its petition, H&E asserts that section 73.525 does not entitle DTV channel 6 stations to interference protection because the Commission allegedly announced a policy "that analog-specific FCC rules would not apply to DTV operations."<sup>15</sup> In support of this theory, H&E cites a statement in the Commission's 1998 *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order* ("*Fifth Reconsideration Order*") indicating that "a new permittee or licensee's DTV facility must generally comply with the

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<sup>14</sup> See *supra* n. 12.

<sup>15</sup> H&E Petition at 1, 3.

analog operation rules...except where the analog rule is...inapplicable to digital technology.”<sup>16</sup> Because H&E views section 73.525 as an “analog rule...inapplicable to digital technology,” it submits that the Commission’s treatment of channel 6 in the *Reconsideration Order* contradicts its earlier statement from the *Fifth Reconsideration Order*.<sup>17</sup> Ultimately, H&E appears to believe that section 73.525 does not require NCE-FM stations to protect DTV stations on channel 6.

The primary problem with H&E’s theory regarding the applicability of section 73.525 is that the general “policy” regarding analog TV rules cited by H&E was superseded by the Commission’s more direct decision regarding section 73.525 in particular. Specifically, in the *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, released simultaneously with the *Fifth Reconsideration Order*, the Commission directly addressed continuing TV channel 6 protections, as set forth in section 73.525.<sup>18</sup> In doing so, the Commission recited the staff’s conclusion that “the current rules for protection of analog TV channel 6 service from interference caused by FM radio service are adequate to protect DTV operations on existing analog channel 6 allotments...and on new channel 6 allotments.”<sup>19</sup> Thus, to the extent that any statement from a previous Commission order is “controlling,” as H&E asserts, this more specific statement indicating that DTV stations were entitled to protection from NCE-FM stations under section 73.525 is the controlling statement.

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<sup>16</sup> H&E Petition at 1; In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, 6866 (1998) (“*Fifth Reconsideration Order*”).

<sup>17</sup> H&E Petition at 1-3.

<sup>18</sup> In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, 7437 (1998) (“*Sixth Reconsideration Order*”).

<sup>19</sup> *Sixth Reconsideration Order* at 7437.

Another flaw with H&E’s argument is that the policy it cites addresses which analog TV rules do not apply to DTV stations, while the rule it claims to be negated—section 73.525—is a radio rule applicable to NCE-FM stations. According to the policy statement quoted by H&E, a “DTV facility” generally must comply with “analog operation rules” except where “the analog rule” is inapplicable to digital technology.<sup>20</sup> This statement potentially negates only one type of rule: (i) an “analog operation rule” that is (ii) applicable to a “DTV facility.” Section 73.525 is not an analog TV rule; nor is it applicable to DTV facilities. Rather, Section 73.525 is a radio rule applicable to NCE-FM radio stations.<sup>21</sup> It does not obligate TV stations to do anything. Therefore, the Commission’s broad statement regarding which analog TV rules would apply to DTV facilities simply could not have modified section 73.525 under any interpretation.<sup>22</sup> Accordingly, the Commission should reject H&E’s petition.<sup>23</sup>

NPR Petition for Reconsideration. NPR correctly notes that the Commission plans to consider revising or eliminating the interference protections under Section 73.525, and the reallocation of channels 5 and 6, in other proceedings—the pending digital audio broadcasting proceeding and a more general media ownership proceeding.<sup>24</sup> However, NPR is incorrect when it asserts that the existence of other proceedings in which the Allocation Issue and Interference Protection Issue were raised precludes the Commission from addressing similar issues in its

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<sup>20</sup> *Fifth Reconsideration Order* at 6866 (emphases added).

<sup>21</sup> In fact, section 73.525 is located in a rule sub-part entitled “Noncommercial Educational FM Broadcast Stations.”

<sup>22</sup> Further, even if the policy statement cited by H&E is read to encompass rules like section 73.525, it is not binding on the Commission because it is mere dicta.

<sup>23</sup> ABC agrees with H&E that the Commission should consider how it could update section 73.525 to better “reflect DTV technical parameters.” H&E Petition at 4. However, ABC disagrees with H&E’s assertion that, in the meantime, the protections of section 73.525 should not apply. Rather, ABC believes that any modifications to the section 73.525 protections should be made only after the DTV transition concludes and when actual “real world” testing may form the basis for such modifications.

<sup>24</sup> NPR Petition at 3-5.

DTV proceeding.<sup>25</sup> In fact, the very opposite is true—the Commission was obligated to address those issues because they were raised in timely petitions for reconsideration. Specifically, the Communications Act, the Commission’s own rules and the Administrative Procedure Act all obligate the Commission to acknowledge and address arguments raised in petitions for reconsideration.<sup>26</sup> The Communications Act, in particular, states that “the Commission...shall enter an order with a concise statement of the reasons therefore, denying a petition for reconsideration or granting such petition, in whole or in part...”<sup>27</sup> Thus, in addressing these channel 5 and 6 issues, the Commission merely was executing its statutory obligations and NPR’s request for the Commission to “withdraw” its findings is contrary to law and is without merit. Accordingly, the Commission should reject NPR’s petition.

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<sup>25</sup> NPR cites no precedent in support of this procedural argument and ABC is not aware of any such precedent. Further, if the Commission accepted NPR’s novel argument regarding other pending proceedings, it may not be empowered to act on NPR’s instant petition either because it raises issues raised in those other pending proceedings.

<sup>26</sup> 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(i); 5 U.S.C. § 553.

<sup>27</sup> 47 U.S.C. § 405(a).



**III. CONCLUSION**

For all of the foregoing reasons, ABC urges the Commission to dismiss or deny the NPR and H&E petitions for reconsideration.

Respectfully submitted,

**ABC, Inc.**

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## CERTIFICATE OF SERVICE

I, Dayle Jones, hereby certify that true and correct copies of the foregoing Opposition have been forwarded by express U.S. Mail, postage prepaid, on the 20<sup>th</sup> day of May, 2008 to the following parties:

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