No. 00-522

# In the Supreme Court of the United States

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C., PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION


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## QUESTION PRESENTED

Whether the Federal Communications Commission acted within the scope of its authority under Title III of the Communications Act of 1934, 47 U.S.C. 301 *et seq.*, and in compliance with the Administrative Procedure Act, 5 U.S.C. 706, when it declined to award petitioner a license to provide digital television service.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 216 F.3d 1133. The opinions and orders of the Federal Communications Commission (Pet. Lodging App. L315-L474, L268-L314, L104-L267) are reported at 14 F.C.C.R. 1348, 13 F.C.C.R. 6860, and 12 F.C.C.R. 12,809.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on July 7, 2000. The petition for a writ of certiorari was filed on October 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

This case arises from a proceeding in which the Federal Communications Commission (Commission) adopted policies to promote the new technology of digital television (DTV). Providing for the transition from today's analog television technology to DTV required the Commission to resolve myriad technical and policy concerns. In addition, because DTV will require viewers to obtain either new television sets or converters, it was necessary as a practical matter for the Commission to establish a transitional period during which existing television broadcasters will operate two stations—one using the old analog technical standards and the other using the new DTV standards. The Commission properly applied the applicable statutory requirements in addressing those concerns and allocating the initial DTV licenses at issue in this case.

1. Section 307(b) of the Communications Act of 1934, 47 U.S.C. 307(b), requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In the context of analog television broadcast stations, the Commission historically has fulfilled its statutory spectrum-allocation responsibilities by determining technical limits, such as power and antenna height, within which stations may operate, and by regulating the geographic separation between stations in order to maximize the number of available channels and protect stations from interference.* See, *e.g.*, 47 C.F.R. 73.610, 73.612, 73.614.

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* An industry group known as the National Television Systems Committee developed technical standards for television

In 1987, recognizing that new digital technologies might improve significantly the picture and sound quality of broadcast television, the Commission began an inquiry "to consider the technical and public policy issues surrounding the use of advanced television technologies by television broadcast licensees." *Advanced Television Sys.*, 2 F.C.C.R. 5125, 5126 (1987). In 1991, the Commission began a rulemaking proceeding in which it proposed, among other things, that any conversion to DTV should include a transitional period during which existing television broadcasters could operate two channels at the same time, so as to provide the same programs to existing NTSC television receivers as well as new DTV receivers. *Advanced Television Sys.*, 6 F.C.C.R. 7024, 7029-7033 (1991) (*NPRM*). The Commission proposed to limit the parties initially eligible for "paired" digital channels to "existing broadcasters," defined as: (1) existing analog licensees; (2) parties holding construction permits to build new analog stations; and (3) parties with applications for construction permits pending as of the date of adoption of the *NPRM* (October 24, 1991), whose applications were ultimately granted. *Id.* at 7025-7026 & n.21. The Commission noted that established broadcasters had invested "considerable resources and expertise in the present system and represent a large pool of experienced talent." *Id.* at 7025. Preserving the industry's existing ownership structure also would minimize the "potential for disruption" inherent in the technological change to DTV, although the Commission emphasized that broadcasters would have to surrender one of their paired channels at the end of the transition. *Id.* at 7025,

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transmission in the 1940s and 1950s. Those standards, which the Commission adopted, are known as the NTSC standards.

7026-7027. The Commission further developed its plan for the transition to DTV in a series of orders that followed the *NPRM*. Pet. App. 6a.

2. In February 1996, before the Commission's DTV rulemakings were complete, Congress added to the Communications Act a new Section 336, entitled "Broadcast Spectrum Flexibility." See Telecommunications Act of 1996, Pub. L. No. 101-104, § 201, 110 Stat. 107. New Section 336(a)(1) established statutory eligibility criteria for any initial DTV licenses: "If the Commission determines to issue additional licenses for advanced television services, the Commission * * * should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both)." 47 U.S.C. 336(a)(1) (Supp. IV 1998).

In July 1996, the FCC adopted a further notice of proposed rulemaking seeking comment on initial DTV allotments, procedures for assigning DTV frequencies, and related technical and policy issues. *Advanced Television Sys.*, 11 F.C.C.R. 10,968 (1996) (Pet. App. L1-L103). One of the ensuing orders revised the Commission's initial eligibility standards for DTV channels, in part to implement Section 336(a)(1). *Advanced Television Sys.*, 12 F.C.C.R. 12,809 (1997) (*Fifth Report and Order*) (Pet. Lodging App. L104-L267). Another, issued the same day, made DTV channel allotments for different areas of the United States. *Advanced Television Sys.*, 12 F.C.C.R. 14,588 (1997) (*Sixth Report and Order*). Specifically, in the *Fifth Report and Order*, the Commission limited the class of broadcasters eligible to receive a second, paired DTV channel during the transition period to parties who, as of the date of the *Fifth Report and Order* and *Sixth Report and Order*, were

either licensed to operate a full-service analog television station, or held a permit to construct such a station. Pet. Lodging App. L111-L112. Although the Commission believed that new Section 336(a)(1) foreclosed the Commission's former policy of extending "initial eligibility" for a paired DTV channel to broadcasters whose applications for an analog station had not yet been granted, 47 U.S.C. 336(a)(1) (Supp. IV 1998), the Commission stated that it would "give particular consideration for assigning temporary DTV channels to new licensees who applied on or before October 24, 1991, given the reliance that these parties may have placed on rules we adopted before passage of the 1996 Act." Pet. Lodging App. L111-L112 & n.26.

The initial DTV channel allotments made in the accompanying *Sixth Report and Order* constituted the first phase of a three-phased licensing process for parties who were eligible to receive DTV licenses under Section 336(a)(1) and the *Fifth Report and Order*. The second phase would consist of obtaining a DTV construction permit, to be followed by an application for a DTV operating license. Pet. Lodging App. L133-L136.

In February 1998, the Commission released two decisions responding to petitions for reconsideration. *Advanced Television Sys.*, 13 F.C.C.R. 6860 (1998) (*Service Reconsideration Order*) (Pet. Lodging App. L268-L314); *Advanced Television Sys.*, 13 F.C.C.R. 7418 (1998). In pertinent part, the Commission affirmed its decision to implement Section 336(a)(1) through a three-phased licensing process, beginning with the initial, simultaneous issuance of DTV licenses to eligible broadcasters. The Commission explained that using the Commission's traditional two-phased process (an application for a construction permit followed by an application for an operating license), without the simul-

taneous initial licensing phase, "would have prevented the establishment of a date certain at which to determine initial eligibility" as required by Section 336(a)(1), and could have created prolonged uncertainty about broadcasters' eligibility for DTV licenses. Pet. Lodging App. L270. Establishing a date certain for issuing the initial DTV licenses also enabled the Commission to make DTV channel allotments in the *Sixth Report and Order*. *Ibid.*

The Commission also addressed arguments that so-called "pending applicants"—parties such as petitioner, whose application for a permit to construct an analog station in Avalon, California, was pending when the *Fifth Report and Order* was issued—should be able to participate in the transition to DTV. The Commission rejected requests to include the pending applicants among the recipients of initial, paired DTV licenses, but it gave the pending applicants two new options for using analog licenses they were awarded after April 3, 1997 (the date of adoption of the *Fifth Report and Order*). The pending applicants could (1) use their newly granted channel for DTV, or (2) convert to DTV after initially providing analog service, if the conversion would not create interference problems. The Commission also streamlined its own procedures to facilitate construction of DTV facilities by pending applicants such as petitioner. Pet. Lodging App. L271-L274.

The Commission's reconsideration orders themselves became the subject of petitions for reconsideration. The Commission again rejected the argument that those applicants whose applications for analog channels were granted after April 3, 1997, should receive paired DTV channels to use during the DTV transition period. *Advanced Television Sys.*, 14 F.C.C.R. 1348, 1352-1359 (1998) (Pet. Lodging App. L315, L319-L326). The

Commission noted that, although it had stated in the *Fifth Report and Order* its intention to give "particular consideration" to such applicants in light of the change of law in 1996, the Commission also had notified the applicants that they would have low priority in the event there was a shortage of DTV channels. Pet. Lodging App. L325-L326. The Commission found that its *Service Reconsideration Order* had "fully taken account of and accommodated the desires of these licensees to convert to digital television by allowing them to convert on their analog channel regardless of the fact that they were not eligible for initial DTV licenses." *Id.* at L326. In view of the relief the Commission already had provided pending applicants, the competing interests of other potential spectrum users, and "the disruption that could be caused" by trying to award licenses to all of the pending applicants, the Commission again declined to grant paired DTV channels to this group. *Ibid.*

3. The court of appeals denied petitions for review filed by petitioner and others. Pet. App. 1a-27a. With respect to petitioner's arguments, the court of appeals first rejected a challenge to "the [Commission]'s entire DTV licensing scheme," in which petitioner maintained that Section 308(a) of the Communications Act, 47 U.S.C. 308(a), required each recipient of a paired DTV license to submit an application for that paired license. Pet. App. 11a. The court of appeals concluded that the Commission "reasonably construed the Communications Act to allow it to modify existing broadcast licenses and construction permits" pursuant to 47 U.S.C. 316(a)(1), so as "to render incumbent broadcasters initially eligible to provide DTV services * * * without having received written applications." *Id.* at 16a.

The court of appeals also rejected petitioner's claim that the Commission did not adequately explain the basis for its decision not to grant petitioner a second, designated DTV channel during the transition period. The court found that the Commission "left no mystery as to its rationale." Pet. App. 17a. Having made initial awards of DTV spectrum to existing broadcasters as required by Section 336(a)(1), the Commission decided that the remaining DTV spectrum would be put to better use by parties other than petitioner. *Ibid.* The court also concluded that the Commission's "rationale * * * is hardly arbitrary and capricious. The agency reasonably balanced competing demands for spectrum and allowed the pending applicants considerable flexibility in making the transition to DTV." *Id.* at 18a.

Finally, the court of appeals rejected petitioner's argument that the Commission committed reversible error by failing to consider late-filed evidence about the Avalon, California, market area. Pet. App. 18a n.9. Because petitioner's untimely evidence was not accepted into the record, the Commission correctly refused to consider it. Moreover, the Commission deemed a similar record submission by another party "immaterial" to initial DTV licensing. *Ibid.*

**ARGUMENT**

Petitioner asks this Court to grant certiorari in order to correct an alleged administrative error in making broadcast licensing decisions. There was no error, and the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. The petition involves an initial licensing program for DTV that will not recur, and it raises no issue that warrants review by this Court.

1. Petitioner renews its claim (Pet. 10-22) that simultaneous issuance of DTV licenses to the recipients designated in Section 336(a)(1), on a date certain, violated Section 308(a). Section 308(a) provides (with exceptions not relevant here) that the Commission "may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it." Pet. App. 30a. As the court of appeals held, that provision should be read together with other provisions of the Communications Act, particularly Section 336(a)(1)'s rule governing initial DTV licenses and Section 316, which allows the Commission to modify existing licenses. *Id.* at 13a; see generally *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (statutory provisions should be read by reference to the whole law); *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) (specific statutory provisions apply instead of more general ones). The court of appeals also noted that it was obligated to defer to reasonable Commission interpretations of ambiguous statutory provisions. Pet. App. 13a-14a; see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The Commission reasonably harmonized the relevant provisions of the Communications Act in the context of initial DTV licenses. Section 316(a)(1) of the Act provides, in pertinent part, that "[a]ny station license or construction permit may be modified by the Commission * * * if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this [Act] * * * will be more fully complied with." 47 U.S.C. 316(a)(1). The Commission determined (Pet. Lodging App. L129-L130, L284-L285, L287) that Section 316(a)(1) authorized it to issue DTV broadcast spec-

trum to existing analog license holders as of a specified date of issuance, in order to implement the requirements of Section 336(a)(1). As the court of appeals pointed out, it has long recognized that the Commission may, on its own initiative and without applications from the affected broadcasters, modify television channel assignments in response to changed circumstances. Pet. App. 14a (citing *Peoples Broadcasting Co.* v. *United States*, 209 F.2d 286, 287 (D.C. Cir. 1953)). Indeed, the Commission's plan for a transition from analog channels to digital channels was similar to the factual circumstances in *Peoples Broadcasting*, where the Commission required a broadcaster to shift its signal from one analog channel to another. *Ibid.* The court of appeals additionally noted that there was no policy basis for requiring licensed broadcasters to file applications for the paired DTV channels: because Section 336(a)(1) identified the entities eligible to receive initial DTV licenses, there would not have been competition for these licenses even if applications had been submitted. *Id.* at 16a.

Petitioner responds to the court of appeals by arguing that Section 316(a) applies only to "unwelcome" modifications in which the "licensee's interests are being adversely impacted." Pet. 16-17. Petitioner's argument was not presented below and the court of appeals did not consider it. That alone is grounds for refusing to entertain the argument. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). Petitioner's suggested limitation on the Commission's modification power—which would give the Commission greater freedom to injure broadcasters through modifications than to assist them—also finds no support in the plain language of the statute. Nor is it articulated in the two appellate decisions on which petitioner relies.

One of those decisions, in any event, is a decision of the court below. If there were any inconsistency between *Transcontinent Television Corp.* v. *FCC*, 308 F.2d 339, 343 (D.C. Cir. 1962), and the decision of the court of appeals in this case—which there is not—such inconsistency would be a matter for the court of appeals to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957).

The court of appeals also correctly rejected petitioner's reliance (Pet. 19-20) on *MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218 (1994). This Court held in *MCI* that the Commission's power to "modify" the requirements of 47 U.S.C. 203, under which telecommunications common carriers file their rates in a tariff, did not authorize the Commission to make the "basic and fundamental change[]" of eliminating the tariff requirement. 512 U.S. at 225. As the court of appeals held in this case (Pet. App. 14a-15a), awarding paired DTV channels to analog television broadcasters, until the conversion to DTV is accomplished, did not work that sort of fundamental change in the underlying broadcast licenses. "Broadcasters will begin and end the transition period broadcasting television programming to the public under very similar terms." *Id.* at 15a. Petitioner offers no substantial reason why this Court should review the court of appeals' correct and fact-bound conclusion. See Pet. 20-21.

2. The court of appeals likewise was correct in rejecting petitioner's arguments (Pet. 22-29) that the Commission did not adequately explain its reasons for refusing to award paired licenses to pending applicants as a group, and to petitioner specifically. The court of appeals determined that the Commission "clearly" provided an adequate explanation of its rationale for denying the class of pending applicants paired licenses

in light of Section 336(a)(1). Pet. App. 17a; see pp. 4-7, *supra*. The Commission also afforded relief—in the form of flexibility to use analog channels for DTV—that addressed any "equitable" claim the pending applicants might have as a result of the statutorily mandated change eligibility requirements. Pet. App. 17a-18a. Finally, the court of appeals held that petitioner's late-filed evidence was not properly part of the record, and that it would not have affected the outcome of the Commission's licensing proceeding in any event. *Id.* at 18a n.9; see Pet. Lodging App. L325-L326. None of those determinations by the court of appeals raises any issue that warrants further review.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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