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

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Federal Communications Commission
Office of Secretary

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

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

The Personal Communications Industry Association ("PCIA"), through counsel and pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, hereby respectfully requests partial reconsideration of the Commission's Fifth Report and Order ("5th R&O") in the above-captioned proceeding.[1]

I. BACKGROUND

On November 20, 1995, PCIA filed Comments in this proceeding. In its Comments, PCIA stated that it was generally supportive of the Commission's goals in this proceeding. However, PCIA expressed its view that if the Commission should permit broadcast television licensees to provide non-broadcast (or broadcast-related) services, the Commission should not make Advanced Television System ("ATV" now called "DTV") spectrum freely available to existing broadcasters, but rather should make such spectrum available to any qualified entity. PCIA stated that the assignment of free DTV licenses to existing broadcast licensees would permit such licensees to unfairly compete in the marketplace.

[1]FCC 97-116, released April 21, 1997.

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Since the filing of PCIA Comments, the Telecommunications Act of 1996 ("1996 Act") provided that the Commission should assign DTV licenses to existing broadcast licensees, with spectrum being returned by the DTV licensee at the end of the transition period.[2]

In the 5th R&O, the Commission decided to permit DTV licensees to provide ancillary and supplementary services that do not derogate the mandated free, over-the-air program service. "Ancillary and supplementary services could include, but are not limited to, subscription television programming, computer software distribution, data transmissions, teletext, interactive services, audio signals, and any other services that do not interfere with the required free service."[3] It is this decision to permit ancillary and supplemental services of which PCIA requests reconsideration.

II. PETITION FOR RECONSIDERATION

As properly recognized by the Commission, Section 336(a)(2) of the Communications Act (Section 201 of the 1996 Act), provides that the Commission may permit those ancillary and supplemental services "... as may be consistent with the public interest, convenience, and necessity."[4] It is PCIA's view that the Commission has failed to comply with this standard in permitting the blanket provision of ancillary or supplemental services. Specifically, the 5th R&O does not differentiate between the different types of ancillary or supplemental services and determine whether the provision of each category of service by a DTV licensee would be consistent with the public interest, convenience, and necessity. Instead, the Commission groups all such services together and

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[2] 5th R&O at para. 2.

[3] Id. at para. 29.

[4] Id. at para. 31.

gives ATV licensees blanket permission to provide such services as long as there is no derogation of the digital TV signal.

The Commission does not define "ancillary" or "supplemental" services in the 5th R&O. It is therefore difficult to determine whether these terms mean services that "supplement" or "relate" to the broadcast service, such as the services listed in paragraph 29 of the 5th R&O, or whether a DTV licensee can provide any additional service that does not derogate the free broadcast television signal. If the Commission intended any service to be provided, it has failed to meet the standard of Section 336(b)(2). The 5th R&O contains no discussion of the impact of the provision by DTV licensees of land mobile service on the public, including the impact on existing land mobile licensees who have paid billions of dollars into the Federal Treasury for licenses which are a sliver of the 6 MHz wide channel allocated for free to television broadcasters.[5]

In paragraph 21, the Commission summarizes its inquiry and states:

> Assuming we permitted ancillary and supplementary services, we also asked to what extent we should allow broadcasters to use DTV spectrum for services that go beyond traditional broadcast television or ancillary and supplementary uses analogous to those allowed under the current regulatory structure. We also asked whether broadcasters should be permitted to provide nonbroadcast and/or subscription services...

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[5]Certainly, the construction of a digital television station represents an enormous cost. However, the construction of a PCS system, regional paging system or wide-area SMR system covering the same service area as the DTV station represents a comparable cost. However, paging and SMR licensees are being asked to bid for such licenses at auction, while broadcast incumbent broadcast licensees are being given the licenses for free, and are being given permission to utilize their spectrum to compete with the PCS, paging and SMR licensees who have paid dearly for their licenses.

The Commission also makes note of PCIA's objection to the provision of land mobile services.[6] Although the Commission properly phrases the question regarding how liberal it should be in permitting ancillary and supplemental services, the Commission fails in its decision to discuss the public interest benefit of permitting individual services, particularly land mobile services. This failure is repeated in Appendix B attached to the 5th R&O. Appendix B is the Commission's Final Regulatory Flexibility Analysis ("FRFA"). The FRFA's identification of small businesses which may be impacted by the Commission's 5th R&O focuses entirely on television licensees. There is no mention or consideration of the impact of a DTV licensee's provision of land mobile service on existing (and future) land mobile radio licensees. The actual impact of DTV licensee provision of land mobile service will be significant for existing small business land mobile radio licensees, and the Commission's failure to consider this impact is inconsistent with the Regulatory Flexibility Act and the requirements of Section 336(a)(2) of the Communications Act.

The Commission's action appears to give DTV licensees the ability to provide for-profit land mobile radio services. In paragraph 36 of the 5th R&O, the Commission recognizes that Section 336(b)(3) of the Communications Act requires that the Commission regulate non-broadcast services provided by DTV licensees in a manner consistent with other providers of the same service. However, the Commission's statement is not followed by any action that would implement this recognition. New Section 73.624(c)(1) states that DTV licensees offering such services must comply with the Commission's regulations regarding these services, but makes no additional mention as to whether DTV licensees offering land mobile service must provide, for example, emergency 911

[6] Id. at para. 25.

access,[7] telephone number portability,[8] and mandatory resale,[9] or whether such operations would be considered "broadband CMRS" or "narrowband CMRS". Previously, such delineation has been consistent with the specific spectrum allocated for the service. This bright line does not exist in this case.

The 1993 Budget Act gave the Commission the authority to auction spectrum used for the provision of for-profit mobile radio services. The Senate and House Amendments in the Legislative History of the 1993 Budget Act precludes the Commission from granting "... any right to a licensee different from the rights awarded to licensees [within the same service] who obtained their license through assignment methods other than competitive bidding..."[10] DTV licensees, who are not subjected to auction, will have license rights different that other CMRS providers, in that DTV licensees do not appear to have the same license responsibilities to customers and are permitted to provide video broadcast and subscription services.

Section 332(c)(1)(C) of the Communications Act requires the Commission to review competitive market conditions with respect to commercial mobile services, including an analysis of whether or not there is effective competition. The Commission is required to consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. However, the Commission has failed to perform this analysis in the 5th

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[7]47 C.F.R. §20.18.

[8]47 C.F.R. §20.15.

[9]47 C.F.R. §20.12.

[10]House Conf. Rep. No. 103-213, 103d Cong. 1st Sess. at p. 1174.

R&O with regard to the land mobile radio services that DTV licensees appear to be permitted to provide.

PCIA believes that if the Commission complies with its statutory responsibilities and closely reviews the impact of DTV licensee provision of land mobile service, it will find that such service is not in the public interest, convenience and necessity. As discussed by PCIA in 1995, land mobile licensees who purchased licenses at auction will find the ability to fund construction of their systems more difficult, delaying service to the public and possibly preventing some carriers from being able to continue to operate. The Commission will be creating an unfair competitive playing field between CMRS providers and DTV licensees.

Further, small business land mobile licensees will be unable to compete against DTV licensees who have many times the spectrum available (for free) as the small business licensee. Finally, the Commission's decision to allocate free licenses to incumbent licensees to provide land mobile service is inconsistent with the Commission's decisions in WT Docket No. 96-18,[11] PR Docket No. 93-144[12] or PR Docket No. 89-552[13] to require incumbent licensees to purchase licenses on their existing frequencies to provide land mobile advanced services.

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[11]Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-18, 6 CR 864 (1997).

[12]First Report and Order, Eighth Report and Order, And Second Further Notice of Proposed Rule Making, 61 FR 6138 (February 16, 1995).

[13]Third Report and Order; Fifth Notice of Proposed Rule Making, PR Docket No. 89-552, 62 FR 16004 (April 3, 1997).

III. CONCLUSION

WHEREFORE, the premises considered, it is respectfully requested that the Commission RECONSIDER its decision to permit DTV licensees to provide ancillary and supplementary services in the above-captioned proceeding.

Respectfully submitted,

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