

Federal Communications Commission

FCC 98-23

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

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

**MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE
FIFTH REPORT AND ORDER**

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By the Commission:

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I. INTRODUCTION

1. In the *Fifth Report and Order*¹ in the digital television ("DTV") proceeding, we adopted rules to permit the nation's broadcasters to implement the conversion to digital television in accordance with the Telecommunications Act of 1996 ("1996 Act").² Our goals were to preserve and promote free, universally available, local broadcast television in a digital world, as well as to advance spectrum efficiency and the rapid recovery of spectrum by fostering the swift development of DTV. Accordingly, we sought to maximize broadcasters' flexibility to provide a digital service to serve the needs and desires of the viewers, while adopting rules to ensure a smooth transition to digital television.

2. We established an aggressive but reasonable construction schedule, a requirement that broadcasters continue to provide free, over-the-air television service, a target date of 2006 for the completion of the transition, and a simulcasting requirement phased in at the end of the transition period. We also recognized that digital broadcasters remain public trustees of the nation's airwaves and have a responsibility to serve the public interest. In order to permit an opportunity to reassess the decisions we made in the *Fifth Report and Order*, we also noted our intention to conduct a review of the progress of the transition to DTV every two years. In response to petitions for reconsideration from various parties, we take this opportunity to reaffirm, revise, or clarify certain of our actions.³ Issues raised in the petitions for reconsideration that are not addressed here will be resolved in separate proceedings or future orders as noted.⁴

¹ *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997) ("*Fifth Report and Order*"). Contemporaneously, we released the *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588 (1997) ("*Sixth Report and Order*"), which established the DTV Table of Allotments.

² 47 U.S.C. §336, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ We note that many of the petitions jointly addressed issues in both the *Fifth* and *Sixth Report and Orders*. This Order will address only issues raised in the *Fifth Report and Order*. Issues related to the *Sixth Report and Order*, as well as certain issues that involve aspects of both the *Fifth* and the *Sixth Report and Orders*, will be addressed in the *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* in MM Docket No. 87-268.

⁴ Certain petitioners raise issues that will be addressed in our proceeding addressing the assessment of fees for DTV broadcasters' ancillary or supplementary services. See *Notice of Proposed Rulemaking* in MM Docket No. 97-247, 63 Fed. Reg. 460 (January 6, 1998) (*DTV Ancillary or Supplemental Service Fees Notice*). Other petitions raised issues that are more relevant to the Commission's pending proceeding, initiated after the petitions and oppositions were filed, as to whether it should preempt state and local zoning regulations that are alleged to impede DTV tower siting and construction, as proposed in a joint petition for rulemaking filed by the Association for Maximum Service Television ("MSTV") and the National Association of Broadcasters ("NAB"). See *Notice of Proposed Rule Making* in MM Docket No. 97-182, 12 FCC Rcd 12497 (1997). These include the petition of MSTV addressing Commission interaction with the Federal Aviation Administration. In addition, in future Notices, we will address issues regarding the applicability of the must-carry and retransmission consent provisions to DTV, as well

II. ISSUE ANALYSIS

A. Eligibility

3. Background. The 1996 Act expressly limited initial eligibility for DTV licenses to persons that, as of the date of the issuance of the licenses, hold either a construction permit or license (or both) for a television broadcast station.⁵ In the *Fifth Report and Order*, the Commission issued initial DTV licenses simultaneously to all eligible full-power permittees and licensees.⁶ We concluded that it more effectively effectuates the Congressional scheme to implement the statute through a streamlined three-phased licensing process, with the first phase consisting of the initial DTV license, rather than through the conventional two-phased licensing process. Use of the two-step process without the initial licensing phase would have prevented the establishment of a date certain at which to determine initial eligibility because, given the statutory directive that eligibility be limited to permittees and licensees as of the date of issuance of the DTV licenses, it could potentially have left eligibility open until the last DTV operating license was granted, a period that could possibly take years. This was also necessary to allow us to establish the DTV Table of Allotments.⁷

1. Alleged Exclusion of Eligible Permittees

4. Petitions/Comments. Coast TV ("Coast") and Three Feathers Communications, Inc. ("Three Feathers") assert that they held television construction permits as of the date of issuance of the DTV licenses but were erroneously excluded from the list of eligible broadcasters contained in Appendix E to the *Fifth Report and Order*. Coast, permittee of a new station to operate on NTSC channel 38, Santa

as the provision of for-profit ancillary or supplementary services on remaining DTV capacity by public television stations. Also, Blade requests that we address issues related to the incorporation of closed-captioning into DTV transmission. We note that the Commission has recently discussed this issue in our *Report and Order* implementing closed captioning requirements for programming in MM Docket No. 95-176. See 62 Fed. Reg. 48487 (Sept. 16, 1997). Finally, several other matters were raised by petitioners but were not raised in the *Fifth* or *Sixth Report and Orders*. Therefore, they are more appropriately considered in a separate proceeding or some other context. This applies to Blade's request that we address issues relating to closed captioning, microwave frequency, and EAS-weather bulletins. It also applies to the petition of National Public Radio ("NPR") regarding the grandfathering of certain FM facilities that relocate their transmitting antennas as a result of the DTV conversion. Also in this group are the petitions of MSTV and Blade addressing RF radiation requirements.

⁵ 47 U.S.C. § 336(a)(1).

⁶ As discussed in the *Fifth Report and Order*, we did not extend initial eligibility for DTV channels to low power television ("LPTV") stations and translators, which are secondary services under our rules and policies. *Fifth Report and Order* at 12816a. However, in the *Sixth Report and Order*, we implemented measures intended to mitigate the impact of DTV implementation on LPTV service. Petitions for reconsideration addressing LPTV issues will be dealt with in the *MO&O* addressing petitions for reconsideration of the *Sixth Report and Order*.

⁷ *Fifth Report and Order* at 12838. Appendix E of the *Fifth Report and Order* contained a list of all eligible parties. The conventional licensing procedure is a two-phased process commencing when an applicant files for a construction permit. Those seeking to build broadcasting facilities must file for and obtain a construction permit before commencing construction and, upon completion of construction, must file for and obtain a license to cover the permit. We retained these steps for DTV licensees but added an initial license phase. *Fifth Report and Order* at 12838-40.

Barbara, California, notes that the *Sixth Further Notice* in this proceeding proposed to allot DTV channel 22 as the DTV allotment for NTSC channel 38, thereby confirming Coast's status as a permittee under the eligibility criteria specified in the 1996 Act.⁸ However, the *Fifth Report and Order's* list of eligible broadcasters does not list Coast TV, and the Table of Allotments contained in the *Sixth Report and Order* does not include a DTV allotment paired with NTSC channel 38, Santa Barbara. Thus, Coast requests a DTV allotment and initial DTV license.⁹

5. Three Feathers states that it is an existing permittee whose permit for channel 36, Hutchinson, Kansas, was granted by the Video Services Division on April 2, 1997, one day before the adoption date of the *Fifth Report and Order*.¹⁰ Three Feathers asserts that, although there is a concomitant DTV channel allotment in the *Sixth Report and Order*, it was mistakenly excluded from the *Fifth Report and Order's* eligibility list.¹¹

6. Discussion. Commission records indicate that Three Feathers held a construction permit for channel 36, Hutchinson, as of the date of issuance of the DTV licenses. Similarly, Coast's application for a construction permit had also been granted before that date, thereby making it eligible for a DTV license. Their exclusion was inadvertent. Accordingly, attached as Appendix C hereto is an addendum to Appendix E of the *Fifth Report and Order*, which lists the foregoing facilities of Three Feathers and Coast as eligible for initial DTV licenses pursuant to the *Fifth Report and Order*, and we shall amend the DTV Table of Allotments to reflect the DTV channel associated with channel 38, Santa Barbara, California.

2. Eligibility of Parties with Pending NTSC Applications

A. General Matters

7. Petitions/Comments. Several petitioners argue that parties whose new NTSC construction permit applications were still pending as of the date of issuance of the initial DTV licenses should be able to participate in the transition to DTV, at least under certain circumstances.¹² Many of these petitioners filed applications within the past three years that are mutually exclusive with other applications and which, as a result, have not been grantable by the Commission.¹³

⁸ *Sixth Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 11 FCC Rcd 10968, 11025 (1996) ("*Sixth Further Notice*").

⁹ Coast Petition at 1-3.

¹⁰ File No. BPCT-950703KE.

¹¹ Three Feathers Petition at 1-2.

¹² *E.g.*, John C. Anderson ("Anderson") Petition at 1-3; Island Broadcasting, Ltd. ("Island, Ltd.") Petition at 1-2; McPike Communications ("McPike") Petition at 2-3; Laredo Community College Reply at 1-2.

¹³ In 1993, the Commission was directed to reexamine one of the comparative criteria it had traditionally used to evaluate competing applications in a comparative hearing for a new commercial broadcast station. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). In response to *Bechtel*, the Commission instituted a freeze on the processing of mutually exclusive commercial broadcast television applications in 1994. *Public Notice*, 9 FCC Rcd 1055 (1994). We recently released a *Notice of Proposed Rulemaking* to implement the requirement in the Balanced Budget Act

8. George S. Flinn ("Flinn") and Broadcasting for the Challenged, Inc. claim that the newly granted NTSC construction permits would be worth very little if they could not be used for DTV, but instead had to be surrendered to the Commission at the end of the transition period.¹⁴ Similarly, AAPTS/PBS asserts that pending applicants cannot realistically make the substantial investments required to proceed with their applications and construct facilities absent assurances that their NTSC channels can be converted to DTV.¹⁵

9. AAPTS/PBS requests that we allow the new NTSC permittees to convert to DTV service on the NTSC channel at any time during the transition. It argues that since DTV facilities require less separation than analog stations, most of these new broadcasters should be able to convert to DTV on the protected NTSC channels without causing interference.¹⁶ In the alternative, AAPTS/PBS asserts that the Commission should allow such parties to switch to a DTV channel after the transition without being subject to competing applications,¹⁷ a proposal also put forth by Mid-South Public Communications Foundation ("Mid-South").¹⁸

10. Discussion. The 1996 Act stated that, if the Commission determines to issue additional DTV licenses, the Commission "should limit the initial eligibility for such [DTV] 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)...."¹⁹ In the *Fifth Report and Order*, we fully implemented this provision. We made no decision at that time regarding the assignment of DTV channels to new permittees and licensees whose pending NTSC applications had not yet been granted and who were, as a result, not awarded initial DTV licenses.²⁰ The treatment of such pending applicants has been of concern throughout the course of this proceeding.²¹ Therefore, having issued the initial DTV licenses pursuant to the 1996

of 1997 that we use competitive bidding to decide most mutually exclusive commercial broadcast cases. We invited comment on whether to use competitive bidding to resolve the pending applications. *Notice of Proposed Rulemaking* in MM Docket 97-234, GC Docket 92-52, and GEN Docket 90-264 62 Fed. Reg. 65392 (December 12, 1997) ("*Broadcast Auctions Notice*").

¹⁴ Flinn Petition at 4; Broadcasting for the Challenged Petition at 4.

¹⁵ AAPTS/PBS Petition at 29.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Mid-South Petition at 3.

¹⁹ 47 U.S.C. § 336(a)(1).

²⁰ *Fifth Report and Order* at 12816a, n. 26. For convenience, we shall refer to these entities simply as the "pending applicants."

²¹ For example, in the *Notice of Proposed Rulemaking* in MM Docket No. 87-268, adopted on October 24, 1991 (before the passage of the 1996 Act), the Commission proposed that the parties initially eligible for DTV licenses (then called "ATV," or "advanced television" licenses) would be limited to: (1) licensees; (2) permittees; and (3) those with NTSC applications pending as of that date whose applications were ultimately granted. They were proposed to be included because they had already invested resources prosecuting their applications. The Commission also sought comment on whether parties that applied after October 24, 1991 should receive ATV licenses after the

Act, we now take this opportunity to address the concerns of the pending NTSC applicants.

11. We shall afford new NTSC permittees, whose applications were not granted on or before April 3, 1997 and who were therefore not eligible for an initial DTV paired license, the choice to immediately construct either an analog or a digital station on the channel they were granted. They will not be awarded a second channel to convert to DTV but may convert on their single 6 MHz channel.²² If they choose the analog option, they will be subject to the traditional two-year construction period applied to NTSC stations, and they may, upon application to the Commission, convert their analog facility to DTV at any point during the transition period, up to the end of that period.

12. Allowing these NTSC applicants to participate in the conversion to DTV will serve the public interest. Pursuant to the *Bechtel* freeze, discussed in note 13, above, many of these applications have remained unprocessed pending the Commission's resolution of fundamental policy questions relating to the comparative hearing criteria. These parties themselves did nothing to delay the processing of their applications and make themselves ineligible for initial DTV licenses. Therefore, where possible, it would be equitable to accommodate their desire to operate DTV facilities.²³ Moreover, additional considerations weigh in favor of new licensees whose applications were filed before October 24, 1991, given the reliance they may have placed on the rules we adopted before the passage of the 1996 Act.²⁴

13. Further, as discussed in detail below in Section F, all NTSC service must cease at the end of the transition period. Because NTSC is a technology of the past that will cease to exist, authorizing new analog stations that cannot evolve to digital operation would have significant public interest costs. It could limit the ability of the analog broadcaster to serve its viewers as well as it otherwise might; it could put the licensee at a competitive disadvantage vis-a-vis its emerging digital competitors; and viewers would lose altogether a channel of free, over-the-air video programming at the end of the transition period. In contrast, allowing the transition to DTV would allow broadcasters to better serve their viewers on a local scale, and it could help facilitate the overall conversion from analog to digital broadcasting across the country.

14. Before the NTSC permittee or licensee can build a DTV station, either initially or after first building an analog station, it must file a DTV application.²⁵ We will treat these DTV applications as minor modifications. The proposed DTV facility must protect all DTV and NTSC stations by complying

initial licenses were issued. 6 FCC Rcd 7024, 7025-26 (1991). In the *Second Report and Order/Further Notice of Proposed Rulemaking* in this proceeding, the Commission adopted its proposal to limit initial eligibility to licensees, permittees and applicants pending as of October 24, 1991. 7 FCC Rcd 3340, 3343 (1992).

²² If their granted channel is outside the core, and if they find a channel within the core that protects all DTV and NTSC stations and complies with all the DTV technical rules, they may request authorization to convert on that alternative channel in lieu of their granted channel. If such authority is granted, their granted out-of-core 6 MHz channel will be returned to the Commission, and their authorization will specify the new in-core channel.

²³ We note that the 1996 Act and the accompanying Conference Report, S. Conf. Rep. 104-230, 104th Cong. 2d Sess. (1996), are silent as to the eligibility of pending applicants for future DTV licenses.

²⁴ See *Fifth Report and Order* at 12816a, citing *Second Report and Order* at 3343. See also n. 21, above.

²⁵ The DTV application of an analog broadcaster may incorporate its request for maximization of the DTV facility. We will address maximization issues in general in the reconsideration to the *Sixth Report and Order*.

with all applicable DTV technical rules. In addition, such a new permittee or licensee's DTV facility must generally comply with analog operating rules, such as minimum operating hours, except where the analog rule is inconsistent with the digital rules or inapplicable to digital technology. It must also provide one, free over the air video program service, as with other DTV licensees. These stations will also be afforded the flexibility to provide digital ancillary or supplementary services authorized by Section 73.624(c) of the Commission's Rules, consistent with the DTV standard.

15. To prevent warehousing of spectrum, we will require these permittees to build a station, analog or digital, within the initial two-year construction period granted, rather than applying the DTV construction timetable adopted in the *Fifth Report and Order*.²⁶ We will not extend the time for construction based on sale of the permit or based on a decision to convert to DTV in the initial two-year period before the analog station is built. Those stations that first construct and operate an analog station (within the initial two year period) and then choose later to construct a DTV station must convert by the 2006 deadline and, upon grant of a DTV permit, will have (subject to the 2006 deadline) until the construction deadline for that category of station or a period of two years, whichever is longer, within which to build the DTV station.

16. DTV stations operating on a core NTSC channel will continue to do so after the end of the transition period. However, stations operating outside the core will be doing so on an interim basis only. At the end of the transition period, to fully implement the policies adopted in the *Sixth Report and Order* and the recently concluded *Channels 60-69 Reallocation* proceeding,²⁷ the Commission will reassign all out-of-core DTV broadcasters, including the currently pending applicants, to channels in the core. Because the out-of-core allotment is intended to be temporary, the subsequent move to a core channel will be considered a minor change in facilities, intended solely to effectuate the policies set forth in the above-mentioned documents. For this purpose, all core channels will be considered fungible.

B. Denied NTSC Applications

17. Petitions/Comments. SL Communications ("SL") requests reconsideration of an allotment decision in the *Sixth Report and Order* that we consider here because it implicates eligibility. SL requests that we allot a DTV channel for a vacant analog UHF channel in Texas, for which an initial construction permit application was filed by another party. In 1995, that applicant and SL filed a petition to substitute SL for the applicant. The petition was denied on February 27, 1997, the proceeding was terminated, and a petition for reconsideration is pending. Because there was no permittee or licensee for the channel in question, there was no corresponding DTV allotment made in the *Sixth Report and Order* and no additional license awarded in the *Fifth Report and Order*. SL argues that a DTV allotment should have been made because an application was on file before October 24, 1991.²⁸

²⁶ The construction requirements applicable to other DTV broadcasters, such as coverage of community of license, shall apply. See *Fifth Report and Order* at 12840, n. 161, and 12,847.

²⁷ The Commission recently concluded a rule making proceeding reallocating UHF channels 60-69 for both broadcast and nonbroadcast services. See note 116, below.

²⁸ SL Petition at 3. In the *Sixth Further Notice*, we restated that, in the event of a shortfall of DTV allotments, eligible parties would be ranked in the following order: (1) licensees and permittees with constructed facilities having program test authority; (2) other permittees; and (3) all parties with an application for a construction permit pending as of October 24, 1991. *Sixth Further Notice* at 10973, n. 12.

18. Discussion. We decline to reconsider this allotment eligibility decision. Under the eligibility criteria established by Section 336(a)(1) of the Communications Act and adopted in the *Fifth Report and Order*, SL was not eligible for the award of an initial DTV license, as it was not a permittee or licensee as of the date of issuance of the DTV licenses. Indeed, the original applicant for which SL sought to substitute did not have a permit at that time, and the application had been denied. Thus, regardless of the outcome of the proceeding to reconsider whether the NTSC application was properly denied, we were not required to take the vacant analog allotment into consideration when we crafted the DTV Table of Allotments. It would be premature to give such consideration in the instant case because no permit or license has been granted. However, in its recent order denying the petition for reconsideration, *Dorothy O. Schulze and Deborah Brigham*, FCC 98-21 (adopted February 12, 1998), the Commission held that the NTSC channel is exempt from the general provisions of the *Sixth Report and Order* deleting vacant NTSC allotments and that the Mass Media Bureau should take appropriate steps to permit the filing of applications for this channel. If such an application for an NTSC construction permit is subsequently granted, the permittee will have the same rights and obligations as other parties with pending NTSC applications, as discussed above.

B. Definition of Service – Spectrum Use

19. Background. In the *Fifth Report and Order*, we noted our expectation that the fundamental use of the DTV license would be for the provision of free over-the-air television service.²⁹ Thus, we required that broadcasters provide a free digital video programming service the resolution of which is comparable to or better than that of today's service and aired during the same time periods that their analog channel is broadcasting.³⁰ However, we also recognized the benefit of affording broadcasters the opportunity to develop additional revenue streams from innovative digital services. Therefore, we allowed broadcasters the flexibility to respond to the demands of their audiences by providing ancillary or supplementary services that do not derogate the mandated free, over-the-air program service.³¹ These services are required to comply with the DTV transmission standard established by the Commission. We did not require that such services be broadcast-related, and we noted that such ancillary or 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.

20. As noted in the *Fifth Report and Order*, our decision to allow broadcasters flexibility to provide ancillary or supplementary services is supported by Section 336. This section specifically gives the Commission discretion to determine, in the public interest, whether to permit broadcasters to offer such services. Section 336(a)(2) of the Act provides that if the Commission issues additional licenses for advanced television services, it "shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity."³²

1. Ancillary or Supplementary Services

²⁹ *Fifth Report and Order* at 12820.

³⁰ *Id.*

³¹ *Id.* at 12820-21.

³² *Id.* at 12821, citing 47 U.S.C. § 336(a)(2).

21. Petitions/Comments. The Personal Communications Industry Association ("PCIA") argues that the *Fifth Report and Order* did not adequately define "ancillary or supplementary" services. PCIA notes that it is difficult to ascertain whether these services are limited to services that supplement or relate to the broadcast service, or could include any services without such a limit. PCIA claims that the provision of land mobile service by DTV licensees would not serve the public interest, as it would have a negative impact on existing mobile service providers.³³ According to PCIA, allowing DTV licensees to provide mobile services on an ancillary or supplementary basis would create an uneven playing field between DTV licensees and mobile service providers. PCIA further claims that consideration of the effect of the Order on mobile licensees is missing from the *Fifth Report and Order's* Final Regulatory Flexibility Analysis, as it identifies small businesses that may be impacted by the decisions in the *Fifth Report and Order*, but analyzes the impact only on other broadcast licensees.³⁴

22. PCIA also argues that the Commission's decision is contrary to the 1993 Budget Act, which authorized the Commission to auction spectrum used for commercial mobile radio purposes.³⁵ PCIA claims that DTV licensees, which were not required to participate in an auction, will ultimately have license rights different from those of other mobile service providers. They argue that these licensees do not appear from the *Fifth Report and Order* to have the same regulatory responsibilities as current mobile providers and are permitted to provide video broadcast and subscription services.³⁶

23. PCIA acknowledges that Section 73.624(c)(1), adopted in the *Fifth Report and Order*, states that DTV licensees offering such services must comply with the Commission's regulations regarding each specific service. However, it argues that the Commission has failed to define these regulatory requirements in sufficient detail. For example, PCIA questions whether DTV licensees offering land mobile services will be required to provide emergency 911 access, telephone number portability, and mandatory resale.³⁷

24. AAPTS and PBS ("AAPTS/PBS") oppose PCIA's petition and argue that DTV licensees should be allowed to provide land mobile and other ancillary or supplementary services that do not relate to broadcast service. AAPTS/PBS states that the *Fifth Report and Order's* blanket authorization of supplementary services is consistent with the mandate of Section 336(a)(2), which allows ancillary service offerings that are consistent with the public interest.³⁸ AAPTS/PBS also observes that allowing public television stations the flexibility to provide a variety of services is crucial, as these services could generate needed revenue for DTV construction and operation.³⁹

25. Discussion. We are unpersuaded by PCIA's arguments that we should specifically exclude the

³³ PCIA Petition at 3-4.

³⁴ *Id.* at 4.

³⁵ *Id.* at 5.

³⁶ *Id.*

³⁷ *Id.* at 4-5.

³⁸ AAPTS/PBS Opposition at 6-7.

³⁹ *Id.* at 7.

provision of mobile services from the definition of DTV ancillary or supplementary services. As we stated in the *Fifth Report and Order*, we believe that the approach we have taken with respect to permitting ancillary or supplementary services will best serve the public interest by fostering the growth of innovative services to the public and by permitting the full possibilities of DTV to be realized. Granting broadcasters the flexibility to offer whatever ancillary or supplementary services they choose may also help them attract consumers to the service, which will, in turn, speed the transition to digital. Such flexibility should encourage entrepreneurship and innovation, will contribute to efficient spectrum use, and will expand and enhance use of existing spectrum.⁴⁰ Permitting broadcasters to assemble a wide array of services that consumers desire will also help promote the success of the free television service.⁴¹

26. As noted above, Section 336(b) outlines our authority to permit the provision of ancillary or supplementary services by DTV licensees.⁴² Under this section, we are required to limit ancillary or supplementary services to avoid derogation of any advanced television services that we may require.⁴³ We are also required to apply any regulations relevant to analogous services.⁴⁴ Our decision is fully consistent with the statutory requirements. The services we have authorized will not derogate advanced television service, nor will they create inequities for other regulated services.

⁴⁰ See *Report and Order* in MM Docket No. 95-42, 11 FCC Rcd 7799, 7802 (1996) (*Digital Data Report and Order*).

⁴¹ *Fifth Report and Order* at 12822.

⁴² Section 336(b) of the Communications Act provides that in prescribing the regulations required by Section 336(a), the Commission shall:

- (1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services;
- (2) limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies;
- (3) apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or supplementary service shall have any rights to carriage under section 614 or 615 or be deemed to be a multichannel video programming distributor for purposes of section 628;
- (4) adopt such technical or other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services, and may adopt regulations that stipulate the minimum number of hours per day that such signal must be transmitted; and
- (5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.

47 U.S.C. § 336(b).

⁴³ 47 U.S.C. § 336(b)(2).

⁴⁴ 47 U.S.C. § 336(b)(3).

27. The *Fifth Report and Order* addressed the issue of parity in the treatment of various service providers. We stated that, consistent with Section 336(b)(3), all non-broadcast services provided by digital licensees will be regulated in a manner consistent with analogous services provided by other persons or entities.⁴⁵ We also noted that we currently follow such an approach for ancillary or supplementary services provided by NTSC licensees, for example, on the vertical blanking interval (VBI) and the video portion of the analog signal.⁴⁶ Further, in the *Fifth Report and Order*, we noted that we would review our flexible approach to permit ancillary or supplementary services during our periodic DTV reviews and to make adjustments to our rules as needed.⁴⁷ These reviews will allow us to address any specific concerns raised by the mobile service industry regarding the provision of certain ancillary or supplementary services by DTV licensees on a case-by-case basis if warranted.

28. Contrary to the claims of PCIA, our decision regarding ancillary or supplementary services will fulfill our Congressional mandate to establish a fee program that prevents unjust enrichment of DTV licensees. In enacting Section 336, Congress specifically recognized the possibility that DTV licensees might offer services competing with those subscription-based services operating on spectrum purchased in the auction process. Congress therefore required that the Commission establish a fee program for ancillary or supplementary services provided by digital licensees if subscription fees are required in order to receive such services.⁴⁸

29. In considering the assessment of fees for the ancillary or supplementary use of the DTV spectrum, Congress mandated that to the extent feasible, the fee imposed should recover an amount that equals but does not exceed the amount that would have been realized in an auction of the spectrum under Section 309(j).⁴⁹ Congress stated that the fee should be designed to prevent the unjust enrichment of DTV licensees using the DTV spectrum for services analogous to services provided on spectrum assigned at auction. We recently issued a Notice of Proposed Rule Making to consider proposals as to how this statutory provision should be implemented and these fees assessed.⁵⁰

30. Finally, there is no basis to PCIA's claim that we were required to consider the impact of our DTV decision on land mobile licensees in the Final Regulatory Flexibility Analysis (FRFA) appended to the *Fifth Report and Order*. The FRFA, required of agencies in rulemaking proceedings by the Regulatory Flexibility Act, is designed to protect small entities that are directly subject to administrative rules rather than all entities that are indirectly affected by the results that any rules will produce.⁵¹ The U.S. Court of Appeals for the D.C. Circuit has held that such an analysis is "limited to small entities

⁴⁵ *Fifth Report and Order* at 12823, citing 47 U.S.C. § 336(b)(3).

⁴⁶ *Fifth Report and Order* at 12823. See also *Digital Data Report and Order* at 7805-06; 47 C.F.R. § 646(c). We also noted that we follow such an approach with respect to subsidiary communications services on the television aural baseband subcarriers. 47 C.F.R. § 73.667(b).

⁴⁷ *Fifth Report and Order* at 12823.

⁴⁸ 47 U.S.C. § 336(e)(1).

⁴⁹ 47 U.S.C. § 336(e)(2)(A).

⁵⁰ *DTV Ancillary or Supplemental Service Fees Notice*, above at n. 4.

⁵¹ 5 U.S.C. §§ 601 *et seq.*

subject to the proposed regulation" and that "Congress did not intend every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy."⁵²

2. Minimum Programming Hours

31. Petition. Chronicle Publishing Co. ("Chronicle") observes that the *Fifth Report and Order* requires broadcasters to provide a free digital video programming service, the resolution of which is comparable to or better than that of today's service, aired during the same time periods that their analog channel is broadcasting. Chronicle argues that there may be unexpected difficulties for stations operating on channels adjacent to nearby stations, for which the interference issues are not yet fully understood. To accommodate such difficulties, Chronicle requests that the Commission modify the foregoing requirement to exempt broadcasters from providing a free digital video signal between the hours of midnight and 6:00 a.m. (even though the analog station is broadcasting) in order to allow licensees to conduct maintenance or resolve any technical or other unanticipated problems arising from the use of new digital technology, especially in the UHF band. Chronicle maintains that such "down time" is essential for the ultimate success of DTV.⁵³

32. Discussion. We decline to grant Chronicle's requested modification to our requirement that broadcasters provide a free digital video programming service when the analog station is broadcasting. This requirement was designed to assure that broadcasters provide on their digital channel the free over-the-air television service on which the public has come to rely.⁵⁴ We believe that it is a minimal requirement that should not be unduly burdensome, particularly in light of the flexibility we have otherwise provided to broadcasters to provide a variety of digital services. While we recognize that broadcasters may have technical problems to resolve as they make the transition to DTV, we believe that the remedy requested is overbroad. In the event, however, that stations experience unexpected technical difficulties with the required transition to DTV such as those outlined by Chronicle, they may request special temporary authority to operate at variance from our required minimum digital television service on a case-by-case basis so that such technical difficulties can be resolved. If it later appears that a more general change in our requirements may be necessary, we can consider that modification during our periodic reviews.

C. Public Interest Obligations

33. Background. In the *Fifth Report and Order*, we stated that we sought to promote the successful transition of analog broadcast television into a digital broadcast television service that serves the public interest.⁵⁵ We noted that the 1996 Act clearly provided that broadcasters have public interest obligations with respect to the program services they offer, regardless of whether they are offered using analog or

⁵² *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985).

⁵³ Chronicle Petition at 4-5.

⁵⁴ *Fifth Report and Order* at 12820.

⁵⁵ *Id.* at 12829. We noted that the rules imposing public interest obligations on broadcast licensees originate in the statutory mandate that broadcasters serve the "public interest, convenience, and necessity," 47 U.S.C. § 307(c), as well as in other provisions of the Communications Act. *Fifth Report and Order* at 12827-28.

digital technology.⁵⁶ We stated that although the current rules were developed when technology permitted broadcasters to provide just one stream of programming over a 6 MHz channel, digital technology expands the effective capacity of 6 MHz of spectrum to permit (but not require) licensees to provide several program streams, as well as other digital services, on their 6 MHz channels.⁵⁷ Noting the differences in views as to the nature and extent of digital broadcasters' public interest obligations, we stated that we would issue a Notice to collect and consider all views on broadcasters' public interest obligations in the digital world. However, we also put broadcast licensees and the public on notice that existing public interest requirements continue to apply to all broadcast licensees, that the Commission may adopt new public interest rules for digital television, and that the *Fifth Report and Order* "forecloses nothing from our consideration."⁵⁸

34. Petitions. Media Access Project, et al. ("MAP"),⁵⁹ contends that the Commission should not delay its analysis of what modified (and increased) public interest obligations it should impose on DTV licensees.⁶⁰ According to MAP, the Commission's failure to impose new public interest obligations violates Section 201 of the 1996 Act, 47 U.S.C. §§ 336(d),⁶¹ 336 (a)(1),⁶² and 47 U.S.C. § 336(b)(5).⁶³ MAP adds that new public interest obligations are also warranted because broadcasters will have full use of 12 MHz (double their available spectrum) for at least 9 years, and also will be able to provide a number of commercial services that were previously impossible.⁶⁴ MAP urges the Commission to clarify that all new and existing public interest obligations will apply to both free and subscription program services in both analog and digital modes. MAP contends that such a conclusion appears implicit in the *Fifth Report*

⁵⁶ *Id.*; 47 U.S.C. § 336(d).

⁵⁷ *Fifth Report and Order* at 12829-30.

⁵⁸ *Id.* at 12830.

⁵⁹ Media Access Project filed jointly with the Center for Media Education, the Consumer Federation of America, the Minority Media and Telecommunications Council, and the National Federation of Community Broadcasters.

⁶⁰ MAP Petition for Reconsideration at 3-4.

⁶¹ This section provides that television stations are not relieved from serving the public interest, and requires that a renewal applicant must "establish that all of its program services on the existing or advanced television spectrum are in the public interest." MAP Petition at 7-8; MAP Reply at 2-5, 7.

⁶² This section directs the Commission to "adopt regulations that allow [DTV licensees] to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity." MAP Petition at 7-8; MAP Reply at 2-5, 7.

⁶³ This states that, in prescribing DTV regulations, the Commission shall "prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity." MAP Petition at 7-8; MAP Reply at 2-5, 7.

⁶⁴ MAP Petition at 9-10.

and Order and is supported by 47 U.S.C. § 336(d).⁶⁵

35. MSTV and the Association of Local Television Stations, Inc. ("ALTV") oppose MAP's Petition. MSTV contends that the Commission correctly deferred discussing new public interest matters until after the White House Commission studying that issue can make its recommendations.⁶⁶ Further, according to MSTV and ALTV, the 1996 Act did not impose new public interest obligations on DTV licensees.⁶⁷ ALTV argues that the three provisions of Section 336 cited by MAP do not create any new public interest obligations but must be construed merely as not relieving a DTV broadcaster from its current public interest obligations.⁶⁸ According to ALTV, the Commission does not have authority to impose more specific obligations without an express statutory directive. Finally, according to ALTV, even if the Commission does have such authority, it would be premature to impose specific public interest obligations, as rigid rules would hamper experimentation in programming and services.⁶⁹

36. Decision. We will not reconsider the approach we took in the *Fifth Report and Order* with respect to the issue of the nature and extent of broadcasters' public interest obligations in the digital world. MAP has not presented sufficient reasons why we must make an immediate decision on these questions instead of issuing a Notice so that we may collect and consider all views on these important issues. We reiterate that, with respect to digital television service, broadcast licensees and the public are on notice that existing public interest requirements continue to apply to all broadcast licensees and that we may adopt new public interest rules for digital television, foreclosing nothing with respect to the public interest from our consideration.⁷⁰

D. Transition

1. Simulcast

37. Background. In the *Fifth Report and Order*, the Commission declined to adopt a simulcast

⁶⁵ *Id.* at 15. In this regard, MAP argues that Congress, in the 1996 Act, has overridden *Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). In that decision, the Commission held that because subscription services are not intended to be received by the "general public," they are not broadcast services, and therefore are not subject to Title III public interest obligations. Nevertheless, MAP advocates that we should expressly overrule that decision, to eliminate possible confusion. MAP Petition at 15-16.

⁶⁶ The Advisory Committee on Public Interest Obligations of Digital Broadcasters has been constituted and has commenced its work. Exec. Order No. 13,038, 62 Fed. Reg. 12,065 (Mar. 11, 1997).

⁶⁷ MSTV Opposition at 32-34.

⁶⁸ ALTV Opposition at 2-3.

⁶⁹ *Id.* at 5.

⁷⁰ *Fifth Report and Order* at 12830.

requirement for the early years of the transition,⁷¹ but it adopted a phased-in simulcasting requirement as follows: by the sixth year from the date of adoption of the *Fifth Report and Order*, there is a 50 percent simulcasting requirement; by the seventh year, a 75 percent simulcasting requirement; and, by the eighth year, a 100 percent simulcasting requirement, which will continue until the analog channel is terminated and the analog spectrum returned.⁷²

38. Petitions: Include Simulcasting Target Dates in Periodic Reviews. MSTV contends that although the simulcasting phase-in is based on the transition end date of 2006, the Commission may change this date. Therefore, MSTV urges the Commission to expressly include simulcasting target date requirements in its biennial review of the DTV transition. MSTV contends that this will ensure that simulcasting requirements remain tied to consumer acceptance of DTV, and broadcasters have the flexibility to program their DTV channels to best attract the public to DTV during the early stages of the transition.⁷³

39. Limited Simulcasting Exemption for Public TV Stations. AAPTS/PBS contends that public stations may be adversely affected by the partial-to-full simulcasting requirement, as well as by the requirement that the digital channel operate during the same hours as the licensee's NTSC station. According to AAPTS/PBS, these requirements effectively impose a minimum operating requirement on the DTV station. It therefore advocates that the Commission not require public stations to simulcast their NTSC programming on their DTV stations, because that will effectively require that the licensee operate the DTV station whenever the NTSC station is operating. AAPTS/PBS instead urges that the Commission apply the simulcast requirement only during the hours when a licensee operates the DTV station. AAPTS/PBS notes that for many public stations, the power requirements for operating a DTV station whenever their NTSC station is operating (which is often 18 hours a day) will exceed their financial resources and may chill their ability or willingness to build a DTV station in the first place. Since there are no minimum operating requirements for noncommercial TV stations, according to AAPTS/PBS, these two DTV operation requirements "could have the perverse result of providing an incentive for public television stations to reduce their NTSC operating hours in order to comply with these [two *Fifth Report and Order*] requirements."⁷⁴

40. Accordingly, AAPTS/PBS urges that the Commission afford public stations the discretion to determine how many hours a day to operate their DTV stations. AAPTS/PBS contends that public stations will still offer DTV services during a reasonable portion of the day because they incurred the DTV construction costs, and PBS will be delivering HDTV programming at least during prime time. In

⁷¹ In the *Fifth Report and Order*, we generally defined simulcasting as the duplication of the programming of the analog channel on a DTV channel. We recognized that we will need to define the simulcasting requirements more clearly and noted that we will do so as part of the two-year reviews of DTV or other appropriate proceeding. *Fifth Report and Order* at 12832, 12833.

⁷² *Id.* at 12832. We declined to impose a simulcasting requirement in the early years of the transition to afford broadcasters flexibility to program their DTV channels to attract consumers, especially during the critical launch phase of DTV. We noted that a simulcast requirement near the end of the transition period will help ensure that consumers will enjoy continuity of free over-the-air program service when we reclaim the analog spectrum at the conclusion of the transition period. It might be difficult to terminate analog broadcast service if broadcasters show programs on their analog channels but not on their digital channels. *Id.* at 12832-33.

⁷³ MSTV Petition at 48.

⁷⁴ AAPTS/PBS Petition at 21-22.

addition, because public stations rely on audience contributions for their operating costs, they will have an incentive to operate their DTV stations the maximum number of hours they can afford. AAPTS/PBS therefore contends that this proposal will not adversely affect the transition to DTV.⁷⁵ If a public station operates its DTV station fewer than the number of hours required to meet the simulcast percentage, the licensee should be required to simulcast for the entire time the DTV station is operating.⁷⁶

41. Discussion: Periodic Review. We agree with MSTV that we should expressly include simulcasting requirements in our periodic review.⁷⁷ As discussed at ¶ 45, below, Congress now requires us to reclaim the analog spectrum by December 31, 2006 and to grant extensions of that date to stations under circumstances specified in the statute. We will conduct a periodic review of the progress of DTV every two years until the cessation of analog service. In these reviews, we will address any new issues raised by technological developments, necessary alterations in our rules, or other changes necessitated by unforeseen circumstances.⁷⁸ In the *Fifth Report and Order*, we noted that our decisions were, in some respects, necessarily preliminary.⁷⁹ We believe, therefore, that the periodic review will permit us to make whatever adjustments will be required, including any needed adjustments to simulcasting requirements.

42. Noncommercial Stations. We do not believe that it is necessary at this time to grant AAPTS/PBS's request to afford public stations discretion to determine how many hours a day to operate their DTV stations. We note that, in the *Fifth Report and Order*, we adopted a six-year period for public stations to construct their DTV facilities, the longest construction period for any category of DTV applicant. We reiterate our beliefs, stated in that Order, that special relief measures may eventually be warranted to assist public television stations to make the transition, that it would be premature at this time to determine what those measures might be, and that the specific nature of any special relief for public stations is best considered during our periodic reviews.⁸⁰

2. Licensing of DTV and NTSC Stations

43. Background. In the *Fifth Report and Order*, we concluded that the NTSC and DTV facilities should be licensed under a single, paired license. We stated that this will help both the Commission and broadcasters by keeping administrative burdens down, and that it would allow us to treat the DTV license and the NTSC license together for the purposes of revoking or not renewing a license. Therefore, we stated that once broadcasters have satisfied construction and transmission requirements, they will receive a single, paired license for the DTV and NTSC facilities.⁸¹

⁷⁵ *Id.* at 22.

⁷⁶ *Id.* at 23.

⁷⁷ In the *Fifth Report and Order*, we specifically stated that we would include the "proper application of the simulcast requirement" in our periodic reviews. *Fifth Report and Order* at 12856.

⁷⁸ *Id.* at 12856-57.

⁷⁹ *Id.*

⁸⁰ *Id.* at 12852.

⁸¹ *Id.* at 12834.

44. Petitions/Comments. The Department of Special Districts, San Bernardino County, California ("San Bernardino") notes that the 1996 Act requires the Commission to condition the DTV license on the "require[ment] that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation."⁸² San Bernardino argues that this condition should appear on the face of the instrument for all license renewals granted after the start of 1998, consistent with the eight-year license term and the 2006 reversion date adopted in the *Fifth Report and Order*. San Bernardino adds that this will not prevent the Commission from fashioning appropriate public interest adjustments in the periodic DTV reviews, including extensions of the switch over and give-back target dates.⁸³

45. Discussion. We note that the 2006 reversion date is now statutory. After the adoption of the *Fifth Report and Order* and the filing of the petitions for reconsideration, Congress enacted the Balanced Budget Act of 1997, which provides that "[a] broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006" unless the Commission grants an extension based on specific criteria enumerated in the statute.⁸⁴ We believe that this statutory language addresses any concerns San Bernardino may have regarding the reversion of one of the licenses of each station. Nevertheless, to ensure that all broadcasters are aware of their obligation to surrender either the original license or the additional license pursuant to Commission regulation, we will place on all broadcast television licenses granted after December 31, 1998,⁸⁵ an express condition requiring return of one of the two 6 MHz channels at the end of the transition period. We will impose such a condition on all renewals granted until the transition period has ended.

E. Application/Construction Period

46. Background. In the *Fifth Report and Order*, we announced that we would apply a streamlined three-stage application process to the group of initially eligible analog permittees and licensees allotted a paired channel in the DTV Table of Allotments. In the *Fifth Report and Order* itself, the Commission completed Stage 1, the initial modification of the license for DTV, by issuing DTV licenses to all parties initially eligible to receive them.⁸⁶ Before initial DTV licensees can commence construction, however, we required that they file an application for a construction permit.⁸⁷ We stated that we would treat the construction application, the second stage, as a minor change application, which does not require a

⁸² 47 U.S.C. § 336(c).

⁸³ San Bernardino Petition at 4-5.

⁸⁴ 47 U.S.C. § 309(j)(14).

⁸⁵ This provision is not relevant until after December 31, 1998, because Section 307(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(c), sets an eight year maximum on broadcast television license terms.

⁸⁶ *Fifth Report and Order* at 12838.

⁸⁷ Since the release of the *Fifth Report and Order*, the Mass Media Bureau has already begun to act upon such applications.

showing of financial qualifications.⁸⁸ We observed that the DTV construction permit application would not constitute a change in frequency, but merely the implementation of the initial DTV license on a channel assigned in the *Sixth Report and Order*.⁸⁹ In the third stage, upon completion of construction, the permittee may commence program tests upon notification to the Commission, provided that an application for a license to cover the construction permit for the DTV facility is timely filed.⁹⁰

1. Financial Qualifications

47. Petitions/Comments. MAP argues that the Commission should have required broadcasters to demonstrate their financial qualifications as a condition of awarding an initial DTV permit or license. MAP notes that the Commission's classification of an application for DTV construction permit as a minor change means that the applicant is not required to demonstrate its financial qualifications. MAP asserts that this decision threatens to delay the institution of DTV service because financially unqualified applicants may warehouse awarded spectrum or simply be unable to construct DTV facilities.⁹¹

48. MAP also argues that the conversion to DTV is not a change in facilities, but instead involves issuing a new construction permit and license to each existing broadcaster making the transition. Because the license is new, according to MAP, the Commission is statutorily required to determine whether the broadcaster is qualified to receive it. In this regard, MAP cites Section 308(b) of the Communications Act of 1934, as amended, which states that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission may by regulation prescribe as to the ... financial ... qualifications of the applicant to operate the station."⁹² In the alternative, MAP asserts that even if the DTV applications are categorized as a change, the Commission's classification of them as minor is inconsistent with Section 73.3572(a)(1) of the Commission's Rules. That provision of the rules defines a major change as one involving a change in frequency or community of license. MAP disputes the Commission's assertion in the *Fifth Report and Order* that "the change involved in constructing and operating a DTV facility does not constitute a change in frequency, merely the implementation of the

⁸⁸ The *Fifth Report and Order* stated that we would later issue a Public Notice providing additional details as to how we will process DTV applications. This Public Notice was released on October 16, 1997, after the deadline for filing petition for reconsideration of the *Fifth Report and Order*. It sets forth the requirements an application must meet to be considered routine, and it describes in detail the procedural rules that will govern the processing of DTV construction permit applications. Public Notice 77129 (Oct. 16, 1997) (*DTV Processing Public Notice*). It may be downloaded from our web site, at http://www.fcc.gov/Bureaus/Mass_Media/Public_Notices/TV_Notices/pnmm7208.txt.

⁸⁹ *Fifth Report and Order* at 12840, n. 159.

⁹⁰ Pursuant to Section 1.68(a) of the Commission's rules, 47 C.F.R. § 1.68(a), the Commission will grant the application where it finds that "all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest."

⁹¹ MAP Petition at 12-13.

⁹² *Id.* at 13; MAP Reply to Oppositions at 8, citing 47 U.S.C. § 308(b).

initial DTV License on a channel assigned in the *Sixth Report and Order*.⁹³ MAP states that, regardless of whether broadcasters use their new frequency for the current analog or future digital transmissions, they will change their frequencies and be subject to Section 73.3572(a)(1).

49. Finally, MAP argues that examining the financial qualifications of broadcasters before granting them DTV licenses is consistent with the Congressional directive to limit initial eligibility to existing licensees and permittees. Specifically, MAP states that the 1996 Act merely states who is eligible to *apply* for an initial DTV license, not who is *qualified* to have it granted. If Congress had wanted to mandate that all incumbents receive DTV licenses, according to MAP, it would not have used the term "*initial eligibility*." Thus, MAP concludes that the 1996 Act does not supersede the Commission's obligation to look at an applicant's "citizenship, character, and financial, technical, and other qualifications," as required by Section 308 of the Communications Act, as amended.⁹⁴

50. MAP's petition is opposed by MSTV and ALTV. MSTV states that existing broadcasters can be relied upon to construct DTV based on their track record and their need to transition their businesses to the digital world, given the mandatory cessation of NTSC broadcasting and the dictates of the marketplace. MSTV and ALTV argue that requiring existing broadcasters to demonstrate their financial qualifications would simply delay the DTV licensing process and the onset of digital television.⁹⁵ MAP replies that the concerns about delay are exaggerated, and that they ignore the public's right to participate in the licensing process.⁹⁶

51. ALTV also argues that, because of the accelerated construction schedule, there is only a limited risk in assuming that DTV applicants are financially qualified. In addition, according to ALTV, requiring DTV applicants to demonstrate their financial qualifications would needlessly expose highly proprietary station financial information to competitors.⁹⁷ In response, MAP asserts that the application process for a new broadcast station has always been public, and both the public and the Commission have had the right to know whether an applicant is financially qualified. MAP adds that the financial disclosures would be no more intrusive than disclosures broadcasters already make to Wall Street investors or other creditors.⁹⁸

52. Finally, ALTV notes that an application filed to warehouse spectrum would be an abuse of process and a misrepresentation that would lead to sanctions against the applicant. ALTV asserts that this deterrent sufficiently addresses MAP's concerns.⁹⁹ However, MAP argues that reliance on a case-by-case enforcement policy would add more cost and uncertainty to the DTV licensing process than a disclosure rule. Specifically, MAP states that financially unqualified parties would have already held digital licenses

⁹³ MAP Petition at 13, n. 6, citing *Fifth Report and Order* at 12840, n. 159.

⁹⁴ MAP Petition at 13-14.

⁹⁵ MSTV Opposition at 34; ALTV Opposition at 6.

⁹⁶ MAP Reply at 9.

⁹⁷ ALTV Opposition at 6.

⁹⁸ MAP Reply at 8-9.

⁹⁹ ALTV Opposition at 6.

for years before the Commission could determine whether they were warehousing spectrum. MAP adds that warehousing parties may also have assigned their licenses before their lack of financial qualifications could be discovered. Finally, MAP states that a petition to deny an application for such an assignment or for a renewal would be difficult to pursue, because there would be no financial information available to the petitioner or the Commission to support the petition.¹⁰⁰

53. Discussion. We decline to reconsider the streamlined licensing process we established for implementing the DTV allotments made in the *Sixth Report and Order*, under which we do not require a showing of financial qualifications. We continue to believe that the DTV construction permit applications related to these allotments should be treated as minor change applications. They do not involve new stations or changes in frequency as these terms have traditionally been used for the purposes of Section 73.3572(a)(1) of the Commission's Rules to define a major change. This is not an instance where an individual broadcaster has devised its own plan to change its channel or community of license and is requesting Commission authorization of that specific change. To the contrary, in order to implement the transition to DTV that we have found will serve the public interest, each application is to implement a specific DTV channel allotment expressly set forth by the Commission in the *Sixth Report and Order* for use by the applicant, the incumbent analog broadcast licensee, as contemplated by Congress.

54. We also conclude that treating DTV applications like applications for minor changes is consistent with Section 308(b) of the Communications Act. Section 308(b) authorizes the Commission to exercise its discretion when determining whether a financial qualifications showing requirement for certain classes of applications would serve the public interest. As noted above, Section 308(b) requires that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission may by regulation prescribe as to the ... financial ... qualifications of the applicant to operate the station." 47 U.S.C. § 308(b) (emphasis supplied).¹⁰¹ Consistent with this statutory language, the Commission long ago made a public interest determination that applicants for minor changes in broadcast facilities (*i.e.*, analog television and radio) do not need to provide information regarding their financial qualifications.¹⁰² MAP does not assert that this Commission policy is inconsistent with Section 308(b). Further, MAP does not state why the Commission's public interest determinations regarding analog television application forms and DTV license application forms should be considered differently for the purposes of Section 308(b). Accordingly, we find MAP's Section 308(b) argument unpersuasive.

55. As we emphasized in the *Fifth Report and Order*, one of our primary goals is to achieve a rapid and efficient transition from analog to digital broadcast television.¹⁰³ We continue to believe that the approach we have taken will foster swift and widespread construction and operation of digital television stations with minimal risk of spectrum warehousing or disuse. As noted by ALTV and MSTV, a number of factors will encourage broadcasters to construct their DTV stations quickly. These factors include

¹⁰⁰ MAP Reply at 10.

¹⁰¹ See also *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 412 (D.C. Cir. 1983).

¹⁰² Section III of the Commission's application form for new or modified broadcast facilities, FCC Form 301, requires the applicant to provide information regarding its financial qualifications. The instructions to that form state that all applicants must be financially qualified to effectuate their proposals. However, the directions further state: "DO NOT SUBMIT Section III if the application is for changes in operating or authorized facilities." (emphasis in original).

¹⁰³ E.g., *Fifth Report and Order* at 12811-12.

stations' need to compete with other video program providers, who are also delivering or preparing to deliver digital video programming; the planned cessation of NTSC broadcasting in 2006; and the opportunity to offer a variety of ancillary services in addition to the one mandatory, over-the-air video programming service.

56. In addition, as we discussed in the *Fifth Report and Order*, we will grant requests for extensions of time within which to construct DTV facilities only if they meet specific, delineated criteria.¹⁰⁴ We will grant an extension of the applicable deadline where a broadcaster has been unable to complete construction due to circumstances that are either unforeseeable or beyond the licensee's control, and only if the licensee has taken all reasonable steps to resolve the problem expeditiously. As we stated in the *Fifth Report and Order*, "such circumstances include, but are not limited to, the inability to construct and place in operation a facility necessary for transmitting DTV, such as a tower, because of delays in obtaining zoning or FAA approvals, or similar constraints, or the lack of equipment necessary to transmit a DTV signal."¹⁰⁵ As a further guarantee that valuable DTV spectrum would not be warehoused, the *Fifth Report and Order* noted that we do not anticipate that the circumstance of "lack of equipment" would include the cost of such equipment.¹⁰⁶

2. Construction Schedule

57. Background. The *Fifth Report and Order* adopted a construction schedule for DTV facilities. Affiliates of the top four networks (ABC, CBS, Fox and NBC) must build digital facilities in the ten largest television markets by May 1, 1999. Affiliates of those networks in the top 30 television markets, not included above, must construct DTV facilities by November 1, 1999.¹⁰⁷ All other commercial stations must construct DTV facilities by May 1, 2002. All noncommercial stations must construct their DTV facilities by May 1, 2003.¹⁰⁸ As discussed above, we delineated specific criteria pursuant to which we would grant requests for extensions of time within which to construct.

General Issues.

58. Petitions/Comments. Several petitioners request reconsideration of the construction schedule. For example, Cordillera Communications ("Cordillera"), which intends to construct nine DTV stations, requests an extension of the deadlines or, in the alternative, relaxation of the standards for granting extensions. According to Cordillera, the full implementation of DTV will take longer than the ten-year

¹⁰⁴ *Id.* at 12841-42.

¹⁰⁵ *Id.* at 12841-42.

¹⁰⁶ *Id.* at 12841-42.

¹⁰⁷ We observed that within the top 30 markets, there are individual television markets where ABC, CBS, Fox, or NBC has more than one affiliate. In such instances, we determined that the May 1, 1999, and November 1, 1999 construction requirement applies to the station with the largest audience share. *Id.* at 12841, n. 163.

¹⁰⁸ The *Fifth Report and Order* also noted that 24 stations in the top ten markets have voluntarily committed in writing to the Commission to building DTV facilities within 18 months, i.e., by November 1, 1998. We asked these latter 24 stations to file reports at six-month intervals, beginning on November 1, 1997, stating that their plans to meet these deadlines are on schedule or specifying any difficulties encountered in attempting to meet these deadlines. *Id.* at 12841.

period the Commission has established. Cordillera cites the time needed to acquire a tower site, construct a tower in compliance with local and federal regulations, acquire equipment to provide maximum service, and evaluate the impact of DTV on its viewers who receive its NTSC signals via translator. It adds that modifying the construction schedule will prevent the Commission from needlessly expending resources on processing extension applications.¹⁰⁹

59. Discussion. We do not believe that it would serve the public interest to extend the construction timetable established in the *Fifth Report and Order*. If a broadcaster does not complete construction within the time period contemplated by the current timetable, it may request an extension of time within which to construct, as noted above. The criteria we use to determine whether grant of an extension would serve the public interest adequately address the concerns raised by Cordillera.¹¹⁰ In addition, arguments related to zoning are more relevant to our ongoing proceeding considering the alleged impact of delays to DTV station construction caused by local zoning regulations.¹¹¹

Effect on Radio Stations.

60. Petitions/Comments. National Public Radio ("NPR") requests that we extend the construction schedule. It claims that the current timetable, combined with the allotment, in the *Sixth Report and Order*, of DTV channels on the basis of current transmitter sites and replication of existing NTSC service areas, threatens to create a shortage of available tower capacity for DTV antennas. As a result, NPR claims, a substantial number of public radio stations will be forced to relocate their transmitting antennas at a significant financial cost and possible loss of signal coverage areas. NPR asserts that:

"[a]ccording to the FCC's FM and TV engineering database, ... 18% of the total number of FM stations... are located at the same geographical coordinates as at least one television antenna. Hundreds if not the majority, of these FM antennas are co-located with TV antennas and, in many instances, will be forced to relocate as a result of the increased weight and load associated with the new DTV equipment. ... Because towers cannot take on new equipment when they have reached the limits of their load-bearing capacity, some existing broadcast antennas and associated equipment will have to be relocated. Many FM radio stations will likely fall into this category."¹¹²

NPR asserts that this analysis applies to noncommercial, as well as commercial, radio stations. It adds that several FM stations have already been informed that they will have to relinquish their tower space to make way for a DTV antenna.¹¹³

61. Discussion. We decline to alter the construction schedule as requested by NPR. First, NPR's

¹⁰⁹ Cordillera Petition at 4-5.

¹¹⁰ 47 C.F.R. § 73.3534(b).

¹¹¹ *Notice of Proposed Rule Making* in MM Docket No. 97-182, 62 Fed. Reg. 46241 (September 2, 1997). The comment cycle ended on December 1, 1997.

¹¹² NPR Petition at 2, quoting the May 30, 1997 petition for proposed rule making filed by NAB and

claim that a significant number of educational FM stations will have to relinquish their tower space and pay for a costly relocation of their transmitting antennas is, at this time, speculative. NPR provides no documentary evidence to support its claim that several FM stations have already been informed that they will have to relinquish their tower space in order for the tower owner to make room for DTV equipment. It also provides insufficient information regarding the cost or time period of such circumstances. We also note that NPR does not distinguish between commercial and noncommercial FM stations in its analysis of the Commission's FM and TV databases. As a result, the record lacks any information as to how many of the FM stations discussed by NPR are noncommercial FM stations. Thus, NPR has not demonstrated at this time that the construction schedule will have any undue negative impact on a significant number of public radio stations. We can revisit this issue, if warranted, during the periodic DTV reviews.

Issues Relating to Noncommercial Television Stations.

62. Petitions/Comments. AAPTS/PBS states that public television stations with both NTSC and DTV channels outside the core channels should be permitted to defer DTV construction until they have a permanent DTV channel (*i.e.*, the end of the transition period, when they have a core channel). According to AAPTS/PBS, 13 public television stations have both their analog and their digital channels outside channels 2-46, and 13 have channels outside channels 7-51. It adds that "over half of those stations in each case have operating budgets of less than \$5 million. Under the current rules, they not only will have to build two DTV stations, but will have to migrate their viewers to a new channel at the end of the transition."¹¹⁴ AAPTS/PBS states that since the Commission has not yet determined what the core channels will be, these public TV stations do not know what that new channel will be at the end of the transition period or when they will learn of the assignment. AAPTS/PBS asserts that this uncertainty makes planning and finding funding for the transition difficult.¹¹⁵

63. AAPTS/PBS's proposal is supported by Motorola as a way for noncommercial educational stations to alleviate conversion costs. According to Motorola, the proposal "recognize[s] the difficult economics involved with a two step migration to digital service. More importantly, [it] could accelerate the recovery of UHF channels 60-69 for public safety or other wireless use."¹¹⁶

64. Discussion. We decline to adopt the modifications to the construction schedule proposed by AAPTS/PBS. We do not believe that such modifications are necessary. Because we recognized the financial difficulties often faced by noncommercial broadcasters, the construction timetable we adopted in the *Fifth Report and Order* provided noncommercial stations a six-year period within which to construct their DTV facilities, the longest construction period allotted to any category of DTV applicant. In the *Fifth Report and Order*, we also stated that special relief measures may eventually be warranted to assist public television stations to make the transition, but we concluded that it was premature to determine what those specific measures should be. We stated then, and we continue to believe, that determining the specific nature of whatever special relief may be needed for noncommercial educational broadcasters is

¹¹⁴ AAPTS/PBS Petition at 14-15.

¹¹⁵ *Id.* at 15.

¹¹⁶ Motorola Comments (July 18, 1997) at 5. The Commission has recently concluded a rule making proceeding reallocating UHF channels 60-69 for both broadcast and nonbroadcast services. *Report and Order* in ET Docket No. 97-157, FCC 97-421 (released January 6, 1998) ("*Channels 60-69 Reallocation Report and Order*").

best considered during our periodic reviews.¹¹⁷ APTS/PBS has not demonstrated that its concerns regarding public television stations with both NTSC and DTV channels outside the core channels cannot adequately be addressed in that context. Nonetheless, as will be discussed in the *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, we will consider, on a case-by-case basis, requests to defer construction and/or to make an immediate transition to digital when filed by those stations that have both analog and digital channels outside the core.

Satellite Stations.

65. Petitions/Comments. Hubbard Broadcasting, Inc. ("Hubbard") seeks clarification as to the application of the construction schedule to satellite stations. Hubbard is the licensee of KSTP-TV, an ABC affiliate in the top 30 market of Minneapolis/St. Paul, Minnesota, as well as two satellite stations licensed to Alexandria and Redwood, Minnesota. As Hubbard points out, if a network has more than one affiliate in a top 30 market, only the one with the largest audience share is subject to the expedited schedule for networks. Parent station KSTP, as a network affiliate in a top 30 market, is subject to a November 1, 1999 construction date. Hubbard asks how the construction schedule applies to satellite stations such as its own that transmit the same network programming as their parent, not by virtue of a network affiliation agreement, but by rebroadcast consent granted by the network.¹¹⁸

66. Discussion. We clarify that the construction exception for same-market affiliates applies to satellite stations. Thus, with regard to Hubbard's particular example, the two satellite stations are located within the same market as their parent and, according to Hubbard, broadcast the programming of the same network. Under our rules, if a network has more than one affiliate in a top 30 market, the station with the smaller audience share¹¹⁹ is not subject to the expedited schedule for networks affiliates. Therefore, regardless of the stations' satellite status or type of network contract being used, Hubbard's two satellites are not subject to an accelerated construction schedule. Instead, they are subject to the five-year construction deadline.¹²⁰

Voluntary Commitment of Viacom.

67. Petitions/Comments. Viacom notes that affiliates of the four major networks in the top 10 markets are subject to a May 1, 1999 construction deadline.¹²¹ Moreover, several stations have volunteered

¹¹⁷ *Fifth Report and Order* at 12852.

¹¹⁸ Hubbard Petition at 2-3.

¹¹⁹ Because satellite status is granted to a station only in areas that cannot support a full service television station, it is extremely unlikely that a satellite station would have a larger audience share than its parent.

¹²⁰ If viewership information were collected only on the basis of the combined viewership of both the parent station and its satellite, then the two stations could arguably be considered as a unit for the purposes of the accelerated construction schedule. However, this is not the case. Nielsen gathers average daily and weekly circulation (*i.e.*, viewership) information for parent stations and satellite stations separately. *See, e.g., Television and Cable Factbook*, Vol. 65 (1997).

¹²¹ *Fifth Report and Order* at 12840-41.

to complete construction by November 1, 1998.¹²² Viacom states that it has six stations in the top ten markets, all of which are UPN affiliates and, therefore, subject to the longer May 1, 2002 deadline. However, Viacom volunteers to commit to an accelerated construction of DTV facilities in two of these markets (to as early as the 18-month voluntary deadline), on the condition that the Commission use the empirical data generated by those two markets and, if necessary, amend the DTV Table on the basis of that data.¹²³

68. Discussion. We commend Viacom for its willingness to serve the public by accelerating the construction of two of its DTV stations, although it would not be appropriate for the Commission to accept conditions on Viacom's voluntary commitment. However, we note that, once DTV stations begin operating, we expect to be made aware of interference or other problems attributable to their technical characteristics, such as frequency and site location. Indeed, we would expect to be informed of problem areas, to enable us to consider appropriate technical adjustments. Accordingly, we welcome Viacom's commitment to the rapid construction of two of its stations in top ten markets. In addition, in our *Memorandum Opinion and Order on Reconsideration of Sixth Report and Order*, we will address the substance of Viacom's concerns, and make a number of amendments to the DTV Table of Allotments.

3. Processing Procedures

69. Background. In the *Sixth Report and Order*, the Commission allowed flexibility for DTV facilities to be built at locations within five kilometers of the reference allotment sites without consideration of additional interference to analog or DTV service, provided the DTV facilities do not exceed the allotment reference HAAT and ERP values.¹²⁴ In the *Fifth Report and Order*, we noted that we would expedite processing of construction permit applications that could correctly certify as to a series of checklist questions, which include whether the proposed facility conforms to the DTV Table of Allotments by specifying an antenna site within five kilometers of the reference allotment site. We noted our intent to grant a construction permit to such broadcasters within a matter of days and noted that other applicants would be required to furnish additional technical information.¹²⁵

70. Petitions/Comments. Costa de Oro TV ("Costa de Oro") asks the Commission to establish expedited processing procedures for stations that need to relocate their transmitters due to the inability to use their current sites. It argues that in crowded areas like Los Angeles, only a few mountaintops are available to be used for transmitter sites, and stations may not be able to find a new site within the five kilometer safe harbor established in the *Sixth Report and Order*. Costa de Oro also requests additional information as to how we intend to process applications that involve a site change of greater than five

¹²² *Id.* at 12841.

¹²³ Viacom Opposition at 19. The empirical data would be intended to address a number of technical issues raised in Viacom's petition to reconsider the *Sixth Report and Order*. Viacom's concerns generally relate to the ability of UHF stations to compete against VHF stations in the digital world. We will address these concerns on reconsideration of the *Sixth Report and Order*.

¹²⁴ *Sixth Report and Order* at 14634-35.

¹²⁵ *Fifth Report and Order* at 12839; see also *DTV Processing Public Notice*, n. 88, above. Pursuant to the checklist, we have already granted 10 DTV applications.