

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 73 and 74 of the)	
Commission’s Rules to Establish Rules for Digital)	MB Docket No. 03-185
Low Power Television and Television Translator)	
Stations)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum through Incentive)	
Auctions)	
)	
Amendment of Part 15 of the Commission’s Rules)	ET Docket No. 14-175
to Eliminate the Analog Tuner Requirement)	

Filed Electronically through ECFS

To: The Commission

COMMENTS OF DTV AMERICA CORPORATION

1. DTV America Corporation (“DTV America”) hereby submits these Comments in response to the *Third Notice of Proposed Rulemaking* (“NPRM”) in the above-captioned proceeding, 29 FCC Rcd. 12536 (2014).¹ DTV America Corporation holds licenses and construction permits for new low power television (“LPTV”) stations and has applications pending for additional stations – a total of more than 290 LPTV facilities in all. DTV America clearly has a significant stake in the long-term future of LPTV generally and the outcome of this proceeding in particular. It seeks in these comments to put an end to the crippling impact of secondary status and finally to give LPTV stations that provide a specified level of service to the community and help diversify media ownership an opportunity to enjoy the basic protection against interference

¹ The NPRM was published at 79 FR 70824 (Nov. 28, 2014). The Media Bureau extended the deadline for initial comments by *Order*, DA-1727, released December 1, 2014.

and expectancy of license renewal that is necessary to justify continued capital investment in the industry.

2. While the NPRM raises many questions about how LPTV stations may or should be permitted to operate after the reverse incentive auction has concluded and the television broadcast band has been re-packed, the real issue in the minds of LPTV operators is how many stations will survive and whether they will ultimately be permitted by the Commission to operate in an atmosphere that will allow them to attract investment and to offer innovative services to the public. If the stations do not survive, or if they are not allowed sufficient freedom to innovate, then all of the other questions in the NPRM become rather unimportant – even the details of channel-sharing, which, while perhaps attractive on the surface, ultimately provides a station with at best half a loaf instead of the full resource needed to make the most of the television art and to generate enough income to support station operation.

3. Since its creation in 1982,² the LPTV service has suffered greatly from the secondary status it has been accorded by the Commission. LPTV stations have been displaced time and again over the years and have had to foot the bill for changing channels without compensation; the FCC never fulfilled its promise to provide LPTV stations with the simple right to take advantage of private contracts through network and syndicated exclusivity.³ The impact on LPTV stations was

² See <http://www.fcc.gov/encyclopedia/low-power-television-lptv>.

³ The Commission stated that “[w]hile the actual coverage area of these stations is smaller than that of full service stations and they operate on a secondary basis, they [LPTV stations] nonetheless can be expected to have the same basic need for and interest in program exclusivity as full service stations. *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 6171 at ¶44 (1988). However, it never followed up and actually afforded any exclusivity rights to LPTV, while recognizing that other stations could assert exclusivity rights against LPTV stations. *Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299 at n. 183 (1988).

disregarded when full power TV stations were all given second temporary channels during the DTV transition;⁴ and now the Commission is proposing to re-pack the TV spectrum into a smaller number of channels without regard to the number of LPTV stations that may be put out of business and see their investment go up in smoke.⁵ Congress only made things worse by declining to afford MVPD carriage rights to all but a very few LPTV stations,⁶ and the Commission has done nothing to help increase LPTV access to MPVD distribution.

4. The Commission has always said that one of its hopes for LPTV was to diversify the ownership of the media and to afford an opportunity for small businesses that cannot afford to own a full power station to participate actively in the media industry, not only by producing programs but also by controlling distribution channels.⁷ It is time now to make sure that once the incentive auction and re-pack have been concluded, and we know which LPTV stations will survive, the

⁴ While the Commission adopted rules allowing LPTV stations to apply for new channels if displaced by full power allotments without waiting for a general application filing window, it made full power allotments without regard to the impact on LPTV stations, stating: “We disagree with those parties that suggest we provide allotments for fewer than all full service licensees in order to avoid the displacement of low power TV stations. We note that low power television and TV translator operations are authorized only on a secondary basis.” *Digital Television Service (Sixth Report and Order)*, 12 FCC Rcd. 14588 at ¶11 (1997).

⁵ “We conclude that protecting other categories of facilities, including low power television (“LTPV”) stations and television translator (“TV translator”) stations, which are secondary in nature and are not entitled to protection from primary services under our current rules, would unduly constrain our flexibility in the repacking process and undermine the likelihood of meeting our objectives for the incentive auction.” *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, 29 FCC Rcd. 6567 at ¶21 (2014).

⁶ See Section 614(h)(2) of the Communications Act, 47 USC § 534(h)(2).

⁷ “[LPTV] was primarily intended to provide opportunities for locally-oriented television service in small communities, both rural and individual, within larger urban areas. LPTV presents a less expensive and very flexible way of delivering programming tailored to the interests of viewers in small localized areas, providing a means of local self-expression. In addition, LPTV has created abundant opportunities for new entry into television broadcasting and has permitted fuller use of the broadcast spectrum.” <http://www.fcc.gov/encyclopedia/low-power-television-lptv>.

surviving stations will be able to stay in place over the long term and succeed or fail based on their business acumen and not their second-class license status.

5. DTV America urges the Commission to take affirmative steps now, in this proceeding, to save at least some of the diversity that is rapidly disappearing from the media scene, as merger after merger rolls through the governmental approval process. LPTV stations that provide a specified level of service should be allowed to declare their eligibility for permanent status prior to the incentive auction. After the auction and re-pack, those that made a timely declaration should be permitted to apply for permanent status.

6. This proposal is intended neither to impair nor to delay the incentive auction. The auction can proceed, and the TV spectrum can be re-packed, without guaranteeing a long-term home for any LPTV station. But when the process is over, that should be the last time that qualifying LPTV stations are banished to Never Never Land, not knowing how long they may survive or when they may be snuffed out no matter how much they have invested or how much service they have provided to the public. Moreover, the groundwork should be laid now, so that LPTV stations that want to qualify for primary status will understand what it will take to qualify and can stake their claim and then weather the re-pack with the hope that their post-auction survival prospects will be enhanced.

7. There is no question that the Commission has statutory authority to create more primary LPTV stations, especially if the qualifying criteria are the same ones used for Class A stations in 2000. Congress specifically gave the Commission authority to upgrade qualifying LPTV stations in the *Community Broadcasters Protection Act of 1999*, 47 USC § 336(f). While the Commission has consistently refused to open more than one window of opportunity for LPTV stations to upgrade to Class A status, there can be no dispute that the statute allows further upgrades, as the

Commission is given broad discretion in Section 336(f)(2)(B) of the Communications Act, without a time limit, to determine which stations may qualify for Class A primary service protection.⁸ The Commission have *chosen* not to use this authority in the past, but the authority remains part of the law and not only may, but indeed should, be used now.

8. LPTV stations can be allowed to qualify for post-repack primary status without disrupting the incentive auction or the re-pack and without adding any strain on the Commission's resources prior to the re-pack. DTV America suggests that the Commission announce during the summer of 2015 that it will accept certifications in December of 2015 from LPTV stations that have qualified before they file their certification.⁹ The Commission need not process the certifications or entertain petitions to deny at that stage. Just as it did with the initial Class A qualification window in 2000, the Commission can publish a list of stations that submitted complete certifications. Then after the spectrum re-pack, those stations that have not been displaced and those that have been displaced and have found new channels can file license applications on Form 302-CA. At the time the license applications are filed, likely in late 2016 or early 2017, the Commission will have finished all or most of the re-pack and will be able to turn

⁸ There is no date or time limit in 47 USC § 336(f)(2): “For purposes of this subsection, a station is a qualifying low-power television station if—(B) the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.”

⁹ If the Commission wishes to specify an earlier date by which stations must qualify, it must give stations a reasonable amount of notice to establish qualifications. For example, if a station must open a main studio, hire extra employees to staff the studio, and establish a public inspection file, it needs a reasonable amount of time to do that. LPTV stations do not have to comply with those requirements now, and there is little reason for any of them to undertake those activities unless and until they know that there will be a benefit in return.

toward evaluating the qualifications of individual applicants and entertaining any petitions or objections that may be filed.¹⁰

9. The qualifications for primary status can be the same as the existing Class A requirements, as these requirements have been publicly known for well over a decade. The requirements assure local presence and responsiveness, which are among the important characteristics that Congress and the Commission have tried to preserve in enacting and administering the *Community Broadcasters Protection Act of 1999*.¹¹

10. When the re-packing of full power stations and existing Class A stations has been completed, the Commission should give priority to new Class A stations in applying for any remaining available television channels.¹² And once they find their new home, they should finally become primary spectrum users, safe from being dug up and tossed out at any time by full power stations. Notwithstanding the virtues of full power television, not every political unit, ethnic group, or other small community can afford a full power station; nor can full power stations afford to sell advertising at rates that are realistic for small business enterprises of many kinds in their communities. Existing Class A stations and LPTV stations have offered significant opportunities

¹⁰ Because all Class A stations must maintain an online public inspection file that includes certifications of Class A compliance and issues-programs lists showing their service to the public, and they must file Children's Television Reports on Form 398, a largely self-policing mechanism is already in place that will ensure that after Class A status has been conferred, stations continue to comply with the requirements they agreed to accept when they certified their eligibility for permanent status.

¹¹ The Commission may want to consider whether it should be necessary any longer for local main studios to be opened and staffed 40 hours a week, given the fact that local public inspection files are now posted online, and there is little need for members of the public to visit a station in person any longer to obtain information about the station's program services.

¹² Since existing Class A stations will presumably be accommodated in the initial re-pack, they will in effect have priority over any newly qualifying Class A stations.

to surmount ownership entry barriers and have provided outlets for program producers and advertisers who cannot afford access to full power television. The newly protected stations will continue and will expand those opportunities to maximize the voices that can communicate in our pluralistic and democratic society.

11. Two particular aspects of primary status for new Class A stations merit attention. One is whether full power stations claiming “technical problems” should be permitted to displace Class A stations. While as discussed at par. 7, *supra*, Section 336(f)(2) of the Communications Act does not confine the Commission to one specific time period for creating new Class A stations, in contrast, Section 336(f)(1)(D) does specify a precise time limit after which full power stations may no longer file maximization applications at the expense of Class A stations. The other consideration in section 336(f)(1)(D) relates to preserving the service area of full power TV stations during the transition from one technology (analog) to another (digital). That consideration should not come into play after the re-pack, because Section 6403(b)(2) of the *Middle Class Relief and Job Creation Act of 2012*¹³ already requires the Commission during the re-pack to preserve the service area of each full power station that does not relinquish its channel in the auction. Thus

¹³ Public Law 112-96, Feb. 12, 2012.

there is no need to allow displacement of any new Class A qualified station by full power stations claiming a need to resolve “technical problems.”¹⁴

12. The other aspect meriting attention is whether Digital Replacement Translator (“DRT”) applications should receive priority over applications by new Class A qualified stations seeking channels after the re-pack. DTV America respectfully submits that such priority is not justified. DRTs do nothing to increase or enhance diversity of ownership or programming. A decade ago, while there may have been situations where a full power station’s signal was receivable prior to the digital transition, but not afterwards, because of the significant differences between what happens when analog signal quality is degraded and what happens when a digital signal is weak,¹⁵ these differences should be much less pronounced after a change in digital channel as opposed to a change in basic transmission technology. Moreover, in those rare cases where a full power signal may become unviewable in a few geographic pockets, a full power station can contract to utilize a stream on an appropriately sited Class A or LPTV station, giving the full power

¹⁴ It may nevertheless be appropriate, but only for a limited period of time, to allow those full power and Class A stations that can clearly demonstrate inability to operate on the channel assigned to them after the re-pack (and not just a preference to move to a different channel) to seek an alternate channel without protecting LPTV stations that qualify to upgrade to Class A. *See Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, cited at note 5, *supra*, at ¶¶553-556. The Commission should, however, provide relief for LPTV stations that are unable to find new channels immediately, whether because of channel scarcity and/or requests for channel changes by full power stations, by allowing those stations to go dark during the time they have no place to go, and by exercising the agency’s statutory authority to make findings that the automatic license expiration in Section 312(g) of the Communications Act, 47 USC § 312(g), should not apply. Among other considerations, the evolution to new television broadcast standards, which may come sooner rather than later, may allow LPTV stations to implement new transmission formats that will reduce the interference they cause and will thus open up channel placement opportunities not available with ATSC 1.0.

¹⁵ The analog signal may be receivable, though with a poor quality picture, while the digital signal cannot degrade and may not be receivable at all.

station the ability to fill in a gap in its signal coverage while still leaving other streams available to allow diversity to flourish. A DRT can do nothing but repeat the parent full power station, so it offers far fewer public benefits than allowing newly qualified Class A stations to remain on the air.

13. DTV America's proposals offer many benefits and no meaningful detriments. They will encourage more stations to upgrade the level of their service to their community, they will help preserve and enhance diversity of ownership of both distribution channels and content,¹⁶ they will neither delay nor complicate the incentive auction, they will not impair efforts to repurpose TV spectrum for broadband, and they will not divert significant Commission resources before conclusion of the auction and spectrum re-pack.

14. It is time for the Commission to strike a meaningful blow for diversity, localism, and creativity, by giving those who do not have the billions of dollars it takes to compete with major broadcast, cable, and wireless conglomerates to find a place in the sun, where they can create jobs, provide outlets for small business enterprises to reach the public, and take risks with technological innovations that larger enterprises are often reluctant to take. Accordingly, DTV America urges the Commission to fulfill its announced goal in this proceeding of facilitating the survival of LPTV

¹⁶ Ownership of program content alone, even with the Internet, is not sufficient without diversity of ownership of distribution facilities as well. If all the distribution facilities become concentrated in the hands of a very few, which is where both broadcast and broadband facilities are currently headed, then unless Internet Service Providers become subject to common carrier obligations – an extremely controversial concept unlikely to be adopted without significant levels of forbearance from carrier obligations – the concentrated owners of distribution channels will have a choke hold over access to receivers and other display devices and thus will have a highly undesirable level of control over the growth of diversity. The historic reluctance of major cable operators to carry LPTV stations, except perhaps stations affiliated with major Hispanic networks, bears witness to the low probability that ownership of content alone can be sufficient to maintain diversity of content.

stations by ending the yoke of secondary status for those who provide a level of service that Congress has previously tightly decided merits preservation and permanent status.

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th St., 11th Floor
Arlington, VA 22209-3801
Tel.: 703-812-0404
Fax: 703-812-0486
E-mail: tannenwald@fhhlaw.com

Respectfully submitted,



Peter Tannenwald

Counsel for DTV America Corporation

June 12, 2015