

FCC MAIL SECTION

Federal Communications Commission

FCC 98-261

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DIS:

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

In the Matter of)
)
Reallocation of Television Channels) ET Docket No. 97-157
60-69, the 746-806 MHz Band)

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1998

Released: October 9, 1998

By the Commission:

INTRODUCTION

1. By this action, we reconsider our decisions in the *Report and Order* in this proceeding.¹ We decline to change our decision to allow no new television (TV) permittees to operate in channels 60-69. We also decline to change the status of low-power TV and TV translators in channels 60-69.

BACKGROUND

2. On August 5, 1997, the President signed the Balanced Budget Act of 1997 (Budget Act) into law. In pertinent part, the Budget Act requires the Commission, not later than January 1, 1998, to reallocate 24 megahertz of spectrum in the 746-806 MHz band for public safety services. The Budget Act further requires us, not later than January 1, 1998, to reallocate the remaining 36 megahertz in the band for commercial use to be assigned by competitive bidding, which will occur after January 1, 2001.²

3. On December 31, 1997, we adopted the *Report and Order* in this proceeding. We reallocated TV channels 63, 64, 68, and 69 to the fixed and mobile services, and designated them for the exclusive use of public safety, and channels 60-62 and 65-67 for commercial use pursuant to a future auction. Further, we declined to adopt additional protections for low-power TV and TV translator stations beyond those adopted in our *DTV*

¹ *In re Reallocation of Television Channels 60-69, the 746-806 MHz Band*, ET Docket No. 97-157, *Report and Order*, 12 FCC Rcd 22953 (1997).

² Budget Act, Pub. L.No. 105-33, 111 Stat. 251§ 3004 (adding new § 337(a) and (b) of the Communications Act of 1934, as amended).

Proceeding.³ We also stated that no new applications will be considered for the provision of analog TV service in channels 60-69, but that current applicants would, at a later date, be afforded an opportunity to amend their applications to seek channels below 60 upon which to provide service.

4. We received petitions for reconsideration of the *Report and Order* from four parties. Three of these parties request reconsideration of our decision to consider granting no new applications in channels 60-69, and one requests reconsideration of our decision to provide no additional protection to low-power TV and TV translator stations. We also received one opposition to the petitions.

DISCUSSION

5. *License Applications*. Three petitioners, all applicants for new stations in TV channels 60-69, request that we reconsider our decision to allow no new analog TV stations in channels 60-69 beyond those who already have construction permits. Each petitioner provides different reasons why its application for a new station in channels 60-69 should be granted.

6. *Davis Television Fairmont, LLC (Davis)*. Davis, an applicant for a station on channel 66 in Fairmont, West Virginia, claims that our decision to dismiss any application for which an applicant cannot secure a channel below 60 is unnecessarily restrictive and inequitable.⁴ Davis offers a set of options which would allow it to continue to pursue its application. First, Davis proposes specialized relief for its particular situation, allowing it to operate on channel 66 until the end of the DTV transition period, after which channels will be available below channel 60. Davis claims that this will have no impact on the public safety channels (63, 64, 68, and 69), and would involve only one short-spacing, with DTV channel 58 in Weston, West Virginia.⁵ Failing this, Davis proposes a liberalization of spacing limitations in cases like Davis'. This might allow Davis to operate on Channel 55 rather than relinquish its application.⁶ As an alternative, Davis suggests that it be allowed to identify and operate on a DTV channel without first broadcasting in analog TV format. Davis points out that this would comport with our decision in the *Reconsideration of the DTV Sixth Report and Order*, which allows new stations, under some circumstances, to operate in DTV format only,

³ See *In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service (DTV Proceeding)*, MM Docket No. 87-268, *Fifth Report and Order* 12 FCC Rcd 12810 (1997)(on reconsideration, 13 FCC Rcd 6860 (1998)); *Sixth Report and Order*, 12 FCC Rcd 14588 (1997)(on reconsideration, 13 FCC Rcd 7418 (1998)).

⁴ Davis, Petition for Reconsideration at 2.

⁵ *Id.* at 3-4.

⁶ *Id.* at 5.

without accompanying analog transmission.⁷ Finally, if we decide to do none of the above, Davis requests that we form a "priority waiting list" of applicants for stations in TV channels 60-69, so they may receive preferential treatment in acquiring new DTV facilities after the DTV transition period. This, according to Davis, would help to mitigate the loss in time, effort, and expense that these applicants expended in preparing their applications.⁸ Davis contends that its proposed solutions are consistent with the mandate of the Budget Act that we are to waive our rules in order to permit settlement agreements between mutually exclusive applicants for TV licenses.⁹

7. *Lindsay Television, Inc. and Achernar Broadcasting Company (Lindsay)*. Lindsay, an applicant for a license on channel 64 in Charlottesville, Virginia, requests that we reconsider the portion of our decision that holds pending applications for the designated public safety channels until the Mass Media Bureau provides the opportunity for amendment of applications to seek channels below 60. Lindsay contends that Congress intended that public safety use and TV use of channels 60-69 should coexist, and cites a section of the Conference Report which accompanied the Budget Act to demonstrate this.¹⁰ Thus, argues Lindsay, Congress intended that TV and public safety should share channels 60-69, and for this reason, we should allow new TV stations in these channels. Lindsay asserts that this would comport with the Commission's intention to accommodate as broad a range of services as technically feasible in channels 60-69.¹¹ Lindsay concludes that our policy goals for public safety spectrum are achievable without dismissing TV applications, and that we are obligated to consider shared use as a reasonable alternative.¹²

8. *ValueVision International, Inc. (ValueVision)*. ValueVision, an applicant for licenses on channel 64 in Destin, Florida, and channel 69 in Des Moines, Iowa, agrees with

⁷ *Id.* at 6 (citing 13 FCC Rcd 7418 at ¶ 56 (see n.4 *supra*)).

⁸ *Id.* at 6.

⁹ *Id.* at 6-7 (citing *In re Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, MM Docket No. 97-234, *Notice of Proposed Rule Making*, 12 FCC Rcd 22363 (1997)).

¹⁰ See Lindsay, Petition for Reconsideration at 4-5 (citing 143 Cong. Rec. H6175 (1977), which reads:

The conferees expect that, for the period during the transition, the Commission will ensure that full-power digital and analog licensees will operate free of interference from public safety service licensees, and conversely, that public safety service licensees will operate free of interference from analog and digital television licensees. The conferees also expect that the Commission will ensure that public safety service licensees continue to operate free of interference from any new commercial licensees. H.R. Conf. Rep. No. 105-17, 105th Cong., 1st Sess. 580 (1997)).

¹¹ See Lindsay Petition at 6-7.

¹² See *id.* at 7.

our decision to allow applicants to amend their applications to specify channels below 60, but requests that we allow applicants who are unable to find channels below 60 to acquire licenses in channels 60-69. In support of this, ValueVision states that Congress provided that we shall permit all applicants for pending television licenses to resolve conflicts among their applications, and that this guarantee would be meaningless if we dismiss their applications.¹³

9. In response to these arguments, the Association of Public-Safety Communications Officials-International, Inc. (APCO) claims that Congress and the Commission recognized that little can be done in the short run regarding existing TV stations, but that the record contains no indication that Congress intended to allow new TV stations in channels 60-69.¹⁴ In response to contentions that Congress intended us to allow new TV licensees in channels 60-69, APCO states that the reference to the ability of public safety service licensees to operate free of interference from new commercial licensees clearly relates to new commercial licensees subsequent to auction of the commercial portions of channels 60-69, not to new analog TV stations. APCO points out that TV use of channels in the public safety portions of the band could significantly limit public safety use of the band in major metropolitan areas, and could interfere with the use of part of the band for interoperability.¹⁵ Finally, APCO points out that in a previous proceeding where we reallocated TV spectrum for shared public safety use, we stated that

even existing licensees can be displaced as a consequence of spectrum reallocations. See, e.g., Direct Broadcast Satellites, 740 F.2d 1190,1209 (D.C. Cir. 1984). Certainly, mere applicants cannot expect greater protection.... When, as in this instance, the public interest requires reallocating spectrum for different uses, that interest must take precedence over the private interests of existing applicants.¹⁶

10. We agree with APCO that we have authority to dismiss applications when the public interest so demands. Beyond this, contrary to the opinion expressed by Lindsay and ValueVision, we believe that it was clearly the intention of Congress that channels 60-69 were to be reallocated with all due haste, with only "grandfathering" for current licensees in the band. This is the most logical conclusion to be drawn from the Budget Act, which states that holders of "a television broadcast license to operate between 746 and 806 megahertz may not

¹³ See ValueVision, Petition for Reconsideration at 2.

¹⁴ See APCO, Opposition to Petitions for Reconsideration at 2.

¹⁵ See *id.* at 4.

¹⁶ See *id.* at 5 (citing *In re Amendment of Parts 2, 73, and 90 of the Commission's Rules and Regulations to Allocate Additional Channels in the Band 470-512 MHz for Public Safety and Other Land Mobile Services*, 59 RR 2d 910, 917-18 (1986)).

operate at that frequency after the date on which the digital television service transition period terminates...."¹⁷ This language, coupled with the Budget Act requirement that we reallocate this spectrum not later than January 1, 1998, and begin licensing this spectrum for public safety use not later than September 30, 1998,¹⁸ persuades us that it was the intention of Congress to remove TV broadcasting from channels 60-69, and allocate the band to other services, as quickly as possible. We therefore conclude that we have both general and specific authority, granted by Congress, to make channels 60-69 available for public safety and commercial use as soon as feasible, and to take such actions as may be necessary to facilitate such availability.

11. In the *Report and Order* in this proceeding, we carefully considered the interests of all parties and the public, in deciding to allow no new TV permittees in channels 60-69. We concluded that the success of the transition of our nation's TV broadcasting system to DTV required allowing limited use of channels 60-69 to be used for DTV on an interim basis. We further decided that the time, effort, and money which holders of licenses and construction permits for new stations in these channels had expended justified continuing to authorize these stations in channels 60-69, though we adopted limits on holders of construction permits. We concluded, however, that it was important to maximize the utility of the 746-806 MHz band for public safety and new commercial services. In addition, any TV application granted would have no allotment for a DTV channel and would be required to cease analog operations at the end of the DTV transition period. For these reasons, we decided not to authorize additional new analog full-service television stations on channels 60-69.¹⁹ Upon reconsideration, we affirm our authority to make these decisions, and we have been presented with no persuasive arguments to change the decisions we made in the *Report and Order*. We will provide applicants a later opportunity to amend their applications to seek a channel below 60, but we will not authorize additional new full-service analog TV stations in channels 60-69. With regard to Davis' specific suggestion to allow short-spacing, we will consider individual short-spacing waiver requests on a case-by-case basis in conjunction with affording an opportunity for amendment of applications to seek channels below 60.²⁰ With regard to Lindsay, we are aware that Lindsay has pending a request for a waiver to allow it to provide TV service in the Charlottesville, Virginia area on channel 64. Because of the unusual facts presented in the Lindsay adjudicatory proceeding, our denial of Lindsay's petition for reconsideration is without prejudice as to its pending waiver request.

12. *Latin Communications Group Television, Inc. (Latin)*. Latin, the licensee of three low-power TV stations, asks us to reexamine our decision not to protect low-power TV

¹⁷ Budget Act § 3004(e)(1) (adding new § 337 to the Communications Act).

¹⁸ *Id.* § 3004(a).

¹⁹ See *Report and Order* at ¶ 40.

²⁰ See *Report and Order* at ¶ 40.

stations operating on channels 60-69 from new licensees during the DTV transition period.²¹ Latin observes that competitive bidding for licenses in channels 60-62 and 65-67 may not commence until after January 1, 2001, according to the Budget Act. Therefore, Latin argues, protection of low-power TV on these commercial channels until the scheduled end of the DTV transition period on January 1, 2006, would involve only a brief delay in the commencement of commercial services.²² Latin contends that the public interest in the continuation of valuable low-power TV service outweighs early introduction of unknown new commercial services, and claims that the public interest would be served by requiring new commercial licensees to protect low-power TV until the end of the DTV transition period.²³ In its opposition, APCO observes that Latin's reasoning applies only to the commercial channels in the band and not to those designated for public safety use.²⁴

13. As we stated in the *Report and Order*, providing protection from interference by new services to low-power TV is incompatible with the allocations for public safety and commercial services required under the Budget Act in that such action would preclude new licensees' access to the band in large areas of the United States. It would also effectively give low-power TV primary status, at least in the commercial portions of the 746-806 MHz band, an action we have declined to take previously.²⁵ We observe that low power TV will be able to continue operating on the commercial channels at least until the auction is conducted, and in some cases for much longer, depending upon the speed with which new licensees begin service. When we assign licenses by competitive bidding, we do not believe that it is reasonable to require the winners, who will have primary status, to delay initiating service by as much as five years, in order to protect a secondary service. We believe that the time between adoption of the *Report and Order* and the auction for the commercial portion of the band, during which low-power TV stations may continue to operate, is sufficient to allow low-power TV licensees to evaluate their options and take any necessary action, such as seeking channels below 60 or negotiating interim agreements with new commercial licensees in channels 60-69. We have also taken a number of steps to accommodate low-power TV stations in the *DTV Proceeding*. We allowed low-power TV stations displaced by new DTV stations to apply for suitable replacement channels in the same areas on a non-competitive basis. We adopted several changes in technical rules as well. We deleted taboo restrictions on the use of channels seven channels below and 14 channels above the channels of other stations in the low-power TV service. We also eliminated the requirement that low-power TV stations consider the existing full service UHF taboo restrictions on channels +/- 2, 3, 4, or 5

²¹ See Latin, Petition for Reconsideration at 1.

²² *Id.* at 4-5.

²³ *Id.* at 5.

²⁴ See APCO Opposition at 2.

²⁵ See *Report and Order* at ¶ 31.

removed from existing analog TV stations, and allowed low-power TV and TV translator stations to make use of terrain shielding, Longly-Rice terrain dependent propagation prediction methods, and interference abatement techniques to show that low-power stations will not cause interference to analog stations. We specified that low power operations need protect only actual DTV operating facilities, and decided to accept applications for low-power stations provided they specified sites outside of the noise-limited service areas, based on actual DTV facilities. We stated that we will entertain requests to waive the low-power protection standards where it can be demonstrated that the proposed low-power TV or TV translator stations would not cause any new interference to the reception of analog TV stations. We also changed the basis of our rules on low-power TV station power limits so that power limits are now expressed in terms of effective radiated power, rather than total output power. Finally, we strongly advised that industry coordinating committees should consider low-power TV and TV translator stations in developing proposed modifications to the DTV Table and avoid negative impact on low-pwer operations where possible.²⁶

14. In the Budget Act, Congress required the Commisison to seek to assure that LPTV and TV translator stations displaced from channels 60-69 are assigned channels below 60,²⁷ and the Commission is currently examining ways in which this may be accomplished. Finally, we observe that, because these channels were allocated to broadcasting, as well as fixed and mobile services,²⁸ low-power TV licensees are likely to be eligible to bid for their channels at auction, and if successful, will enjoy primary status in their channels and service areas. For these reasons, we find that we have taken reasonable measures to accommodate low-power TV stations, and decline to provide them with protection from new primary services in channels 60-69.

15. Accordingly, IT IS ORDERED, pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, that the petitions for reconsideration filed by Davis Television Fairmont, LLC; Latin Communications Group Television, Inc.; Lindsay Television, Inc. and Achernar Broadcasting Company; ValueVision International, Inc. are DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

²⁶ See *DTV Sixth Report and Order* at ¶¶ 141-147, 182.

²⁷ See Budget Act § 3004(e)(2).

²⁸ See *Report and Order* at ¶ 17.