

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Service Rules for the 746-764 and) WT Docket No. 99-168
776-794 MHz Bands, and)
Revisions to Part 27 of the)
Commission's Rules)

**PETITION FOR PARTIAL RECONSIDERATION
SUBMITTED BY
THE NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB")¹ submits this petition for partial reconsideration of the Commission's *First Report and Order* in this proceeding.² In the *First Report*, the Commission adopted licensing and service rules for the commercial spectrum located in the 700 MHz bands, which was previously reallocated from its exclusive use for television broadcasting on channels 60-69. Specifically, the *First Report* established license bands that can be used for a variety of wireless services, and set forth competitive bidding rules governing the auction of these bands, which will be conducted this Spring. In addition, the *First Report* included interference standards designed to assure that the operations of new licensees in the 700

¹ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

² *First Report and Order* in WT Docket No. 99-168, FCC 00-5 (rel. Jan. 7, 2000) ("*First Report*").

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MHz bands protect existing analog and digital television broadcast stations transmitting on these bands.

NAB emphasizes in this petition the importance of fully maintaining existing analog broadcast television service during the transition to digital television (“DTV”). In this regard, NAB seeks reconsideration of the Commission’s decision to consider regulatory requests needed to implement arrangements that facilitate new licensees’ use of the 700 MHz bands through the premature cessation of analog television service. That decision appears contrary to Congress’ clear intent to insure that viewers do not lose their existing analog television service during the DTV transition, even if the transition extends beyond the target date of 2006. In addition, NAB contends that the Commission has misconstrued the nature of the 2006 target date for the DTV transition.

I. The Commission Should Not Consider Requests To Implement Agreements Designed To Facilitate Use Of The 700 MHz Bands By New Licensees During The DTV Transition.

In the *First Report* (at ¶ 145), the Commission determined to “consider specific regulatory requests needed to implement” agreements between incumbent broadcast licensees and new licensees in the 700 MHz bands.³ NAB believes that the Commission’s decision to consider regulatory requests needed to implement arrangements facilitating the operation of new wireless services in the 700 MHz bands contravenes Congress’ clear intent to insure that viewers do not lose their existing analog television service on these bands during the DTV transition. Granting regulatory requests to accommodate use of the 700 MHz bands by new wireless

³ Such agreements would likely involve incumbent broadcasters (i) converting to DTV-only transmission before the end of the statutory transition period; (ii) accepting higher levels of interference than allowed by the Commission’s established protection standards; or (iii) otherwise accommodating the operations of the new licensees.

licensees also conflicts with Congress' well-established policy of preserving access to free broadcast television.

In the Balanced Budget Act of 1997 ("Budget Act"), Congress added a new Section 309(j)(14) to the Communications Act concerning the auction of recaptured broadcast television spectrum. *See* 47 U.S.C. § 309(j)(14). New Section 309(j)(14)(A) requires reclamation of the six MHz channels that broadcasters now use for transmission of analog television service by no later than December 31, 2006. However, new Section 309(j)(14)(B) requires the Commission to grant an extension of this date to any station in any television market if any one of three specified conditions exist.⁴ As explicitly stated in the Conference Report to the Budget Act, Congress adopted these provisions requiring extension of the 2006 target date for the DTV transition "to ensure that a significant number of consumers in any given market are not left without broadcast television service as of January 1, 2007."⁵

In addition, the 1997 Budget Act included provisions establishing certain conditions on new licensees operating in the 700 MHz bands during the DTV transition. *See* 47 U.S.C. § 337(d). In particular, new Section 337(d)(2) requires the Commission to "establish any additional restrictions necessary to protect full-service analog television service and digital television service during a transition to digital television service." 47 U.S.C. § 337(d)(2). These various statutory provisions adopted in the Budget Act clearly show that Congress intended to

⁴ Section 309(j)(14)(B) specifies that broadcasters will be permitted to keep their channels for analog television service beyond 2006 if: (i) one or more of the largest television stations in a market do not begin DTV transmission by the 2006 target through no fault of their own; (ii) digital-to-analog converter technology is not generally available in a market; or (iii) fewer than 85% of the television households in a market are able to receive digital television signals (either off the air or through a cable-type service that includes DTV stations). 47 U.S.C. § 309(j)(14)(B).

⁵ H.R. Rep. No. 217, 105th Cong., 1st Sess. 576-77 (1997).

insure that viewers did not lose their existing analog television service, either through the premature cessation of analog television transmissions or through interference with analog television signals by new licensees in the 700 MHz bands.

NAB believes that the Commission's decision to consider "specific regulatory requests needed to implement" arrangements facilitating use of the 700 MHz bands by new licensees is obviously contrary to this congressional intent expressed in the Budget Act. These arrangements that the Commission has determined to consider would generally involve incumbent broadcasters ceasing their analog transmissions on television channels 60-69 (and converting solely to DTV-only transmission before the end of the transition period) or accepting higher levels of interference for their analog transmissions. Either result would violate Congress' intention – as expressly set forth in the Budget Act – to insure that existing analog television service would continue until certain statutory conditions have been met.⁶

Given Congress' clear intention to prevent the loss of existing analog television service, the Commission does not have discretion to consider "whether the public interest would be served by approving specific requests" to facilitate arrangements accommodating use of the 700 MHz bands by new licensees (*First Report* at ¶ 145), if such arrangements would result in the loss of existing analog television service during the DTV transition. In particular, the Commission lacks the discretion to consider, in connection with such arrangements, "the benefits to consumers of the provision of new wireless services." *First Report* at ¶ 145. Congress by statute has already determined that the public interest would best be served by the continuation of analog television service until specific statutory conditions have been fulfilled. The

⁶ Until, for example, at least 85% of the television households in a market are able to receive DTV signals. *See* 47 U.S.C. § 309(j)(14)(B).

Commission does not possess the authority to alter this congressional determination made in the 1997 Budget Act.

Granting regulatory requests to accommodate use of the 700 MHz bands by new wireless licensees also conflicts with Congress' long-standing policy of preserving access to free broadcast television. In the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), Congress required cable television systems to dedicate a portion of their channels to local broadcast television stations. As recognized by the Supreme Court, "Congress' overriding objective in enacting" these "must carry" requirements was to "preserve access to free television programming," especially for viewers without cable. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 646 (1994) ("*Turner I*").⁷ The Commission's facilitation of arrangements in which broadcasters would cease analog transmissions on television channels 60-69 clearly would be contrary to Congress' intent in the Cable Act "to prevent *any significant reduction* in the multiplicity of broadcast programming sources available to noncable households." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 193 (1997) (upholding constitutionality of must carry provisions) (emphasis added). Because its decision is contrary to the basic purpose of the must carry requirements of the Cable Act, the Commission should reexamine the determination to consider regulatory requests designed to facilitate use of the 700 MHz bands by new wireless licensees prior to the completion of the DTV transition period.

⁷ As the Supreme Court explained in *Turner I*, must carry rules ensure that "broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue . . . to maintain their continued operation. In so doing, the provisions are designed . . . to ensure that every individual with a television set can obtain access to free television programming." 512 U.S. at 647.

II. The Commission Has Misconstrued The Nature Of The 2006 Target Date For The DTV Transition.

NAB also wants to emphasize that the 2006 date for the completion of the DTV transition is a “soft” target that may likely be extended in many television markets, rather than a “hard” deadline. Indeed, a number of analysts doubt that the full transition to DTV and the return of analog spectrum will be completed by 2006. For example, Forrester Research, an independent market research firm, estimates that only 23% of U.S. households will have DTV sets by 2004 and only 48% by 2007.⁸ If, as these analysts believe, 85% of television households will not be equipped to receive DTV in 2006, then the Commission will be required under Section 309(j)(14)(B) to extend the December 31, 2006 target date for the end of the DTV transition and the broadcasters’ return of their analog channels. NAB believes that the Commission has fundamentally misconstrued the “soft” nature of this target date for the DTV transition in the *First Report*.

Specifically, several determinations made in the *First Report* imply that the 2006 date is a “hard” deadline for the end of the DTV transition. For example, licenses issued to winning bidders for the 700 MHz bands “will extend eight years beyond the year 2006, the date as of which incumbent broadcasters are required to have relocated to other portions of the spectrum.” *First Report* at ¶ 67.⁹ In addition, the *First Report* adopted performance requirements for new licensees in the 700 MHz bands, which require a licensee to “provide ‘substantial service’ to its service area no later than January 1, 2014, *i.e.*, eight years after 2006, the date as of which

⁸ See Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future*, at 14-15 (Dec. 1998).

⁹ The *First Report* does mention in a footnote that this 2006 date “may be extended under particular circumstances.” *Id.* at fn. 161. However, the Commission still set a *definite* initial license term of January 1, 2014 (*i.e.*, eight years after 2006) for new licensees in the 700 MHz bands.

incumbent broadcasters are required to have relocated to other portions of the spectrum.” *First Report* at ¶ 70.¹⁰ The terms of these licensing and performance requirements established for new licensees in the 700 MHz bands thus clearly treat the 2006 date as a definite deadline for the conclusion of the DTV transition. In this regard, the *First Report* may lead new licensees to assume incorrectly that license terms and performance requirements based on a 2014 date will allow them a full eight years after the end of the DTV transition to comply with these requirements and qualify for a license renewal expectancy.

NAB is particularly concerned that new Section 27.60 of the Commission’s rules treats the 2006 date as the definite conclusion of the transition to DTV. This section establishes interference protection criteria “to reduce the potential for interference to public reception of the signals of existing TV and DTV broadcast stations transmitting on TV Channels 59 through 68.” 47 C.F.R. § 27.60. The section also states that the digital “transition period is scheduled to end on December 31, 2006,” and, “[a]fter that time, unless otherwise directed by the Commission,” new licensees in the 700 MHz bands “will no longer be required to protect reception of co-channel or adjacent channel TV/DTV stations.” 47 C.F.R. § 27.60(b). As discussed in detail above, the DTV transition period may likely extend beyond 2006, and new licensees in the 700 MHz bands will need to protect the operations of the existing television stations in these bands until the transition period is in fact complete. To insure the protection of existing broadcast television service throughout the transition to DTV, NAB requests that the Commission amend Section 27.60 to make clear that new licensees in the 700 MHz bands will be required to protect

¹⁰ Moreover, licensees meeting this “substantial service” requirement will be deemed to have satisfied an important element of qualifying for a license renewal expectancy. *See First Report* at ¶ 68.

incumbent television stations until the completion of the DTV transition, even if the transition extends beyond the target date of 2006.¹¹

NAB also takes this opportunity to remind the Commission that it can significantly improve the odds of meeting the 2006 target date, or otherwise bring an expeditious conclusion to the DTV transition, by acting promptly on other matters relating to DTV. In particular, the Commission must act to adopt must carry regulations for DTV signals.¹² The Commission can additionally encourage the transition to digital broadcasting by implementing technical standards for making digital televisions compatible with cable systems.¹³ Without Commission action on these two vital issues, the transition to DTV will without doubt extend well beyond 2006, thereby frustrating the development of new wireless services on the 700 MHz bands. The Commission can therefore best promote the deployment of new wireless services on these spectrum bands by taking the actions necessary to insure the swift and successful implementation of DTV and the return of all analog broadcast channels (including channels 60-69).

¹¹ NAB suggests that Section 27.60 be amended to remove the reference to the end of the DTV transition on December 31, 2006, and to provide as follows: "Until otherwise directed by the Commission, 747-762 MHz and 777-792 MHz stations must protect reception of co-channel or adjacent channel TV/DTV stations." When the DTV transition period is in fact complete, then the Commission can eliminate this requirement for the new 700 MHz licensees.

¹² As NAB explained in response to the Commission's *Notice of Proposed Rulemaking* on digital must carry, a timely and successful DTV transition cannot be achieved without the adoption of must carry rules insuring consumer access to all DTV broadcasts. See Comments of NAB in CS Docket No. 98-120 at 9-24 (filed Oct. 13, 1998).

¹³ With regard to DTV compatibility, Chairman Kennard recently announced that he has directed Commission staff to prepare proposed rules for adoption, if the consumer electronics and cable industries cannot agree on compatibility standards by April of this year. See "IPTV: From the Vast Wasteland to the Vast Wonderland," Address by William E. Kennard to the Consumer Electronics Show (Jan. 7, 2000).

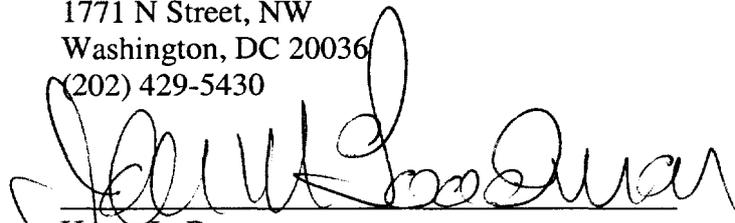
III. Conclusion

The Commission should reexamine its decision to consider regulatory requests needed to facilitate arrangements accommodating use of the 700 MHz bands by new wireless licensees during the DTV transition, if such arrangements would result in the premature loss of analog television service. Rather than facilitating arrangements contrary to Congress' intent to insure that viewers do not lose existing analog television service during the DTV transition, the Commission should act expeditiously on other important matters relating to DTV (especially digital must carry). Taking the actions necessary to achieve the successful implementation of DTV (and the recapture of analog television spectrum) by the 2006 target date is the best way to promote the rapid development of new commercial wireless services on the 700 MHz bands. The Commission should also reexamine its treatment of the 2006 date for the DTV transition to insure that all its rules and policies adopted in this proceeding properly construe the 2006 date as only a target that may be extended.

Respectfully submitted,

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