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

In the Matter of)
)
Service Rules for the 746-764 and)
776-794 MHz Bands, and)
Revisions to Part 27 of the)
Commission's Rules)
)
)
)

WT Docket No. 99-168

To: The Commission

**PETITION FOR RECONSIDERATION OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

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SUMMARY

The auction of 36 MHz in the 700 MHz band for commercial services will be a watershed event in that it will be the first and largest amount of spectrum below 1 GHz ever available for flexible uses. Congress, in mandating the auction of this spectrum, and the Commission, in allocating it, have evinced a clear desire to open the spectrum up for the widest possible array of competing commercial services, including commercial broadcasting. Yet in its First Report and Order, establishing service rules for the band, the Commission has walked away from those goals. It adopted restrictive service rules that harken back to the type of spectrum management the Commission has disavowed – rigid power limits that foreordain winners and losers and preclude uses that the public might desire. Specifically, the Commission has adopted power limits that make it impossible for commercial broadcasting and other higher power broadband uses to function in the band. As a result, the Commission has gutted its allocation (which permits commercial broadcasting) and countermanded Congress' instruction that the band be auctioned broadly for commercial services.

The Commission's decision to effectively limit use of the 700 MHz band to lower-power wireless services configured in a particular way is without technical foundation. The Commission could have adopted interference standards that set boundary conditions for operation depending on the particular use of the spectrum. Given service areas that span huge swaths of the country, this would have been particularly appropriate and would have given meaning to the flexible allocation. The Commission's failure to adopt interference standards in favor of rigid power limits and guard bands will result in government dictation of equipment, service architecture, and service selection, as well as overall inefficiency in the spectrum use. MSTV urges the Commission to reconsider its restrictive service rules and its adoption of guard bands.

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The Association for Maximum Service Television, Inc. ("MSTV") hereby requests reconsideration of the Commission's *Report and Order*¹ Establishing Service Rules for the 746-764 MHz and 776-794 MHz spectrum block. By excluding high-power point to multipoint operations from these bands and incorporating guard bands into its 700 MHz band plan, the Commission has effectively excluded commercial broadcasting. In doing so, it has for all intents and purposes invalidated its spectrum allocation decision, violated its own flexible use policy and contradicted the intent of Congress that the band should be made available for commercial broadcasting. We urge the Commission to reconsider these decisions.

¹ *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, *First Report and Order*, FCC 00-5 (rel. Jan. 6, 2000) ("*First Report and Order*").

I. BACKGROUND

The Balanced Budget Act of 1997 mandated the allocation of 36 megahertz of spectrum at 746-764 MHz and 776-794 MHz to commercial services on a primary basis.² Congress clearly intended that those “commercial services” should include commercial broadcasting.³ In its *Reallocation Order*, the Commission found that “an allocation to fixed, mobile and broadcasting is appropriate” and that such an allocation “will serve the public interest by allowing the broadest range of services” in the commercial portions of the 700 MHz band.⁴ The Commission specifically noted its belief that “Congress intended to include commercial broadcasting” in the new 700 MHz band allocation.⁵

In its *Reallocation Order*, the Commission expressly rejected the argument that interference concerns justified eliminating broadcasting from the 700 MHz band allocation after the DTV transition.⁶ Instead, the Commission reaffirmed MSTV’s position that a flexible allocation permitting broadcasting in the band is appropriate, and that technical rules can minimize interference.⁷ While acknowledging that the sharing of spectrum among disparate services would pose technical challenges, the Commission foresaw straightforward solutions. It pointed out that “TV broadcasting and land mobile services currently share spectrum in the 470-

² See Pub. L. No. 105-33, 111 Stat. 251 § 3004 (1997) (adding new § 337 of the Communications Act).

³ *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, ET Docket No. 97-157, *Report and Order*, 12 FCC Rcd 22953, 22962 (1998) (“*Reallocation Order*”). See also *Reply Comments of the Walt Disney Company* at 3.

⁴ *Reallocation Order* at 22962.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 22961; *Comments of the Association for Maximum Service Television* at 2.

512 MHz band,” a fact that demonstrated that services with markedly different technical characteristics can coexist in the same spectrum block given the proper boundary conditions.⁸

In the *Notice of Proposed Rulemaking* in this proceeding, the Commission apparently maintained its commitment to preserving opportunities for commercial broadcasting in Channels 60-69 and asserted that “the potential flexibility established for these bands by the revisions to the Table of Allocations will ultimately be realized by the service rules.”⁹ It is true that, citing “the statutory requirement that flexibility does not establish harmful interference or discourage investment and development of new technologies,” the Commission stated that it ultimately “may or may not establish rules that enable the full range of services included in the Table.”¹⁰ However, the Commission did not withdraw its previous finding that allowing “the broadest range of services” would serve the public interest. Rather than attempt to foreordain the ultimate uses of the commercial 700 MHz band, the Commission asserted that it sought to establish “rules that are not based on a Commission prediction of how these bands will ultimately be used, but instead reflect a record that enables us to establish maximum practicable flexibility.”¹¹

In the *First Report and Order*, the Commission abruptly retracted its support for the broadest range of services and for user-defined applications, finding that “[e]stablishing regulatory flexibility sufficient to accommodate conventional television broadcasting would

⁸ *Id.* at 22962 & n.45.

⁹ *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, *Notice of Proposed Rule Making*, FCC 99-97 at ¶5 (rel. June 3, 1999) (“*Notice*”).

¹⁰ *Id.*

¹¹ *Id.* at ¶16.

impose disproportionate, offsetting burdens on wireless services, constraining their technical effectiveness and, consequently, their economic practicability.”¹² This conclusion apparently rested on the Commission’s belief that “inherent interference” between higher-power and lower-power services “would create substantial spectrum inefficiencies”¹³ and its assumption that commercial broadcasting was an unlikely use of the band.

Ironically, in discussing appropriate standards of protection for incumbent broadcasters who will continue to operate in the 700 MHz band during the DTV transition, the Commission again noted that “land mobile and TV stations have *successfully* shared the 470-512 MHz band (TV Channels 14-20) in 11 major metropolitan areas of the United States.”¹⁴ The Commission cited the success of this experience in deciding to adopt similar standards once again to protect incumbent broadcasters.¹⁵ Despite finding that such broadcast and wireless services had “successfully” shared spectrum in the past, the Commission nonetheless, and without reasoned explanation, asserted in the very same proceeding that they could not successfully do so in the future. By deciding that it would not tolerate in its service rules what it had permitted in its allocation – high-power, broad reach broadcasting – the Commission effectively altered its allocation of the 700 MHz band after the allocation phase of the proceeding was over. It also made a predictive, and preclusive, judgement about how the band would be used, contrary to Congressional intent and its own past policy choices.

¹² *First Report and Order* at ¶18.

¹³ *Id.* at ¶18.

¹⁴ *Id.* at ¶138 (emphasis added).

¹⁵ *Id.*

II. THE COMMISSION HAS FAILED TO PROVIDE A REASONED EXPLANATION FOR PROHIBITING HIGH-POWER, POINT-TO-MULTIPOINT SERVICES IN THE COMMERCIAL 700 MHz BANDS

The Commission has failed to articulate reasons for frustrating the will of Congress and contradicting its own policy by adopting service rules that eliminate the possibility of engaging in any high-power point-to-multipoint transmission (including any known form of broadcasting) in the commercial 700 MHz band.

A. The Commission Rejected Interference Standards As A Management Tool In Order To Promote A Particular Use of the Spectrum

Interference standards, such as the ones that currently regulate “incompatible” services on adjacent and co-channels in the broadcast spectrum (and such as the standards that many commenters in this proceeding have proposed to regulate interference with adjacent public safety users), could have been crafted to allow the full range of permitted services and given meaning to the idea of a flexible allocation. The Commission’s stated rationale for not adopting such interference standards was that such standards would be a burden on wireless providers, making wireless services in the 700 MHz band less economical and leading to inefficient use of spectrum. Beyond the bias embedded in such a rationale – that wireless services are the best and highest-valued use of the spectrum¹⁶ – the rationale is a specimen of circular reasoning. It assumes that the interference standards that would be adopted would burden wireless users and, therefore, that such standards are too burdensome. But interference standards can be, and usually are, crafted to strike a balance among competing uses. In this case, different interference standards could have been adopted depending on the actual uses of the spectrum, thereby not prejudging what the uses will be or over-burdening any service at the expense of another.

¹⁶ We note that it is arbitrary and capricious for the Commission to merely assume or implausibly predict that a given course of action will serve legitimate policy goals. *See, e.g., Bechtel v. FCC*, 10 F.3d 875, 887 (D.C. Cir. 1993).

The Commission's discussion of interference issues was also badly one-sided. It relied heavily on comments of wireless advocates, many of whom made obviously overstated and speculative claims about the inability to manage interference between services. The Commission did not adequately answer the allegation that it lacked grounds for reopening an issue already settled in the allocation phase.¹⁷ Moreover, it simply brushed aside the views of several commenters who urged that traditional broadcast and wireless services could and should share the same spectrum.¹⁸ This exclusive reliance on the views of those who cried the loudest has resulted in rules that unfairly favor a particular service category – in other words, a complete reversal of the decision reached in the allocation phase to allow the broadest possible range of services.

B. The Commission Incorrectly Assumed That There Is “Inherent” Interference Between High- And Low-Power Services

The technical faults in the Commission's justification for adopting restrictive service rules are rooted in its finding that “inherent interference” between high- and low-power services justifies banning high-power services. The notion that a particular service is prone to “inherent” interference is nonsensical as a matter of physics. Interference is a function of proximity and signal level and can occur regardless of the type of service involved.

Whether or not interference occurs in the commercial 700 MHz band depends entirely on the Commission's willingness to establish interference protection standards, just as it

¹⁷ *Reply Comments of KM Communications, Inc.*, at 2. The Commission has previously held that it cannot entertain proposals to “effectively change” an initial allocation subsequent to the allocation phase of rulemaking proceedings. *See infra* nn. 32-33 and accompanying text.

¹⁸ *Id.* at 2-3; *Comments of KM Communications, Inc.* at 2; *Reply Comments of the Walt Disney Company* at 2-8; *Comments of the Walt Disney Company* at 1-2, 4-5; *Reply Comments of the Association for Maximum Service Television, Inc.* at 4; *Comments of the Association for Maximum Service Television, Inc.* at 2-4, 10; *Comments of Alaskan Choice Television* at 3-4.

has long done to facilitate sharing of the 470-512 MHz band by high- and low-power services.¹⁹ As long as interference among services is manageable in this way, there is no rational justification for banning one service on grounds that it might cause interference while allowing a variety of others.

C. The Commission Incorrectly Assumed That High- And Low-Power Services Will Operate In Close Proximity

The Commission's argument about the potential burden that interference standards would impose on wireless providers incorrectly assumed that high- and low-power service providers would frequently operate in close proximity to one another – an assumption that is contradicted by the size of the 700 MHz service areas. By definition, interference only occurs where neighboring signals overlap. If the 700 MHz band were being licensed on the basis of small service areas the size of a city or a few counties, this argument might make sense because of the many service area boundaries and the fact that high-power services by definition cover a relatively large area. But the Commission has decided to channelize the 700 MHz band into just two paired channels over just six large service areas covering broad regions of the country.²⁰ This decision means that neighboring high- and low-power licensees could interfere with each other only at the extreme edges of vast service areas. That overlap, if it occurred at all, could easily be dealt with through technical rules that would not be unduly burdensome on either party.

¹⁹ MSTV recognizes the Commission's increasing interest in negotiated interference limits, which are a natural corollary to flexible use. In fact, MSTV proposed a single 36 MHz channel to facilitate this type of band management. *Comments of the Association for Maximum Service Television, Inc.* at 4. However, the decision to channelize the band did not necessarily implicate the decision to abandon flexibility by adopting non-neutral power limits rather than service-neutral protection criteria.

²⁰ *First Report and Order* at ¶56.

D. The Commission Incorrectly Assumed That Low-Power Services Represent A More Efficient Use Of Spectrum Than Do High-Power Services

Of course, licensees could theoretically disaggregate their regional licenses through subsequent transactions, making it possible to have internal points of overlap between neighboring high- and low-power service providers. There is no logical reason to assume, as the Commission does, that such transactions would represent an inefficient use of spectrum.

For example, high- and low-power service providers might both wish to purchase exclusive rights to use a particular band to serve a particular metropolitan area within a licensee's service area. Simple economics suggests that in such cases market factors (*e.g.*, the supply of and demand for services of both types in the area), as well as the relative burdens of providing interference protection, would determine which use of the band is more valuable. There is no economic justification to support the Commission's assumption that the low-power service is inherently a more efficient use of the spectrum.²¹

E. By Foreclosing Competition Between High- and Low- Power Services In The Commercial 700 MHz Band, The Commission Has Defeated The Statutory Mandate And Violated Its Own Policy

The flexible allocation of the commercial 700 MHz band mandated by Congress is meaningless unless accompanied by implementing service rules. The Commission recognized as much in the *Notice* by acknowledging that its proper role was to adopt service rules that would allow for the provision of the broadest possible range of allocated services, not to interpose its

²¹ The Commission's assumption that high-power uses are inefficient ignores statements by Disney and its subsidiary ABC attesting to the fact that potential broadcast users of the 700 MHz band regard the spectrum as highly valuable. Disney correctly argues that "[t]he determination of the spectrum's most valuable use is best left up to the marketplace by means of the spectrum auction. Money will be bid based upon sound business plans to provide valuable services to the public and the relative scarcity of the necessary spectrum for each competing service." *Reply Comments of the Walt Disney Company* at 8.

own judgment about which services should predominate.²² Yet the Commission ultimately did substitute its judgement for the mechanics of the market by adopting limited service rules that preclude high power service, in spite of the fact that it was possible to adopt comprehensive and neutral rules through the use of appropriate interference standards.

The restrictive rules adopted in this proceeding frustrate the fundamental purpose of the Congressionally-mandated flexible allocation – to ensure that the market, rather than the federal government, would decide which commercial use was more efficient. The Commission itself has repeatedly made the same point with regard to the merits of flexible use.²³ It reaffirmed that point in this proceeding when it pledged to design the service rules based on what was technically possible, rather than on its own prediction regarding the ultimate uses of the band. Yet, notwithstanding the mandate of Congress and its own policy, the Commission in this instance has substituted conjecture for economic rationality by determining that only provision of low-power services will constitute efficient use of the commercial 700 MHz spectrum.

The record suggests that far from promoting efficient spectrum use, the Commission's attempt to dictate use of the commercial 700 MHz bands for advanced wireless services will actually be anticompetitive. For example, the Cellular Telecommunications Industry Association points out that in spite of the Commission's assertions to the contrary, the

²² Notice at ¶16 (asserting that Commission sought to establish “rules that are not based on a Commission prediction of how these bands will ultimately be used, but instead reflect a record that enables us to establish maximum practicable flexibility”).

²³ See, e.g., *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, FCC 99-354, 1999 WL 1054886 (rel. Nov. 22, 1999); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2349-50 (1994); *Improving Commission Processes*, 11 FCC Rcd 14006, 14010 (1996).

new 700 MHz band plan leaves only one block capable of supporting 3G wireless services.²⁴ As a result, only one 3G provider will be able to operate in the 700 MHz band in a given area.

Similarly, US West argues that the Commission has unwisely set power limits for the upper and lower commercial 700 MHz bands that may effectively preclude the use of certain equipment.²⁵

These arguments show that the Commission's use of power limits, which are akin to design specifications, to manage spectrum will not result in the market-driven flexible use it seeks.

Interference standards, which are more like performance criteria, are likely to have the opposite and desired effect of promoting market-driven flexible use.

III. THE COMMISSION HAS FAILED TO PROVIDE A REASONED EXPLANATION FOR CREATING GUARD BANDS IN THE COMMERCIAL 700 MHz BANDS

There is another respect in which the Commission has failed to adhere to its own ethos of flexible use. Notwithstanding vigorous opposition by industry, the Commission devoted 6 MHz of spectrum to guard bands to protect adjacent public safety services. The Commission has not explained why guard bands, which by their very nature make it difficult to put spectrum to its highest-value use, advance the stated policy of protecting adjacent public safety licensees from interference. Addressing concerns about interference with public safety operations in the *Reallocation Order*, the Commission itself recognized that "properly crafted technical rules will minimize adjacent channel interference."²⁶ The Commission has offered no reason for reversing that position by adopting guard bands. On the contrary, it would appear that public safety

²⁴ Letter from Thomas E. Wheeler to William E. Kennard, WT Docket No. 99-168 (January 7, 2000).

²⁵ *Petition for Expedited Reconsideration of US West Wireless* at 3.

²⁶ *Reallocation Order* at 22959.

operations can be protected, as they are now, through the enforcement of emissions limits, rather than through the use of inflexible and wasteful guard bands.²⁷

Under these circumstances, Commission precedents demonstrate that there is no justification for the use of guard bands. The Commission itself has noted that “[g]uard bands are spectrally inefficient” and should be used only as a last resort.²⁸ It has specifically rejected the use of guard bands in circumstances where interference to wireless services could be controlled by means of limits on signal levels,²⁹ and circumstances where the proffered justification for guard bands was a “speculative assumption” of adjacent channel interference.³⁰ Similarly, in the MDS context, the Commission has pointed out that careful engineering enables adjacent channel operations to coexist without guard bands.³¹ The Commission has not articulated any reason for reversing the approach outlined in so many previous cases in the present rulemaking.

²⁷ MSTV was among the many commenters who proposed viable approaches to protecting public safety without resorting to guard bands. *See Comments of the Association for Maximum Service Television, Inc.* at 1 (responding to Public Notice, WT Docket 99-168, DA 00-31 (Jan. 7, 2000)). *See also Letter from Ellen P. Goodman to Magalie Roman Salas*, WT Docket No. 99-168 (Jan. 5, 2000); *Letter from Jonathan D. Blake and Ellen P. Goodman to Magalie Roman Salas*, WT Docket No. 99-168 (Dec. 29, 1999); *Letter from Jonathan D. Blake to Magalie Roman Salas*, WT Docket No. 99-168 (Dec. 27, 1999).

²⁸ *Broadcast Corp. of Georgia (WVEU-TV)*, 95 FCC 2d 901, 908 (1984).

²⁹ *Development and Implementation of a Public Safety National Plan and Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821-824/866-869 MHz Bands by the Public Safety Services*, 3 FCC Rcd 5391, 5394 (1988). *See also Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations*, 47 RR 2d 1627 at ¶5 (1980) (holding that “[g]iven the availability of alternative methods for handling interference,” reservation of Channel 69 as a guard band separating UHF television operations from local land mobile radio operations was “unnecessary and inappropriate on operational grounds”).

³⁰ *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112, 19141-42 (1998) (also noting that guard bands “deprive parties the flexibility to design and operate their systems in a manner that best meets their needs”).

³¹ *Amendment of Part 94 of the rules regarding point-to-multipoint use of the 2.5, 10.6, and 18 GHz bands by Private Operational Fixed Microwave licensees; Amendment of Part 1 of the rules concerning the general procedures for filing an application in the Private Operational Fixed Microwave Service*, 3

The decision to adopt guard bands in this proceeding is also unsound as a procedural matter. The Commission has previously ruled that it will not entertain a proposal to adopt guard bands in circumstances where, as here, their adoption would “effectively change the allocation” adopted in previous proceedings.³² Such proposals can be considered only on reconsideration of the initial allocation, not in subsequent phases of the rulemaking.³³ Because the guard bands adopted in this proceeding would effectively change the initial flexible allocation, their adoption was procedurally flawed and should be reconsidered.

IV. THE COMMISSION HAS ADOPTED SIGNAL-TO-UNDESIRED NOISE RATIOS THAT DO NOT PROVIDE ADEQUATE PROTECTION FOR BROADBAND SERVICES SUCH AS BROADCASTING

A close examination of the signal-to-noise ratios (“D/U ratios”) listed in section 27.60 of the rules adopted in this proceeding (“TV/DTV interference protection criteria”) reveals that they were based on land mobile sources rather than on the variety of sources contemplated in this docket. This incorrect assumption has resulted in D/U ratios that may not in fact provide adequate interference protection for co-channel and adjacent channel TV and DTV stations, as well as broadband applications.

MSTV requests that the Commission reconsider its decision with respect to D/U ratios. Specifically, we ask that the Commission revise the D/U ratios to conform with the potential applications of these bands.

FCC Rcd 3532, 3534 (1988).

³² *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, 11 FCC Rcd 13657, 13669-70 (1996).

³³ *Id.*

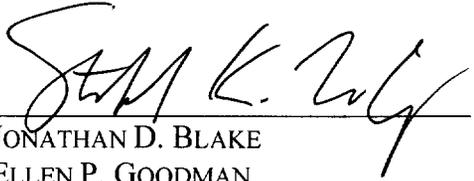
V. CONCLUSION

For the reasons stated herein, MSTV urges the Commission to reconsider the service rules adopted in this proceeding and modify them in a manner that will give both high- and low-power service providers a fair and nondiscriminatory opportunity to use the 746-764 and 776-794 MHz bands to provide a variety of innovative services for the benefit of consumers and the public interest.

Respectfully Submitted,

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