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RECEIVED
MAY 23 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 23, 2000

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

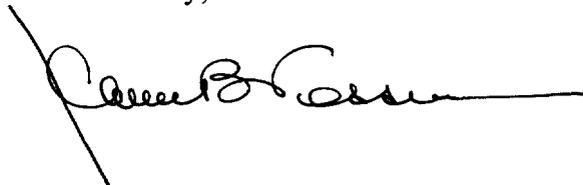
Re: *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions
to Part 27 of the Commission's Rules – WT Docket No. 99-168*

Dear Ms. Salas:

This notice of a written *ex parte* presentation in the above-referenced proceeding is provided for inclusion in the public record in accordance with the Commission's *ex parte* rules.

Please associate the attached letter to Mr. Ari Fitzgerald with the above-captioned proceeding and direct any questions regarding this matter to the undersigned.

Sincerely,



Attachment

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Ex Parte

Mr. Ari Fitzgerald
Legal Advisor
Office of the Chairman
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, D.C. 20554

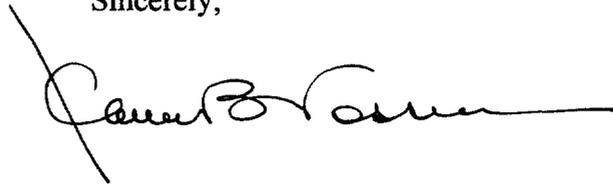
Re: *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions
to Part 27 of the Commission's Rules – WT Docket No. 99-168*

Dear Mr. Fitzgerald:

During our most recent meeting to discuss the forthcoming auction of channels 60-69, you asked for our views on the Commission's authority to order mandatory relocation of broadcast stations. Enclosed is a brief memorandum that responds to that request.

We would be happy to answer any questions this memorandum may engender and also welcome the opportunity to discuss this matter with your successor, Clint Odom.

Sincerely,



Attachment

cc: Adam Krinsky – Office of Commissioner Tristani
Marsha MacBride – Office of Commissioner Powell
Mark Schneider – Office of Commissioner Ness
Bryan Tramont – Office of Commissioner Furchtgott-Roth
Tom Sugrue – Chief, Wireless Telecommunications Bureau
Roy Stewart – Chief, Mass Media Bureau
Dale Hatfield – Chief, Office of Engineering and Technology
Robert Pepper – Chief, Office of Plans and Policy

**COMMISSION'S POWER TO MANDATE THE REMOVAL OF TELEVISION
STATIONS FROM CHANNELS 52 THROUGH 69 IN ADVANCE OF
THE DTV TRANSITION DEADLINE**

This paper reviews the Commission's authority to mandate the migration of television stations from Channels 52-69 to lower television frequencies. Specifically, this paper reviews Section 316 of the Communications Act of 1934, as amended (the "Act"), and the Commission's general rule making authority as the sources of that authority. In addition, insofar as television channels 60 through 69 are involved (the "Channels"), this paper reviews Section 337 of the Act for its potential to limit the Commission's channel migration power.

As explained below, both the Commission's general rule making power and Section 316 of the Act provide the Commission with independent or complementary means of mandatorily migrating such broadcasters to other spectrum. Concerning the Channels, neither Section 337 of the Act, nor any other provision of the Act, specifically forecloses the Commission from taking steps to remove television broadcasting from Channels 60-69 more rapidly than the transition deadline of Section 337 of the Act.¹ Instead, while Section 337 does direct the Commission to auction the reclaimed spectrum, and specifically prohibits the continued use of Channels 60-69 after the digital transition period, Section 337 does not prevent the Commission from taking steps to migrate existing broadcasters prior to the end of the transition period.

A. Section 316 and Rule Making

Section 316 of the Act provides the Commission its authority to mandatorily modify licenses on an *ad hoc* basis. Section 316(a) of the Act permits the Commission to modify "any license or construction permit...if in the judgment of the Commission such action will promote the public interest, convenience and necessity, or the provisions of this Act." 47 U.S.C. § 316(a)(1998). While Section 316 provides the target licensee with the opportunity to participate in the modification decision, a Section 316 modification proceeding may be conducted rapidly, efficiently and generally without the need for an oral hearing.²

¹ Section 337 of the Act applies only to television Channels 60 through 69. Accordingly, it has no direct bearing on efforts to migrate broadcast stations from Channels 52 through 59.

² Prior to 1983, the Commission was required to hold a hearing for each proceeding as a result of the United States Court of Appeals decision in *Western Broadcasting Co. v. FCC*, 674 F.2d 4 (D.C. Cir. 1982). However, in direct response to the *Western* decision, Congress revised Section 316(a) to require a hearing only if there was "substantial and material questions of fact." P.L. 98-214, § 4(a), 97 Stat. 1467 (1983), amending 47 U.S.C. § 316(a).

The Commission frequently uses Section 316 to require licensees to change channels. It is used most often to grant one proposed FM broadcaster the opportunity to move an incumbent FM broadcaster to another channel to allow the proposed FM broadcaster to construct a station that meets the FM broadcast allocation rules.³ The Commission has used Section 316 for other services, such as Multipoint Distribution Service,⁴ Cellular Radio Service,⁵ Fixed-Satellite Service,⁶ and Business Radio Service.⁷ In each case, the central inquiry is into where the public interest lies in the particular case at hand.

When the Commission desires to modify licenses *en masse*, it can do so through the exercise of its general rule making authority.⁸ On numerous occasions, the Commission has used its rule making authority to clear spectrum to permit the use of new technologies. For example, the Commission cleared the 12.2-12.7 GHz band to allow the Direct Broadcast Satellite Service to use this band without interference from pre-existing operational fixed microwave service stations.⁹ The Commission reallocated spectrum to create the Emergency Radio Service in the 453 MHz band.¹⁰ More recently, the Commission reassigned Digital Electronic Message Service licensees from the 18 GHz band to the 24 GHz band responding to national security concerns

³ Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Cross Plains, Texas, *et. al.*) 2000 FCC LEXIS 1418 (March 21, 2000) (ordering the reallocation of 31 FM stations, and modifying relating broadcast licenses pursuant to Section 316(a)).

⁴ *In the Matter of Order to Show Cause to Michiana Metronet, Inc. for Point-to-Point Station WLN896 at Fort Wayne, Indiana and Point-to-Point Station WLK941 at Columbia City, Indiana*, 8 FCC Rcd. 5108 (Chief, Dom. Fac. Div. 1993)(Division issues order to microwave carrier to show cause why it should not move to alternative spectrum to allow an MDS channel 2A station to expand from 4 to 6 MHz bandwidth if MDS station pays the cost of the move).

⁵ *See e.g., Cellular Applications for Unserved Areas*, 6 Comm. Reg. (P&F) 219 (1997) (ordering the modification of authorized cellular system service area boundaries that encroach on neighboring CGSAs).

⁶ *New Skies Satellites, N.V.*, Order and Authorization, 14 FCC Rcd 13003 (1999) (modify the existing earth station licenses, previously authorized for a full ten-year license term, to reflect the three-year license term).

⁷ *License Communications Services, Inc.*, Memorandum Opinion and Order, 1998 FCC LEXIS 3890 (July 30, 1998) (modifying license to specify new operating frequency due to administrative error).

⁸ *Amendment of Part 90 to Create Emergency Radio Service*, 11 FCC Rcd. 1708, 1710 (1996)(a license is not considered modified under Section 316, and subject to Section 316 procedures, when the Commission affects the rights of all licensees of a particular class through rule making)(citing *California Citizens Band Assn. v. United States*, 375 F.2d 43, 50-52 (9th Cir. 1967). *See also Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712, ¶139 (1995) (stating that “the Commission may modify any station license or construction permit if in its judgment such action will promote the public interest, convenience, and necessity, and, . . . such modification may appropriately be accomplished through Notice, and comment rulemaking”).

⁹ *See National Association of Broadcasters v. F.C.C.*, 740 F.2d 1190 (1984)(clearing the Operational Fixed Service operators from the spectrum).

¹⁰ *Amendment of Part 90, supra*, n.5 (permitting existing users the opportunity to find new spectrum, or to terminate service).

raised by the U.S. Government.¹¹ These actions were based, in part, on the Commission's delegated authority to select appropriate spectrum uses, and to prefer one use of the spectrum over others.¹²

B. Section 337

Section 337 of the Act has been reviewed as a potential source of limitations on the Commission's broad channel migration authority because Section 337 directs the Commission's future allocation of Channels 60 through 69.

Section 337 of the Act was added as a result of the passage of the Balanced Budget Act of 1997.¹³ This new provision requires the Commission to reallocate portions of the spectrum used for the Channels to the Public Safety Services and new commercial licenses. Section 337(a)(1) requires that the Commission reserve 24 MHz for public safety services, and Section 337(a)(2) requires the Commission to auction 36 MHz of the spectrum for commercial use.

The Commission conducted a rulemaking to implement Section 337.¹⁴ As adopted, the Commission's rules regarding the auctioning of the Channels call for an auction in 2000, with any spectrum currently utilized by television stations available for use by auction winners upon the termination of the digital television service transition period. *MO&O*, ¶ 10. Section 309(j)(14) of the Act states that the digital television service transition period will end on December 31, 2006, unless extended due to the lack of digital television programming or receivers.

While Section 337 provides for a transition period for broadcasters operating on Channels 60 through 69, it does not provide that the Commission cannot facilitate or cause the more rapid migration of television stations from this spectrum. Moreover, nothing in the legislative history of Section 337 suggests any such limitations on the Commission's regulatory powers. To the contrary, the Commission has already determined that:

the intention of Congress [was] 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 *Amendment of the Commission's Rules to Relocate the Digital Electron Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, 13 FCC Rcd 15147 (1998).

¹² *National Association of Broadcasters*, *supra* n. 9, at 1209.

¹³ 47 U.S.C. § 337 (1998); P.L. No. 105-33, 111 Stat. 251 (1997).

¹⁴ *Reallocation of Television Channel 60-69, the 746-806 MHz Band*, Notice of Proposed Rulemaking, 12 FCC Rcd 14141 (1997)[hereinafter *NPRM*], Report and Order, 12 FCC Rcd 22953 (1997)[hereinafter *R&O*], Memorandum Opinion and Order, 13 FCC Rcd 21578 (1998)[hereinafter *MO&O*].

MO&O, ¶ 10 (emphasis supplied). Thus, the Commission has already found that its acceleration of the reallocation of the spectrum would be consistent with Section 337.¹⁵

C. Conclusions

Section 316 and the Commission's general rule making power provide the Commission with the vehicles to effectuate a program for migrating television broadcast stations from Channel 52-69 at a pace more rapid than the maximum time frame provided in Section 337. No provision of the Act limits this general authority to move forward the date to hasten the introduction of new technologies.

¹⁵ Moreover, in a case like this in which the statute is silent or ambiguous with respect to the specific issue, a reviewing court is directed by the *Chevron* doctrine to uphold the agency's interpretation if the "agency's answer is based upon a permissible construction of the statute." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

Section 309(j)(14) of the Act, which establishes the digital television service transition period, also was reviewed to determine whether it imposes any limits on the FCC's authority to mandate license modifications. Neither Section 309(j)(14), nor its legislative history evinces any such limitation. Section 309(j)(14) requires the Commission to allow broadcasters to retain their analog operations during the transition period, but does not mandate that the broadcaster be allowed to retain the use of any particular analog television channel.