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AUG 16 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
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Service Rules for the 746-764 and 776-994 MHz Bands, and Revisions to Part 27 of the Commission's Rules; Carriage of the Transmissions of Digital Television Broadcast Stations; Review of the Commission's Rules Affecting the Conversion to Digital Television	)	**WT Docket No. 99-168** **CS Docket No. 98-120** **MM Docket No. 00-83**

To: The Commission

COMMENTS

Sonshine Family Television, Inc. ("SFTI"), licensee of television broadcast station WBPH, Channel 60, Bethlehem, Pennsylvania, and permittee of digital television broadcast station WBPH-DT, Channel 59, Bethlehem, through counsel, hereby responds to the FCC's *Further Notice of Proposed Rule Making*, FCC 00-224, released June 30, 2000, in the above-captioned proceeding (the "*FNPRM*").

The *FNPRM* starts from a worthy premise, i.e., the FCC should facilitate the transition to digital television broadcasting through a variety of means, including encouraging television stations on Channels 59-69 to convert to lower channels prior to the deadline for completing the transition to digital television broadcasting. This, presumably, will have the added benefit, at least from the viewpoint of the FCC and the U.S. Treasury, of increasing the total proceeds of the planned auction of licenses for so-called "third-generation" or "3G" wireless communications licenses in the bands from 746-764 and 776-994 MHz, because prospective bidders will have assurance of early access to the spectrum. However, the means proposed in the *FNPRM* for reaching the FCC's voluntary

clearance objective are inadequate to satisfy the legitimate concerns of incumbent channel 60-69 licensees and, therefore, will be ineffective.

SFTI is "doubly interested" in expediting the transition of NTSC broadcast stations to permanent locations in the so-called "core spectrum," Channels 2-51, because both its NTSC and DTV allotments are outside the core; indeed, both allotments are within the band which the FCC is seeking to have cleared in advance of the deadline for completing the DTV transition. Moreover, although WBPH-TV 60 operates on an unreserved channel, SFTI is a not-for-profit corporation supported for the most part by viewer contributions. Thus, negotiated payments from wireless licensees in exchange for early access to the spectrum could represent a useful source of capital necessary to finance the conversion to DTV. Thus, SFTI supports the decision in the *Memorandum Opinion and Order* accompanying the *FNPRM* to countenance voluntary channel clearance agreements between incumbent broadcasters and new wireless licensees, and also the proposal in the *FNPRM* to extend that decision to encompass three-party agreements, where necessary and voluntarily agreed to through arms-length negotiation, to accomodate incumbent broadcasters such as SFTI who do not have a DTV allotment in the core spectrum.

However, the secondary auctions proposed in the *FNPRM* for "facilitating" the transition, particularly the so-called "descending clock" or "Dutch" auction advocated by Spectrum Exchange Group, L.L.C. ("Spectrum Exchange"), violate free market principles and lack sufficient assurances to secure broadcaster participation.[1] The Spectrum Exchange *Petition* starts (Page 6) from a flawed, misleading and value-laden premise, that for new wireless licensees, the spectrum has "value" but for

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[1] *See* Sprectrum Exchange, *Petition for Rule Making* in WT Docket No. 99-168, filed April 24, 2000.

incumbent broadcasters the only issue is the "cost" of transitioning to DTV operation on another channel. A broadcaster's ability to continue a "brand" (developed through the public's association of a station with a particular channel) value. The ability to develop a new brand, on a new channel, over a period of time, through a combination of simulcasting and ancillary programming services, also has value. The ability to recoup capital investment in equipment and programming has value. So does the ability to defer expenses. The ability to reach existing audiences from an existing transmitter site, rather than relocating to a different site with a different service area, also has value. Incumbent broadcasters who are amenable to voluntarily relinquishing their Channel 59-69 allotments have a legitimate right to seek to recover that value -- and not simply a list of itemized costs -- through arms-length negotiations.

The descending clock auction proposed by Spectrum Exchange, however, would circumvent the free market. Its objects are to minimize payments made by wireless licensees to incumbent broadcasters and, concommitantly, maximize the amount bidders are willing to pay for wireless licenses. The proposal is inconsistent with a free market in several ways. First of all, auction stategy would dictate, to some incumbent broadcasters, that they should accept less than the full portion of the value that some wireless licensees would be willing to pay, in order to be assured of receiving at least some compensation. Second, the various stations in a market are not fungible and some stations likely would be compelled to relingquish their existing facilities in exchange for facilities that they would not have agreed to accept in an arms-length negotiation. The existence of a number of "comparable" stations is essential to the Spectrum Exchange proposal but comparability does not necessarily exist in the real world. By way of illustration, in the Philadelphia market, stations are licensed to communities ranging from Reading, Pennsylvania, to Bethlehem, to Atlantic City, New

Jersey and to Wilmington, Delaware. The facilities and transmitter locations of the stations reflect the dispersed nature of the communities in the market. This is equally true of the DTV Table of Allotments if not more so; because of the necessity to make more channel allotments in the already congested northeastern corridor, a large number of DTV allotments in that part of the country are limited by substandard spacings. Thus the existence of a match between a station on Channels 59-69 and a station being cleared through Spectrum Exchange's Dutch auction will be due to coincidence, at best. This would be true even if all stations (including stations below Channel 59) participated in the auction, which is unlikely. Third, as evidenced by Spectrum Exchange's proposed "lone holdout" rule, success of the Dutch auction would be dependent upon, ultimately, coercion rather than voluntary participation, achieved by either enforced acceptance of an un-negotiated clearing price or the threat of enforced acceptance.

For all of those reasons, the Spectrum Exchange proposal should be rejected. The alternative proposal, *FNPRM*, ¶ 96, for a secondary auction of "options" to require incumbent broadcasters to clear existing channel assignments at a set price, is preferable to the Spectrum Exchange proposal, to the extent the "option" alternative permits the incumbent to set the threshold price at which it will be willing to clear. That, however, is not a substitute for negotiation. Once the threshold price has been announced, wireless companies will have little incentive to make substantial bids for the right to exercise the option. The *FNPRM* acknowledges (¶ 101) the possibility of collusion between wireless bidders to minimize the price of options, but no collusion is necessary to cause the price of options to be suppressed. Each wireless bidder need only recognize that its bid must exceed the previous bid by only one dollar (or whatever other minimum increment the FCC might adopt). The *FNPRM* addresses the possible suppression of option bids (by collusion or otherwise) by proposing

that incumbents could bid on their own options. However, because the incumbent could not transfer the price bid for the option to itself, that would be tantamount to forcing the incumbent to choose between (1) a total price for the transfer of spectrum rights that might be less than the maximum a buyer would be willing to pay through an arms length negotiation or (2) no transaction at all.

There are other defects in both auction proposals. For one, these secondary auctions would lock incumbent broadcasters and wireless licensees into transactions at fixed prices without negotiation of other transaction details that necessarily bear on price (e.g., the scheduling and manner of payment). Second, the *FPRNM* does not describe how incumbent broadcasters would be guaranteed payment of the price set by the auction/option. Needless to say, no incumbent broadcaster put to the expense of an early transition to DTV should be required to pursue a defaulting licensee through bankruptcy court.

For all of the above reasons, the secondary auction schemes proposed in the *FNPRM* should not be adopted. It is certainly possible that the lack of a codified scheme for "voluntary" clearance of Channels 59-69 may result in the aggregate bidding for 3G wireless licenses being less than the maximum that might be received if bidders had perfect assurance of access to all of the spectrum on a date certain. But the FCC is not operating in an environment where it is required or should expect to maximize revenue to the federal treasury. Rather, it is operating in an environment where NTSC television stations have been afforded the right (*see*, e.g., 47 U.S.C. § 337(d)(2)) to continue to operate on their assigned channels until December 31, 2006, or such later date as the transition to DTV is substantially complete, lest the public be deprived of over-the-air broadcast service on which it has come to rely. A free market does not mandate or guarantee maximization of benefits to any

particular party. Rather, it allocates benefit among parties based on each party's individual assessment of risks and returns.

If the FCC wants to maximize the likelihood that incumbent licensees will voluntarily enter into channel-clearing agreements with 700 MHz licensees, then it should act promptly to ensure that the ability of incumbent broadcasters to serve the public will not be penalized by a decision to make an early transition to DTV broadcasting. As a first step the FCC should rule, immediately, that DTV-only broadcasters are entitled, under Section 614 of the Communications Act, to mandatory carriage for a single channel of video programming on cable television systems within its local television market, pursuant to Section 76.56(b) of the FCC's Rules.

Such a conclusion is entirely consistent with Section 614 of the Act. No provision of the Act requires the FCC to adopt a special set of rules for cable carriage of DTV signals. To the contrary, the only reference in Section 614 to DTV requires the FCC to ensure carriage of DTV signals by making "necessary" changes in the Rules. 47 U.S.C. § 534(b)(4)(B). No change in the must-carry rules is "necessary" to require carriage of a single channel of video programming. Possible technical issues can be mooted by requiring DTV-only broadcast stations to provide each cable system with a custom-cut receiving antenna and conversion equipment comparable to equipment already used by cable operators to receive signals transmitted in digital format via microwave and fiber optic delivery systems.

Without assurance that cable operators will carry DTV-only stations, the FCC will have no hope of securing agreements by NTSC licensees on Channels 59-69 to voluntarily relinquish their NTSC allotments prior to the conclusion of the transition to DTV. This issue is addressed in the *FNPRM*, but only ambiguously, where the FCC states (¶ 65):

> cable systems are ultimately obligated to accord "must carry" rights to local broadcasters' digital signals. Existing analog stations that return their analog spectrum allocation and convert to digital are entitled to mandatory carriage for their digital signals consistent with applicable statutory and regulatory provisions. . . . [T]o facilitate the continuing availability during the transition of the analog signal of a broadcaster who is party to a voluntary band clearing agreement with new 700 MHZ licensees, such a broadcaster could, in this context and at its own expense, provide its broadcast digital signal in an analog format for carriage on cable systems. In these circumstances, nothing prohibits the cable system from providing such signals in analog format to subscribers, in addition to or in place of the broadcast digital signal, pursuant to an agreement with the broadcaster.

While the *FNPRM* posits the existence, "ultimately," of a right to mandatory carriage for DTV stations that voluntarily relinquish their NTSC allotments, it then implies that such carriage is subject to an "agreement" between the broadcaster and the cable operator. "Ultimately" is not soon enough and far too equivocal. If a broadcaster's ability to deliver its DTV programming to cable subscribers can be held hostage to the necessity of an agreement with the cable operator, than the broadcaster cannot be expected to voluntarily relinquish a frequency for which it has a guarantee of carriage, sometimes secured through years of costly litigation.

No rules that the FCC might adopt regarding voluntary agreements between broadcasters and new 700 MHZ wireless licensees, and no auction system the FCC can devise to facilitate the transfer of spectrum rights, will be effective in securing the early clearance of NTSC stations on Channels 59-69 unless broadcasters can be assured of access to cable subscribers for their primary DTV programming.[2] Even a guarantee of access to cable subscribers, alone, will not be a sufficient incentive. Broadcasters asked to relinquish NTSC allotments on Channels 59-69 must be able to control the timing of the conversion of their analog signals to digital; when a broadcaster provides

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[2] SFTI operates in the Philadelphia local television market. In the Philadelphia market, cable reaches, typically, 75-80 percent, and in some counties more than 90 percent, of all television households.

the necessary reception and conversion equipment, that event should trigger a fixed deadline for the cable operator to commence carriage of the station's DTV video programming, on the same cable channel on which the station has theretofore been carried by the cable system.

Broadcaster willingness to enter into voluntary channel-clearing agreements will also be dependent on the FCC's commitment to vigorous enforcement of its must-carry rules. If broadcasters are to voluntarily relinquish their analog spectrum, the FCC must explicitly state that prior decisions enforcing must-carry rights for their NTSC stations are *res judicata* when an incumbent broadcaster making an early transition to DTV-only broadcasting asserts a right to carriage of DTV video programming. Where must-carry rights have not previously been adjudicated, cable operators must not be permitted to avoid compliance by filing frivolous motions to stay the enforcement of carriage orders or to ignore carriage obligations pending action on petitions for reconsideration. Further, the FCC must make clear that willful violations of orders enforcing must-carry rights will result in the prompt imposition of monetary forfeitures sufficiently substantial to deter cable operators from ignoring their must-carry obligations.

To the extent the FCC is able, by assuring cable carriage for DTV-only stations, to encourage broadcasters, through voluntary agreements, to make the conversion to DTV prior to the end of the scheduled transition period, it will provide additional incentive for consumers, particularly those who rely on off-air reception of broadcast signals, to adopt DTV reception technology. Such assurances of cable carriage, therefore, will advance not only the FCC's goals in this proceeding, but also the prospects for a timely transition of all NTSC stations to DTV. At the same, to the extent that the FCC is able to encourage other NTSC stations -- those below Channel 59 -- to commence DTV broadcasts, including the broadcast of original programming for DTV -- it will also encourage

incumbent licensees on Channels 59-69 to voluntarily relinquish their existing allotments. To that end, the FCC must expedite the adoption of rules for mandatory cable carriage of DTV stations' full signal, not merely a single channel. Assured carriage of a single channel of DTV programming is a matter of survival for Channel 59-69 licensees asked to relinquish their existing channel assignments; assured carriage of the full DTV signal of all stations is necessary for the public and broadcasters to realize the benefits of the conversion to DTV. Thus, as a second step, the FCC should expeditiously complete its proceeding to adopt mandatory carriage rules for all DTV signals and attend, in the words of Commissioner Ness's Separate Staement, to all of "the crucial issues surrounding the transition of analog stations to the digital age." If the FCC acts to advance the objective of completing the transition of all television stations to DTV broadcasting, then it will also expedite the clearance of Channels 59-69 through voluntary, arms-length agreements between incumbent broadcasters and new wireless licensees.

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August 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Comments to be served by first class United States mail, postage prepaid, this 16th day of August 2000, on Peter Cramton, Chairman, Spectrum Exchange Group, LLC, 2920 Garfield Terrace, NW, Washington, DC 20008.

J. Geoffrey Bentley