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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 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 99-168
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television	)	MM Docket No. 00-39

TO: The Commission

COMMENTS OF THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

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Summary

On the cusp of the auction of 36 MHz of spectrum corresponding with television channels 60-62 and 65-67, the Commission asked for suggestions on how it might facilitate private negotiations between broadcasters and new entrants to reduce broadcast use of the spectrum in the near term. The Commission has already said that it will, in many cases, approve voluntary broadcaster decisions to reduce or cease service even though that might cost communities valued television service (or the prospect of a free, over-the-air digital service). Whatever else the Commission may consider doing, there should be no mistake about two things:

1. Moving broadcasters out of channels 60-69 early does not speed the transition to DTV even if it reduces analog service. The problem with the DTV transition is not that broadcasters are not transmitting digital signals. The problem is that there are too many obstacles between those signals and the consumers who must access them in order to reduce reliance on analog television.

2. There is no way to relocate broadcasters from channels 60-69 to lower channels during the transition to DTV without a heavy service penalty. That penalty should be borne only by those stations that agree to absorb it and should not be allowed to impact the coverage and service of licensees that are not party to voluntary relocation agreements. The Commission ought to be finding ways to expand and promote the availability of DTV service, not to limit its future.

When Congress directed the Commission to auction the 36 MHz "early" (that is, when the DTV transition was just beginning), there was little doubt that the value and utility of the spectrum to new entrants would be significantly reduced by the incumbency of broadcast operations. Congress was willing to sacrifice auction receipts in order to hasten the auctions *and* preserve the public's television service. Thus, it ordered the FCC to allow broadcasters to continue operations without disruption until the end of the transition.

It is reasonable for the Commission to try to make the reallocated spectrum as useful and valuable as possible as soon as possible. It is thus reasonable to remove unnecessary regulatory obstacles to the conclusion of voluntary private deals between broadcasters and new entrants that would free up spectrum for the newcomers. Interference protections are not unnecessary obstacles. We credit the Commission with not proposing to reduce existing interference protections and urge it to clarify one critical point. Before assessing individual voluntary agreements to relocate a broadcast facility from a channel 60-69 frequency to core spectrum, the Commission should clarify that it will not allow *any* new interference to existing or planned facilities.

If the Commission is as interested as it appears to be in clearing spectrum, it should do the one thing that is within its power to free analog channels. It should issue rules that provide for effective consumer access through cable to DTV signals: digital cable carriage and compatibility rules that make effective and fair cable transmission of DTV signals to consumer equipment something that happens tomorrow, not 5-10 years from now.

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TO: The Commission

COMMENTS OF THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

I. Introduction

The Association for Maximum Service Television, Inc. ("MSTV")[1] files these comments in response to the Commission's *Further Notice of Proposed Rulemaking* in the above-captioned matter ("*Further Notice*").[2] Since issuing the *Further Notice*, the Commission has decided to

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[1] MSTV represents nearly 425 local television stations on technical issues relating to analog and digital television services. It played a central role in developing the methodology for allotting and assigning digital television channels and has worked intensively and consistently for a rational reallocation of television channels 60-69.

[2] *Service Rules for the 746-764 and 776-794 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 and Policies Affecting the Conversion to Digital Television, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* , FCC 00-224, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-83 (adopted June 22, 2000). The Memorandum Opinion and Order portion will be referred to as the "*Memorandum Opinion and Order*."

delay the licensing of spectrum in the 747-762 and 777-792 MHz bands (30 MHz of the 36 MHz reallocated for auction to commercial services) for six months, in order, ostensibly, to increase the auction revenues for the spectrum by "facilitating" cessation of broadcast service in the band.[3] This second postponement of the auction reflects the lack of a coherent long-term plan for the reallocated spectrum currently used by broadcasters on channels 60-62 and 65-67 (hereinafter, the "700 MHz band").[4] The fact that the auction of the "guard band" portion of the 700 MHz band (746-747 MHz, 762-764 MHz, 776-777 MHz and 792-794 MHz) will go off on schedule next month highlights the regulatory disarray. If there is a need to establish additional procedures to foster the utility and value of 30 MHz of the 700 MHz band, then the same need exists with respect to the remaining 6 MHz; holding one auction six months before the other can only create confusion (and potential unfairness) among new entrants to the band that all stand to benefit from the relocation of some of the very same broadcast facilities.

The Commission, valiantly trying to respond to various conflicting constituencies, pieced together a 700 MHz band channel plan, service rules and auction schedule that satisfy many in part but do not necessarily result in the best use of the spectrum. In doing so, it rejected spectrum management principles that would have yielded the most efficient and ultimately the

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[3] *See Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until March 6, 2001*, Public Notice FCC 00-282, WT Docket No. 99-168 (July 31, 2000) ("*Auction Extension Order*"). The Public Notice stated that the "Commission will memorialize its views supporting this decision in a separate opinion." As of today, no opinion has been released, but we assume the Commission was responding to the numerous *ex parte* requests it received in late July to postpone the auction so as to make it more valuable to the prospective bidders.

[4] This second extension puts the auction beyond the congressionally set deadline of September 30, 2000, for depositing of the auction proceeds. *See* Pub. L. No. 106-113, §213, 113 Stat. 1501, Appendix E (1999). Commissioners Furchtgott-Roth and Tristani dissented from the decision to extend the auction date, stating that the action "is in stark disregard of this agency's statutory obligation." *Auction Extension Order, Dissenting Statement of Commissioners Furchtgott-Roth and Tristani.*

most valuable, use of the spectrum for broadband services.[5] What the Commission needs to do now is focus on the relationship between use of the 700 MHz band and the DTV transition and take the regulatory action necessary to speed comprehensively and systematically the DTV transition.

Specifically, the Commission should take no action that would compromise the growth and robustness of the public's free over-the-air television service either now or in the future. We accept that there may be voluntary agreements that would result in a loss of television service. But the Commission should minimize that loss and reject private agreements that would result in any new interference to, or reduction of service from, broadcasters that do not voluntarily participate in band-clearing arrangements. Certainly, the possibilities for new services in the 700 MHz band are rich. Just as certainly, broadcasters share the interests of potential 700 MHz band bidders in a speedy end to analog television service and relocation of the digital stations in channels 60-69 -- but not at the expense of continued and future television service. As we conclude in these comments, and have urged in dozens of filings over the past two years, there are concrete steps the Commission ought to be taking to speed the DTV transition and free the

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[5] *See* Comments filed in response to the *Sixth Further Notice of Proposed Rulemaking* in MM Docket No. 87-268 (the DTV proceeding), 11 FCC Rcd 10968 (1996), and other related Commission documents in that docket (*e.g.*, Broadcasters' Comments on the Sixth Notice of Proposed Rulemaking in MM Docket No. 87-268 (Nov. 22, 1996); Broadcasters' Caucus Reply to Comments on the Sixth Notice of Proposed Rulemaking in MM Docket No. 87-268 (Jan. 24, 1997); Petition for Clarification and Partial Reconsideration of the Fifth and Sixth Reports and Orders Submitted by MSTV, the Broadcasters Caucus and Other Broadcasters in MM Docket No. 87-268 (June 13, 1997)); *see also* MSTV comments filed in *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, ET Docket No. 97-157 on Sept. 15, 1997, and Oct. 14, 1997, and MSTV comments filed in the above-captioned docket WT Docket No. 99-168 on July 19, 1999, and Aug. 13, 1999.

analog spectrum for other uses.[6] What is truly needed to enhance the value of the 700 MHz band is a systematic approach to facilitate consumer access to DTV.

II. The Degree To Which The Value Of The 700 MHz Spectrum To New Entrants Is Compromised By Broadcast Incumbents Was A Known Quantity Years Ago And Was A Risk Congress Accepted In Ordering The FCC To Protect Television Service.

In the past nine months, it has become apparent to potential 700 MHz band bidders that the existence of incumbent broadcasters substantially reduces the utility of the 700 MHz band for other services. Broadcasters highlighted this problem years ago and both the Commission and Congress knew about it. Notwithstanding the difference in value and utility between clear spectrum that could have been assigned at the end of the DTV transition and encumbered spectrum that could be assigned during it, Congress ordered that the encumbered spectrum be

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[6] *See, e.g.*, Comments of MSTV in CS Docket No. 98-120 (Oct. 13, 1998) ("*MSTV DTV Cable Carriage Comments*"); Reply Comments of MSTV in CS Docket No. 98-120 (Dec. 22, 1998) ("*MSTV DTV Cable Carriage Reply Comments*"); *see also* Reply Comments of MSTV in MM Docket No. 00-39 (June 16, 2000); *Ex Parte* Notification of MSTV in CS Docket No. 98-120 (Mar. 29, 2000); Letter from Margita E. White, President, MSTV, *et. al.*, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (Feb. 22, 2000); Letter from Members of MSTV Board of Directors to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (Nov. 9, 1999); Letter from Margita E. White, President, MSTV, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (July 22, 1999); Filings in the FCC's DTV compatibility and interoperability proceeding, CS Docket No. 98-120 (*e.g.*, Reply Comments of NAB and MSTV in PP Docket No. 00-67 (June 8, 2000); Comments of NAB and MSTV in PP Docket No. 00-67 (May 24, 2000); Letter from Margita E. White, President, MSTV, to William E. Kennard, Chairman, FCC, (Mar. 6, 2000); Letter from Edward O. Fritts, NAB, and Margita E. White, President, MSTV, to Commissioner Ness (Dec. 20, 1999); Letter from Margita E. White, President, MSTV, to W.J. Tauzin, Chairman, House Subcomm. on Telecommunications, Trade and Consumer Protection (Dec. 2, 1999); MSTV Report on DTV Implementation in CS Docket No. 98-120 (Oct. 8, 1999); Letter from Margita E. White, President, MSTV, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (July 22, 1999); Statement of Victor Tawil, MSTV, May 20 FCC Roundtable on DTV Compatibility with Cable and Other Video Distribution Services (May 20, 1999); Letter from Margita E. White, President, MSTV, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (Nov. 10, 1998); Comments of MSTV in CS Docket No. 97-80 (Sept. 23, 1998); Letter from Victor Tawil, MSTV, to William E. Kennard, Chairman, FCC in CS Docket No. 98-120 (Sept. 16, 1998); Letter from Victor Tawil, MSTV, and Henry L. Baumann, NAB, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (June 4, 1998); *Ex* (continued...)

auctioned early. It also ordered that broadcasters be left undisturbed in the spectrum through the end of the transition.[7] In short, Congress opted for a scheme that involved various trade-offs which the Commission should preserve.

In 1996, MSTV, along with other broadcasters, submitted a report by MIT Professor Jerry Hausman in response to the Commission's *Sixth Notice of Proposed Rulemaking* in the DTV proceeding.[8] This report illustrated how little usable spectrum would be available in the major markets if part or all of channels 60-69 were auctioned before broadcasters had transitioned to DTV and moved to lower channels. The Hausman Report compared the estimated value of an early auction of the DTV "holes" in channels 60-69 with an auction of the entire band after the transition. By extrapolating from PCS auctions, it found that the market places a significantly higher value on larger blocks of contiguous spectrum. The Report estimated that holding the auctions for channels 60-69 at the end of the DTV transition would lead to 2.3 to 10.6 times more revenue because of the ability to sell large spectrum blocks after the transition was complete. The Congressional Budget Office concurred with the basic thrust of this Report when, in 1997, it "scored" the channel 60-69 spectrum at a relatively low dollar figure to reflect the broadcasters' incumbency.[9] With the CBO estimates and the FCC record in hand, Congress nevertheless opted for early auctions. It also made the determination that

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Parte Notice of MSTV and NAB in CS Docket No. 97-80 (May 28, 1998); *Ex Parte* Notice of MSTV in CS Docket No. 97-80 (May 21, 1998)).

[7] *See* 47 U.S.C. § 337(d)(2) (stating that the Commission shall establish "restrictions necessary to protect full-service analog television service and digital television service during a transition to digital television service").

[8] *See Broadcasters' Comments on the Sixth Notice of Proposed Rulemaking*, Appendix D1, in MM Docket No. 87-268 (Nov. 22, 1996) ("Hausman Report").

[9] *See* Congressional Budget Office, *Reducing the Deficit: Spending and Revenue Options*, Part 15, Ch. 4 (Mar. 1997).

television service should not be compromised – not for public safety entrants and not for commercial entrants – during the transition to DTV. Television broadcasters incumbent in the 700 MHz band were to be allowed to retain their channels until they were relocated as part of the orderly repacking process that accompanies the end of the transition. In other words, Congress accepted a reduction in auction revenue for the sake of other goals.

Within the constraints of the congressionally-mandated auction rules and schedule, there were band plans that could have been adopted to free up more usable spectrum for the 700 MHz band new entrants. For example, in comments on the proposed 700 MHz band service rules, MSTV suggested that allocating a single contiguous 36 MHz block rather than separated paired channels would mitigate the "Swiss-cheese" effect that is now dogging the auction of the spectrum.[10] The Commission rejected this proposal in favor of a traditional paired approach tailored to narrowband services, again presumably knowing the costs its plan would entail in terms of foregone revenue.

The Commission is now trying, understandably, to reduce the economic consequences of earlier decisions by "facilitating" the early retirement or relocation of broadcast stations. The problem, as the Commission understands, is that there is no painless way to effectuate pre-transition broadcast facility moves. Although some may euphemistically refer to "relocation" of broadcasters, the fact is, as discussed below, that most broadcasters operating in the 700 MHz band cannot practically be relocated -- not at all or not without tremendous disruption to existing and future service. Instead, these stations would have to go off the air (or never go on the air, as the case may be). At issue here is not the relocation of incumbents in the fashion of microwave

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[10] *See, e.g.*, *Comments of MSTV and NAB* in ET Docket No. 97-157 (Sept. 15, 1997).

or broadcast auxiliary service incumbents in the PCS and 2 GHz bands, where incumbents are relocated to comparable facilities in "new" spectrum or new channels.[11] The relocation of incumbent broadcasters before the end of the transition can only come at significant cost to the public's television service.

III. The Commission Should Manage Spectrum, Not Markets.

The Commission has already taken a number of aggressive steps to help clear the 700 MHz band for the upcoming auction. First, it decided to "consider specific regulatory requests needed to implement" agreements between incumbents and new licensees in the 700 MHz Band.[12] Then it adopted a presumption in its *Memorandum Opinion and Order* that the public is better served by loss of its television service than by delay in receiving new 700 MHz services.[13] The adoption of this presumption was a dramatic shift away from a half-century of Commission

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[11] *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9 ("*Emerging Technologies*"), *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992); *Emerging Technologies, Second Report and Order*, 8 FCC Rcd 6495 (1993); *Emerging Technologies, Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993); *Emerging Technologies, Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994); *Emerging Technologies, Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994), *aff'd Association of Pub. Safety Communications Officials- Int'l v. FCC*, 76 F.3d 395 (D.C. Cir. 1996); *In re Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, *First Report and Order/Further Notice*, 12 FCC Rcd 7388 (1997); *In re Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite* Service, ET Docket No. 95-18, *Second Report and Order and Second Memorandum Opinion and Order* (rel. July 3, 2000).

[12] *In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, First Report and Order*, WT Docket No. 99-168, FCC 00-5, ¶ 145 (rel. Jan. 7, 2000). Presumably, such agreements would involve broadcast licensees going off the air, converting to DTV-only transmission far before the end of the transition, accepting high levels of interference and thereby reducing service, or reducing power and thereby reducing service.

[13] *See Memorandum Opinion and Order* ¶¶ 60-62.

and judicial precedent that the loss of television service is *prima facie* **not** in the public interest.[14] This new presumption was not in keeping with precedent and it is questionable whether it is consistent with the congressional directive to leave television services intact during the transition to DTV. This presumption would have particularly negative consequences if the Commission now adopted band-clearing "facilitation" mechanisms that would encourage degradation of television service in channels 2-59.

The question raised in the *Further Notice* is whether the Commission has done enough to facilitate voluntary relocation agreements. We believe that it has. The Commission does not have a role to play as a deal-broker. Its role should be limited to post-transition approvals. If, as the Commission believes, the most valued use of the 700 MHz band is for non-broadcast services, then market theory would predict that the new entrants would be able to buy out broadcasters who presumably value the spectrum less. The Commission, and others, raise the potential problem of broadcaster hold-outs who might insist on a premium in order to optimize the spectrum for new entrants. While this possibility exists, it is minimized by the 2006 deadline for the end of the DTV transition and relocation of incumbent broadcasters. Moreover, it is a

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[14] *See, e.g. Hall v. FCC*, 237 F.2d 567, 572 (D.C. Cir. 1956); *New Jersey Pub. Broad. Auth.*, 74 FCC 2d 602, 605 (1979). The removal of service from an area has been held to have "grave consequences," *KTVO, Inc.* 57 Rad. Reg. 2d 648, 650 (1984), that may require "extraordinary justification." *Sarkes Tarzian, Inc.*, 6 FCC Rcd 2465, 2465 (1991). The loss of free broadcast television service to even a relatively small number of viewers has been definitive in Commission station relocation, deintermixture, and maximum spacing decisions. For example, the Commission has frequently denied applications to relocate transmitters even though far more viewers would have gained service than would have lost service. *See, e.g.*, *West Michigan Telecasters, Inc.*, 460 F.2d 883 (D.C. Cir. 1972); *Carolina Christian Broadcasting, Inc.*, 48 Rad. Reg. 2d 355 (1980); *WLCY-TV*, 16 FCC 2d 506 (1969); *Central Coast Television*, 14 FCC 2d 985 (1968).

risk often faced by those who would aggregate and clear spectrum and it is a problem that many have overcome.[15]

As the Commission heard in testimony before its hearing on secondary spectrum markets, its job is to remove obstacles to the conclusion of private spectrum deals (such as allowing a broadcaster to maintain its DTV license even if it vacates its NTSC channel and vice versa), not to make markets or intervene in them.[16] Commissioner Ness made a similar observation in her Separate Statement accompanying the *Memorandum Opinion and Order*, stating that the Commission should intervene in relocation negotiations "only if it is essential to eliminate a regulatory barrier, to fulfill our licensing responsibility, or to respond to failures in the marketplace that are manifest and supported by record evidence."[17] Taking action that would countenance anything other than purely voluntary agreements -- such as allowing disruption to non-participating broadcasters' television service or imposing any type of mandatory relocation policy -- would amount to an abdication of the Commission's spectrum management function and a contravention of the statutory DTV transition scheme.

Some of the aggressive measures that have been proposed to the Commission to "facilitate" the early clearing of broadcast licensees from the 700 MHz band risk elevating the goal of revenue maximization over wise spectrum management.[18] As the Commission's

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[15] For example, Nextel and the MMDS licensees have been successful in aggregating spectrum by leasing spectrum or buying the licenses from thousands of licensees.

[16] *See, e.g.* Testimony of Morgan O'Brien, Vice Chairman, Nextel Communications, Public Forum on Facilitating Secondary Markets in Radio Spectrum (Apr. 13, 2000).

[17] *Separate Statement of Commissioner Ness to Memorandum Opinion and Order and Further Notice* (June 30, 2000).

[18] Critics of our position will claim that early and systematic clearing of television incumbents can be defended as a way to speed the provision of new services, not as a way to maximize auction revenues. The problem with this argument is that the Commission, in its allocation decision and in its establishment (continued...)

statutory auction authority makes quite clear, the goal of FCC license auctions is not to raise money for the Treasury.[19] Nor is the goal of auction rules to flush out the most valuable use of the spectrum – a determination that should be made at the allocation, not at the licensing stage. Members of Congress have expressed their concern that the Commission jeopardizes its spectrum management function by allocating spectrum and establishing service rules with revenue maximization in mind.[20] Such jeopardy would indeed exist if the Commission were to adopt policies or procedures that compromised the vitality of existing television service and the potential of DTV forever for the sake of auction revenues in March.

IV. The Band-Clearing Proposals The Commission Is Considering Could Fatally Compromise Both Digital And Analog Television Service.

A. The DTV Table May Not Support Channel Exchanges Without Severe Coverage And Interference Penalties On Non-Participating Broadcasters.

MSTV appreciates that the Commission appears only to be considering "voluntary" arrangements between television incumbents and new entrants in the 700 MHz Band.[21] It must take care that those voluntary arrangement do not have untoward spill-over effects. As the Commission knows well, the DTV Table was constructed with exquisite care to preserve existing analog service while creating DTV stations that can more or less replicate the analog service.

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of service rules, has already made its public interest determination, within the constraints of its authority, about what types of services ought to operate in the 700 MHz band. At issue now is the timing of when those services can be auctioned. The Commission lacks the authority to change the timing constraints established by Congress that are based on the pace of the DTV transition.

[19] *See* 47 U.S.C. § 309(j)(7)(A) (explaining that in identifying licenses to be auctioned and in prescribing auction rules, the Commission "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding").

[20] *See. e.g.*, Letter from Thomas J. Bliley, Jr., Chairman, House Commerce Comm., and John D. Dingell, Ranking Member, House Commerce Comm., to Newt Gingrich, Speaker, U.S. House of Representatives, *et. al.* (Sept. 18, 1996).

[21] *See. e.g.*, *Further Notice* ¶ 82.

Whatever mechanism the Commission adopts to facilitate early clearing of the 700 MHz band, it should allow no new involuntary interference to the facilities of existing licensees. This includes not allowing broadcasters that cut deals to relocate into the lower band to use the *de minimis* interference allowance. This allowance should be reserved for licensees attempting to expand, not contract service. In general, the Commission should seek ways in the core spectrum to encourage the growth of DTV with new licensees and larger service areas, not to use the spectrum to support early relocation at the expense of the public's DTV and analog television service.

The Commission, over a ten year process of rulemakings crafted many compromises, between UHF and VHF stations, between applicants and licensees, between the DTV and analog services, and between replicating and maximizing service, just to name a few. It assigned specific DTV channels to specific licensees in order to maximize service and minimize interference. The soundness of the balance so struck was recently upheld by the Court of Appeals for the District of Columbia Circuit in a case in which MSTV intervened on the side of the Commission.[22] That is not to say that the DTV Table will not evolve or that DTV channel assignments will not change in certain areas. But the fact is that there cannot be significant changes in the most congested parts of the country – those areas where there are the highest concentrations of 700 MHz band broadcast licensees (*e.g.*, in southern California) – before the end of the transition. There are simply too many stations and not enough spectrum, and the fit of DTV stations into an NTSC environment is extremely tight. As the Commission itself noted, it "attempted to minimize to the extent possible the number of out-of-core DTV allotments in

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[22] *See Community Television, Inc. v. FCC*, No. 98-1106, 2000 U.S. App. LEXIS 15689 (D.C. Cir. July 7, 2000).

developing the DTV Table."[23] Most especially, the "DTV Table of Allotments minimize[d] the use of channels 60-69 to facilitate [the] early recovery of this portion of the spectrum."[24]

Thus, channels 60-69 were allotted to broadcasters only in the most severely spectrum-congested regions of the country. The Commission "allotted spectrum between channels 60 and 69 to the fewest number of broadcasters. . . . Had other channels been available, they would have been allotted to these broadcasters."[25] The bottom line is that the only reason broadcasters have DTV channels in the 700 MHz band is that there was no other place to put them. In the congested markets, the same is true for the NTSC channels. The only way to effect a substantial clearing of the 700 MHz band before the end of the DTV transition is to reduce service by eliminating broadcast outlets and local service. To the extent that broadcasters and new entrants voluntarily agree to clear portions of the 700 MHz band early, the Commission ought to take action that mitigates, not encourages, loss of television service.

The band-clearing proposals before the Commission ignore some of the most basic features and constraints of the television tables of allotments (analog and digital). For example, three-way clearing arrangements, along the lines laid out in the *Further Notice*,[26] only work if

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[23] *In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, 7440 (1998) ("*Allotment Reconsideration*"); *see also Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, 12 FCC Rcd 14588, 14624 (1997) ("*DTV Sixth R&O*") ("[W]e have developed a Table of DTV Allotments that attempts to provide all eligible broadcasters with a DTV allotment within channels 2-51 without bias against the use of any channel in this band. Where necessary, however, channels outside this region are also used.").

[24] *DTV Sixth R&O*, 12 FCC Rcd at 14626.

[25] *In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, 6891-92 (1998).

[26] *See Further Notice* ¶¶ 87-92.

analog and digital and higher and lower channels are essentially fungible. The proposal of the Spectrum Exchange Group, L.L.C. assumes, for example, that if a digital channel 32 is "made available" (for example, by the licensee's delaying the introduction of digital services), then an analog licensee on channel 62 can be relocated to that channel. The assumptions (based on engineering fact) underlying the DTV Table of Allotments, however, were that channels are not fungible. Channel 32 was assigned to a specific licensee because that was the channel that could replicate that licensee's analog coverage given the existing transmitter site, service area, and perhaps even analog channel number of that licensee (*e.g.*, the fact that it is adjacent to channel 32).[27] The analog licensee on channel 62, by contrast, might well be operating at an entirely different site, might have a very differently shaped service area, and obviously is operating on a different analog channel. Moreover, the operation of analog, rather than digital, signals on channel 32 might make it entirely unusable (since analog operations cause more interference and are more vulnerable to interference than are digital operations).

What, then, happens when the channel 62 analog licensee agrees to vacate its channel? If the analog licensee simply goes off the air (or never goes on the air), the public in that community loses a broadcast outlet. If the analog licensee moves to digital channel 32, there are at least three consequences. First, the public loses the digital service that was or will be provided by DTV channel 32 for the short or long term. The *Further Notice* assumes that the DTV licensee will be able to switch over from analog to DTV overnight (in fact, broadcasters are finding that it will take years of experience with DTV to perfect the systems, coordinate between

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[27] The table assigned DTV channels adjacent to the licensees' analog channels to provide for collocation and thereby avoid destructive interference to the viewing public. *See DTV Sixth R&O,* 12 FCC Rcd. at 14676 ("[I]n those cases where it is necessary to use adjacent channels in the same area, the Table pairs and co-locates adjacent NTSC and DTV channels to the extent possible.").

the studio and transmission facilities, and identify interferors and interferees). Even if it can, such a switch-over creates complications not addressed in the *Further Notice,* such as how the statutory definition of the "end of the transition" can be met.[28] Second, the operation of analog channel 62 on digital channel 32 will likely impact the channel 62 viewers, as the *Further Notice* suggests,[29] many of whom might lose service because the Grade B contour of channel 62 cannot fit within the DTV contour of channel 32. Third, the ripple effects of interference could extend to the viewers of many of the stations in the market, as well as to those of stations in adjacent markets, as service contours are reduced to accommodate the analog signal. In sum, three-way band-clearing proposals are immensely complex. As discussed below, any such arrangement should not be permitted to have spill-over effects.

B. Relocation Arrangements Should Be Subject To A "No New" Interference Test For Non-Participating Broadcasters.

Voluntary agreements between a willing buyer and a willing seller must not have any adverse impact on licensees not party to the agreement.[30] That is, no increased interference or loss of television service should result from any voluntary relocation agreement except that which is accepted by the contracting broadcast licensee(s). Even as to this interference or loss of television service, the Commission should stringently adhere to the public interest criteria laid out in the *Memorandum Opinion and Order* before approving such an agreement.[31]

The Commission's rules currently state that any negotiated agreement between

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[28] That definition requires that the public be able to receive all four major network broadcast stations in digital form before it loses analog service. *See* 47 U.S.C. §309(j)(14)(b). If the channel 32 licensee is one such station, then there is no clear deadline on which the switch from analog to digital should occur.

[29] *See Further Notice* ¶ 91.

[30] MSTV has not opposed truly and entirely voluntary relocation agreements.

two DTV broadcasters to accept or cause additional interference will be allowed only if it creates no new interference to any other broadcast facility.[32] The same standard should be used in assessing voluntary relocation agreements, whether they are bilateral, three-way, or take some other form. In the spectrum-congested regions where the Commission was forced to make allotments in channels 60-69, stations already are competing to use *de minimis* interference allowances, and many stations will face up to a 10 percent reduction in service population as a result. These areas already suffer from spectrum shortages and excessive interference; there simply is no room and no justification for additional interference losses that are not entirely voluntarily and mutually agreed to.

Accordingly, regardless of the band-clearing mechanism used, stations relocating to the lower television band during the transition should not be permitted to cause *any* new interference to the analog or digital operations of other full power television stations. To the extent that a station's relocation would result in any change in the analog or digital television allotments in the region – either through adding a new allotment or through utilizing different technical parameters than a vacating incumbent station – such relocation should be permitted only where the proposed new operations will result in no new interference to other stations' digital or analog operations.

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[31] *See Memorandum Opinion & Order* ¶¶ 60-62.

[32] *See* 47 C.F.R. § 73.623(c).

C. Inclusion Of Band Clearing Procedures In The Auction Would Be Either Ineffective Or Invalid Without The Proper Procedural Steps.

The *Further Notice* seeks comment on Commission or private actions either before or during the March 700 MHz band auction to bring together buyers and sellers in the band.[33] The proposal of the Spectrum Exchange Group[34] is essentially a three-way clearing proposal with the addition of a pre-auction to facilitate the identification of broadcasters willing to clear. Whether such a pre-auction is conducted by the Commission or by a private party, the problems with three-way clearing proposals and their unintended, and involuntary, effects on the public and other broadcasters are the same. The *Further Notice* seeks comment on whether the Commission has the authority to conduct secondary auctions of the sort Spectrum Exchange proposes – one that involves the offering of options to relocate by incumbent broadcasters.[35] The Commission probably does not have the authority to conduct auctions in which what is being auctioned off is a broadcaster's willingness to relocate rather than an initial license. As the *Further Notice* observes, Section 309(j) gives the Commission another tool with which to conduct its traditional function of assigning initial FCC licenses.[36] However, a broadcaster's desire to be paid to relocate is not an initial license. Furthermore Section 4(i) of the Communications Act, simply says that the Commission "may perform any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions."[37] This provision cannot be read to extend or alter the Commission's express auction authority. If it could be relied upon to support an

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[33] *See Further Notice* ¶ 86.

[34] Spectrum Exchange Group, L.L.C., Petition for Rule Making (filed Apr. 24, 2000).

[35] *See Further Notice* ¶¶ 94-96.

[36] *See id.* ¶ 100.

[37] 47 U.S.C. §154(i).

expanded auction authority, then it could have been relied upon as a primary auction authority (to execute the function of assigning licenses), and Section 309(j) would be extraneous.

It is perhaps less clear whether the Commission has the authority to include in its auction of initial licenses an option price for the relocation of a given incumbent broadcaster. However, conducting such an options auction will be either ineffective or illegal unless the Commission takes a systematic approach to restructuring the DTV Table and provides effective opportunity for notice and comment. The practical problems with the proposal begin with the fact that options prices are generally negotiated prices, not sums that a seller simply throws out and by which it is then bound. But beyond that obvious defect, the proposal will be ineffective to the extent that the Commission expects licensees that would only sell if they could relocate to come up with an option price in complete ignorance of their relocation options.[38] Such broadcasters will not be able to determine the price at which they would vacate channels in the 700 MHz band until they know whether and to which channels their analog or digital operations would be relocated, and what the operational parameters of their stations would be on the new channels. The only way to make this process effective would be for the Commission (i) to adopt a no new interference standard, which will allow broadcasters to make informed judgments about what they would lose in a move or, failing this, (ii) to provide broadcasters in advance of the auction with operating parameters and new channels for prospective moves. The Commission does not have the information to solicit comments on proposed moves and cannot obtain it without first determining which broadcasters are willing to relocate or cease operations. Once it

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[38] In the absence of this information, the only broadcasters likely to participate in an options auction are those that are willing to take a channel off the air permanently. These broadcasters, who are likely few in number, can easily negotiate directly with prospective bidders such that the bidders will have a good idea of the clearance price before they bid.

has this information, it would then have to produce for public comment a revised Table that shows any coverage and interference impacts on existing stations.

V. The Most Effective Regulatory Action The FCC Can Take To Clear The 700 MHz Band Is The Adoption Of Effective Carriage Rules.

The *Further Notice* focuses on voluntary relocation agreements between incumbent broadcasters and new entrants to the 700 MHz band, which we have discussed above. But as Commissioners Ness and Furchtgott-Roth recognize, the key to making the 700 MHz band available to new licensees is *not* through voluntary agreements, which will be *ad hoc* and spotty, but a wholesale clearing of this spectrum the way Congress intended – through a speedy end to the DTV transition.[39] The best way for the Commission to accelerate the resettlement of incumbent broadcasters *en masse* without creating an "undue adverse effect on the public's overall receipt of broadcasting service"[40] is to facilitate consumer access to DTV signals by adopting effective cable carriage and digital interoperability rules that assure the digital cable carriage rights of all DTV stations, including those that relocate from the 700 MHz band.

A. Commission Action To Implement Effective Digital Cable Carriage Rules Is Long Overdue.

The transition to digital television requires the cooperative efforts of broadcasters and the Commission, as well as associated industries like cable and consumer equipment manufacturing. Broadcasters must build digital facilities and procure programming, and the Commission must implement rules that will make DTV signals accessible to viewers. Broadcasters have been doing their part to facilitate the transition and doing it, for the most part,

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[39] *See Separate Statements of Commissioners Ness and Harold Furchtgott-Roth.*

[40] *Memorandum Opinion and Order* ¶ 46.

ahead of schedule.[41] The Commission, however, has been slow to act. In particular, as discussed above, the Commission has failed to adapt digital cable carriage rules that are pre-requisites for a successful and complete DTV transition.[42]

Because almost 70% of the public depends on cable for television service, digital broadcasters are dependent on cable carriage and interoperability between DTV sets and digital cable technologies to reach viewers.[43] The Commission has recognized the nexus between cable carriage rights and a swift and seamless transition to DTV in the *Memorandum Opinion and*

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[41] Although broadcasters are not required to start broadcasting in digital format until 2002, all stations currently broadcasting in NTSC format have applied to construct digital facilities. 147 stations serving 64% of the public are already broadcasting in digital format.

[42] *See, e.g.*, Comments of MSTV in CS Docket No. 98-120 (Oct. 13, 1998) ("*MSTV DTV Cable Carriage Comments*"); Reply Comments of MSTV in CS Docket No. 98-120 (Dec. 22, 1998) ("*MSTV DTV Cable Carriage Reply Comments*"); *see also* Reply Comments of MSTV in MM Docket No. 00-39 (June 16, 2000); *Ex Parte* Notification of MSTV in CS Docket No. 98-120 (Mar. 29, 2000); Letter from Margita E. White, President, MSTV, *et. al.*, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (Feb. 22, 2000); Letter from Members of MSTV Board of Directors to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (Nov. 9, 1999); Letter from Margita E. White, President, MSTV, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (July 22, 1999).

[43] *See, e.g.*, Reply Comments of NAB and MSTV in PP Docket No. 00-67 (June 8, 2000); Comments of NAB and MSTV in PP Docket No. 00-67 (May 24, 2000); Letter from Margita E. White, President, MSTV, to William E. Kennard, Chairman, FCC, (Mar. 6, 2000); Letter from Edward O. Fritts, NAB, and Margita E. White, President, MSTV, to Commissioner Ness (Dec. 20, 1999); Letter from Margita E. White, President, MSTV, to W.J. Tauzin, Chairman, House Subcomm. on Telecommunications, Trade and Consumer Protection (Dec. 2, 1999); MSTV Report on DTV Implementation in CS Docket No. 98-120 (Oct. 8, 1999); Letter from Margita E. White, President, MSTV, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (July 22, 1999); Statement of Victor Tawil, MSTV, May 20 FCC Roundtable on DTV Compatibility with Cable and Other Video Distribution Services (May 20, 1999); *MSTV DTV Cable Carriage Reply Comments*; Letter from Margita E. White, President, MSTV, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (Nov. 10, 1998); *MSTV DTV Cable Carriage Comments*; Comments of MSTV in CS Docket No. 97-80 (Sept. 23, 1998); Letter from Victor Tawil, MSTV, to William E. Kennard, Chairman, FCC in CS Docket No. 98-120 (Sept. 16, 1998); Letter from Victor Tawil, MSTV, and Henry L. Baumann, NAB, to William E. Kennard, Chairman, FCC, in CS Docket No. 98-120 (June 4, 1998); *Ex Parte* Notice of MSTV and NAB in CS Docket No. 97-80 (May 28, 1998); *Ex Parte* Notice of MSTV in CS Docket No. 97-80 (May 21, 1998).

Order, stating that cable systems ultimately must carry broadcasters' DTV signals.[44] The Chairman has echoed this determination on other occasions.[45] This statement, however, presupposes an end to the transition that is nowhere in sight.

What is required is affirmative action that results in digital carriage rules *during* the transition so that cable subscribers (who are the most likely to be early DTV set buyers) can easily access the DTV signals and the end of the transition is drawn within sight.[46] Not only is such action advisable, it is legally required by legislation. The *1992 Cable Act* mandates rules that translate the analog cable carriage rules to a digital environment as soon as there is a DTV transmission standard.[47] The *1997 Budget Act*, which codified the Commission's model for a

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[44] *See Memorandum Opinion and Order* ¶ 65 ("[W]e wish to clarify that cable systems are ultimately obligated to accord 'must carry' rights to local broadcasters' digital signals."). A year ago, the CBO reached the same conclusion. *See* Congressional Budget Office, *Completing the Transition to Digital Television*, at 27-30 (Sept. 1999).

[45] *See, e.g.*, Bill McConnell, *Kennard Backs Digital Carriage*, BROAD. & CABLE, May 22, 2000, at 6 ("Every TV station, including newly allotted outlets, will be guaranteed cable carriage of at least one digital signal when the transition from analog transmission is complete, FCC Chairman William Kennard told a group of broadcasters last week.").

[46] *See MSTV DTV Cable Carriage Comments* at 16-19 (explaining that without digital cable carriage rules in place during the transition, broadcasters will fail to meet the deadline for launching digital service, which will result in a failure to meet the statutory definition of a successful DTV transition); *MSTV DTV Cable Carriage Reply Comments* at 2-8.

[47] Congress, too, has recognized that digital carriage rules are a necessary precondition to the transition to digital television by issuing a legislative mandate to the Commission. In the Cable Act of 1992, Congress directed the Commission to act to ensure the digital carriage rights of broadcasters, requiring that "at such time as the Commission prescribes modification of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards." 47 U.S.C. §534(b)(4)(B). The Commission "prescribe[d] modification of the standards for television broadcast signals" when it issued its *Fifth Report and Order* in the DTV proceeding in 1996. *See In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd 12809 (1997).

swift transition to digital television, makes explicit the expectation that consumers be able to receive DTV signals via cable before the transition can be deemed complete.[48]

More than two years ago, the Commission commenced a proceeding to determine the carriage rights of DTV stations; however, it has yet to issue an order addressing this issue.[49] The Commission must act now to curtail the period of uncertainty broadcasters face with respect to carriage of their digital signals. As explained above, digital carriage rules will facilitate the DTV transition, allowing for the wholesale vacation of the 700 MHz band. MSTV therefore again urges the Commission to move quickly to conclude the digital must carry proceeding.[50] Once broadcasters and new entrants to the 700 MHz band are assured that the DTV signals will be carried in an appropriate fashion on cable, the DTV transition will move forward more quickly and the 700 MHz band will be of more use to its new entrants.

It is notable irony that the Commission, which reveals an unusual willingness to intercede in the private negotiations of parties in the 700 MHz band relocation context, has defended its unwillingness to issue digital cable carriage rules out of deference to the workings of the market. Frankly, the reliance on marketplace forces should be reversed. In relocation contexts, even where it has ordered that one service relocate another, the Commission has stated that it should not and will not meddle in the private negotiations of the parties.[51] The Commission should be

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[48] *See MSTV DTV Cable Carriage Comments* at 18.

[49] *See In re Carriage of the Transmissions of Digital Television Broadcast Stations, Amendment to Part 76 of the Commission's Rules, Notice of Proposed Rulemaking,* 13 FCC Rcd 15092 (1998).

[50] *See supra* note 43.

[51] *See In re Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, Second Report and Order and Second Memorandum Opinion and Order*, ET Docket No. 95-18, at ¶ 45 ("We endeavor to minimize restrictions on relocation negotiations, merely providing an incentive to negotiate to both parties . . . . Outside of these requirements [that the (continued...)

significantly more hesitant to interfere in private market negotiations in the 700 MHz band when no relocation is ordered until the end of the DTV transition. The Commission should put its faith in the marketplace when it comes to the ability of sophisticated bidders to determine how much they ought to pay for encumbered spectrum and how they might reduce those encumbrances. It should not be so believing when it comes to the ability of individual broadcasters to negotiate appropriate digital cable carriage agreements or for the market to force a solution to nagging digital cable compatibility issues. The past two years have taught that the market is not working in those areas.

B. Mandatory Carriage Of A Station's Digital-Only Signal Is Consistent With The Communications Act, And The Commission Should Act Quickly To Issue A Declaratory Ruling Making This Clear.

In addition to adopting general cable carriage rules for digital signals, the Commission should rule on the issue of cable carriage rights for stations broadcasting in digital format only. MSTV strongly urges the Commission to make clear, both in its general digital cable carriage rules and in a declaratory ruling issued pursuant to the recent request by digital-only station WHDT-DT for mandatory carriage of its digital-only signal,[52] that a digital-only station is entitled to mandatory cable carriage of its signal. Clarifying the carriage rights of digital-only signals will provide assurance to analog broadcasters assigned to the 700 MHz band that if they choose to relinquish their analog channels and cease analog broadcasts before the end of the DTV transition, their DTV signals will reach cable subscribers during the transition. As MSTV urged in its comments in the WHDT-DT digital-only signal proceeding and as it has explained in

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incumbents be able to maintain service], we will leave all arrangements to the negotiations of the parties involved.").

great detail before, such a course of action is consistent with current law.[53] In doing so, MSTV has expressed open-mindedness as to measures that would minimize disruptions and accommodate hardship cases for smaller systems in implementing the bedrock carriage principle. Other broadcasters have evidenced a similar flexibility.

Section 614 of the Communications Act clearly contemplates that cable operators must carry the signals of qualified local television broadcast stations, regardless of whether they are transmitted in digital or analog format.[54] Section 614 requires a cable operator to carry "the signals of local commercial television stations,"[55] where a local commercial television station is defined as "any full power television broadcast station, other than a qualified noncommercial educational television station . . . licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system."[56] As MSTV has stated in the digital cable carriage proceeding, all DTV signals can be carried on cable in a way that reduces any additional capacity strains for cable.[57] Of course there is no additional capacity burden whatsoever in the case of a station that ceases analog transmissions before the end of the DTV transition because the DTV

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[52] *See Cable Services Bureau Action: Petition for Declaratory Ruling that Digital Television Stations Have Must Carry Rights*, *Public Notice*, DA 00-1406 (July 3, 2000).

[53] *See* Comments of MSTV in CSR 5562-Z (Aug. 4, 2000); *supra* note 43.

[54] *See MSTV DTV Cable Carriage Comments* at 13; *MSTV Digital Cable Carriage Reply Comments* at 11-12.

[55] Communications Act of 1934 § 614(a) (codified as amended at 47 U.S.C. § 534(a)).

[56] *Id.* § 614(h)(1)(A) (codified as amended at 47 U.S.C. § 534(h)(1)(A)).

[57] *See MSTV Digital Carriage Reply Comments* at 40-41 (explaining that adopting digital must-carry requirements will not overburden cable operators because digital signals will go on-air gradually, because cable system capacity is increasing, and because total must carry requirements can never exceed one-third of a cable operator's capacity); *supra* note 7.

signal would be carried in place of the analog signal. Having already said that post-transition DTV stations are entitled to cable carriage, the Commission needs to go further to address the situations of the transitional DTV-only and the transitional paired DTV and NTSC stations.

VI. The Commission Should Wait At Least Until After The Conclusion Of The 700 MHz Auctions To Make Decisions About How Channels 52-59 Should Be Reallocated And Auctioned.

Congress has directed the Commission to auction the spectrum currently occupied by television broadcast channels 52-59 no later than September 30, 2002.[58] In the *Further Notice*, the Commission asks whether any of the procedures it adopts for 700 MHz auctions should be applied to the auction of channels 52-59.[59] MSTV urges the Commission to wait until after the 700 MHz band auctions are concluded before making decisions about the reallocation and licensing of the spectrum now occupied by channels 52-59.

Making any decisions now about the reallocation and licensing of channels 52-59 would be premature. The procedure the Commission follows when auctioning spectrum consists of two phases: the allocation phase, during which the Commission determines what services will be eligible to use the spectrum, and the assignment phase, during which the Commission devises service rules for the spectrum and designs a competitive bidding system. The reallocation of the 700 MHz band was ordered by Congress in 1997[60] and was implemented by the Commission in 1998,[61] one and a half years before the Commission commenced the licensing phase.[62] It is far

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[58] *See* Communications Act § 309(j)(14)(C)(ii).

[59] *See Further Notice* ¶ 105.

[60] *See* Communications Act §337(a) (as added by the Balanced Budget Act of 1997, Pub.L.No. 105-33, §3004, 111 Stat. 251 (1997)).

[61] *See Reallocation of Television Channels 60-69, the 746-806 MHz Band, Report and Order*, ET Docket No. 97-157, 12 FCC Rcd 22953 (1998); *see also Reallocation of Television Channels 60-69, the 746-806 MHz Band, Memorandum Opinion and Order*, ET Docket No. 97-157, 13 FCC Rcd 21578 (1998).

too early for the Commission to begin considering licensing issues related to channels 52-59 when it has not even begun the allocation phase of the process.

Even if it were not premature to make licensing judgments about channels 52-59, the conclusions that the Commission reaches about facilitating voluntary relocation in the 700 MHz band may be totally inapplicable to channels 52-59. The lower channels are much more densely populated by broadcasters, with over 260 stations, than is the 700 MHz band, with about 70 stations.[63] In addition, if the Commission were to facilitate the relocation of stations from the 700 MHz band to the core spectrum (channels 2-51) before the end of the transition, in addition to licensing new stations (including Class A LPTV licensees), any prospect of relocating licensees in the channels 52-59 spectrum will be even dimmer than are the chances of relocating the 700 MHz incumbents during the transition. The inevitability of interference resulting from relocating the licensees on channels 52-59 could make any procedures the Commission adopts in this proceeding ruinous in the next. For these reasons, MSTV urges the Commission to wait before deciding how to allocate spectrum and conduct the auction for Channels 52-59. This will allow the Commission to apply the experience it gains from the 700 MHz band auctions to the channel 52-59 auction.

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For the foregoing reasons, MSTV urges the Commission to take appropriate steps to speed the DTV transition so that the 700 MHz band can be used more completely by the new entrants. To the extent that the Commission allows or facilitates voluntary agreements to

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[62] *See In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, Notice of Proposed Rulemaking*, 14 FCC Rcd 11006 (1999).

[63] *See* Warren Communications News, Television & Cable Factbook (2000).

relocate incumbent broadcasters from the 700 MHz band, it should not allow any new interference to or loss of service from non-participating broadcast stations. It should also ensure that any new relocation arrangements it is inclined to approve are first subject to effective notice and comment procedures. Finally, the Commission should not make any judgments about how the procedures it adopts in the 700 MHz band auctions will or will not be relevant to the future auction of channels 52-59 – spectrum which has not yet even been reallocated.

Respectfully submitted,

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