

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Service Rules for the 746-764 and 776-794)	
MHz Bands, and Revisions to Part 27 of the)	WT Docket No. 99-168
Commission's Rules)	
)	
Carriage of the Transmissions of Digital)	CS Docket No. 98-120
Television Broadcast Stations)	
)	
Review of the Commission's Rules and)	MM Docket No. 00-39
Policies Affecting the Conversion to Digital)	
Television)	
)	

To: The Commission

REPLY COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

September 15, 2000

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SUMMARY

The FCC can rescue the DTV transition and facilitate 700 MHz band clearing by enforcing full digital mandatory carriage rights. This will immediately benefit those stations that voluntarily choose to terminate analog service in the Channels 59-69 band and rely solely upon digital operations and will encourage all television stations to convert to digital. The public interest benefits of the accelerated introduction of new wireless services and new digital television services which would flow from these actions are inextricably linked. Commenters overwhelmingly agree that band clearing will not occur absent digital must carry. It is clear that a spectrum shortage exists and that the United States must play catch-up in the wireless Internet race. To clear the band, the FCC must act expeditiously and hold the 700 MHz auction at the earliest possible date.

PCC supports a secondary auction structure as proposed by Spectrum Exchange, as well as the use of third-party agreements, because these mechanisms would facilitate band clearing and be completely voluntary. The FCC has little authority to force broadcasters to leave the band, and the agency should refrain from subsidizing new wireless entrants by imposing an artificial cap on relocation costs. Vacating licensees would be accepting significant business risk in prematurely terminating established and reliable analog service. New entrants must fully compensate vacating licensees for bearing this risk.

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To: The Commission

REPLY COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

I. INTRODUCTION.

Paxson Communications Corporation ("PCC") submits herewith its reply in response to comments regarding the *Further Notice of Proposed Rule Making*¹ in the above-referenced proceeding and what steps the FCC should take to facilitate clearing incumbent television broadcasters in the 700 MHz (or Channels 59-69) band that is to be auctioned to wireless providers. PCC raised several important points in its initial

¹ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-39, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-224 (rel. June 30, 2000) ("*Further Notice*").

comments about the potential for early band clearing and stressed that the FCC must consider broader, linked issues, especially the digital television transition:

- PCC states that it was seriously concerned about the DTV transition, which is the genesis of the 700 MHz reallocation. Only the FCC, and not the marketplace, is capable of and authorized to resolve certain important aspects that are stalling the transition: transmission standards, digital must carry, construction permits, and television set interoperability.²
- The 700 MHz auction presents a great opportunity to jump-start the DTV transition. PCC proposes that television broadcasters could enter third party agreements to clear the 700 MHz band by voluntarily terminating analog service on channels 59-69 and operating instead in a DTV format on their allotted DTV channel.³
- The FCC must enforce full digital must carry rights for all television stations for both cable and direct-to-home (“DTH”) satellite providers. Without mandatory carriage of DTV signals, incumbent broadcasters have no incentive to vacate the band. The 1992 Cable Act requires the adoption of digital must carry.⁴
- A timely 700 MHz auction would accelerate the DTV transition, accelerate spectrum availability, and sustain the nation’s prosperity and technological leadership. PCC urged the FCC not to delay the auction any further.⁵
- The FCC should establish a framework to permit a secondary auction that would facilitate voluntary, not mandatory, band clearing.⁶
- A rebuttable presumption that substantial public interest benefits would arise from the proposed band clearing was appropriate but should be presumed under more relaxed circumstances than contemplated.⁷

² PCC Comments at 8-12.

³ *Id.* at 13-16.

⁴ *Id.* at 25-28, 31-41.

⁵ *Id.* at 16-22.

⁶ *Id.* at 22-24.

⁷ *Id.* at 29-30.

Consistent with its initial comments, PCC hereby responds to a variety of points raised by other commenters.

II. ACCELERATED 700 MHZ BAND CLEARING AND DIGITAL MUST CARRY PRESENT INEXTRICABLY LINKED PUBLIC INTEREST BENEFITS.

A. New, Advanced Wireless Services and New, Advanced Digital Television Services are Intertwined.

A clearing of broadcast licensees from the Channels 59-69 band will not occur unless the FCC enforces full digital must carry. Commenters addressing the subject in their August 16, 2000 filings overwhelmingly agree.⁸ The FCC can ensure effective 700 MHz band clearing by permitting analog stations operating on Channels 59-69 to commence digital operations on their DTV channel and to terminate their analog service on a date certain (*i.e.*, by the later of May 1, 2002 or 18 months after receiving a final DTV construction permit), provided there is full digital must carry on all multichannel video providers. MSTV is entirely correct in urging the FCC to “focus on the relationship between the use of the 700 MHz band and the DTV transition and take the regulatory action necessary to speed comprehensively and systematically the DTV transition.”⁹ Such regulatory action, it rightly concluded, was “the adoption of effective [digital] carriage rules.”¹⁰ It would be irrational for a broadcaster to agree to terminate analog operation in the Channels 59-69 band without assurances that viewers could continue

⁸ Association for Maximum Service Television, Inc. (“MSTV”) at 18-24; USA Broadcasting at 7-8; Sinclair at 5; Shop-At-Home at 7; Maranatha at 2; Sonshine Family Television at 7-8; Spectrum Exchange Group at 10.

⁹ MSTV at 3.

¹⁰ *Id.* at 18.

receiving service. As Sinclair noted, relocating licensees to DTV-only operation would result in significant audience loss and substantial economic harm.¹¹

Success of DTV implementation depends on viewers purchasing digital receivers. A massive migration of licensees to solely digital operation creates strong incentives for viewers to purchase DTV receivers. Without full digital must carry, the digital transition will fatally stall; and without early band clearing, the band will be indefinitely encumbered, stifling wireless uses. As Verizon Wireless stated, unless a substantial number of broadcasters are cleared, the 700 MHz band could remain unusable for next generation services for a long time.¹² If the 700 MHz band cannot be cleared with reasonable certainty, prospective wireless providers will not make the necessary massive investment to develop and put in place innovative services. The current proceeding presents an opportunity for the FCC to set the stage for third party agreements among broadcasters and auction bidders to clear the band at a date certain, promote the deployment of valuable new wireless services, salvage the DTV transition, and accelerate the recovery of analog broadcast spectrum.

Accordingly, the FCC must recognize the interdependence of the public interest benefits cited as a basis for its actions in this proceeding: accelerating both the development of wireless Internet services and the transition to digital television service.¹³ Deployment of powerful new wireless services is critical to the nation's

¹¹ Sinclair at 3.

¹² Verizon Wireless at 3.

¹³ *Further Notice* at ¶51.

continued technological superiority and economic prosperity. A successful transition to DTV also means that a new and valuable service can be embraced, bringing new applications of its own.

B. No More Auction Delays.

No further delays for the 700 MHz auction should be allowed. A distinct window exists for clearing the Channels 59-69 band, and PCC completely agrees with Verizon Wireless that the FCC must act expeditiously.¹⁴ As it further noted, there is an undeniable spectrum shortage and the United States is playing catch-up.¹⁵ PCC supports USA Broadcasting's view that there is little incentive for parties to engage in serious negotiation so long as the date for the 700 MHz auction is uncertain.¹⁶ Accordingly, the FCC should hasten, not delay, the deployment of innovative wireless technologies and digital television service.

The longer the auction is delayed, the less incentive broadcasters will have to clear the Channels 59-69 early. The uncertainty of the auction adversely affects broadcasters' business plans and unnecessarily increases their business risk. The DTV construction deadline is fast approaching, and the contemplated efficiencies of substituting digital for analog service will be squandered if vacating licensees cannot learn soon enough what facilities they must operate. For broadcasters to clear early, they must put plans in place soon.

¹⁴ Verizon Wireless at 2.

¹⁵ *Id.* at 1.

¹⁶ USA Broadcasting at 12.

PCC is obliged to note that while 10 wireless providers made the effort to formally ask the FCC to delay the 700 MHz auction beyond the date Congress established, only 2 chose to participate in initial comments in this proceeding – and they only addressed the issue of broadcasters operating in the Channels 59-69 band. Verizon Wireless argued that the FCC should order existing broadcasters to move off the band¹⁷ while Nextel stated that negotiations to clear the band would take place after the 700 MHz auction.¹⁸ PCC has surveyed the major broadcasters in the band and can report that there are no negotiations in progress with potential wireless users. It is obvious that in seeking the auction delay, the wireless bidders have pulled the wool over the FCC's eyes.

C. The DTV Transition Still is Faltering.

Further delays in the 700 MHz auction will mean that DTV slips closer to accurately being defined as a train wreck. Permitting the digital transition to deteriorate further will make salvaging the transition more difficult. Accelerated clearing, however, means a significant number of stations will go digital, giving consumers a new and timely reason to purchase receivers, and it also gives broadcasters strong incentives to educate viewers and promote DTV service.

¹⁷ Verizon Wireless at 4.

¹⁸ Nextel at 3-4.

PCC already identified a number of the well-known DTV transition problems in its initial comments.¹⁹ A set of articles published in BROADCASTING & CABLE in the interim similarly discussed the numerous DTV problems:

- The reliability of over-the-air reception remains in doubt; this is the controversy between 8-VSB and COFDM.
- There are a limited number of tower fabricators and rigging crews. There is a lack of capacity of DTV transmitter manufacturers. There is a lack of capacity of DTV antenna manufacturers. Plus the fight between the industry and Hollywood regarding the right to copyright protection. The FCC has yet to issue some 1000 of the nearly 1600 DTV construction permits to allow broadcasters to gain the needed lead-time.
- Staggering DTV construction costs exceed the valuation of some small market broadcast stations, making financing uncertain and potentially unavailable.
- A lack of digital television sets, their associated cable/satellite compatibility, and copy protection standards is stalling DTV receiver production, delaying consumer purchases and keeping prices high.
- Even simple labeling issues concerning digital sets cannot get solved.²⁰

Yesterday's Commission meeting commenced long-promised DTV/cable compatibility proceedings²¹ and gives PCC hope that the FCC finally will begin to resolve these undermining problems, although the issue of sets capable of over-the-air reception of digital and analog remains unanswered. The FCC's action represents a step in the right direction, but the agency must aggressively continue to eliminate the

¹⁹ PCC Comments at 8-13.

²⁰ Andrew Bowser, *The DTV Waiting Game*, BROADCASTING & CABLE, Sept. 4, 2000, at 42; Bill McConnell, *The Cable Standard*, BROADCASTING & CABLE, Sept. 4, 2000, at 52.

issues relating to DTV transition standards which stand as barriers to DTV's success. PCC remains legitimately concerned that the FCC is unprepared to address DTV problems, as exemplified by its continued delay at commencing these proceedings. The FCC's lack of enthusiasm was reflected in Chairman Kennard's statement last month:

The law put the broadcasters completely in the driver's seat. The broadcasters made a deal with the United States Congress that if you give us this spectrum, we will give the public high definition television. But nobody really said that the American public wanted it or what the business plan was. There were a lot of promises made, but none has been fulfilled.²²

The Chairman's recollection is inaccurate – and worth exploring. It was the Commission, not Congress, that purposefully and presciently adopted a flexible DTV standard, giving digital broadcasters the opportunity to extract more services out of their allotted bandwidth. In 1995, the Commission concluded that “allowing . . . flexibility would increase the ability of broadcasters to compete in an increasingly competitive marketplace, and would allow them to serve the public with new and innovative services.”²³ In November 1995, the Commission-empowered Advisory Committee on Advanced Television Service (ACATS) completed testing on the ATSC DTV Standard, which intentionally incorporated this flexibility as well the capacity for future

²¹ See actions commenced in CS Docket No. 97-80 and PP Docket No. 00-67 at the Commission's Meeting on September 14, 2000.

²² Stephen Labaton, *The Battle of the Bandwidths*, N.Y. TIMES, Aug. 11, 2000, at C1.

²³ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry*, 10 FCC Rcd 10541, 10544 (1995).

improvements.²⁴ Shortly thereafter, instead of requiring high definition television, Congress granted discretion to the FCC to permit digital broadcasters to offer ancillary or supplementary services on their DTV channels if the agency so decided,²⁵ which the Commission, to its credit, then did in adopting the DTV standard.²⁶ Accordingly, the prudent decision to deviate from a high-definition requirement was a deliberate one made by the FCC – not Congress or broadcasters.²⁷

The DTV transition is faltering. No submitted comments hint otherwise. PCC agrees with MSTV that the Commission must focus on the relationship between DTV and the 700 MHz band – and their derived, inextricably linked public interest benefits – if the agency wishes to clear the band early.

III. DIGITAL MUST CARRY IS REQUIRED.

A. The FCC Incorrectly Describes the 1992 Cable Act's Must Carry Provisions in the *Further Notice*.

Commenters overwhelmingly agree that the FCC must enforce full digital must carry if the 700 MHz band is to be cleared.²⁸ Vacating licensees choosing to clear and

²⁴ See MM Docket No. 87-268, *Fifth Further Notice Of Proposed Rule Making*, 11 FCC Rcd 6235 (1996).

²⁵ 47 U.S.C. § 336(a)(2).

²⁶ MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809, ¶¶ 27-36 (1997).

²⁷ Nonetheless, PCC reasonably anticipates that continuing technological improvements will permit broadcasters to offer HDTV and multicasting simultaneously. Accordingly, disagreements over the HDTV/multicasting issue are temporary. Indeed, the FCC set in place strong incentives for broadcasters to pursue such technological improvements by wisely adopting a flexible standard.

²⁸ See *supra* text accompanying note 8.

terminate analog service prior to the close of the digital transition would automatically lose the 30% of viewers which rely on over-the-air service. Without full digital must carry, vacating licensees would lose cable and satellite viewers as well.

The FCC makes an obvious but incomplete statement in the *Further Notice* when it says cable systems ultimately are obliged to carry broadcasters' digital signals.²⁹ That obligation is here and now and immediate, subject only to the broadcaster making the election. It is left to the broadcaster to determine the highest and best use of its signal (analog or digital). It is the station's choice to determine when to request digital must carry in place of analog must carry. Once a station elects must carry over retransmission consent, it has made its election for its analog and digital signal. This is the broadcasters' right.

The FCC goes on in the *Further Notice* to note that when analog spectrum is returned, digital signals are entitled to mandatory carriage.³⁰ This ignores the broadcasters' legal right in the 1992 Cable Act to demand must carry. There is nothing in the 1992 Cable Act that says that broadcasters must return their analog channels prior to gaining digital must carry or, in fact, do anything with their analog channel to gain digital must carry. The 1992 Cable Act's mandatory carriage requirements are not conditioned upon an analog or digital transmission format. Stations can choose either analog *or* digital must carry rights while broadcasting during the transition in analog *and* digital.

²⁹ *Further Notice* at ¶165.

³⁰ *Id.*

Congress could have excluded DTV from mandatory carriage if it had intended to, but it did not. Instead it stated that the Commission shall:

establish any *changes* in the signal carriage requirements . . . to ensure cable carriage of [DTV] broadcast signals of local commercial television stations which have been *changed* to conform with [DTV] standards.³¹

To accept the view that digital carriage is not triggered until analog spectrum is returned, the phrase “signals . . . which have been *changed*” would have to be reinterpreted to mean “signals . . . which have been *exchanged*.” But Congress did not say that. The statute requires DTV must carry when broadcasters’ signals are changed – not exchanged. Irrefutably, broadcasters’ signals are changed at the moment their DTV transmissions commence. Indeed, Congress used the word “changes” (*i.e.*, “establish any changes”) in the same sentence. This term is plainly understood as requiring a transformation within some existing framework (*i.e.*, a station begins broadcasting in digital format). Mandatory digital carriage has nothing to do with the return of analog spectrum.

PCC reminds everyone that the issue is must carry and not retransmission consent. Therefore, when the FCC, in the *Further Notice*, notes that a vacating licensee “*could* . . . at its own expense, provide its broadcast digital signal in analog format for carriage on cable systems,”³² it is not talking about must carry. Obviously, vacating licensees could reach private agreements on certain carriage terms with cable and

³¹ 47 U.S.C. § 534(b)(4)(B) (emphasis added).

³² *Further Notice* at ¶65 (emphasis added).

satellite operators, but that would have nothing to do with must carry. The majority of broadcasters like PCC do not have the leverage to negotiate retransmission consent agreements. They must rely on must carry and the 1992 Cable Act's guarantee of such must carry rights. The FCC is mixing apples and oranges in its discussion in the *Further Notice*. Broadcasters have statutory must carry rights, whether analog or digital, and the FCC's job simply is to timely adopt the technical changes necessary to implement digital mandatory carriage requirements as Congress directed.³³ The FCC cannot modify, limit, or otherwise qualify the must carry rights that Congress established.

B. The PAX DTV Must Carry Proposal.

Contrary to what some may assert, digital must carry is technically achievable. The "PAX DTV Must Carry Proposal" described below provides for broadcasters to elect either analog or digital carriage during the DTV transition. Television stations electing digital carriage could deliver a digital signal to cable headends or to DTH sites for carriage by the cable operator or satellite provider. A station broadcasting a single stream of HDTV programming would have its signal converted to analog (as is currently done for cable networks) and carried at the same channel location and on the same basic service tier as the existing analog signal. When a cable operator's digital set-top box penetration reaches 85% of its subscribers, the system would begin to carry the digital signal on the system's digital tier. Stations broadcasting multiple DTV programming streams (or "multicasting") would have their primary digital signal replace

³³ 47 U.S.C. § 534(b)(4)(B).

their existing primary analog signal on cable systems at the same channel location and on the same basic tier of service as their traditional signal. The remaining portion of the station's digital signal would be used to deliver additional channels of free programming services to the cable system that would be carried on the digital portion of the cable system served *via* digital set-top box, which would require approximately 2 MHz of spectrum in this digital tier.³⁴ When a cable operator's digital set-top box penetration reaches 85% of its subscribers, the system would carry all of the broadcast station's digital programming on the system's digital tier.

The cable channel mapping protocol (PSIP) would permit the multicast channels to appear in sequence with the station's primary channel (i.e. if the primary channel is 20, then the multicast channels would be 201, 202, 203, and 204). A cable subscriber without a set-top box would simply surf the existing channel line-up from channel 19 to 20 to channel 21 and so on. A cable subscriber with a set-top box would go from channel 19 to channel 20, then to channels 201, 202, 203, 204, before moving on to channel 21.

The digital must carry plan outlined above would be implemented as follows:

- This must carry election would be applicable to cable systems with at least 440 MHz of capacity, provided that the systems have installed digital headends and have begun to install digital set-top boxes.
- This must carry option would be available on a first-come, first-served basis within the existing 33% cap on the use of cable systems' usable activated channels for must carry purposes.³⁵

³⁴ As confirmed by discussions with cable operators.

³⁵ 47 U.S.C. § 534(b)(1)(B).

- Complaints regarding compliance with the must carry obligations would be directed to the full Commission for resolution for the first six months and thereafter to the Cable Services Bureau assuming no new or novel issues are raised.
- There could be no perceptible signal degradation of either the primary or multicast signals. This standard should be established using an equivalent picture quality standard for other signals carried on both the analog and digital portions of the cable system.
- Cable systems with less than 1,000 subscribers or fewer than 36 usable activated channels will not be required to comply.
- The cable system would not be required to carry multicast signals duplicating the programming of the primary signal, with program duplication defined as the simultaneous broadcast of identical programming.
- It is the station's obligation to provide a quality signal to the cable headend. If the station's analog signal is of sufficient quality at the headend then it will be the cable operator's obligation to accept the station's digital signal either over-the-air or by other commercial means, as set forth in the 1992 Cable Act.

This digital must carry proposal is technically feasible, consistent with the 1992 Cable Act, and can be implemented immediately. The FCC should incorporate into its satellite must carry rules the same definitions, conditions, and requirements as well, since there is no statutory or technical reason for distinguishing between the multichannel providers.

C. The DTV Must Carry Issue is Before the FCC.

PCC submits that the FCC is overdue to act on its DTV must carry rulemaking released on July 10, 1998.³⁶ PCC also would argue, as it has in this proceeding, that

³⁶ Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 1092 (1998).

the resolution of the DTV issue is critical to the clearing of the channel 59-69 band and the effective auction of the 700 MHz spectrum. PCC also, however, would point out that the DTV must carry issue is no longer one of merely academic interest or regulatory rulemakings.

On July 3, 2000, the FCC released a Public Notice (DA 00-1406) seeking comment on the request of television station WHDT-DT (Stuart, Florida) for mandatory carriage of its digital programming on cable systems in its market.³⁷ Comments in response to the FCC Public Notice were filed on August 4, 2000 and reply comments were filed by August 18, 2000. The matter has now been before the FCC's Cable Services Bureau for a month and action should be expected shortly.

Furthermore, PCC's digital television station in Chicago, Illinois, WCPX-DT, formally requested carriage on Chicago area cable systems shortly after commencing its DTV operations. When those carriage requests were denied, PCC filed Complaints for Carriage with the FCC on September 11, 2000. As the Commission is well aware, it has a statutory deadline of 120 days to rule on this Complaint, and PCC expects that the Cable Services Bureau, under the direction of the FCC, will promptly act within that time frame. Both of these cases provide the FCC with the opportunity to promptly and certainly address the digital must carry issue and to make those necessary adjustments as anticipated by the 1992 Cable Act to implement full digital must carry.

³⁷ Guenter Marksteiner, Permittee, WHDT-DT, Stuart, Florida, Petition for Declaratory Ruling, CSR 5562-Z.

Furthermore, the FCC has a proceeding pending involving mandatory carriage obligations of DTH satellite providers.³⁸ Comments and reply comments have been filed in this proceeding and it provides an opportunity for the FCC to establish full digital must carry rules for both cable operators and DTH satellite providers. Congress imposed mandatory carriage obligations on satellite carriers that are substantially similar to those to which cable operators are subject, and the FCC could simultaneously perfect full digital must carry rights of broadcast stations on all multichannel video providers. This is the FCC's legal obligation. The fact that such action also will jump-start the DTV transition, accelerate the wireless internet service in this country, and ensure the country's technological and economic prosperity simply are further public interest benefits resulting from the FCC doing its job.

IV. THE COMMISSION HAS LITTLE AUTHORITY TO REQUIRE MANDATED RELOCATIONS.

PCC disagrees with Verizon Wireless' request that the FCC impose a mandatory relocation requirement for clearing licensees from the 700 MHz band.³⁹ PCC also disagrees with Bell South's argument, made in an *ex parte* filing, that the Commission has broad authority to force an *en masse* relocation of broadcasters.⁴⁰ While Verizon Wireless and Bell South rely upon generalized and amorphous language, clear and precise statutory directives delineate the conditions for mandatory termination of analog

³⁸ Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues, CS Docket No. 00-96, *Notice of Proposed Rule Making*, FCC 00-195 (rel. June 9, 2000).

³⁹ Verizon Wireless at 4-5.

service, denying the FCC any direct authority to mandate a band-clearing relocation of broadcasters.

As PCC stated in its initial comments, when Congress established a timetable for the 700 MHz auction, it was plainly aware that analog service in the Channels 60-69 band was protected throughout the DTV transition yet made no specific accommodation for mandatory clearing.⁴¹ MSTV reasonably concludes from this sequencing that Congress preferred preserving television viewers' ability to continue receiving reliable analog service and accepted the revenue reduction that would result from auctioning encumbered spectrum.⁴² Other commenters similarly maintain that any mandatory relocations would be contrary to this clear Congressional intent to protect viewers' reliance upon existing service.⁴³

In an attempt to refute Congress' direct language, Verizon Wireless argues that the Commission's general directive to "serve the public interest" provides the necessary expansive authority to terminate television service prior to that required by 47 U.S.C. § 309(j)(14)(B).⁴⁴ This authority, Verizon Wireless states, is commonly used in FM allotment proceedings to force an incumbent to change channels to make way for a new

⁴⁰ Bell South *Ex Parte* filing of May 23, 2000.

⁴¹ PCC Comments at 23.

⁴² MSTV at 6.

⁴³ NAB at 4; USA Broadcasting at 9.

⁴⁴ Verizon Wireless at 5.

station.⁴⁵ Similarly referring to FM reallocation proceedings, Bell South asserts that 47 U.S.C. § 316 provides ample authority to modify licenses and thus force a general termination of service. Of course, in such FM reallocation cases, and contrary to what Verizon Wireless and Bell South are seeking for 700 MHz television stations, broadcast service is not terminated. The FCC will force an existing FM station to switch frequency to accommodate a new station so long as there is no significant deterioration of service.⁴⁶ To the extent that the Commission is willing to ensure the full digital carriage rights of a vacating licensee's service, the arguments of Verizon Wireless and Bell South might begin to have merit. However, even with DTV must carry, loss of service would be inevitable for a vacating analog station. Try as they might, Verizon Wireless and Bell South cannot cite any authority or precedent that might permit a wide-scale, mandatory loss of broadcast service.

Nonetheless, PCC can imagine that there might be certain limited and unusual circumstances where the public interest would be served by band clearing as to require an early analog sign-off by an existing station (*i.e.*, prior to the expressly set deadline). The full implications of such a situation cannot even be interpreted at this time, and the FCC could only move very cautiously in such a rare circumstance. It obviously is *not* in the public interest to attempt to force the relocation of multiple licensees.

⁴⁵ *Id.*, n.8.

⁴⁶ *See, e.g.*, the often cited *Circleville and Columbus, Ohio*, 8 FCC 2d 159, 162 (1967).

V. A REIMBURSEMENT CAP WOULD SUBSIDIZE NEW ENTRANTS.

PCC opposes the adoption of a cap on relocation costs, as sought by Verizon Wireless.⁴⁷ Broadcasters are being asked to assume significant business, construction, and operating risks in prematurely terminating reliable and familiar analog service – especially in light of the absence of digital must carry assurances. PCC agrees with USA Broadcasting that the FCC must account for the significant competitive and economic risks facing licensees resulting from the sizable percentage of viewers which receive service by way of over-the-air signals.⁴⁸ It is only reasonable that new entrants should shoulder the burden of vacating broadcasters' business risk.

In any event, free-market principles dictate that a new wireless entrant would not pay more than an aggregate amount, x , for its spectrum rights. New entrants accordingly should be indifferent as to how x is allocated between the government and broadcasters.⁴⁹ As MSTV correctly noted, aggressive measures such as the proposed cap elevate “the goal of revenue maximization over wise spectrum management,”⁵⁰ which Congress specifically prohibited the FCC from considering in its public interest determinations.⁵¹ Verizon Wireless simply is attempting to gain a subsidy for the

⁴⁷ Verizon Wireless at 7-8; *See also* Industrial Telecommunications Association, Inc. and Access Spectrum LLC at 4.

⁴⁸ USA Broadcasting at 6.

⁴⁹ Unless, of course, wireless bidders have no intention to deploy services soon but only wish to warehouse spectrum.

⁵⁰ MSTV at 9.

⁵¹ 47 U.S.C. § 309(j)(7)(A).

deployment of its wireless Internet services by forcing broadcasters to bear the monetary burden, in addition to the business risk, of vacating the spectrum early. If the FCC were to adopt such an artificial cap in conjunction with voluntary negotiations, it is fairly predictable that clearing would not occur. The FCC should let markets determine relocation costs, especially in light of the unusual risks that vacating licensees would face.

VI. PCC WOULD SUPPORT A SECONDARY AUCTION.

As PCC indicated in its initial comments, it supports voluntary agreements involving broadcasters, wireless companies, and any other parties that would expedite the clearing of the Channels 59-69 band. These agreements could involve direct band clearing arrangements, relocations of stations currently in the band, and indirect clearing through third parties who would negotiate with both broadcasters and wireless operators. The rules adopted by the Commission should not preclude any two-party, three-party, or multiple-party agreements that would facilitate band clearing. PCC agrees that licensees participating in third party agreements to clear the band early and using the secondary auction could be required by these agreements to cease broadcasting on the analog channel in the 59-69 band by May 1, 2002 – or 18 months after issuance of the DTV construction permit (whichever is later).⁵² By clearing at a date certain, wireless providers are given the certainty necessary to improve bidding valuation, develop business plans, and implement wide-scale operation. As PCC

⁵² Spectrum Exchange at 6.

described above and in its initial comments, without early clearing, broadcasters could remain in the band indefinitely.

To ensure that viewers lose no more service than necessary, licensees which participate in the secondary auction or third party agreements and are unable to commence digital operation prior to May 1, 2002 (or 18 months after the DTV construction permit is issued, if later) should be permitted to share use of another television station's digital spectrum. As soon as digital service can commence on the station's own channel, shared use will be terminated. Any licensee participating in a third party agreement must be promised expedited processing by the FCC for all necessary and related applications and filings.

PCC supports Spectrum Exchange's concept that, to the extent necessary, the FCC should establish a procedure whereby a broadcaster can effect transfer of interests in the 700 MHz band.⁵³

VII. PCC'S LOS ANGELES "PROPOSAL" SIMPLY DEMONSTRATES THAT ALTERNATIVES EXIST AND SHOULD BE EXPLORED.

In response to comments filed by Midwest Television,⁵⁴ PCC wishes to clarify that its reference to alternative channel usage in the Los Angeles DMA was simply illustrative and not intended as a specific proposal. PCC will not ask the FCC to force Midwest or any other broadcaster to accept harmful interference to facilitate band clearing, and it agrees with MSTV that new involuntary interference to existing licensees

⁵³ *Id.* at 10.

⁵⁴ Midwest Television at 3-6.

should not be allowed.⁵⁵ By the same token, the FCC should permit voluntary interference agreements consistent with Section 73.623(g) of its Rules.⁵⁶ PCC specifically stated in its comments that the “use of some or all these channels” identified as possible vacancies in Los Angeles would significantly free up the 700 MHz band.⁵⁷ This is still so. PCC respectfully disagrees with Midwest that the identified channels would cause harmful interference in every case. In any event, PCC’s intention was to motivate, or shame, the FCC into using its vast resources to solve the problem of DTV stations in the Channel 59-69 band.

As PCC noted in its initial comments, the FCC issued the DTV Table of Allotments in April 1997 with a number of stations assigned DTV channels in the 60-69 band.⁵⁸ Four months later, Congress directed the FCC to reallocate and auction the spectrum.⁵⁹ Notified of the impending auction, the FCC had two opportunities on reconsideration to clear out the DTV channels that it imprudently allocated in the 700 MHz band, but declined.⁶⁰ Action on the FCC’s part would have facilitated band

⁵⁵ MSTV at 14-15.

⁵⁶ 47 C.F.R. § 73.623(g).

⁵⁷ PCC Comments at 13.

⁵⁸ MM Docket No. 87-268, *Sixth Report and Order*, 12 FCC Rcd 14588 (1997).

⁵⁹ 47 U.S.C. § 337(b)(2)(a). In November 1999, Congress accelerated the auction so that proceeds would be deposited in the U.S. Treasury by September 30, 2000. See Pub. Law 106-113 Stat. 1501, Appendix E, § 213.

⁶⁰ MM Docket No. 87-268, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, at ¶93 (1998); MM Docket No. 87-268, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348 (1998).

clearing and accelerated the DTV transition by reducing the number of stations that might encumber the Channel 59-69 band.

VIII. MISCELLANEOUS RESPONSES.

A. Offensive Programming.

In its initial comments, PCC noted its commitment to broadcasting and the many important roles of being a responsible broadcaster. PCC's stations, in combination with numerous non-owned affiliates, comprise the distribution of the PAXTV network, which provides family-friendly programming unduplicated by the other free over-the-air broadcast television and/or cable networks. PCC described that mandatory cable carriage of these and other emerging network stations has been critical to their economic viability and accordingly has contributed to the diversity of voices in the media marketplace.⁶¹ The results are plain: in 1990 there were 3 over-the-air television broadcast networks, and now there are 10.

Subsequent to PCC's initial comments, the Federal Trade Commission has released a report detailing the treatment of violence by the media industry, especially with respect to children,⁶² and Congress promptly held a hearing on the matter.⁶³ In a separate proceeding, the Commission has inquired how the diversity requirements of

⁶¹ PCC Comments at 8.

⁶² Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries, Federal Trade Commission (Sept. 2000).

⁶³ Senate Commerce Committee, Sept. 13, 2000.

Section 612(g) of the Communications Act should be met.⁶⁴ Section 612(g) provides that at such time as cable systems with 36 or more activated channels which are available to 70% of households within the United States are subscribed to by 70% of those households, the FCC may promulgate any additional rules necessary to provide diversity of information sources.⁶⁵

PCC believes the Commission should take this opportunity to further its diversity goals. PCC sees the opportunity with digital multicast programming and must carry on cable and satellite to offer increased family-friendly programming. Digital multicasting will offer families increased choices to compete with the invasive presence of violent and sexual programming. Greater programming choice is a “First Amendment-friendly” means to combat the adverse effects of offensive programming. PCC will address this issue more fully in the referenced proceeding.

B. Channels 52-59.

PCC agrees with MSTV that the FCC should wait at least until after the conclusion of the 700 MHz auction to make decisions about how Channels 52-59 are reallocated and auctioned, including associated channel clearing and third party agreements.⁶⁶

⁶⁴ Annual Assessment of the Status of Competition in Market for the Delivery of Video Programming, CS Docket No. 00-132, *Notice of Inquiry*, FCC 00-270, at ¶8 (rel. Aug. 1, 2000).

⁶⁵ 47 U.S.C. § 532(g).

⁶⁶ MSTV at 24-25.

C. The FCC Should Ask Congress to Pass a New All Channel Receiver Act

Given the intertwined public interest benefits of accelerated band clearing and DTV implementation, PCC believes now is the appropriate time for the FCC to ask Congress to pass a new All Channel Receiver Act. The current All Channel Receiver Act authorizes the FCC to require that television receivers “be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting.”⁶⁷ In the DTV proceeding, the FCC concluded that, because the flexible DTV standard was designed to respond to market and consumer demand, the All Channel Receiver Act’s applicability to digital receivers may be diminished.⁶⁸ Market forces, however, have been insufficient to overcome strategic, anti-competitive barriers to the DTV transition. PCC urges the FCC to ask Congress to provide it with the authority it believes is necessary to accomplish the goals of the All Channel Receiver Act in the digital world.

IX. CONCLUSION

PCC reminds the Commission that the 1992 Cable Act requires full digital must carry and that such carriage still furthers important government interests. The Commission was left with the responsibility to institute any technical changes necessary to ensure the full carriage of broadcasters’ digital signals, and broadcasters are still waiting.

⁶⁷ 47 U.S.C. § 303(s).

⁶⁸ MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809, ¶¶ 111-113.

The public interest benefits of accelerating the introduction of wireless Internet services and rescuing the digital television transition are intertwined. Commenters agree that the 700 MHz band will not be cleared early unless the FCC enforces digital must carry. To facilitate this clearing, the FCC can sanction voluntary efforts, such as the secondary auction proposed by Spectrum Exchange. However, wireless bidders must be prepared to compensate vacating broadcasters for accepting significant business risk in prematurely terminating their traditional service.

Respectfully submitted,

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