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

In the Matter of	)	
	)	
Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 99-168
	)	
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

THIRD REPORT AND ORDER

Adopted: January 18, 2001 **Released:** January 23, 2001*

By the Commission: Commissioner Tristani approving in part, dissenting in part, and issuing a separate statement.

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* The final version of this Third Report and Order was approved by the Commission on January 19, 2001.

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I. INTRODUCTION

1. By this Third Report and Order, we adopt mechanisms and make determinations intended to facilitate the clearing of the 740-806 MHz band to allow for the introduction of new wireless services, and to promote the early transition of analog television licensees to digital television service ("DTV"). The 746-806 MHz band at issue here has historically been used exclusively by television stations (Channels 60-69). The incumbent television broadcasters are permitted by statute to continue operations until their markets are converted to digital television,[1] which is not scheduled to occur until December 31, 2006, and that date may be extended under certain circumstances.[2] Congress has, however, mandated that the Commission commence competitive bidding for the commercial licenses well before the scheduled termination date of the DTV transition.[3] In the *700 MHz MO&O and FNPRM,* we provided guidance on our review of applications for approval of voluntary agreements accelerating the transition of incumbent analog television licensees and opening these bands for new 700 MHz licensee use, and sought comment on several potential mechanisms to advance the spectrum clearing process.[4] This Third Report and Order announces additional policies to facilitate voluntary band clearing agreements among incumbent broadcasters and new wireless licensees.

II. EXECUTIVE SUMMARY

2. In this Third Report and Order, we make the following principal determinations:

- We conclude that it is not necessary or appropriate at this time to adopt cost-sharing rules to assist in clearing the 700 MHz band, and we leave cost-sharing arrangements to voluntary negotiations among new wireless licensees.

- We extend the general rebuttable presumption adopted in the *700 MHz MO&O and FNPRM* for bilateral agreements (between incumbent Channel 59-69 broadcasters and new 700 MHz wireless licensees) to three-way agreements (which would provide for TV incumbents on television Channels 59-69 to relocate to lower band TV channels that, in turn, would be voluntarily cleared by the lower band TV incumbents).

- We provide guidance on interference issues that may arise from a proposal to clear a station and relocate that broadcast operation to a channel below channel 59.

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[1] *See* 47 U.S.C. § 337(e). *See also* Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of Fifth Report and Order*, 13 FCC Rcd 6860, 6887 (1998)("*DTV Fifth Report and Order Reconsideration*").

[2] *See* 47 U.S.C. § 309(j)(14).

[3] *See* Cellular Telecommunications Industry Association *et al.*'s Request for Delay of the Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 (Auction No. 31), *Memorandum Opinion*, FCC 00-304 (rel. Sept. 12, 2000).

[4] *See* Service Rules for 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Memorandum Opinion and Order* and *Further Notice of Proposed Rulemaking*, FCC 00-224 (rel. June 30, 2000) ("*700 MHz MO&O and FNPRM*").

- We confirm that DTV broadcasters may enter into negotiated interference agreements pursuant to Section 73.623(g), and may use existing DTV allotment swap procedures to effectuate band clearing.

- We reiterate our commitment to process regulatory requests associated with relocation agreements expeditiously, and make certain procedural changes intended to streamline our consideration of such requests.

- We clarify that voluntary agreements to relocate temporarily into Channels 52-58 will not be prohibited.

- We make clear that we do not intend at this time to conduct a secondary auction, and leave the implementation of any such auction to private, voluntary efforts that are otherwise consistent with Commission policies and rules and do not interfere with the integrity and operations of the Commission's spectrum auctions. We also provide guidance on how the Commission's anti-collusion rules may apply in the context of band clearing agreements and secondary auctions.

- We decline to adopt relocation cost caps or cost recovery guidelines at this time.

- We find that issues raise by the parties regarding the DTV must-carry rules adopted in the *MO&O and FNPRM* are in significant part being addressed by other orders we are adopting.

III. BACKGROUND

3. In the *700 MHz First Report and Order,* we adopted service rules for the commercial use of the 747-762 MHz and 777-792 MHz bands that enable the broadest possible use of this spectrum, consistent with sound spectrum management.[5] In developing these rules, we were guided by our conclusion in our *Spectrum Reallocation Policy Statement* that a flexible, market-based approach is the most appropriate method for establishing service rules for this band.[6] In the *700 MHz MO&O and FNPRM,*[7] we generally affirmed the service rules we adopted in the *700 MHz First Report and Order,* provided additional guidance on the factors we would consider when reviewing applications for approval of regulatory requests associated with voluntary agreements accelerating the transition of incumbent analog television licensees to digital television service and opening the 700 MHz bands to new licensees, and sought comment on several aspects of the spectrum clearing process.

4. In the *700 MHz MO&O and FNPRM*, we sought comment on the following potential mechanisms to further the goals of transitioning the 700 MHz band to wireless services. First, we sought comment on whether or not we need to adopt cost-sharing rules that would spread the cost of band clearing among 700 MHz licensees that benefit from the process, and tentatively concluded that we should not. Second, we sought comment on additional band clearing mechanisms that would provide

[5] *See* Service Rules for 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476 (2000) ("*700 MHz First Report and Order*").

[6] Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 FCC Rcd 19868 (1999) ("*Spectrum Reallocation Policy Statement*").

[7] *See 700 MHz MO&O and FNPRM* ¶¶ 5-79.

alternatives to individually negotiated agreements between 700 MHz licensees and incumbent broadcasters in the 700 MHz band. We suggested that one such alternative would be "three-way" agreements that would provide for TV incumbents in the 700 MHz band to relocate those operations to lower band TV channels that would be voluntarily cleared by the lower band TV incumbent. We suggested that another alternative would be to allow use of "secondary auctions" in which 700 MHz bidders would bid for the right to enter into band clearing arrangements with TV incumbents that wished to clear their channels. We sought comment on the viability of these and other alternatives for facilitating the clearing of TV Channels 59-69 in connection with the upcoming auction of licenses for this portion of the spectrum. In addition, we sought comment on whether any or all of these mechanisms could or should be used to facilitate the clearing of Channels 52-58 in connection with our future licensing of this lower portion of the spectrum for wireless services.

IV. DISCUSSION

A. Cost-Sharing Rules

5. *Background.* In the *700 MHz MO&O and FNPRM* we tentatively concluded that it would not be necessary or appropriate to adopt cost-sharing rules in this proceeding and that we should rely on market forces to produce any desirable cost-sharing arrangements. In doing so, we discussed a number of factors that should give new 700 MHz licensees incentives to reach cost-sharing agreements with each other and that may make it easy for them to bargain among themselves. We nonetheless sought comment on how any cost-sharing rules that we might adopt should work.[8]

6. *Discussion.* We conclude that it is not necessary or appropriate to adopt cost-sharing rules to assist in clearing the 700 MHz band. We note that the majority of the commenters who addressed the issue support this view. Entravision, NAB, Paxson, Nextel, USA Broadcasting, and PCIA, for instance, believe that the establishment of cost-sharing arrangements should be left to the private parties.[9] Verizon, however, supports the adoption of cost-sharing rules in cases where the clearing of a particular TV incumbent benefits more than one license holder.[10]

7. Based on the record before us, we find that the new 700 MHz commercial wireless licensees should be able to enter into cost-sharing agreements without Commission rules. As we explained in the *700 MHz MO&O and FNRPM*, the number of new wireless entrants that would benefit significantly from any particular clearing agreement will be small because the 700 MHz band has been allocated based on large spectrum blocks and regional licenses.[11] Because there will be relatively few new commercial wireless entrants, they should be able to bargain among themselves to reach cost-sharing agreements. We also believe that the group of new entrants will have very similar, strong incentives to reach clearing

[8] *See id.* ¶¶ 82-85.

[9] Entravision Comments at 6; NAB Comments at 8; NAB Reply at 5-6; Paxson Comments at 44; Nextel Comments at 4-6; USA Broadcasting Comments at 13; PCIA Comments at 2 and 4. *See also* ITA/Access Comments at 5.

[10] Verizon Comments at 8. Verizon contends that costs should be shared among the winners of both Auction No. 31 (the 30 MHz auction) and Auction No. 33 (the Guard Band auction). Spectrum Exchange suggests that if the winner of the 20 MHz license in a given region is able to enter into a comprehensive clearing arrangement with the incumbent broadcasters in that region, the winner of the 20 MHz license should be able to require the winner of the 10 MHz license in that region to contribute one-third of the clearing cost. Spectrum Exchange Comments at 9-10.

[11] *See 700 MHz MO&O and FNPRM* ¶ 83.

agreements with incumbent broadcasters and commence operations.[12]

8. These factors are also likely to minimize "free rider" problems in the 700 MHz band. A free rider problem can arise where a new entrant seeks to benefit from a clearing agreement without assuming financial costs or other obligations of that agreement. The Commission recognized that free riders could be a significant problem in the broadband Personal Communications Services ("PCS") context where the various PCS spectrum blocks were licensed sequentially and later-licensed PCS entities might have sought to free ride on the efforts of early entrants, which might have frustrated cost-efficient relocation.[13] Because PCS licensing took place over several years, the earlier licensed PCS operators therefore had to initiate relocation negotiations without knowing the identity of later PCS licensees and whether they would be willing to share the cost of the microwave relocation.[14] By contrast, in the instant situation, the Commission intends to license all commercial 700 MHz licensees within a period of several months, and the new licensees are likely to be ready to deploy their services at the same time. All 700 MHz licensees will therefore know with whom they need to bargain to reach cost-sharing agreements, and they will not find themselves in the position of needing to relocate incumbents earlier than others who would benefit from such relocation. We therefore do not believe that mandatory cost-sharing rules are necessary to expedite clearing of the 700 MHz band for use by new licensees.[15]

9. In sum, we conclude that we can rely on market forces to produce any desirable cost-sharing relationships, and cost-sharing rules are unnecessary to assist licensees in reaching clearing agreements with TV incumbents. We also find that market-driven agreements will provide parties with more flexibility to negotiate any cost-sharing arrangements based on individual situations.[16] We therefore leave all cost-sharing arrangements to negotiations among successful auction bidders in this band.

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[12] *See 700 MHz MO&O and FNRPM* ¶ 83. While new entrants will in most cases need to negotiate with several incumbent broadcasters to clear their license areas fully, we agree with Nextel's observation that comprehensive cost-sharing agreements for the clearing of multiple TV incumbents may be possible in some instances because some broadcast ownership groups control multiple licenses for TV stations on channels 59 to 69. *See* Nextel Comments at 4-5.

[13] *See* Amendment to the Commission's Rules Regarding A Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8831 ¶¶ 7-8 (1996).

[14] The Commission's initial auction of broadband PCS licenses, which involved the A and B blocks, concluded on March 13, 1995. Auction No. 5, the first auction of C block spectrum, ended on May 6, 1996 and was followed by Auction No. 10, another C block auction, which concluded on July 16, 1996. Auction No. 11, the first F block auction, ended on January 14, 1997. Auction No. 22 made available additional C and F block, as well as E block, spectrum and concluded on April 15, 1999.

[15] Nextel supports the Commission's view that the licensing of non-Guard Band 700 MHz licensees all at the same time will facilitate the establishment of cost-sharing arrangements through voluntary negotiations without the need for rules. Nextel Comments at 4.

[16] Nextel and NAB contend that agreements will be unique to each broadcaster's situation, and that the resulting complexity makes it difficult to develop fair, "one-size-fits-all" cost-sharing rules. They argue that such rules might disadvantage certain 700 MHz licensees by forcing them to pay for other licensees' mistakes or poor bargaining. Nextel Communications Comments at 4-6; NAB Reply at 5-6.

B. Voluntary Band Clearing Mechanisms

1. Three-Way Voluntary Transition Agreements

10. *Background.* In the *700 MHz First Report and Order* and *700 MHz MO&O and FNPRM,* we adopted policies and a general presumption concerning bilateral agreements between incumbent Channel 59-69 broadcasters and new 700 MHz wireless licensees in order to expedite the full commercial and public safety use of the 700 MHz spectrum specified in Section 337 of the Act without an undue adverse effect on the public's overall receipt of broadcasting service.[17] In the *700 MHz MO&O and FNPRM,* we found that we have authority to review and approve regulatory requests made in connection with voluntary agreements as part of our authority, under the statutory scheme as a whole, to take steps to manage the electromagnetic spectrum in the manner that most effectively facilitates the transition of this portion of the spectrum from conventional broadcast to commercial and public safety use.[18] In implementing our policy of facilitating the clearance of these bands to the extent that incumbent broadcasters and new 700 MHz licensees voluntarily negotiate agreements toward that end, we made two initial statements. First, we said that we would not review the wisdom of private parties' business decisions in reaching agreements. Second, we indicated that our role would be limited to weighing the effect on the public interest of regulatory requests made in connection with such agreements.[19] We further stated that, in order to ensure that all public interest issues are readily identified, we would require broadcasters that enter into voluntary band clearance agreements to provide the public in the principal area served by the licensee with the notice required by Part 73 of the Commission's Rules for the filing of applications involving major license modifications.[20]

11. In the *700 MHz MO&O and FNRPM*, we established a rebuttable presumption that, in certain circumstances, substantial public interest benefits will arise from a voluntary agreement between a 700 MHz licensee and an incumbent broadcast licensee on channels 59-69 that clears the 700 MHz band of incumbent television licensee(s). We stated that we would presume that the public interest is substantially furthered when an applicant demonstrates that the grant of its request will both result in certain specific benefits and avoid specific detriments.[21] We further indicated that when this presumption is not established, or is rebutted, we would review regulatory requests by weighing the loss of broadcast service and the advent of new wireless service on a case-by-case basis.[22]

12. Finally, in the *700 MHz MO&O and FNRPM,* we sought comment on whether, and under what conditions, we should consider requests to approve three-way clearing agreements that would provide for TV incumbents on television Channels 59-69 to relocate to lower band TV channels that, in turn, would be voluntarily cleared by the lower band TV incumbents.[23] Pursuant to such agreements, the lower band broadcasters would give up one of their two channel allotments (either analog or digital), to which the Channel 59-69 incumbents would then move their operations. We noted that such three-way

[17] *700 MHz First Report and Order*, 15 FCC Rcd 476; *700 MHz MO&O and FNPRM* ¶¶ 44-66.

[18] *700 MHz MO&O and FNPRM* ¶ 51. *See also* 47 U.S.C. §§ 301; 303; 309(j)(3)(A); 309(j)(14)(C).

[19] *Id.* ¶ 58.

[20] *Id.* ¶ 59. *See also* 47 C.F.R. §§ 73.3580(d), 73.3572(a).

[21] *Id.* ¶¶ 60-61.

[22] *Id.* ¶¶ 61-65

[23] *Id.* ¶¶ 87-92.

voluntary relocation agreements could facilitate clearing in the 700 MHz band by providing a replacement channel for incumbent broadcasters on Channels 59-69.[24]

13. *Discussion.* We adopt a general presumption, standards of review, and policies for three-way agreements that are similar to those adopted in the *700 MHz MO&O and FNPRM* for bilateral agreements between incumbent Channel 59-69 broadcasters and new 700 MHz wireless licensees. We find that three-way voluntary agreements are consistent, as bilateral agreements are, with the legislative purposes of achieving an orderly DTV transition and expeditiously assigning the spectrum currently used by broadcasters on channels 60-69 to other commercial and public safety licensees.[25]

14. A number of commenters also agree that three-way agreements could produce significant benefits for all.[26] APCO states that television station allotments are blocking public safety access to some or all of the 700 MHz band in many parts of the country, including some of the nation's largest metropolitan areas. Accordingly, APCO asserts that the sooner television stations vacate channels 60-69, the sooner public safety agencies will have the opportunity to utilize the spectrum allocated for public safety.[27] We also find that, in addition to helping public safety and commercial wireless entities by clearing the 700 MHz band, three-way agreements could help broadcasters on channels 59 to 69 by facilitating their relocation to lower channels. Nextel asserts that parties to negotiations should have certainty as to whether a three-way agreement can be implemented once it is reached, arguing that otherwise the parties will have no incentive to invest the time and the resources necessary to negotiate an agreement that may never be implemented.[28] Finally, as a number of commenters state, a voluntary band clearing process will assist the Commission in "encourag[ing] the larger and more effective use of radio in the public interest."[29]

15. Based on this record, we find that adopting guidelines for three-way agreements similar to those we established for bilateral agreements should help negotiating parties and serve the public interest by providing a measure of certainty regarding the conditions under which a regulatory request to implement a three-way agreement may be approved. The presumption we will apply to three-way agreements will be the same as the presumption we adopted for bilateral agreements.[30] Thus, we will presume that the public interest is substantially furthered when an applicant demonstrates that the grant

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[24] *Id.* ¶ 87.

[25] *See* 47 U.S.C. § 336(b), (c), (f). We continue to disagree with MSTV's contention that the Commission's role in clearing the 700 MHz spectrum should be limited to post-transition approvals. MSTV Comments at 8. Instead, as noted above, we have concluded that we have authority to review and approve regulatory requests made in connection with voluntary agreements as part of our authority, under the statutory scheme as a whole. *700 MHz MO&O and FNPRM* ¶ 51. *See also* 47 U.S.C. § 309(j)(14)(C); 47 U.S.C. § 309(j)(3)(A); 47 U.S.C. §§ 301, 303.

[26] Verizon Comments at 3-4; Nextel Comments at 7-8; USA Comments at 8; Spectrum Exchange Comments at 8-9; Entravision Comments at 3; STFI Comments at 2; Paxson Comments at 16; Sinclair Comments at 3-6.

[27] APCO Comments at 2-3.

[28] Nextel Comments at 7-8.

[29] Verizon Comments at 5 (*citing* 47 U.S.C. § 303(g)).

[30] *See 700 MHz MO&O and FNPRM* ¶¶ 61-62.

of its request will both result in certain specific benefits and avoid specific detriments.[31] To obtain this presumption, an applicant must first demonstrate that grant of its request would result in one of the following: (1) make new or expanded wireless service, such as '2.5G' or '3G' services, available to consumers, (2) clear commercial frequencies that enable provision of public safety services; or (3) result in the provision of wireless service to rural or other underserved communities. To obtain the presumption, the applicant must also show that grant of its request would not result in any one of the following: (1) the loss of any of the four stations in the designated market area ("DMA") with the largest audience share; (2) the loss of the sole service licensed to the local community; or (3) the loss of a community's sole service on a channel reserved for noncommercial educational broadcast service. As we stated in the *700 MHz MO&O and FNPRM,* the presumption is not conclusive or dispositive. In specific cases where the presumption applies, for instance, we will consider whether special or unique factors involving loss of broadcast service are sufficient to rebut the presumption.[32] When the presumption is not established or is rebutted, we will review regulatory requests by weighing the loss of service and the advent of new wireless service on a case-by-case basis. In conducting this analysis, we will consider all relevant public interest factors regarding the provision of wireless services, the acceleration of the DTV transition, and the loss of broadcast service. We will consider as a relevant factor in our public interest determination, for instance, the extent to which a station's signal will remain available, after implementation of the agreement, to a significant number of its viewers in the licensee's service area.[33]

16. The standards we adopt here for reviewing regulatory requests made in connection with three-way voluntary agreements will enable us to weigh both the benefits associated with recovery of the spectrum for new wireless uses and any loss of service to the broadcast community. We will apply the same loss of service analysis to both bilateral and three-way band clearing agreements in light of the fact that they will contribute to the same process of facilitating the transition to DTV and clearing the 700 MHz band for new services. MSTV accepts that there may be voluntary agreements that would result in a loss of television service and argues that the Commission should minimize that loss.[34] As we explained in the *700 MHz MO&O and FNPRM,* in certain circumstances a voluntary agreement that clears the 700 MHz band of incumbent television licensees may be in the public interest despite the fact that it may also result in a loss of television service.[35] As we also stated in the *700 MHz MO&O and FNPRM*, we believe that loss-of-service issues here are limited and temporary.[36] There are a limited number of TV stations operating on channels 59 to 69 to begin with, and any loss of service affecting such stations should in most cases be temporary. Moreover, losses of service affecting stations operating on core channels that might result from a three-way agreement will also be limited in that only a relatively small number of stations on channels 59 to 69 exist and in most cases an in-core station's signal will be replaced by a channel 59 to 69 station's signal. Further, losses that result from three-way agreements may be counterbalanced by a gain for broadcasters of supplemental resources that strengthen the individual broadcast licensee's long-term viability as a DTV provider and that benefit the public by expediting the delivery of advanced television services. We note also that Paxson supports the application of a rebuttable presumption that substantial public interest benefits will arise from voluntary band-clearing

[31] *See id.* ¶¶ 60-61.

[32] *See id.* ¶ 62.

[33] *See id.* ¶ 64.

[34] MSTV Comments at 3, 14.

[35] *See 700 MHz MO&O and FNPRM* ¶¶ 44-57.

[36] *See id.* ¶ 56.

agreements that meet unambiguous standards.[37] Thus, we conclude that it is in the public interest to allow three-way band clearing agreements to go forward where we find that the benefits and detriments are appropriately balanced.

17. Although the factors involved in a loss-of-service analysis will be the same for three-way and bilateral agreements, their application to three-way agreements may in some circumstances require two loss-of-service analyses to assure that effectuation of the agreement would be consistent with the public interest. In those cases, we will do such an analysis separately for: (1) people in the service area of the relocation channel that is temporarily suspending service, and (2) people in the service area of the channel 59-69 incumbent.[38] Of course, if the two signals — i.e., the relocation channel's signal (channel 2-58 range) and the relocating channel's signal (channel 59-69 range) — have been provided from the same location with the same coverage characteristics, the loss-of-service analysis would appear to be identical to that for a bilateral agreement, but with the focus on the loss of the relocation signal rather than the channel 59-69 signal. Because the channel 59-69 signal would continue to be available within approximately the same service area, the only loss we would need to focus on would be that of the signal of the relocation channel. In other words, we would need to ascertain that the presumption is met only for the relocation channel. In other circumstances, however, we would need to conduct two separate loss-of-service analyses and each station involved should separately satisfy the requirements set forth above to qualify for the favorable presumption. If one of the channels involved does not qualify for the presumption, then we will make a public interest determination on a case-by-case basis. We note that a three-way agreement may also, in some cases, expand a service area. Such expansion would generally tend to promote the public interest. We note that such expansion would have to be considered in conjunction with any interference issues.[39] We will consider as relevant factors in our public interest determination the extent to which a station's signal remains available to viewers located within its previous service area, as well as the substitution of a relocating station's programming for the programming previously available to viewers of the relocation channel.[40]

18. Paxson urges the Commission to adopt a presumption in favor of regulatory requests that propose to vacate an allotment even if the grant of the request would result in the loss of a community's sole television station, so long as the community continues to receive Grade B service from at least three other television stations.[41] MSTV opposes Paxson's position and contends that the Commission cannot allow channel relocations to compromise the public's free, over-the air television service.[42] We decline at this time to adopt the presumption suggested by Paxson in light of the fact that, under the standards we adopt today, we may approve a regulatory request made in connection with an agreement under our case-

[37] Paxson Comments at 29.

[38] *See 700 MHz MO&O and FNPRM* ¶¶ 90-91.

[39] *See infra* ¶¶ 19-26.

[40] No comments were received on the issue of whether the loss-of-service analysis would need to be supplemented to account for the substitution of the incumbent's programming for that previously available on the relocation channel. *See 700 MHz MO&O and FNPRM* ¶ 91.

[41] *See* Paxson Comments at 30-31.

[42] MSTV Reply at 8.

by-case analysis even though it does not meet the presumption.[43]

19. *Treatment of Interference Issues.* In the *700 MHz MO&O and FNPRM*, we recognized that interference issues may arise under a three-way agreement that do not arise under a bilateral agreement.[44] Specifically, while a bilateral agreement contemplates that a broadcaster relinquish one of its two TV allotments, a three-way agreement involves the relocation of a channel 59-69 operation into a lower band allotment, which may potentially give rise to interference issues with respect to neighboring TV stations.

20. We find that no interference issues should arise if the relocating station's signal is to be broadcast in the same mode (*i.e.*, the relocation involves an analog operation moving into an analog allotment or a digital operation relocating into a digital allotment) from the same location as the lower band incumbent's signal using the same or lower power and the same or lower antenna height.[45] In all other situations the proposed change must satisfy our prescribed interference protection standards for digital or analog operations, as applicable, and the Commission will address each such proposed assignment on a case-by-case basis.[46]

21. A modification could, for instance, involve either the relocation of an analog operation or the relocation of a digital operation. If the modification involves the relocation of a digital operation either (1) into an analog allotment; or (2) into a digital allotment, where the relocated station does not operate at the same location or with the same or lower power and the same or lower antenna height as the lower band incumbent, we will require such modification to comply with the provisions of Section 73.623(c) of our rules.[47] That rule section spells out technical criteria for DTV modifications, including minimum desired-to-undesired ("D/U") signal ratios, which protect co- and adjacent channel DTV and analog assignments from interference. If the modification involves the relocation of an analog operation either (1) into a digital allotment; or (2) into an analog allotment, where the relocated station does not operate at the same location or with the same or lower power and the same or lower antenna height as the lower band incumbent, we will require such modification to comply with the provisions of Sections 73.610 and 73.698 of our rules in instances where an analog operation may affect the operation of another analog

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[43] *See 700 MHz MO&O and FNPRM* ¶¶ 63-64 for review of regulatory requests not subject to presumption; *see also supra* ¶15.

[44] *See 700 MHz MO&O and FNPRM* ¶ 87 n. 168.

[45] *See* 47 C.F.R. § 73.623(c) (specifying co- and adjacent-channel interference protection standards and minimum spacing requirements); *see also* "Additional Application Processing Guidelines for Digital Television (DTV)," *Public Notice* (Aug. 10, 1998)(describing DTV application procedures and detailing technical requirements for applications that do not conform to the "checklist" variations from the DTV Table of Allotments). *See* 47 C.F.R. § 73.622(d).

[46] *See 700 MHz MO&O and FNPRM* ¶ 87 n.168. Midwest contends that interference calculations for this analysis should be based on the affected station's allotment parameters or on its authorized or applied-for facilities, whichever is greatest. *See* Midwest Comments at 2, 6-9. Current policy requires that such interference analyses consider the impact on both the allotment and authorized parameters. *See* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Services, *Sixth Report and Order*, 12 FCC Rcd. 14588 (1997)("*DTV Sixth Report and Order*"). The Commission is currently considering the issue of whether parameters specified in pending applications should be considered, and we defer our decision on this issue to the outcome of that proceeding. *See* Review of the Commission's Rules and Policies Affecting to Conversion to Digital Television, *Notice of Proposed Rule Making*, 15 FCC Rcd 5257 (2000).

[47] 47 C.F.R. § 73.623(c).

allotment,[48] and the provisions of Section 73.623(c) in instances where an analog operation may affect the operation of a digital allotment.[49]

22. Some broadcasters argue that the Commission should adopt a new "no interference" standard that would prohibit any new involuntary interference to existing licensees.[50] The broadcasters' position is that stations relocating to the lower television band during or after the transition should not be permitted to cause any new interference -- including *de minimis* interference -- to the analog or digital operations of other full power television stations.[51] We disagree. A more stringent "no interference" standard is inconsistent with the objectives of this proceeding, which are to facilitate band clearing in a manner that is minimally disruptive to the DTV transition process and protects the public interest in continued free over-the-air analog broadcasting through the end of the DTV transition.[52] The record in this proceeding contains no basis for the Commission to conclude that a departure from established DTV interference protection criteria is warranted. We adopted rules in the DTV proceeding that specifically permit certain levels of *de minimis* interference, increased power through antenna beam tilting, and DTV allotment exchanges among broadcasters.[53] Under our *de minimis* interference protection standard, non-conforming DTV applications may be allowable where interference will affect less than 2 percent of the population served by another station.[54] Moreover, we have previously recognized that, consistent with the public interest, broadcasters should be afforded as much flexibility as possible to address situations that may be unique to their particular circumstances.[55] We find that this principle is particularly applicable in the context of modifications necessary to effectuate three-way voluntary band clearing agreements.

23. It may be true, as some commenters observe, that analog television stations may not easily be relocated to the allotment of a DTV station or vice versa, and still conform to our non interference requirement with respect to both co- and adjacent channel stations.[56] However, we believe that

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[48] 47 C.F.R. §§ 73.610 and 73.698 (specifying minimum separation distances between co- and adjacent channel analog stations).

[49] *See* Advanced Television Systems and Their Impact Upon the Existing Television Service, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 1363 ¶¶ 32, 33 (1998). As appropriate, other interference protection rules may apply in specific situations. *See, e.g,* 47 C.F.R. §§ 73.623(e) (DTV protection of land mobile stations in the 470-512 MHz band); 73.623(f) (Channel 6 DTV protection to FM radio broadcast stations); 73.613 (analog TV protection of Class A TV stations); and 73.610(f) (Channel 6 analog protection to FM radio broadcast stations).

[50] *See* MSTV Comments at 11; Paxson Reply at 21-23; Midwest Comments at 2, 6-9.

[51] *See* MSTV Comments at 11; Midwest Comments at 2, 6-9.

[52] *See 700 MHz MO&O and FNPRM* ¶56.

[53] *See* Advanced Television Systems and Their Impact Upon the Existing Television Service, *Memorandum Opinion and Order on Reconsideration of the DTV Sixth Report and Order*, 13 FCC Rcd 7418 (1998)("*DTV Sixth Report and Order Reconsideration*"); *see also* "Additional Application Processing Guidelines for Digital Television (DTV)," *Public Notice* (Aug. 10, 1998).

[54] *See* 47 C.F.R. § 73.623(c)(2).

[55] *See DTV Sixth Report and Order Reconsideration*, 13 FCC Rcd at 7478 ¶ 147.

[56] *See* NAB Comments at 6-7; USA Broadcasting Comments at 10; MSTV Reply at 6-7; Midwest Comments at 6.

relocation proposals that can be achieved in a manner consistent with our existing interference protection standards should be encouraged so as to facilitate the congressional intent underlying the allocation of these bands for new wireless uses.[57]

24. We will also entertain negotiated interference agreements pursuant to Section 73.623(g), which is limited to possible agreements between relocating DTV stations and any existing TV stations that are entitled to interference protection under our rules.[58] Pursuant to that section, parties may reach negotiated agreements, notwithstanding the fact that the agreements would result in increased interference to a DTV or analog television station above the minimum technical criteria for DTV allotments, provided that the station agrees in writing to accept the interference and/or to implement an exchange of channel allotments in the same community, same market, or adjacent markets.[59] Under Section 73.623(g), the grant of such applications must be consistent with the public interest. These cases will be reviewed on a case-by-case basis. As with interference agreements negotiated under Section 73.623(g) in other contexts, the Mass Media Bureau will evaluate these cases in the first instance, and it is our intent that the significance of any service gains and losses should be considered seriously in the evaluation of whether the negotiated interference agreement should be approved.

25. We also confirm that broadcasters may file applications for exchanges of DTV allotments on an intra-community, intra-market, or inter-market basis, provided that the exchanges do not result in additional interference beyond our *de minimis* standard to other stations or that all affected stations agree to accept any additional interference that would result from the exchange, and that all other requirements of the DTV allotment rules are satisfied with respect to the application(s).[60]

26. Finally, we note that any interference-related requests in connection with a voluntary band clearing agreement will be considered together with the other regulatory requests to implement that agreement.

27. *Procedural Issues.* We also address here certain procedural issues relating to these voluntary arrangements. The Commission recognized in the *700 MHz MO&O and FNPRM* that regulatory requests to effectuate band clearing agreements may involve changes to the DTV Table of Allotments, modification of licenses, and adjustments to allocations and terms and conditions of individual licenses.[61] The *700 MHz MO&O and FNPRM* made clear that interested parties would have an opportunity to comment on regulatory requests arising from voluntary relocation agreements consistent with existing requirements set forth in the Communications Act and the Commission's rules.[62]

28. In the *DTV Sixth Report and Order*, we adopted the DTV Table of Allotments, rules for initial DTV allotments, procedures for assigning DTV channels, and plans for spectrum recovery.[63] As

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[57] *See* 1997 Balanced Budget Act, § 3002, as codified at § 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 309(j).

[58] *See* 47 C.F.R. § 73.623(g); *see also DTV Sixth Report and Order Reconsideration*, 13 FCC Rcd 7477-78 ¶¶ 146-147.

[59] *See* 47 CFR § 73.623(g).

[60] *See DTV Sixth Report and Order Reconsideration*, 13 FCC Rcd at 7477 ¶ 146.

[61] *See 700 MHz MO&O and FNPRM* ¶ 46.

[62] *See id.* ¶ 59.

[63] *DTV Sixth Report and Order*, 12 FCC Rcd 14588.

part of that action, we recognized that the implementation of DTV service will be a dynamic process and that mechanisms are needed to provide for modifying DTV allotments and station operating facilities.[64] We therefore established procedures and technical standards for adding future DTV allotments and for modifying the DTV Table and stations' operating facility specifications, *i.e.*, effective radiated power, antenna height above average terrain (antenna HAAT), antenna pattern, and transmitter site coordinates.[65] We permitted broadcasters the flexibility to negotiate among themselves station changes and alternative allotment plans, provided no new interference results or affected parties agree.[66]

29. *Discussion.* We agree with the concerns that underlie commenters' proposals to adopt some form of expedited processing of regulatory requests to facilitate voluntary agreements for clearing of channels 60-69.[67] We agree with Sinclair, for example, that the Commission must act expeditiously in disposing of such requests, and that the goals of voluntary band clearing arrangements will be frustrated in the event of undue processing delays.[68]

30. We therefore are committed to processing all such requests as expeditiously as possible. In light of the staff progress in processing applications for initial DTV construction permits, the Commission is now prepared to process expeditiously future DTV applications, including those regulatory requests that arise from three-way voluntary band clearing agreements. We decline, however, to adopt a couple of specific approaches proposed by commenters.[69] Spectrum Exchange, Paxson, and USA Broadcasting propose that the Commission establish a 60-day processing timeline for applications filed by incumbent broadcasters seeking to vacate their analog channels early.[70] Paxson argues that the backlog that had resulted from the wave of applications for initial DTV construction permits suggests that processing of regulatory requests for approval of voluntary agreements may be similarly delayed.[71] As mentioned above, we find that it is unnecessary to establish a 60-day processing timeline. However, we fully expect that routine regulatory requests will be acted on within 90 days.

31. We also doubt that decisionmaking would be expedited by Spectrum Exchange's proposal under which the Commission would "pre-approve" incumbent broadcasters' requests for waiver for early termination of analog over-the-air broadcasts.[72] Such an approach would be impractical because it would

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[64] *See DTV Sixth Report and Order*, 12 FCC Rcd at 14667-78, 14671 ¶¶ 172-173, 182.

[65] *See* 47 CFR §§ 73.622, 73.623; *see also id.*, 12 FCC Rcd at 14684, 14688 ¶¶ 213, 221-222.

[66] We further indicated that any negotiated changes would be subject to international coordination, as appropriate.

[67] *See* Sinclair Comments at 6; Paxson Comments at 28-29; USA Broadcasting Comments at 12-13; Spectrum Exchange Comments at 9.

[68] *See* Sinclair Comments at 6.

[69] *See* Sinclair Comments at 6; Paxson Comments at 28-29; USA Broadcasting Comments at 12-13; Spectrum Exchange Comments at 9.

[70] *See* Spectrum Exchange Comments at 9; USA Broadcasting Comments at 12-13; Paxson Comments at 28.

[71] *See* Paxson Comments at 28.

[72] In Spectrum Exchange's view, a preapproval process would allow broadcasters to design possible three-way clearing schemes and obtain Commission approval prior to the Commission's spectrum auction. Under this proposal, for example, analog stations that anticipate an early transition to digital could apply for pre-approval (continued....)

require the Commission and interested parties to make judgments in the absence of all necessary facts. For example, among the public interest factors that will be considered is whether the request would result in the loss of the sole service licensed to the local community.[73] However, it may be impossible to determine whether such loss would occur before the effective date of the proposed relocation. Therefore, we believe that a more efficient use of Commission application processing staff and resources would involve processing the necessary filings only once a definitive, binding clearing agreement is reached.

32. Consistent with our commitment to process regulatory requests associated with relocation agreements expeditiously, we clarify the procedures that will apply to such requests and adopt certain procedural changes designed to streamline the review process. Requests that require a change to the DTV Table of Allotments will generally be subject to existing procedures found in Section 73.622 of the Commission's rules.[74] Under certain circumstances, however, we will not use a rulemaking proceeding to make a DTV allotment change. Moreover, the following principles will govern whether we will employ routine Part 73 application procedures or rulemaking proceedings, regardless of whether a DTV assignment is being exchanged with another DTV assignment, an analog TV assignment is being exchanged with another analog TV assignment, a DTV assignment is being moved to an analog TV allotment, or an analog TV assignment is being moved to a DTV allotment. Proposals submitted in connection with three-way band clearing agreements where both broadcasters are licensed to the same community and the result will not be the dereservation of a noncommercial educational allotment, will be processed under routine application procedures (*i.e.*, a rulemaking proceeding would not be necessary) and will be subject to public notice and comment procedures.[75] In addition, proposals to change the community of license will be processed under routine application procedures so long as the relocating broadcaster complies with all community-of-license obligations and coverage requirements for both communities, and the situation for the community that is losing a station is consistent with our 700 MHz band-clearing presumptions. In both such cases, the Mass Media Bureau will evaluate these proposals in the first instance, and it is our intent that the significance of any service gains and losses should be considered seriously in the evaluation of whether the proposal should be approved. We also delegate to the Mass Media Bureau authority to make minor, administrative changes to the analog or DTV Table to reflect changes authorized by the grant of applications, such as changing an analog TV allotment to a DTV allotment. In addition, consistent with our existing rules, broadcasters will be permitted to negotiate swaps of DTV channel allotments pursuant to application procedures, provided that they comport with existing policies (*i.e.*, exchanges of DTV allotments on an intra-community, intra-market, or adjacent-market basis will be entertained, provided that the exchanges do not result in additional interference beyond our *de minimis* standard to other stations or that all affected stations agree to accept any additional interference that would result from the exchange, and that all other requirements of the DTV allotment rules are satisfied with respect to the application(s)).[76] We do note, however, that a rulemaking proceeding will be required in situations in which a broadcaster proposes to add a new channel allotment, to change the community of license of an existing allotment (except in the circumstances mentioned above), or to dereserve an existing noncommercial educational allotment, and

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for clearing by January 1, 2001, and requests for pre-approval would be acted on by March 1, 2001. *See* Spectrum Exchange Comments at 9.

[73] *See 700 MHz MO&O and FNPRM* ¶ 61; *see also supra* ¶ 15.

[74] *See* 47 C.F.R. § 73.622(a).

[75] *See* 47 C.F.R. §§ 73.3500 *et seq.* (broadcast application procedures).

[76] *See* 47 C.F.R. § 73.623(g).

existing Commission allotment policies will be applied.[77] We also clarify that in such rulemaking proceedings to modify the DTV Table of Allotments in conjunction with band clearing agreements, the proposals would not be subject to counterproposals from other parties, as is usually the case in broadcast allotment rulemaking proceedings.

33. In managing the transition to DTV, we have, as a general matter, prohibited broadcasters from terminating their analog service early,[78] and we have determined that analog television and DTV facilities should be licensed under a single, paired license.[79] In the *700 MHz MO&O and FNPRM*, we decided to allow early termination of analog service to accommodate voluntary agreements.[80] To effectuate that policy, we clarify that a broadcaster will not be jeopardizing its license by agreeing to relinquish one of the two allotments under its license, subject to prior Commission authorization, to effectuate a band clearing agreement. This is a narrow departure from the general principle that the DTV/analog license is a single license and thus that neither channel can be transferred separately. We believe that this approach will, without an undue adverse effect on the public's overall receipt of broadcasting service, expedite the full commercial and public safety use of the 700 MHz spectrum specified in Section 337 and the transition to DTV.[81] We also clarify that as a result of a three-way agreement if a broadcaster is left with only an analog television channel, it must convert to DTV by the applicable date set forth in Section 73.624(d) of the Commission's rules.[82]

2. Temporary Relocation To Channels 52-58

34. *Background.* In the *700 MHz MO&O and FNPRM*, we sought comment on whether we should permit proposals in connection with three-way agreements where the relocation channel is in the Channel 52-58 band, which will be subject to future licensing for wireless services.[83] Specifically, commenters were asked to discuss whether the potential benefits of allowing interim relocation to Channels 52-58 are sufficient to outweigh the potential costs.[84] The Commission noted that if such relocations were permitted, they would be interim in nature, because the incumbent relocating to the Channel 52-58 band would ultimately have to clear that channel. We also recognized that requiring an incumbent to relocate twice could result in duplicative costs, additional disruption to viewers, and other inefficiencies. On the other hand, we noted that this alternative could provide more options for clearing incumbents from Channels 59-69, and it would not add to the number of incumbent stations that would ultimately have to be cleared from Channels 52 to 58 (because the incumbent clearing the 52-58 channel

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[77] *See* 47 C.F.R. §§ 1.420, 73.607, 73.611, 73.622, 73.623.

[78] *See* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, 12832-12833 ¶¶ 55-56 (1997) ("*DTV Fifth Report and Order*"); *DTV Fifth Report and Order Reconsideration*, 13 FCC Rcd at 6886-6887 ¶¶ 77-78.

[79] *DTV Fifth Report and Order*, 12 FCC Rcd 12833-35 ¶¶ 57-60.

[80] *700 MHz MO&O and FNPRM* ¶¶ 44-66.

[81] 47 U.S.C. § 337.

[82] *See* 47 C.F.R. §73.624(d) (DTV construction deadlines).

[83] *700 MHz MO&O and FNPRM* ¶ 89.

[84] *Id.*

as part of the three-way agreement would otherwise have to be cleared eventually).[85]

35. While many commenters support voluntary three-way agreements between incumbent broadcasters and new wireless licensees, commenters are not in agreement on the issue of whether we should permit a temporary relocation to Channels 52-58. Some commenters generally support the temporary relocation, arguing that this is a beneficial mechanism as it provides the opportunity for a broadcaster operating in the 700 MHz spectrum to continue broadcasting.[86] NAB, on the other hand, contends that approving three-way arrangements resulting in the temporary relocation of broadcasters from Channels 59-69 to non-core channels would likely produce significant inefficiencies rather than a smoother transition to digital broadcasting.[87]

36. *Discussion.* Based on our review of the record, we decide not to prohibit voluntary agreements to relocate temporarily into Channels 52-58. As we recognized in the *700 MHz MO&O and FNPRM*, there are potential benefits and costs associated with temporary relocation to Channels 52-58 resulting from voluntary agreements. As we did in the *700 MHz MO&O and FNPRM*, we note that this alternative could provide more options for clearing incumbents on Channels 59-69. The potential benefit includes allowing the incumbent broadcasters the opportunity to continue operating, while clearing the spectrum for the new wireless licensees. As Entravision notes, this arrangement serves to meet the requirements of all the parties involved, without placing any unacceptable burden upon them.[88] We also note that any such voluntary relocation will not increase the number of stations that will have to be cleared from Channels 52-58, but merely replace one station on those channels with another. At the same time, we recognize, and NAB argues, that such agreements could result in duplicative costs, additional disruption to viewers, and other inefficiencies.[89] After considering all these factors, we will not prohibit the negotiation of such relocation agreements. We find that the benefits may well be substantial, and that a broadcaster will have considered the costs in its individual situation before voluntarily agreeing to move into Channels 52-58 with the knowledge that it will subsequently be obligated to vacate that allotment. We are not deciding to approve any specific request at this time. Rather, we will consider any public interest costs in our review of any requests submitted in connection with voluntary agreements to relocate temporarily into Channels 52-58 under the standards we have set out in this proceeding.

C. Secondary Auctions

37. *Background.* The *700 MHz MO&O and FNPRM* requested comment on a range of issues relating to whether some form of "secondary auction" could be used to facilitate band clearing agreements.[90] Regardless of the form it takes, a secondary band clearing auction would be a mechanism to determine the price that would be paid by 700 MHz licensees to TV incumbents who agree to clear their channels in the 700 MHz band. As we observed in the *700 MHz MO&O and FNPRM*, participation

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[85] *Id.*

[86] *See, e.g.*, Entravision Comments at 3; Spectrum Exchange Comment at 8-9; Spectrum Exchange Reply at 11.

[87] NAB Comments at 7.

[88] *See* Entravision Comments at 3.

[89] *See 700 MHz MO&O and FNPRM* ¶ 89.

[90] *See 700 MHz MO&O and FNPRM* ¶¶ 93-103.

in secondary auctions by both broadcast incumbents and prospective or actual 700 MHz wireless licensees would be entirely voluntary.[91] In effect, secondary auctions would differ from *ad hoc* voluntary agreements among incumbent broadcasters and wireless interests only in that a secondary auction may result in greater benefits to participants than more limited, separately negotiated agreements.[92] The *700 MHz MO&O and FNPRM* outlined some of these benefits, such as reduced financial risk to 700 MHz bidders, lowered transactional costs, and increased likelihood of success in developing band clearing arrangements.[93]

38. A secondary auction could take many forms. The *700 MHz MO&O and FNPRM* outlined possible options for both private and Commission-conducted secondary auctions.[94] For instance, the *700 MHz MO&O and FNPRM* suggested that a Commission-conducted secondary auction could create a market under which participating TV incumbents could offer a legal option to enter into clearing agreements.[95] Bidders in the 700 MHz spectrum auction could bid in the secondary auction for the right to exercise these options and enter into band clearing agreements with participating incumbents at some time in the future.[96]

39. One possible private secondary auction mechanism outlined in the *700 MHz MO&O and FNPRM* is the so-called "TV Exchange" mechanism, which contemplates a private auction among incumbent TV broadcasters using a "descending clock" auction process to identify those broadcasters that would be willing to relocate and the price at which the incumbents would move.[97] In situations where worthwhile clearing could feasibly occur via transition by any of a number of incumbent broadcasters, this type of private auction would reveal a price that should compensate the broadcasters fairly for moving early. This mechanism would also promote efficient band clearing by identifying those incumbents with the lowest costs of relocating or terminating upper band operations.

40. Subsequent to the release of the *700 MHz MO&O and FNPRM*, Spectrum Exchange proposed an alternative private auction approach, which it calls a "linked auction."[98] Such a private secondary auction would not actually link the Commission's spectrum auction operations with those of a private auctioneer. Rather, the secondary auction would be tied to the Commission's auction results only; winning bidders in the Commission's 700 MHz license auction that choose to participate in such plan would make payments into a clearing fund based on a percentage of their winning bids, which would then be divided among participating broadcasters in exchange for clearing. Participation in any such private clearing scheme would be voluntary on the parts of both incumbent broadcasters and bidders

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[91] *Id.* ¶ 99.

[92] *See id.* ¶ 97.

[93] *Id.* ¶¶ 97-98.

[94] *Id.* ¶¶ 94-96.

[95] *Id.* ¶ 96.

[96] *Id.*

[97] *Id.* ¶¶ 93-95. *See also* Spectrum Exchange Group, L.L.C., Petition for Rule Making at 8-9 (filed Apr. 24, 2000) ("Spectrum Exchange Petition"); Spectrum Exchange Comments at 7.

[98] *See* Spectrum Exchange Comments at 3-7; Spectrum Exchange Reply at 4-6.

in the Commission's spectrum auction.[99]

41. *Discussion.* We recognized in the *700 MHz MO&O and FNPRM* that a secondary auction mechanism may produce significant benefits, and see no reason to depart from that finding here. A secondary auction may encourage band clearing in a more systematic and comprehensive fashion than would be the case with individual *ad hoc* clearing arrangements among incumbent broadcasters and winning bidders. A secondary auction may give potential wireless licensees greater certainty that the spectrum will be cleared. The efficiency of such a secondary market mechanism is likely to ensure that the spectrum is employed in the most highly valued economic use.[100]

42. In these circumstances, the private sector is better suited to determine what mechanisms interested parties might demand and to implement a secondary auction in a manner that is most responsive to broadcasters' and potential bidders' needs. We do not therefore intend at this time to conduct a secondary auction, and will instead leave any such auction to private, voluntary efforts that are otherwise consistent with our stated policies.[101] A market-oriented approach is consistent with our recent decisions on spectrum management policies intended to promote secondary markets for spectrum usage rights.[102] Our policies in this regard are based on the principle of orienting Commission policies to create the conditions under which market forces can effectively operate.[103] That principle has also been the basis for the Commission's recent decisions seeking to develop more robust secondary markets that will help promote spectrum efficiency and full utilization of Commission-licensed spectrum and thereby make more spectrum available for the purposes for which it is needed.[104]

43. Private secondary auctions have potential to offer both broadcasters and new entrants additional opportunities to reduce the potential transactions costs of negotiating with each other directly after the auction.[105] At least until the end of the DTV transition period,[106] the transaction costs of

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[99] *See* Spectrum Exchange Petition at 8-11; Spectrum Exchange Comments at 5; Spectrum Exchange Reply at 10 (describing Spectrum Exchange's proposed secondary auctions mechanisms).

[100] *See Spectrum Reallocation Policy Statement*, 14 FCC Rcd at 19870 ¶ 9 ("In the majority of cases, efficient spectrum markets will lead to use of spectrum for the highest value end use.").

[101] As a result of the policy choice that we make here, we see no need at this time to reach the question of whether the Commission has legal authority to conduct a secondary auction of clearing options. *See 700 MHz MO&O and FNRPM* ¶ 100.

[102] *See* Principles for Promoting the Efficient Use of Spectrum By Encouraging the Development of Secondary Markets, *Policy Statement,* FCC 00-401 (rel. Dec. 1, 2000) ("*Secondary Markets Policy Statement*"). *See also* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Notice of Proposed Rule Making*, FCC 00-402 (rel. Nov. 27, 2000); Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of the American Mobile Telecommunications Association, WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, *Report and Order and Further Notice of Proposed Rule Making*, FCC 00-403 (rel. Nov. 20, 2000).

[103] *See Spectrum Reallocation Policy Statement*, 14 FCC Rcd 19871-72 ¶ 12. *See also* Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 Fed. Comm. L.J. 87, 94-95 (1997)("*Market-Based Spectrum Policy*").

[104] *See Secondary Markets Policy Statement*, 14 FCC Rcd 19875 ¶ 18.

[105] *See 700 MHz MO&O and FNPRM* ¶¶ 97-98.

bargaining among incumbent broadcasters and new 700 MHz entrants may be high.[107] Proponents of a secondary auction assert that a voluntary linked auction approach will address this problem by creating a clearing fund, available to incumbents, and introducing greater certainty as to costs and values.[108] In Spectrum Exchange's view, by allowing incumbent broadcasters to share in the economic value of a cleared 700 MHz band, a linked auction is likely to increase participation by both broadcast incumbents and prospective new entrants, reduce risks associated with an unlinked secondary auction approach, and increase certainty and efficiency by eliminating opportunities for gaming the secondary auction.[109] A voluntary secondary auction approach is supported by a number of different parties in this proceeding, including potential 700 MHz wireless licensees, some broadcasters, and Spectrum Exchange.[110]

44. We will rely on private secondary auctions and any other such voluntary, comprehensive band clearing arrangements among new 700 MHz licensees and incumbent broadcasters that would result in the voluntary early transition of this band to new services. We cannot know whether individually negotiated arrangements or private auctions will be the more effective voluntary clearing mechanism and support giving parties a choice, so long as the approach is consistent with Commission policies and rules.[111] Based on this record, we find that a privately conducted secondary auction may be conducted in a manner that would not interfere with the integrity and operations of the Commission's spectrum auction process. We note, importantly, that neither of the specific proposals before us requires any changes in our spectrum auctions procedures and processes to accommodate a secondary auction.[112] Finally, we remind parties that where a secondary auction leads to private band clearing agreements, the Commission must approve any regulatory requests necessary to the effectuation of such agreements.

D. Collusion Issues

45. *Background.* Applicants to participate in Commission spectrum auctions and their affiliates

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[106] *See DTV Fifth Report and Order Reconsideration*, 13 FCC Rcd 6860.

[107] *See* Shop at Home Comments at 5.

[108] *See* Spectrum Exchange Comments at 4. *See also* Verizon Reply at 4.

[109] *See* Spectrum Exchange Comments at 4. Verizon provides qualified support for a linked auction noting that "certain elements" are appealing; "because the two auctions would be tied, a bidder would know the total cost of unencumbered spectrum at the instant it places its bid, which eliminates much of the uncertainty surrounding" the Commission's 700 MHz spectrum auction. Verizon Reply at 4. *See also* Spectrum Exchange Reply at 4-5 (discussing complementarities of spectrum use rights and band clearing rights).

[110] *See, e.g.*, PCIA Comments at 4 ("Past experience indicates that private parties can be trusted to undertake the burden of developing a voluntary, consensus plan for cost-sharing related to 700 MHz band relocation expenses."); Shop at Home Comments at 5 ("Shop at Home strongly encourages the Commission to establish a private, voluntary, secondary auction to clear the 60's spectrum."); Ericsson Reply at 2 (supporting three-way agreements and private secondary auctions); USA Broadcasting Comments at 8-9; Paxson Comments at 23-24; Sonshine Comments at 4.

[111] Thus, we do not conceive of secondary auctions as depriving broadcasters of the ability to conduct individual negotiations, as is feared by some broadcasters. *See, e.g.*, Sonshine Comments at 3-6.

[112] Under Spectrum Exchange's plan, assuming a high bidder in the Commission's spectrum auction is participating in the secondary auction, that high bid would be translated into a bid in the secondary auction by multiplying the license bid by a certain linkage ratio. *See* Spectrum Exchange Comments at 3-7. *See also* Spectrum Exchange Petition at 8-9; Spectrum Exchange Comments at 7 (describing descending clock secondary auction mechanism).

are prohibited from engaging in collusive conduct. The Commission's anti-collusion requirements may be found in Section 1.2105(c) and are intended to deter anticompetitive conduct during auctions of spectrum licenses and to ensure the competitiveness of post-auction markets.[113] We have also made clear that, where evidence exists that violations of federal antitrust laws or the Commission's anti-collusion rules may have occurred, the Commission may investigate and/or refer such allegations to the United States Department of Justice for investigation.[114] In particular, Section 1.2105(c)(1) provides that:

> after the short-form application filing deadline, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).[115]

Thus, auction applicants for licenses in the same geographic areas must not communicate with each other during an auction about bids, bidding strategies, or settlements, unless they have disclosed that they are parties to a bidding arrangement pursuant to Section 1.2105(a)(2)(viii), which requires bidders to disclose on their short-forms all agreements or arrangements "relating to the licenses being auctioned, including any such agreements relating to post-auction market structure."[116]

46. *Discussion.* We here clarify that our anti-collusion rules do not prohibit participation in a secondary auction or band clearing agreements, but that parties need to keep those requirements in mind. For instance, to the extent that negotiating a band clearing agreement or the terms of participation in a secondary auction conveys information about bids, bidding strategies, or settlements to other applicants for licenses in the same geographic license areas in the Commission's auction, such communications would be prohibited while the anti-collusion rule is in effect, unless the parties have identified each other

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[113] 47 C.F.R. § 1.2105(c). *See also* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2387 ¶ 223 (1994)("*Competitive Bidding Second Report and Order*") ("[T]he Commission is concerned that collusive conduct by bidders prior to or during the auction process could undermine the competitiveness of the bidding process and prevent the formation of a competitive post-auction market structure.").

Section 1.2105(c)(6)(ii) provides that "[t]he term bids or bidding strategies shall include capital calls or requests for additional funds in support of bids or bidding strategies." 47 C.F.R. § 1.2105(c)(6)(ii).

Section 1.2105(a)(2)(ix) provides that in order to be eligible to participate in a spectrum auction, an applicant must file a short-form application (FCC Form 175) in which it certifies that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties not identified in the application regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid. 47 C.F.R. § 1.2105(a)(2)(ix).

[114] Bidders who are found to have violated the antitrust laws or the Commission's anti-collusion rules in connection with participation in the auction process may, among other remedies, be subject to the loss of their down payment or their full bid amount, cancellation of their licenses, and may be prohibited from participating in future auctions. *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2388 ¶ 226.

[115] 47 C.F.R. § 1.2105(c)(1).

[116] 47 C.F.R. § 1.2105(a)(2)(viii). *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 225.

on their short-form applications as parties to a bidding arrangement under Section 1.2105(a)(2)(viii).[117] However, to the extent that such negotiations are not with other "applicants"[118] for licenses in the same geographic license areas or do not convey prohibited information, such communications would not be prohibited under the anti-collusion rule and negotiations could continue after the short-form deadline. Similarly, participation in private secondary band clearing auctions does not in itself violate the anti-collusion rule. Many of the parties conducting and participating in private secondary band clearing auctions are not likely to be "applicants" subject to our prohibition on collusion.

47. Accordingly, we remind parties participating in linked auctions or entering into three-way agreements to remain mindful of their obligations under the Commission's anti-collusion rules. In this regard, we note that with respect to auctions of licenses in the 700 MHz band, a band clearing agreement or contract to participate in a secondary auction constitutes an agreement that relates to licenses being auctioned, and is covered by the disclosure requirement of Section 1.2105(a)(2)(viii).[119] As we have described, disclosure of the parties to any agreements on short-form auction applications also provides a "safe harbor" against allegations that communications in connection with such agreements constitute communications prohibited under the anti-collusion rules. Where agreements are not reached before the short-form filing deadline, participants in secondary auctions or parties entering into three-way agreements should educate all involved in such activities about these obligations, and might consider establishing procedures to insulate individuals from others' auction-related communications or taking other precautionary steps to prevent collusive conduct from occurring.[120]

E. Proposals to Make Band Clearing Mechanisms Effective

1. Proposal to Cap Clearing Costs

48. *Background.* The *700 MHz FNPRM* solicited ideas on additional proposals that might accelerate the DTV transition.[121] A number of commenters used this opportunity to request relief on a

[117] We do not here decide that such negotiation necessarily communicates information in violation of the anti-collusion rule.

[118] An applicant "include[s] all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity." 47 C.F.R. § 1.2105(c)(6)(i).

[119] *See* 47 C.F.R. § Section 1.2105(a)(2)(viii). *See also* "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, DA 95-2244, 11 FCC Rcd 9645 (1995) (An agreement in principle on all material terms must be disclosed whether in writing or not; if there is no agreement in principle by the short-form filing deadline, prohibited communications must cease). In addition, we note that applicants in Commission spectrum auctions are also under an affirmative obligation to maintain their short-form applications substantially accurate and complete in all significant respects. *See* 47 C.F.R. § 1.65(a). Thus, applicants entering into contracts after the short form filing deadline would be obligated to amend their applications appropriately. *See* 47 C.F.R. § 1.2105(b)(2)(applications may be amended to make minor changes).

[120] The Commission has permitted applicants to establish internal procedures as a precaution to prevent prohibited communications among authorized bidding agents. *See* "Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction," *Public Notice*, 13 FCC Rcd 341 (1998). Additional information about the application of the Commission's anti-collusion rule may be found on the Commission's Web site at: http://www.fcc.gov/wtb/auctions/.

[121] *700 MHz MO&O and FNPRM* ¶ 104.

number of issues related to the DTV transition.[122] To the extent that these issues are before the Commission in separate proceedings, we decline to address them here.[123]

49. One issue that is not under consideration in other contexts is Verizon's proposal that the Commission establish guidelines for band clearing costs.[124] Verizon advocates a cap on relocation costs, taking into account both the "hard" costs of facilities relocation and "soft" costs, including amounts for lost advertising revenues in the event the station's coverage area is decreased.[125] Verizon asserts that a cap on payments would improve the ability of potential 700 MHz bidders to assess the value of the licenses being auctioned and would reduce disputes over relocation costs.[126] Verizon argues that "[w]ithout clear guidelines on costs, auction revenue that should represent a recovery for U.S. taxpayers on the public spectrum resource will instead be diverted to broadcasters."[127]

50. *Discussion.* At this time, we will not adopt cost recovery guidelines. Broadcasters strongly oppose capping costs.[128] Paxson, for example, argues that "[b]roadcasters are being asked to assume significant business, construction, and operating risks in prematurely terminating reliable and familiar analog service."[129] To the extent that such risks exist, the Commission believes that private parties are best suited to assess, quantify, and reach agreement on the appropriate sharing of risk. We believe that both voluntary clearing agreements and a private secondary auction plan would be more likely to succeed without the use of cost guidelines.[130] Further, the record of this proceeding contains little detail about how to structure any such guidelines.

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[122] *See, e.g.,* Sinclair Comments at 4 (proposal to adopt different technical standard for DTV transmissions); Dielectric Reply at 3 (asserting that digital must-carry, receiver standards, and transmission issues exist which must be resolved); Paxson Comments at 41-44 (calling for adoption of connection and copyright protection standards, transmission standards, and elimination of ban on advertising by noncommercial broadcasters).

[123] *See, e.g.,* Carriage of the Transmissions of Digital Television Broadcast Stations, *Notice of Proposed Rule Making,* 13 FCC Rcd 15092 (1998)("*DTV Must-Carry Notice*") (addressing DTV carriage issues); Ancillary and Supplementary Use of Digital Television Capacity by Noncommercial Licensees, *Notice of Proposed Rule Making,* 14 FCC Rcd 537 (1998) (considering permissible DTV operations by noncommercial broadcasters).

[124] *See* Verizon Comments at 7-8; Verizon Reply at 6. *See also* ITA/Access Comments at 4.

[125] *See* Verizon Comments at 7-8.

[126] *See id.*

[127] *Id.* at 7.

[128] *See, e.g.,* NAB Comments at 8; Paxson Reply at 19; USA Broadcasting Reply at 13. *See also* Nextel Comments at 6.

[129] Paxson Reply at 19.

[130] Although commenters have raised the question of whether the Commission has legal authority to impose limitations on cost reimbursements and offer competing conclusions on that issue, we find it unnecessary to reach that question here. *Compare* USA Broadcasting Reply at 12 (arguing that the Communications Act provides no legal authority to impose limitations on cost recovery in the absence of a mandatory relocation requirement) *with* Verizon Reply at 6 (contending that Communications Act does not limit the Commission's authority to apply relocation cost caps).

2. Digital Must-Carry

51. Pursuant to Sections 614 and 615 of the Communications Act,[131] and the implementation rules originally adopted by the Commission,[132] a commercial or non-commercial television broadcast station is entitled to mandatory carriage ("must-carry") on cable systems located within the station's market. As required by the Act, the Commission in 1998 commenced a further proceeding to determine the scope and manner of mandatory cable carriage of digital broadcast signals.[133] In that proceeding and in the 700 MHz context, broadcast entities assert that imposing a digital must-carry requirement on cable operators is essential to encourage the DTV transition and spectrum clearance, while cable entities contend that any extension of the must-carry obligation before the transition to DTV is complete would exceed our statutory authority and raise constitutional issues.[134] In our recent *DTV Must-Carry Order and FNPRM*, [135] we determined that the purposes of the statutory must-carry requirement will best be realized in the digital environment by expanding the substantive scope of that obligation to keep pace with the expanded technical capabilities of the DTV environment.

52. Previously, in the *700 MHz MO&O and FNPRM,* we clarified two limited issues related to cable carriage of digital signals as part of voluntary band clearing agreements. [136] First, we clarified that cable systems are ultimately obligated to accord "must-carry" rights to local broadcasters' digital signals. We stated that existing analog television stations that return their analog spectrum allocation and convert to digital are entitled to mandatory carriage for their digital signals consistent with applicable statutory and regulatory provisions. Second, we concluded that to facilitate the continuing availability during the transition of the analog signal of a broadcaster who is party to a voluntary band-clearing agreement with new 700 MHz licensees, such a broadcaster could, at its own expense, provide its broadcast digital signal in an analog format for carriage on cable systems. In these circumstances, we noted that nothing prohibits the cable system from providing such signals in analog format to subscribers, in addition to or in place of the broadcast digital signal, pursuant to an agreement with the broadcaster.

53. Although we did not seek comment in the *700 MHz MO&O and FNPRM* on the digital must-carry issue, a number of commenters urge the Commission to adopt DTV must-carry rules in order to encourage band clearing.[137] We find that the requests of commenters in this proceeding for adoption of

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[131] 47 U.S.C. §§ 534, 535.

[132] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, *Report and Order*, 8 FCC Rcd 2965 (1993) ("*Must-Carry Order*"); *See also* Broadcast Signal Carriage Issues, *Memorandum Report and Order*, 9 FCC Rcd 6723 (1994) ("*Must-Carry Reconsideration*").

[133] Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 15092 (1998) ("*DTV Must-Carry Notice*").

[134] Broadcast and cable entities' comments in the must-carry proceeding are summarized in Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-22, ¶¶ 52-56 (rel. Jan. 23, 2001) ("*DTV Must-Carry Order and FNPRM*").

[135] *Id.*

[136] *700 MHz MO&O and FNPRM* ¶ 65.

[137] *See, e.g.,* Entravision Comments at 6; Sinclair Comments at 5; MBC Comments at 2-5; Shop at Home Comments at 7-9; MSTV Comments at 18, 22-24; Paxson Comments at 9; USA Broadcasting Comments at 7-8; SFTI Comments at 5-6; Dielectric Communications Reply at 2.

various DTV must-carry rules have in most respects been resolved by the *DTV Must-Carry Order and FNPRM*,[138] as well as by the *WHDT Order*.[139] Some issues raised by commenters in the DTV Must-Carry proceeding have, however, been deferred pending development of an improved record in response to the *DTV Must-Carry Order and FNPRM*. These include the mandatory dual carriage of a station's digital and analog signals during the digital television transition.[140] We also seek comment in the *DTV Must-Carry Order and FNPRM* on our obligation under Section 339(b) of the Communications Act, also part of the Satellite Home Viewer Improvement Act of 1999, to develop and apply satellite requirements that are "as similar as possible" to those implementing cable television network non-duplication, syndicated program exclusivity, and sports blackout requirements.[141] We will defer consideration of those issues for the 700 MHz transition as well. We believe that the submissions in this proceeding, seeking must-carry actions to encourage the 700 MHz band clearance process, do not raise distinctive or additional factual or policy considerations that justify departure from the broad determinations made in the *DTV Must-Carry Order and FNPRM*.

3. Other Relocation Proposals

54. *Background.* In the *700 MHz MO&O and FNPRM*, we indicated that we would entertain comment on whether reliance on voluntary agreements would be adequate to clear incumbent broadcast operations from 700 MHz bands or, as suggested by commenters, whether we should consider steps other than the review of requests in connection with such agreements to facilitate the clearing more effectively.[142] Responding to this inquiry, a majority of commenters addressed the issue of whether the Commission should exercise its authority to require the mandatory relocation of incumbent broadcasters.[143] In particular, Verizon advocates the mandatory relocation of a "lone holdout" in a market.[144] Verizon argues that the Commission should adopt a "lone holdout rule" to reduce the opportunity for a single broadcaster to gain a windfall by refusing to participate in a coordinated band-clearing process where substantial clearing has already occurred.[145] Furthermore, Verizon maintains that the Commission should also require limited mandatory relocation at a later stage of the DTV transition to provide new 700 MHz wireless licensees with the right to impose involuntary clearing of a broadcast incumbent when relocation channels are available.[146] Broadcasters generally oppose the proposal to

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[138] *DTV Must-Carry Order and FNPRM* ¶¶ 7, 12.

[139] WHDT-DT Channel 59, Stuart, Florida, Petition for Declaratory Ruling that Digital Broadcast Stations Have Mandatory Carriage Rights, CSR-5562-Z, *Memorandum Opinion and Order*, FCC 01-23, ¶¶ 12-15 (rel. Jan. 23, 2001)("*WHDT Order*").

[140] *See DTV Must-Carry Order and FNPRM* ¶¶ 2-3, 108-112.

[141] *DTV Must-Carry Order and FNPRM* ¶ 130. *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong., 145 Cong. Rec. H11793, H11796 (daily ed. Nov. 9, 1999). *See also* 47 U.S.C. 338(b)(1)(B).

[142] *See 700 MHz MO&O and FNPRM* ¶ 92 and n. 170.

[143] *See, e.g.*, Verizon Comments at 3-4; NAB Comments p. 2-4; MSTV Reply at 6; SFTI Comments at 2-4; Entravision Comment at 2-3.

[144] Verizon Comments at 4. Spectrum Exchange initially proposed this idea. *See* Spectrum Exchange Petition at 12.

[145] Verizon Comments at 3-4.

[146] *Id.* at 6.

invoke mandatory relocation arguing that the Commission lacks the authority to provide such relief.[147]

55. *Discussion.* Certain commenters argue that, should there be a "lone holdout" of an incumbent broadcaster in a market where substantial clearing has occurred, it might well threaten the success of the transition to DTV and the ability of new 700 MHz licensees to deploy rapidly new wireless technologies in this spectrum.[148] Holdouts may be a sign of a market imperfection or failure that might impede the proper functioning of the market,[149] and may prevent efficient outcomes of secondary auctions and band clearing negotiations among new 700 MHz wireless licensees and incumbent channel 59-69 broadcasters.

56. We have previously observed that "[i]n the majority of cases, efficient spectrum markets will lead to use of spectrum for the highest value end use."[150] Thus, we believe that voluntary agreements between broadcasters and licensees should result in the effective clearing of the 700 MHz band.[151] We note this view is broadly shared by most commenters, which advocate a voluntary, market-based approach to clearing incumbent broadcast operations from channels 59-69.[152] However, we will revisit this issue in the future if we find it necessary.

F. Other Proposals to Accelerate the DTV Transition

57. *Background.* In the *700 MHz MO&O and FNPRM,* we sought comment on two additional proposals to accelerate the digital television transition: sharing of the 700 MHz spectrum between broadcasters and new wireless licensees, and sharing between broadcasters during the transition. We received no comments on the possible sharing of 700 MHz spectrum between incumbent broadcasters and new commercial service providers, and, accordingly, do not consider that issue further in this rulemaking context.

58. We received limited comment on the second proposal, whether we should allow broadcasters to share DTV facilities and spectrum during the transition. For example, Paxson suggests that we

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[147] *See* Paxson Comments at 23; USA Broadcasting Comments at 9; ALTV Comments at 3-4; MSTV Reply at 6; NAB Comments p. 3-5.

[148] *See* Verizon Comments at 4-7; Spectrum Exchange Petition at 12.

[149] *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing A Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L. J. 1027, 1029-30, 1035 and n. 30 (1995).

[150] *See Spectrum Reallocation Policy Statement*, 14 FCC Rcd at 19870 ¶ 9 (1999). *See also Market-Based Spectrum Policy*, 50 Fed. Comm. L.J. at 94 ("Where possible, the Commission should also exhaustively license spectrum in bands that are now licensed on a site-by-site basis by issuing flexible, geographic-area overlay licenses and creating mechanisms for voluntary changes in spectrum use, including, where appropriate, procedures for new geographic-area licensees and incumbents to negotiate compensated relocation of incumbents.").

[151] In light of the policy choice we are adopting, we find it unnecessary to address the view of certain commenters that the Commission lacks legal authority to impose mandatory relocation or other similar solutions to facilitate clearing of TV incumbents in the 700 MHz band. *See, e.g.*, NAB Comments at 4; USA Broadcasting Comments at 9; MSTV Reply at 5-6; Paxson Comments at 23; Entravision Comments at 4. *See also* Verizon Comments at 3-5 (contending that several provisions of the Communications Act authorize the limited mandatory relocation of holdout broadcasters).

[152] *See, e.g.*, Sonshine Comments at 2; Entravision Comments at 3; USA Broadcasting Comments at 8; Paxson Comments at 23; Nextel Comments at 7-8; Spectrum Exchange Comments at 8-9.

consider allowing incumbent broadcasters who agree to clear the spectrum early, but are unable to commence digital operations by May 1, 2002 (or 18 months after the DTV construction permit is issued, if later), to temporarily share use of another licensee's digital spectrum.[153]

59. *Discussion.* In light of the limited scope of comments on these proposals, we conclude that there is insufficient interest to warrant adoption of a general regulatory process at this time. Paxson's general proposal regarding spectrum sharing does not incorporate a qualifying standard for licensees seeking to share use of another licensee's spectrum, nor a basis for compensation or a time limit for such arrangements. In the absence of other interest in such arrangements, we decline to adopt a rule of general applicability. While we do not adopt rules at this time, we will, of course, consider any such proposals on a case-by-case basis. Paxson also asserts that public broadcasters should be permitted to multicast "secondary, third party, advertiser-supported commercial DTV" programming.[154] Paxson recognizes, however, that proposal is under consideration in a separate proceeding, and we will not address it here.[155]

G. Band Clearing Relating to the Auction of Channels 52-59

60. *Background.* In the *700 MHz MO&O and FNPRM*, we sought comment as to whether the regulations and mechanisms we have adopted in this proceeding to facilitate band clearing should also be employed in conjunction with the auction of spectrum currently used by Channels 52-59.

61. *Discussion.* We agree with ALTV and MSTV that it is appropriate to gain additional experience with the innovative, voluntary band clearing mechanisms before making judgments about whether to extend them for use in other bands.[156] Thus, we intend to defer this issue to our upcoming proceeding on service rules for this spectrum, which will address issues arising out of the reallocation of channels 52-59.

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[153] Paxson Reply at 21.

[154] Paxson Comments at 43-44.

[155] *See* Ancillary and Supplementary Use of Digital Television Capacity by Noncommercial Licensees, MM Docket No. 98-203, *Notice of Proposed Rule Making*, 14 FCC Rcd 3259, 3271 ¶¶ 36-37 (1998).

[156] *See* MSTV Comments at 24-25; ALTV Reply at 8.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act and Paperwork Reduction Act

62. Section 213 of the Consolidated Appropriations Act, 2000 states that the Regulatory Flexibility Act (as well as certain provisions of the Contract With America Advancement Act of 1996 and the Paperwork Reduction Act) shall not apply to the rules and competitive bidding procedures governing the frequencies in the 746 – 806 MHz band (currently used for television broadcasts on channels 60-69).[157] Because the policies and rules adopted in this Third Report and Order relate only to assignments of those frequencies, no Final Regulatory Flexibility Analysis or Paperwork Reduction Analysis is necessary.

B. Alternative Formats

63. Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or at mcontee@fcc.gov. This Third Report and Order can also be downloaded at http://www.fcc.gov/Bureaus/Wireless/Orders/2001/index.html.

C. Further Information

64. For further information concerning this Third Report and Order, contact Nese Guendelsberger or Bill Huber of the Auctions and Industry Analysis Division at (202) 418-0660 (voice), (202) 418-7233 (TTY), or Martin Liebman or Stanley Wiggins of the Policy Division at (202) 418-1310 (voice), (202) 418-7233 (TTY), Wireless Telecommunications Bureau, Washington, DC 20554.

VI. ORDERING CLAUSES

65. Pursuant to Sections 1, 2, 4(i), 5(c), 7(a), 301, 302, 303, 307, 308, 309(j), 309(k), 311, 316, 319, 324, 331, 332, 333, 336, 337, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 155(c), 157(a), 301, 302, 303, 307, 308, 309(j), 309(k), 311, 316, 319, 324, 331, 332, 333, 336, 337, 614, and 615, the Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, and Section 1.425 of the Commission's Rules, 47 C.F.R. § 1.425, IT IS ORDERED that the THIRD REPORT AND ORDER is hereby adopted.

66. IT IS FURTHER ORDERED that Part 73 of the Commission's rules IS AMENDED as set forth in Appendix A. Pursuant to Section 213 of the Consolidated Appropriations Act, 2000, these rules shall be effective immediately upon publication in the *Federal Register*.[158]

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[157] In particular, this exemption extends to the requirements imposed by Chapter 6 of Title 5, United States Code, Section 3 of the Small Business Act (15 U.S.C. § 632), and Sections 3507 and 3512 of Title 44, United States Code. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, Appendix E, Sec. 213(a)(4)(A)-(B); *see* 145 Cong. Rec. H12493-94 (Nov. 17, 1999); 47 U.S.C.A. § 337 note at Sec. 213(a)(4)(A)-(B).

[158] *Id.*, Sec. 213(a)(4)(A).

67. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4(i), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and 303, and Section 1.425 of the Commission's Rules, 47 C.F.R. § 1.425, the Petition for Rulemaking filed by Spectrum Exchange Group, LLC on April 24, 2000 IS GRANTED TO THE EXTENT DISCUSSED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A: FINAL RULES

Section 73.607 is amended by redesignating the current text as paragraph (a) and adding new paragraph (b) to read as follows:

§73.607 – Availability of channels.

* * * * *

(b) Notwithstanding paragraph (a) of this section, an application may be filed for a channel or community not listed in the TV Table of Allotments if it is consistent with the rules and policies established in the Third Report and Order in WT Docket 99-168 (FCC 01-25), adopted January 18, 2001. Where such a request is approved, the Mass Media Bureau will change the Table of Allotments to reflect that approval.

Section 73.622 is amended by redesignating paragraph (c) as paragraph (c)(1) and adding new paragraph (c)(2) to read as follows:

§73.622 – Digital television table of allotments.

* * * * *

(c)(1) * * *

(2) Notwithstanding paragraph (c)(1) of this section, an application may be filed for a channel or community not listed in the DTV Table of Allotments if it is consistent with the rules and policies established in the Third Report and Order in WT Docket 99-168 (FCC 01-25), adopted January 18, 2001. Where such a request is approved, the Mass Media Bureau will change the DTV Table of Allotments to reflect that approval.

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APPENDIX B: COMMENTS AND REPLY COMMENTS

Commenters

Association of Public-Safety Communications Officials-International, Inc. (APCO)
Entravision Holdings, LLC (Entravision)
Industrial Telecommunications Association, Inc. and Access Spectrum LLC (ITA/Access)
Marantha Broadcasting Company, Inc. (MBC)
Maximum Service Television, Inc. (MSTV)
Midwest Television Inc. (Midwest)
National Association of Broadcasters (NAB)
Nextel Communications, Inc. (Nextel)
Paxson Communications Corporation (Paxson)
Personal Communications Industry Association (PCIA)
Shop at Home, Inc. (Shop at Home)
Sinclair Broadcast Group, Inc. (Sinclair)
Sonshine Family Television, Inc. (SFTI)
Spectrum Exchange Group, LLC (Spectrum Exchange)
USA Broadcasting, Inc. (USA Broadcasting)
Verizon Wireless (Verizon)

Reply Commenters

Dielectric Communications (Dielectric)
Ericsson Inc.
Maximum Service Television, Inc. (MSTV)
National Association of Broadcasters (NAB)
National Cable Television Association (NCTA)
Paxson Communications Corporation (Paxson)
Shop at Home, Inc. (Shop at Home)
Spectrum Exchange Group, LLC (Spectrum Exchange)
USA Broadcasting, Inc. (USA Broadcasting)
Verizon Wireless (Verizon)

Ex Parte Submissions

Association of Local Television Stations, Inc. (ALTV)
Cellular Telecommunications Industry Association, Inc. (CTIA)
Ericsson Inc.
National Cable Television Association (NCTA)
Paxson Communications Corporation (Paxson)
Spectrum Exchange Group, LLC (Spectrum Exchange)

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI
Dissenting in Part

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

I previously supported – and continue to favor – a case-by-case review of band clearing proposals for channels 59-69.[159] The public interest in both new wireless offerings and existing television services demands it. Earlier in this proceeding, however, I could not join my colleagues in adopting a presumption that the public is better served by loss of its television service than by delay in receiving new services in the 700 MHz band.[160] Nor can I support today's decision extending that presumption to 3-way channel swaps. Although the Commission's action purports to facilitate the DTV transition with only a temporary loss of service for today's viewers of over-the-air television, I fear it will do neither. Moreover, 3-way swaps may result in loss of service not only for viewers of channels 59-69 but in the core spectrum as well. Again, I would have preferred a case-by-case approach.

As I have noted in the past, I am committed to preserving consumer access to free, over-the-air television. A substantial percentage of American households still rely on free, over-the-air broadcasting for their local news and information. This service ensures that *all* members of the community have access to a range of viewpoints and programming on issues of public concern. At the same time, the 700 MHz spectrum offers unlimited possibilities for advanced wireless services and is a vital source of new spectrum to address public safety needs. Given these competing public interest benefits, I supported applying the Commission's long-standing precedent to determine whether new services warrant loss of existing broadcast service.[161] This case-by-case review, however, prompted uncertainty among potential bidders in the upcoming 700 MHz auction and led to adoption of the presumption in favor of new wireless offerings. At that time, I believed Congress was cognizant that such uncertainty could result when it mandated an early auction while protecting existing broadcast services through 2006 and beyond.[162] I remain unpersuaded that Congress intended the Commission to foster removal of all obstacles to new wireless services in this band – including existing television services.

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[159] *See* Service Rules for 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476 (2000).

[160] *See* Separate Statement of Commissioner Gloria Tristani, Service Rules for 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, (rel. June 30, 2000).

[161] *See* Triangle Publications, Inc., 37 FCC 307, 313 (1964), *citing* Hall v. FCC, 237 F.2d 567 (D.C. Cir. 1954).

[162] *See* Consolidated Appropriations Act 2000, Pub. L. No. 106-113, 113 Stat. 2502, Appendix E, Sec. 213 (requiring the proceeds from the 700 MHz auction be deposited in the U.S. Treasury no later than Sept. 30, 2000) & 47 U.S.C. §§ 309(j)(14)(B) (allowing existing analog broadcasters to continue operating in the 700 MHz band beyond 2006 upon certain showings), 337(d)(2) (requiring technical restrictions on new licensees to protect existing television service in the 700 MHz band during the transition to digital television).

The majority's contention that today's decision will facilitate the transition to DTV while causing only a temporary loss of service cannot withstand scrutiny. As an initial matter, nothing in today's decision requires a broadcaster engaged in a swap to give up its analog operations in favor of digital-only service. To the contrary, the decision expressly permits a broadcaster to operate in analog format on a digital channel allotment as part of a 3-way agreement. Given the negligible penetration of DTV sets and the lack of advertising to support digital operations, it seems likely that a broadcaster would choose to maintain analog operations – where the audience is – on its only channel and "free ride" on the efforts of other broadcasters to complete the digital transition. To the extent that broadcasters adopt such an approach, the transition to digital television will be hampered, not helped. In the event a broadcaster chooses to engage in digital-only operation, however, it will almost certainly request the local cable operator to carry its signal in an analog format, following the approach outlined in the *WHDT Order*.[163] In this case, consumers who subscribe to cable services will have one less reason to buy a digital set.

Thus, in the end: (1) the majority will get what they want – the clearing of the 700 MHz band; (2) a few broadcasters will benefit financially (with no requirement that they expedite their conversion to DTV); and (3) the transition to digital television, already proceeding slowly, will not be furthered. In certain circumstances, the trade-off for new wireless services may be in the public interest. As I have said, I would be willing to consider band clearing proposals on a case-by-case basis. But I again object to the majority's complacency about loss of existing service and its vision that these deals will clearly advance the DTV transition.

More broadly, I remain concerned that band clearing will impede a *smooth* DTV transition. When Congress provided broadcasters with a second 6 MHz channel, the intent was to allow licensees to begin offering digital services while ensuring that existing analog viewers could continue to access today's programming. In contrast, band clearing results in a broadcaster holding one 6 MHz channel rather than two. This inevitably leads to a flash-cut change from analog to digital service, occurring today or, the majority asserts, in May 2002 for most commercial stations. While it's clear that an instant substitution introduces DTV, it does so at the expense of today's viewers of free, over-the-air analog broadcasting services, who will not benefit from the orderly transition envisioned by Congress.

With regard to 3-way swaps in particular, such agreements will inevitably involve complex machinations as broadcasters seek to "shoehorn" existing stations into others' channel allotments. They raise a variety of loss-of-service concerns that involve not only voluntary parties to the agreement but neighboring co-channel and adjacent channel broadcasters as well. An analog provider on channel 61, for example, may seek to move to another broadcaster's digital channel allotment on channel 32 and operate in analog format, raising interference concerns for stations nearby channel 32. Scenarios like this will require close scrutiny. Despite my concerns, I am in part assuaged that the Mass Media Bureau and the Commission will review the loss of service for neighboring television stations on a case-by-case basis as part of the

[163] *See News Release*, "FCC Grants 'Must Carry' Status to Digital-only TV Station," rel. Jan. 19. 2001 (*citing* WHDT-DT, Channel 59, Stuart, Florida, *Memorandum Opinion and Order*, FCC 01-23 (adopted Jan. 19, 2001)).

overall regulatory review – not subsequent to grant of the channel swapping agreement. In doing so, we need to look seriously at loss-of-service issues, consistent with our longstanding precedent.

Finally, I take issue with the majority's treatment of possible "lone holdouts" in the 700 MHz band. Under this scenario, a new wireless licensee could successfully clear its spectrum block of incumbent licensees except for one broadcaster. While the majority expresses no view on mandatory relocation except to assert that the Commission will revisit the matter if necessary, I remain convinced that such action would contravene the statute. Congress set out that incumbent broadcasters in the 700 MHz band could retain their channels until 2006 or beyond when they relocated as part of the orderly repacking process that accompanies the end of the transition.[164] There simply is no statutory authority to support consideration of a mandatory relocation policy, and the majority should have made that clear here. Further, I am disturbed that the majority considers this scenario as a possible "market imperfection" and fails to acknowledge that under the "voluntary" band clearing framework set out herein, a proposal to clear a channel could raise issues that would prevent Commission approval despite the strong presumption or a broadcaster may simply choose to remain on-air in the 700 MHz band.

As I have stated previously, my ultimate concern is that the presumption in favor of band clearing reflects a diminishing regard for the public value of free, over-the-air television services. As we look to the future, I hope that in balancing the ever-growing demand for spectrum this agency will sustain our longstanding commitment to the value that broadcasting services for all Americans.

[164] *See* 47 U.S.C. § 309(j)(14)(B).