

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

In the Matter of)
)
Review of the Commission’s)
Rules and Policies) MM Docket No. 00-39
Affecting the Conversion)
To Digital Television)
)

To: The Commission

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation (“PCC”), by its attorneys, submits herewith its comments in response to the Commission’s Further Notice of Proposed Rule Making¹ regarding receiver issues raised by its “biennial review” of various digital television (“DTV”) transition and implementation matters. PCC’s comments herein address the proposed requirement of DTV reception capability in certain newly manufactured television sets.² PCC urges the Commission to exercise its existing regulatory authority and establish such a requirement to correct extensive market failure and facilitate completion of the DTV transition.

¹ Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, *Report and Order and Further Notice of Proposed Rule Making*, MM Docket No. 00-39, FCC 01-24 (rel. Jan. 19, 2001) (“*Further Notice*”).

² *Id.* at ¶¶ 103-110.

I. THE ALL CHANNEL RECEIVER ACT AUTHORIZES THE COMMISSION TO REQUIRE THAT NEW SETS HAVE DIGITAL CAPABILITY.

Congress passed the All Channel Receiver Act (“ACRA”)³ in 1962 to aid the introduction of UHF broadcasting, but it wisely chose, as it routinely does, to use more general implementing language – language plainly applicable now to the introduction of digital television. The All Channel Receiver Act was intended to speed the introduction and enhance the availability of television services on the UHF band.⁴ The Commission has used this authority to mandate that all television receivers be capable of receiving both VHF and UHF television signals.⁵ The primary concern underlying both the ACRA and the Commission’s regulations was fostering a vigorous, free over-the-air broadcast industry, composed of a “sufficient number of operating television broadcast stations to provide the diversity in programming which is . . . vitally necessary in a representative democracy.”⁶

As the Commission acknowledges,⁷ a plain reading of the ACRA does not limit its authority to impose requirements for only analog receivers. The ACRA grants the Commission

authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in

³ 47 U.S.C. § 303(s).

⁴ *See generally* Amendment to Part 15 of the Rules and Regulations With Regard to All-Channel Television Broadcast Receivers, 21 FCC 2d 245, ¶¶ 3-9 (1970) (“*Tuning Order*”).

⁵ *See id.* *See also* Review of the Commission’s Regulations Governing Television Broadcasting, 10 FCC Rcd 453-58, ¶ 20 (1995).

⁶ *Tuning Order* at ¶ 4.

⁷ *Further Notice* at ¶ 110.

interstate commerce, or is imported from any foreign country into the United States, for sale to the public.⁸

Nothing in this language restricts the Commission's authority to analog television, or UHF television for that matter. Under established principles of administrative law, the plain, unambiguous reading of a statute must govern.⁹ Nearly ten years ago, the Commission noted that the only apparent legislative history to the ACRA indicated that the act was intended to empower the Commission to "give the FCC the power to require 'that *all television receivers* shipped in interstate commerce or imported into the United States be equipped at the time of manufacture to *receive all television channels.*'"¹⁰ Accordingly, the Commission could and should have acted at that time to require that all television receivers have digital capability. If the Commission had acted then, the nation would be well on its way in the DTV transition.

The Commission consistently has acknowledged its authority under the ACRA to require digital capability in receivers.¹¹ In 1992, for example, the Commission noted that "[t]he All-Channel Receiver Act gives us the authority to require that television receivers 'be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting.'"¹²

⁸ 47 U.S.C. § 303(s).

⁹ See *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

¹⁰ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Third Further Notice of Proposed Rulemaking*, 6 FCC Rcd 6984, fn. 310 (1992) (quoting S. Rep. No. 1526, 87th Cong., 2d Sess., at 1 (1962)) ("*Third Advanced Television FNPRM*") (italics added).

¹¹ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rulemaking*, 10 FCC Rcd 10540, ¶¶ 77-78 (1995); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd 12809, ¶¶ 112-113 (1997).

¹² *Third Advanced Television FNPRM* at ¶ 81;

Nonetheless the Commission thus far has refused to exercise its authority under ACRA because of a misguided desire to allow market forces to shape the transition to the greatest extent possible.¹³ This has seriously hurt the DTV transition, and now is the time for the FCC to act and implement a digital all channel receiver requirement. Furthermore, the Commission understood from manufacturers that a digital capability requirement would be unnecessary because sets likely would be DTV-capable.¹⁴ Accordingly, the Commission's regulatory restraint cannot be construed as an absence or acquiescence of authority. Given the plain language of the statute and the Commission's consistent interpretation, any suggestion that the Commission lacks authority under ACRA to require that sets be capable of receiving an over-the-air DTV signal is entirely wrong.

Although some have argued that the ACRA does not authorize a digital receiver requirement because Congress was unaware of and did not foresee digital television,¹⁵ this does not render the ACRA inapplicable to DTV. Canons of statutory construction prohibit such restrictive interpretation.¹⁶ Surely it must be that at the close of the digital television transition, when all broadcasters are transmitting digital signals, the ACRA remains in effect. For the duration of the DTV transition when broadcasters are transmitting both analog and digital signals, the Commission already has created a paradigm where it treats analog and digital signals

¹³ See *Fifth Report and Order* at ¶ 112. See also *Third Advanced Television FNPRM* at ¶ 81 (expressing concern for “prematurely” overburdening consumers).

¹⁴ See *Fifth Report and Order* at ¶ 113; *Third Advanced Television FNPRM* at ¶ 81.

¹⁵ *Further Notice* at ¶ 106.

¹⁶ See e.g. *Browder v. U.S.*, 312 U.S. 335, 339 (1941) (“Old laws apply to changed situations. . . . While a statute speaks from its enactment, [it] embraces everything which subsequently falls within its scope”). See also *Sutherland on Statutory Construction* § 49.02 (6th ed. 2000) (“a statute, expressed in general terms and written in the present or future tense, will be applied, not only to existing but also prospectively to future things and conditions”).

similarly under the law. If indeed any of the Commission's authority under ACRA is diminished by the DTV transition, it would be that to impose receiver requirements on soon-to-be antiquated *analog* receivers.

Others have argued that PCC's requests that Congress clarify that the ACRA applies to digital receivers somehow constitutes *prima facie* evidence that the ACRA is limited to the analog world.¹⁷ To the contrary, it was PCC's recognition that manufacturers would resist advancing the DTV transition that caused it to seek to remove any doubt about the ACRA's applicability to DTV. Congress apparently found such clarification unnecessary and has rejected what would amount to redundant statutes.¹⁸ Given that Congress was aware of the Commission's consistent announcements that it had authority under the ACRA to require digital capability, the absence of a contrary and explicit Congressional directive – despite numerous opportunities to do so – further demonstrates its agreement with this view. Accordingly, the Commission must follow the plain meaning of the ACRA and assume authority to require digital capability in all receivers.

II. THE COMMISSION MUST CORRECT THE RECEIVER MARKET FAILURE TO ENSURE THE TIMELY COMPLETION OF THE DTV TRANSITION AND THE RETURN OF THE ANALOG SPECTRUM.

A. For a Variety of Reasons, the Marketplace is Failing.

It is instructive to imagine what a successful DTV transition would look like.

Undoubtedly, in such a world, a significant number of households would own a digital receiver.

¹⁷ Thomson Multimedia, Inc., Petition for Clarification and Reconsideration in MM Docket No. 00-39 (submitted Mar. 15, 2001) at 8 (*citing* testimony of Jeff Sagansky, President and CEO, PCC *Hearing on the Transition to Digital Television Before the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong. (2001)).

¹⁸ HOUSE COMM. ON COMMERCE, 105TH CONG. AMENDMENT TO THE COMM. Print of June 10, 1997 (offered by Rep. Markey).

Ultimately, the success or failure of digital television will be measured by consumer acceptance. Yet today's consumer has a laundry list of reasons to delay purchasing a DTV receiver. Questions concerning digital cable compatibility and copy protection remain unresolved. Consumers wonder whether today's DTV receivers will be functional next year. These consumer problems illustrate that market forces have been insufficient thus far to overcome strategic anti-competitive barriers to the DTV transition created by the positioning of various industries. The result? Too few and too costly DTV receivers in the marketplace.

B. The Time Has Passed for the Commission to Address the Market Failure.

There is little disagreement that few consumers have purchased DTV receivers.¹⁹ Moreover, and alarmingly, recent reports suggest that the already unimpressive sales rate is dropping.²⁰ Frankly, prices are too high to induce a significant number of consumers to purchase digital receivers. The Congressional Budget Office has concluded that “[d]eclining prices for DTV sets are an essential incentive for consumers to purchase the new product.”²¹ It further stated that for digital programming to be widely viewed, the prices of DTV sets “will have to decrease significantly.”²² CBO suggested that the price of DTV receivers must fall to \$500 before obtaining mass market status.²³ Based upon the history of other consumer electronics

¹⁹ *Further Notice* at ¶ 107.

²⁰ Joel Brinkley, *Digital TV Era Still Remains Out of Reach*, N.Y. TIMES, Aug. 7, 2000, at C1.

²¹ *Completing the Transition to Digital Television*, Congressional Budget Office (“CBO”), Congress of the United States, at xi (Sept. 1999).

²² *Id.* at 34.

²³ *Id.*

products,²⁴ it will take more than 20 years for DTV receivers to reach this price point – over a decade after the scheduled 2006 close of the DTV transition.

C. Correction of this Market Failure is Necessary to a Successful DTV Transition.

The Commission acknowledges that the quantity of DTV receivers in the market is insufficient to support the DTV transition.²⁵ Without consumers purchasing DTV receivers, the critical 85% market penetration level will not be reached.²⁶ The DTV transition will extend indefinitely and analog spectrum will not be recovered for auction.²⁷

To resolve this market failure and ensure the timely completion of the DTV transition, the Commission must require that manufacturers install DTV receiver capability in all sets with a 13” screen or larger. As the market has shown thus far, only in this manner will manufacturers obtain the scale necessary to drive DTV receiver prices to the level necessary for widespread consumer acceptance. Only in this manner will inter-industry stalemates be overcome and digital television be implemented in a timely fashion. Although PCC understands why the Commission refrained from initially adopting a digital capability requirement, if such had been implemented from the beginning, there is little doubt that the DTV transition would have progressed far more than it has. Furthermore, with evidence of slipping sales, there is nothing to

²⁴ *Id.* at 35.

²⁵ *Further Notice* at ¶ 107.

²⁶ The DTV transition ends when 85% of households are capable of receiving digital broadcasts. 47 U.S.C. § 309 (j)(14)(B).

²⁷ *Completing the Transition to Digital Television*, at viii.

suggest that the market can or will correct itself. In 2000, there were 33 million analog TV sets sold in the U.S., and only 26,000 DTV station tuners.²⁸

In addition, PCC finds it peculiar that manufacturers actually would resist a DTV-capability requirement. Absent this feature, most analog receivers sold now and throughout the DTV transition will be antiquated at its close. By refusing to make all receivers DTV-compatible, manufacturers are contributing to consumer resistance to the DTV transition and, ultimately, the delay of its close. It is a veritable fraud on consumers to be selling millions of analog sets each year that will become virtually useless in the digital world. The FCC can put a stop to this anti-consumer behavior, and it should act immediately before another 33 million analog sets are sold.

The Commission notes that some are concerned that requiring digital capability will burden consumers with higher prices.²⁹ However, as Congress recognized in passing the ACRA, receiver costs would be expected to fall subsequent to an initial price increase due to economies of scale.³⁰ Indeed, this exactly was what happened for analog receivers once UHF reception was required, and one need only observe the success of UHF following the enactment of the ACRA to understand the importance of all-channel receivers. In 1962, when Congress passed the ACRA, there were 103 UHF stations. Now there are 971.³¹ Moreover, the significance of this alleged burden on manufacturers is dubious. Computers can become receivers with the addition of a \$59 card. Adding digital capability to manufactured receivers should cost little more.

²⁸ Paul Coe Clark III, *Not Nearly DTV*, THE NET ECONOMY, March 19, 2001, available at <http://www.theneteconomy.com/article.asp?section=2&article_id=031501dtvhearing>.

²⁹ *Further Notice* at ¶ 104.

³⁰ See *First Report and Order*, Docket No. 14760, 47 FR 11698 (Nov. 28, 1962).

The marketplace has failed consumers. It is time for the Commission to abandon its reliance on the market and establish digital capability requirements for television receivers. Market forces have not overcome inter-industry strategic behavior and anti-competitive impediments. DTV receivers are too expensive and too few for the nation to accomplish a timely transition to digital television and return of analog spectrum. PCC stands prepared to offer viewers multicast streams of digital programming. Broadcasters and consumers are ready. The Commission should do whatever it can to facilitate completion of the DTV transition. By requiring digital capability in all receivers sold, the per set price will drop dramatically and consumers will begin to embrace the product.

III. RESPONSES TO OTHER REQUESTS FOR COMMENT.

PCC hereby responds to specific Commission requests for comment:

- Restricting the digital capability requirement only to those receivers with screens larger than 13” is appropriate.³² This straight forward requirement is easier for compliance and enforcement purposes. A “percentage” requirement as proposed in the *Further Notice*³³ would be burdensome on manufacturers and difficult to monitor.
- Reliance on set-top converters is unreasonable,³⁴ as this does not directly address the marketplace failure. Issues such as set-top compatibility standards and product development would further extend the DTV transition. Additionally, it is not clear that consumers would welcome the additional clutter of devices surrounding their television receivers.

³¹ FCC Status Report (Nov. 29, 2000) <<http://www.fcc.gov/mmb/asd/totals/index.html>>.

³² See *Further Notice* at ¶ 107.

³³ *Id.* at ¶ 109.

³⁴ See *id.* at ¶ 108.

CONCLUSION

The Commission should adopt a requirement that certain television receivers be capable of receiving over-the-air DTV signals. The Commission has the authority to adopt such a standard and doing so would benefit consumers and serve the Congressional aims of ensuring a swift and smooth transition and preserving free over-the-air broadcasting in the digital world. Reliance on the marketplace can no longer be justified in light of the enormous consequences of delaying the DTV transition. Requiring consumer sets to receive all broadcast television signals was instrumentally successful before in bringing all channels into use, and it will be again.

Respectfully submitted,

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