

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

In the Matter of)
)
Reallocation and Service Rules for the 698-746) GN Docket No. 01-74
MHz Spectrum Band (Television Channels 52-59))

To: The Commission

REPLY COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

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Dated: June 4, 2001

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SUMMARY

Paxson supports those commenters which argue that this proceeding is premature and ultimately will delay the clearing of the Lower 700 MHz Band. The Commission will be in a better position to meet the Lower 700 MHz Band statutory auction deadline if it waits for the completion of the Upper 700 MHz Band auction and has gained experience with the complexities of voluntary clearing and secondary auctions.

Paxson agrees with numerous commenters that mandatory clearing of incumbents in the Lower 700 MHz Band would be contrary to statute. Moreover, the Commission should continue processing and granting NTSC applications for the Lower 700 MHz Band. Paxson also agrees that the most meaningful step the Commission can take to facilitate band clearing is to adopt full digital multicast must carry so that viewers of incumbent stations will not lose service and will have the incentive to purchase digital receivers.

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Paxson Communications Corporation (“Paxson”) hereby submits its reply in response to comments filed regarding the *Notice of Proposed Rule Making* in the above captioned proceeding.¹ In the *Notice*, the Commission sought comment regarding a number of issues concerning the reallocation of the 698-746 MHz spectrum band (the “Lower 700 MHz Band”) containing Television Channels 52-59 from incumbent broadcasters to new licensees.

On May 7, 2001, Paxson filed a Motion for Extension of Time of Comment and Reply Comment Deadlines (“Extension Request”) urging the Commission to extend the comment deadlines in this proceeding. Specifically, Paxson requested that the Commission extend the deadlines until after completion of the auction for licenses in the 746-806 MHz band containing Television Channels 60-69 (the “Upper 700 MHz Band”)² so that the Commission

¹ Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Notice of Proposed Rule Making*, GN Docket No. 01-74, FCC 01-91 (rel. Mar. 28, 2001) (“*Notice*”).

² The auction currently is scheduled for September 12, 2001. The Spectrum Clearing Alliance has requested that the Commission postpone the auction until January 2002 to allow broadcasters more time to prepare for clearing the band. Spectrum Clearing Alliance, Petition for Reconsideration filed March 16, 2001, in 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, *Third Report and Order*, FCC 01-25 (rel. Jan. 23, 2001) at p. 5.

could benefit from the experience of auctioning the Upper 700 MHz Band. In the alternative, Paxson requested that the Commission postpone the comment deadlines until after the Commission has ruled on the Petitions for Reconsideration of the *Third Report and Order*³ regarding the reallocation of the Upper 700 MHz Band.⁴ On May 11, 2001, the Commission denied the Extension Request because it stated that delaying the comment deadlines might not allow the Commission to meet the statutory deadline for reallocation of the Lower 700 MHz Band.⁵

For the reasons stated in its Extension Request and reasserted herein, Paxson urges the Commission to await the completion of the band clearing and auction of the Upper 700 MHz Band before it adopts final rules regarding voluntary band clearing procedures for the Lower 700 MHz Band. By this reply, Paxson also supports the comments filed in this proceeding urging the Commission not to adopt mandatory band clearing measures to force licensees of television stations in Channels 52-59 to relocate into the core spectrum of Channels 2-51 prior to the end of the DTV transition. Paxson respectfully urges the Commission to continue processing and granting pending NTSC applications in the Lower 700 MHz Band and to accelerate the DTV transition by adopting full digital multicast must carry and resolving the interoperability issues among cable, broadcasters, and set manufacturers and requiring all television sets to receive both digital and analog over-the-air signals.

³ 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, *Third Report and Order*, FCC 01-25 (rel. Jan. 23, 2001) ("*Third Report and Order*").

⁴ The Commission released its *Third Report and Order* in the Upper 700 MHz proceeding on January 23, 2001. Five parties filed Petitions for Reconsideration, and a number of parties filed associated comments and oppositions.

⁵ Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Order*, GN Docket No. 01-74, DA 01-1199, ¶ 3 (rel. May 11, 2001).

I. THE COMMISSION SHOULD AWAIT FINALITY OF THE CHANNELS 60-69 REALLOCATION PRIOR TO ADOPTING BAND CLEARING RULES FOR CHANNELS 52-59.

As Paxson stated in its Extension Request, the Commission should not establish rules and policies governing the reallocation of the Lower 700 MHz Band prior to auctioning the Upper 700 MHz Band. In its comments, the National Association of Broadcasters (“NAB”) similarly argued that this proceeding may be premature.⁶ NAB recommended that if Congress delays the auction as some contemplate, the Commission should delay its consideration of the proceeding to accommodate technological and marketplace developments.⁷ The Association for Maximum Service Television (“MSTV”) also stated that it would be premature for the Commission to define service rules for the Lower 700 MHz Band at this time.⁸ Paxson agrees. In particular, Paxson believes that it is too early to recommend exactly what band clearing procedures should be adopted for the Lower 700 MHz Band. Paxson respectfully urges the Commission to gain the experience from the final band clearing procedures for Channels 60-69 and the actual auction of the Channels 60-69 spectrum prior to adopting voluntary band clearing procedures for Channels 52-59. Paxson also recommends that the Commission entertain requests to keep open the record in this proceeding until after the Upper 700 MHz Band auction has occurred.

As Paxson stated in its Extension Request, throughout the reallocation of the Upper 700 MHz Band the Commission and the public have gained valuable information on the auction process as a result of the public dialogue of the “notice and comment” rule making process, but many unknowns still exist. The Commission has not yet ruled on the Petitions for Reconsideration of the Upper 700 MHz Band *Third Report and Order*, has not yet

⁶ NAB Comments at pp. 2-3.

⁷ *Id.* at pp.2-4.

conducted the Upper 700 MHz Band auction, and has not yet cleared incumbent broadcasters from the Upper 700 MHz Band. Moreover, the Commission observed that the Upper 700 MHz and the Lower 700 MHz proceedings are closely intertwined⁹ and reached many of its tentative proposals in the *Notice* in light of its prior decisions in the Upper 700 MHz Proceeding.¹⁰ Before the Commission attempts to establish the rules and policies to govern the even more challenging task¹¹ of reallocating the Lower 700 MHz Band, it should gain the experience of clearing incumbent broadcasters from the Upper 700 MHz Band and auctioning the Upper 700 MHz spectrum.

Paxson understands that the Commission is under a statutory obligation to reallocate the Lower 700 MHz Band by September 30, 2002.¹² Paxson continues to believe that postponing a decision on band clearing procedures until after the Upper 700 MHz Band auction¹³ would permit ample time for the Commission to auction the Lower 700 MHz spectrum in accordance with the statutory deadline. Moreover, as commenters note,

⁸ MSTV Comments at pp. 2-3.

⁹ *Notice* at ¶ 8 (“Our framework for consideration of both allocation and service rules for the Lower 700 MHz Band is modeled on our approach in the Upper 700 MHz proceeding.”).

¹⁰ *See, e.g., id.* at ¶ 44 (discussing appropriate service rules for Lower 700 MHz Band with reference to service rules for Upper 700 MHz Band); ¶ 53, ¶ 56 (seeking comment regarding a geographic area licensing approach for the Lower 700 MHz Band with reference to a similar approach adopted for the Upper 700 MHz Band); ¶ 126 (proposing to adopt the same band clearing rules and policies in the Lower 700 MHz Band as those adopted for the Upper 700 MHz Band).

¹¹ As the Commission acknowledges, “[The Lower 700 MHz Band] is significantly more encumbered with TV operations” than the Upper 700 MHz Band.” *Id.* at ¶ 7. Moreover, a number of stations in the Channels 60-69 band may relocate to the Channels 52-59 band, and until that number is determined, interested parties will not know the scope of the required clearing in the Lower 700 MHz Band.

¹² *See id.* at ¶ 2; 47 U.S.C. § 309(j)(14)(C)(ii) (2000).

¹³ The Commission would have ample time to reallocate the Lower 700 MHz Band even if the Commission reschedules the auction for January 2002 as requested by the Spectrum Clearing Alliance.

Congress may postpone the current deadline beyond September, 2002.¹⁴ Indeed, with the added advantage of the experience gained from completing the Upper 700 MHz Band auction, the Commission and the parties may be better able to identify the relevant issues and reach resolution in a more prompt and efficient manner, facilitating the Commission's efforts to meet the statutory deadline.

Accordingly, Paxson respectfully urges the Commission to postpone ruling on voluntary band clearing procedures for the Lower 700 MHz Band until it has completed the band clearing and auction of the Upper 700 MHz Band.¹⁵ Moreover, by entertaining requests to keep open the record in this proceeding until after the Upper 700 MHz Band auction, the Commission could ensure that it would benefit from the valuable experience and information that it and the public undoubtedly will gain from clearing the band and conducting the Upper 700 MHz Band auction.

II. MANDATORY BAND CLEARING MEASURES WOULD BE CONTRARY TO THE COMMUNICATIONS ACT AND WOULD HAMPER THE DTV TRANSITION.

Regardless of the voluntary band clearing procedures that ultimately are adopted for the Lower 700 MHz Band, the Commission recognizes that "incumbent broadcasters may remain on the 698-746 MHz band [Lower 700 MHz Band] until the end of the digital

¹⁴ NAB notes in its May 14 comments that "Just last week, Congress indicated its agreement with President Bush's budget proposal to delay the auction of channels 52-59 [until 2006] and of channels 60-69 [until 2004]. If Congress in the final appropriations and authorization bills for the coming fiscal year does postpone the date for these two auctions, then there would be no need for the Commission to move forward with this proceeding at this time." NAB Comments at pp. 3-4. See also Bill McConnell, *An Immovable Feast*, BROADCASTING & CABLE 38, 39 (May 28, 2001) (reporting that "the Bush administration in its 2002 budget proposed delaying the 52-59 auction until 2006 and the 60-69 bidding until 2004"); MSTV Comments at p. 4 (noting that "key members of Congress have expressed support for the Bush Administration's proposal to delay by two years the auction of the 698-746 MHz band.").

¹⁵ In the worst case, the Commission would issue an order in this proceeding and then be forced to reopen it if warranted by the results of the Upper 700 MHz auction. Accordingly, in no event should the Commission issue an order in this proceeding prior to the close of the Upper 700 MHz auction.

transition targeted for 2006,¹⁶ but which may be extended pursuant to Section 309(j)(14)(B) of the Communications Act.¹⁷ As the Commission notes, the Communications Act permits “incumbent television broadcasters...to continue operations until their markets are converted to DTV.”¹⁸ Paxson joins NAB, MSTV, and the Association of America’s Public Television Stations (“APTS”)¹⁹ in opposing the adoption of mandatory band clearing measures to force incumbent broadcasters to vacate the Lower 700 MHz Band prior to the end of the DTV transition in contravention of the Communications Act. As NAB states, “Given the statutorily-recognized right of broadcasters to continue their existing analog television service on all channels (including 52-59) even beyond 2006...any measures to promote the clearing of incumbent broadcasters from channels 52-59 prior to the end of the digital transition must be entirely voluntary.”²⁰

No reasonable countervailing considerations exist to justify the premature mandatory clearing of the Lower 700 MHz Band. Unlike the circumstances in the reallocation of Channels 60-69 where the Commission predicated its early recovery policies “on the urgent need for additional spectrum by other services, particularly to meet the needs of public safety and other land mobile services,”²¹ “early recovery of the 698-746 MHz band (TV Channels 52-59) was not contemplated in the DTV transition plan.”²² Moreover, the vast

¹⁶ Notice at ¶ 20.

¹⁷ 47 U.S.C. § 309(j)(14)(B).

¹⁸ Notice at ¶ 125.

¹⁹ NAB Comments at p. 7; MSTV Comments at p. 10; Comments of Association of America’s Public Television Stations (“APTS Comments”) at p. 3.

²⁰ NAB Comments at p. 8.

²¹ Notice at ¶ 6.

²² *Id.* at ¶ 7 (citing Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Sixth Report and Order*, 12 FCC Rcd 14588, ¶ 1 (1997)); see APTS Comments at p. 3 (the Commission recognizes that “there is less of a need for public safety and other mobile services in the frequency occupied by channels 52-59.”).

number of incumbent broadcasters on Channels 52-59 “would not in any way justify the premature mandatory clearing of incumbent broadcasters from channels 52-59.”²³ To require all analog, digital, and low power licensees, permittees, and applicants to relocate into the core spectrum of Channels 2-51 at any time before the end of the DTV transition would be contrary to statutory directive and would wreak havoc upon the DTV transition. Many markets likely do not have a sufficient number of core channels available to accommodate all of the incumbent broadcasters on Channels 52-59. Forced relocation of incumbent broadcasters would create serious problems with interference, which would result in losses of broadcast service throughout the country. Mandatory band clearing of such magnitude could only delay the DTV transition as the process of relocating broadcasters would drain the Commission’s scarce resources and divert broadcasters’ energies and finances away from the construction of DTV facilities.

In light of the clear statutory directive permitting incumbent broadcasters to continue operating on the band until the end of the DTV transition and the absence of any justification for mandatory band clearing, Paxson respectfully urges the Commission not to adopt any mandatory band clearing procedures that require licensees to vacate the Lower 700 MHz Band at any time prior to the end of the DTV transition.

III. THE COMMISSION SHOULD CONTINUE PROCESSING NTSC APPLICATIONS FOR CHANNELS 52-59.

In the *Notice*, the Commission sought comment regarding whether it should continue to process NTSC applications for stations in the Lower 700 MHz Band.²⁴ Paxson joins other commenters in asking the Commission to continue processing and granting NTSC

²³ NAB Comments at p. 8.

²⁴ *Notice* at ¶ 24.

applications for Channels 52-59.²⁵ For the reasons stated herein, Paxson opposes the comments of the Cellular Telecommunications & Internet Association stating that the Commission should dismiss pending applications for Channels 52-59.²⁶

The Commission noted that with respect to pending applications for Channels 60-69, it “recognized that those persons with pending applications and/or petitions for new full-service NTSC television stations on those channels had already invested time, money and effort into their applications and petitions.”²⁷ Thus, the Commission provided these applicants with an opportunity to amend their applications to a channel below Channel 60.²⁸ Applicants for Channels 52-59 also already have “invested time, money and effort into their applications and petitions,”²⁹ and Paxson agrees with the Commission that “it may be inequitable not to process these applications.”³⁰ Moreover, the Commission noted that “given the significant number of analog and DTV incumbents that already exist on this band, the impact on the provision of new services may be marginal.”³¹ Thus, by continuing to process and grant NTSC applications, the Commission could preserve broadcast services for the public with minimal impact on new services in the Lower 700 MHz Band. Accordingly, Paxson urges the Commission to continue processing and granting applications for NTSC stations in the Lower 700 MHz Band.

²⁵ Comments of Television Capital Corporation of Richmond and Television Capital Corporation of Portland at p. 6; Comments of Pappas Telecasting of America, a California Limited Partnership at p. 2; and Comments of Davis Television Wausau, LLC; Davis Television Corpus Christi, LLC; Davis Television Fairmont, LLC; and Davis Television Topeka, LLC at pp. 5, 8.

²⁶ Comments of the Cellular Telecommunications & Internet Association at p. 3.

²⁷ *Notice* at ¶ 24.

²⁸ *Id.* at ¶¶ 22, 23.

²⁹ *Id.* at ¶ 24.

³⁰ *Id.*

³¹ *Id.*

IV. ADOPTION OF DIGITAL MUST CARRY AND DTV RECEIVER REQUIREMENTS WOULD EXPEDITE THE DTV TRANSITION.

In response to the *Notice* requesting comment regarding proposals “to facilitate the DTV transition,”³² NAB and MSTV urged the FCC to expedite the DTV transition by adopting digital must-carry and DTV receiver requirements. NAB urged the Commission to adopt digital must-carry rules, mandate inter-operability standards for digital televisions and cable systems, and require DTV tuners in every new television receiver sold.³³

Paxson urges the Commission to uphold the plain language of the 1992 Cable Act by adopting full digital multicast must carry, which permits broadcasters to elect immediate and full carriage of digital broadcast signals, whether HDTV or multicast. To this end, Paxson resubmits for adoption by the Commission the Paxson DTV Must Carry Proposal (the “Paxson Proposal”), pursuant to which broadcasters may elect to have either their analog or digital signals carried on cable systems. For broadcasters electing their digital signals, the main programming would be down-converted by the cable operator to analog and carried on the analog portion of the cable system and HDTV or digital multicast signals would be carried on the digital portion of the cable system. The *Paxson Proposal* is workable, reasonable, consistent with the 1992 Cable Act, and will speed the ultimate transition to full digital operations for all stations and the return of broadcasters’ analog spectrum.

The Commission’s action limiting “primary video” to a single programming stream and “program-related” content is contrary to the plain language of the 1992 Cable Act,

³² *Id.* at ¶ 11; NAB Comments at p. 10.

³³ NAB Comments at p. 11.

disregards the value placed on a multiplicity of program/information sources by the United States Supreme Court, and represents an impermissible content-based regulation.

In addition to being beyond the Commission's statutory authority, the Commission's decision on multicast must carry directly contradicts the 1992 Cable Act. Section 614(b)(3)(A) of the 1992 Cable Act states that cable operators "shall carry, in its entirety ... the primary video, accompanying audio ... and, to the extent technically feasible, programming-related material carried in the vertical blanking interval or on subcarriers."³⁴ In the *Report and Order*, the Commission concluded that "'primary video' means a single programming stream and other program-related content,"³⁵ and, therefore, only a single programming stream is entitled to carriage, even if a digital television station is programming multiple streams of free over-the-air programming. This strained reading of the 1992 Cable Act, however, excludes carriage of multicast signals and, as a result, is a policy position of the Commission not permitted by the 1992 Cable Act, is totally at odds with the text, legislative history and all of the policy goals of the 1992 Cable Act, and ignores the Supreme Court's findings, especially in terms of the multiplicity of information sources which multicast must carry would enhance.

In reaching its unsupportable conclusion, the Commission completely ignored the second half of Section 614(b)(3), which states:

The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be

³⁴ 47 U.S.C. § 534(b)(3)(A).

³⁵ *Carriage of Digital Television Broadcast Signals Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, CS Docket No. 00-96, CS Docket No. 00-2, *First Report and Order and Further Notice of Proposed Rule Making*, FCC 01-22 (rel. Jan 23, 2001) ("*Report and Order*") at ¶57.

substituted, under [the Commission's rules regarding nonduplication protection and syndicated exclusivity and sports broadcasting].³⁶

While the Commission purports to rely on one canon of statutory construction,³⁷ it overlooks another: avoid interpreting a provision in a way inconsistent with the policy of another provision.³⁸ The Commission's unnecessary reading of "primary video" in Section 614(b)(3)(A) conflicts with the policy and plain language of Section 614(b)(3)(B) – if a cable operator is not carrying the multicast programming of a digital station, it cannot be carrying the entirety of the television station's programming schedule. The only legal interpretation that reconciles these sections is to require carriage of stations' multicast signals and the Commission was legally wrong to order anything less.

The 1992 Cable Act does not distinguish between analog and digital. Analog broadcasters carry the entirety of their programming schedule on a single video stream, while digital broadcasters may carry different parts of their programming schedule on multiple video streams. Nothing in the 1992 Cable Act allows the abridgment of the broadcaster's programming schedule on the basis of the number of video streams used to deliver that programming. In fact, Section 614(b)(3)(B) of the 1992 Cable Act specifically states that the only allowable reason for carrying less than the entirety of the a broadcaster's programming schedule is to ensure compliance with the Commission's rules regarding nonduplication protection, syndicated exclusivity and sports broadcasting. The Commission was not free to create exceptions in addition to those specified by Congress.³⁹ As such, the entirety of the programming schedule is entitled to cable carriage regardless of

³⁶ 47 U.S.C. § 534(b)(3)(B).

³⁷ *Report and Order* at ¶154 (citing SUTHERLAND, STATUTORY CONSTRUCTION, Vol. 2A, at Section 46.06 (Each word to be given effect.)).

³⁸ *See United Sav. Ass'n. v. Timbers of Inwood Forst. Assocs.*, 484 U.S. 365, 371 (1988).

³⁹ *See United States v. Smith*, 499 U.S. 160, 166-67 (1991).

whether broadcasters carry programming on one video stream or several video streams.

Insofar as the *Report and Order* permits carriage of anything less than the entirety of a qualified broadcaster's programming schedule and/or signal, it directly contradicts the requirements of the 1992 Cable Act and must be reversed.

Paxson urges the Commission to accelerate the DTV transition by adopting full digital multicast must-carry and dual analog and digital receiver requirements.

CONCLUSION

Based upon the foregoing, Paxson respectfully requests that the Commission await final band clearing and auction of the Upper 700 MHz Band prior to adopting voluntary band clearing procedures for the Lower 700 MHz Band. Paxson also recommends that the Commission entertain requests to keep open the record in this proceeding until after the auction has occurred.

In addition, Paxson respectfully urges the Commission not to adopt mandatory band clearing measures to relocate broadcasters from the Lower 700 MHz Band prior to the end of the DTV transition. Paxson supports the continued processing and granting of pending NTSC applications for the Lower 700 MHz Band and urges the Commission to expedite the DTV transition by adopting digital must carry and DTV receiver requirements.

Respectfully submitted,

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By: \s\ William L. Watson
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Dated: June 4, 2001

CERTIFICATE OF SERVICE

I, Lori Closson, do hereby certify that on this 4th day of June, 2001, the foregoing "Reply Comments of Paxson Communications Corporation" was served via first class mail to the following:

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