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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

ORDER ON RECONSIDERATION OF THE THIRD REPORT AND ORDER

Adopted: September 7, 2001 **Released:** September 17, 2001

By the Commission: Commissioners Tristani and Copps concurring and issuing separate statements; Commissioners Abernathy and Martin issuing separate statements.

TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION 1
II. BACKGROUND 2
III. DISCUSSION 7
A. DTV Construction Deadlines For Single-Channel Broadcasters 7
B. Interference Protection Standards 12
C. DTV Replication Policy 17
D. Other Matters Relating to Early, Voluntary Band Clearing 21
1. Spectrum Clearing Alliance's Comprehensive Band-Clearing Plan 22
2. Expedited Processing of Regulatory Requests 26
3. Proposal to Relax Waiver Policies 30
4. Treatment of Pending Channel 59-69 Applicants 32
5. Other Band Clearing Approaches 34
IV. PROCEDURAL MATTERS 36
A. Regulatory Flexibility Act and Paperwork Reduction Act 36
B. Alternative Formats 37
C. Further Information 38
V. ORDERING CLAUSES 39
APPENDIX: PETITIONS FOR RECONSIDERATION, COMMENTS, REPLY COMMENTS, AND OTHER SUBMISSIONS

I. INTRODUCTION

1. By this Order on Reconsideration of the Third Report and Order, we resolve petitions for reconsideration and clarification of the Third Report and Order in this proceeding ("*Upper 700 MHz Third Report and Order*").[1] We generally affirm the decisions we reached in the *Upper 700 MHz Third Report and Order*, although we make certain adjustments to the rules and policies adopted in this proceeding and the related digital television ("DTV") proceeding to accommodate the implementation of voluntary band-clearing agreements among incumbent broadcasters and new licensees in the 746-806 MHz ("Upper 700 MHz") band, which is currently occupied by TV Channels 60-69. We also reject arguments by a petitioner seeking to reverse our decisions on interference issues, and clarify certain aspects of the applicable interference standards.

II. BACKGROUND

2. With the *Upper 700 MHz Third Report and Order*, we completed the adoption of policies to facilitate voluntary clearing of the spectrum currently used for TV Channels 59-69 to allow for the introduction of new wireless services and to promote the transition of incumbent analog television licensees to DTV service.[2] The *Upper 700 MHz Third Report and Order* provided additional guidance regarding the Commission's review of regulatory requests filed in connection with voluntary private band-clearing agreements.[3] In particular, the *Upper 700 MHz Third Report and Order* extended the general rebuttable presumption previously adopted in favor of bilateral agreements (between new 700 MHz wireless licensees and incumbent Channel 59-69 broadcasters) to three-way agreements (which would provide for TV incumbents on television Channels 59-69 to agree with new 700 MHz wireless licensees to relocate to lower band TV

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[1] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, Carriage of the Transmissions of Digital 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*, 16 FCC Rcd 2703 (2001) (*Upper 700 MHz Third Report and Order*).

[2] *See id.* The foundation for these policies was established in earlier decisions in the Upper 700 MHz proceeding. *See* 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 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, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845 (2000) (*Upper 700 MHz MO&O and FNPRM*); 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 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, *First Report and Order*, 15 FCC Rcd 476 (2000) (*Upper 700 MHz First Report and Order*); 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 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, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006 (1999).

[3] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2708-18 ¶¶ 10-36.

channels that, in turn, would be voluntarily cleared by the lower band TV incumbents).[4] The *Upper 700 MHz Third Report and Order* also provided guidance on interference issues that may arise from a proposal to relocate a broadcast operation to a channel below Channel 59, and adopted various procedural changes in order to streamline the process of reviewing regulatory requests needed to effectuate private band-clearing agreements.[5]

3. In this proceeding, the Commission has enunciated a policy of facilitating the clearance of the Upper 700 MHz band to the extent that incumbent broadcasters and new 700 MHz licensees voluntarily negotiate agreements toward that end. The Commission has previously found that "[v]oluntary agreements have the potential of facilitating both the provision of next-generation and Internet wireless services and the transition to DTV by these incumbent broadcast stations."[6] The Commission has recognized that "[t]he overall effect of voluntary agreements that result in an infusion of capital to incumbent broadcasters, should ... be a strengthening of the free, over-the-air DTV service ultimately provided by Channel 59-69 incumbents."[7] In addition, the expeditious recovery of the 700 MHz television spectrum for use in providing other services, as mandated by Congress, will further the broad public interest in intensive and efficient use of the radio spectrum.[8] Thus, the Commission has recognized that "both the transition to DTV and clearance of this spectrum will generally be furthered, not frustrated by such voluntary agreements."[9] This policy favoring voluntary band-clearing arrangements derives from our belief that private parties generally are the best evaluators of their own economic circumstances and alternatives and that the Commission should not attempt to second guess private business decisions.[10] The Commission observed in a previous order in this proceeding:

> Our underlying policy premise is that voluntary agreements can provide supplemental resources to broadcasters that will both expedite their transition to DTV and strengthen their economic viability, as well as enable earlier delivery of new wireless services, but the private parties should determine for themselves, in light of specific circumstances, when the economic case is made. When the private parties are satisfied, therefore, we will be inclined to grant regulatory requests arising from such private commercial arrangements, provided the requests do not, on balance, have adverse public policy consequences.[11]

We have thus viewed our primary role to be assessing the effect on the public interest of

[4] *See id.*, 16 FCC Rcd at 2709-12 ¶¶ 13-18.

[5] *See id.* at 2712-17 ¶¶ 19-33.

[6] *Upper 700 MHz MO&O and FNPRM*, 15 FCC Rcd at 20847 ¶ 2.

[7] *Id.*, 15 FCC Rcd at 20865 ¶ 50.

[8] *Id.* at 20866-67 ¶¶ 52-53.

[9] *Id.*, 15 FCC Rcd at 20862 ¶ 44.

[10] *See, e.g.*, *Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2707 ¶ 9, 2721 ¶ 44.

[11] *Upper 700 MHz MO&O and FNPRM*, 15 FCC Rcd at 20869 ¶ 58.

regulatory requests in connection with such agreements.[12] Our belief in the efficacy of market-based forces also led us to conclude that it is not necessary or appropriate at this time to adopt cost-sharing rules, cost caps, or cost recovery guidelines to assist in clearing the Upper 700 MHz band, and to leave cost-sharing arrangements to voluntary negotiations among new wireless licensees.[13] Similarly, we have left the implementation of any process by which broadcasters and new wireless licensees reach band-clearing agreements, including any secondary auction process, to private, voluntary efforts. We have stated that these processes must be consistent with Commission policies and rules and must not interfere with the integrity and operations of the Commission's spectrum auctions.[14]

4. The Commission has received three petitions for reconsideration of the *Upper 700 MHz Third Report and Order*.[15] One petition was filed by Spectrum Clearing Alliance ("SCA"), which is led by Paxson Communications Corporation and joined by a number of other broadcasters having existing analog TV operations on Channels 60-69 as well as by other parties interested in band clearing.[16] SCA states in its petition that it is developing a comprehensive, private band-clearing plan that would be a "definitive framework for clearing the 700 MHz band."[17] SCA asserts that the adoption by the Commission of certain procedural and DTV policy changes would facilitate early clearing and provide certainty to prospective bidders that the Channel 59-69 spectrum will be cleared by a certain date.[18] One signatory of the SCA Petition, Spectrum Exchange Group, LLC ("Spectrum Exchange"), which has expressed an interest in serving as an intermediary to facilitate SCA's clearing scheme, also filed a separate petition in support of the SCA plan.[19]

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[12] *See id.*, 15 FCC Rcd at 20863-67 ¶¶ 46-53, 20869 ¶ 58; *Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2720-21 ¶¶ 42-44.

[13] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2706-07 ¶¶ 5-9, 2723-24 ¶¶ 48-50.

[14] *See id.*, 16 FCC Rcd at 2718-21 ¶¶ 37-44.

[15] The attached appendix is a list of the petitioners and other parties that submitted petitions, responsive filings, and *ex parte* notifications concerning band-clearing issues.

[16] *See* The Spectrum Clearing Alliance Petition for Clarification and Reconsideration, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-39 (filed Mar. 16, 2001) ("SCA Petition").

[17] *See id.* at 2-6, 11-12.

[18] *See id.* at 12. SCA also requested a brief delay in the start of Auction No. 31 to provide time to implement a band-clearing plan. *See id.* at 5-6. On July 11, 2001, the Wireless Telecommunications Bureau ("WTB") announced the postponement of Auction No. 31 pending resolution of petitions for reconsideration and clarification of the *Upper 700 MHz Third Report and Order*. WTB stated that it will announce key auction dates upon release of this order. *See* "Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Postponed," *Public Notice*, DA 01-1546, Report No. AUC-01-31-B (rel. July 11, 2001).

[19] *See* Petition for Clarification and Reconsideration of Spectrum Exchange Group, LLC, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-39 (filed Mar. 16, 2001).

5. The Association for Maximum Service Television, Inc. ("MSTV") also filed a petition, primarily seeking reconsideration of our decision in the *Upper 700 MHz Third Report and Order* not to adopt a new "no interference" standard that would prohibit any new involuntary interference to existing licensees.[20] MSTV also seeks clarification of the appropriate interference standard to be used for protection of DTV allotments and facilities from modified analog operations.[21] Finally, MSTV requests that the Commission rule out the possibility that other types of band-clearing policies might be adopted in the future and express "an unqualified commitment to voluntary band clearing."[22]

6. Because these petitions were filed within six months of the then-scheduled start of the auction of commercial licenses in the Upper 700 MHz band (Auction No. 31, the auction of licenses in the 747-762 and 777-792 MHz band),[23] an expedited pleading schedule was established to give the Commission an opportunity to provide timely guidance regarding these issues to prospective bidders and incumbent broadcasters in advance of Auction No. 31.[24]

III. DISCUSSION

A. DTV Construction Deadlines For Single-Channel Broadcasters

7. *Background.* The Commission initially adopted a DTV construction schedule that requires rapid build-out of digital broadcast facilities, among other reasons, to "ensure that recovery of broadcast spectrum occurs as quickly as possible."[25] The DTV construction deadlines are set forth in Section 73.624(d) of the Commission's rules.[26] According to the remaining deadlines, those commercial television broadcasters that have not yet constructed their authorized digital facilities must do so by May 1, 2002, and noncommercial broadcasters must complete their DTV facilities by May 1, 2003.[27] Consistent with this plan, the *Upper 700 MHz Third Report and Order* stated that, if a broadcaster is left with only a single analog allotment as a result of a voluntary band-clearing agreement, it must convert to DTV by the deadline set forth

[20] *See* Petition for Clarification and Reconsideration of the Association for Maximum Service Television, Inc., LLC, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-39 (filed Mar. 16, 2001) ("MSTV Petition").

[21] *See id.* at 9-10.

[22] *Id.* at 4-5.

[23] *See* "Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 12, 2001," *Public Notice*, Report No. AUC-01-31-A, DA 01-266 (rel. Jan. 31, 2001).

[24] *See* "Pleading Cycle Established for Responses to Petitions For Reconsideration of the Third Report and Order in WT Docket No. 99-168, CS Docket No. 98-120, and MM Docket No. 00-39," *Public Notice*, DA 01-788 (March 29, 2001).

[25] *See* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809, 12843 ¶ 83 (1997).

[26] 47 C.F.R. § 73.624(d).

[27] Deadlines for construction of DTV facilities affiliated with the four major networks in the top 30 markets have already passed. *See* 47 C.F.R. § 73.624(d).

in Section 73.624(d).[28]

8. SCA seeks reconsideration of the Commission's decision in the *Upper 700 MHz Third Report and Order* to require broadcasters that are left with a single channel as a result of a band-clearing arrangement to comply with the current DTV construction deadlines. In its petition, SCA requested that the Commission permit an incumbent broadcaster participating in an arrangement that clears an allotment in the Channels 59-69 band and leaves that broadcaster with only a single channel to remain in analog operation beyond the DTV construction deadline and to convert to digital at any time during the DTV transition.[29] SCA points out that this approach would be consistent with the Commission's decision in the DTV proceeding to afford those stations that were not allotted a paired channel the flexibility to convert to digital operation at a later stage in the DTV transition.[30] SCA contends that, due to the limited number of stations that would be affected, delaying their conversion to digital would not have an impact on the 85% market penetration trigger in Section 309(j)(14)(B) of the Communications Act that defines the end of the DTV transition period.[31] SCA also asserts that, by allowing such stations the discretion to convert to DTV at any time up until the end of the DTV transition, single-channel broadcasters would minimize service losses.[32] In a subsequent *ex parte* submission, SCA now proposes that such single-channel broadcasters be permitted to continue to operate in analog "until December 31, 2005 or when 70% of the television households in their markets are capable of receiving digital broadcast signals over-the-air."[33]

9. *Discussion*. Upon review of the arguments presented, we agree with SCA, Spectrum Exchange, and Ericsson that a broadcaster that gives up one of its channels to accommodate band

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[28] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2717 ¶ 33.

[29] *See* SCA Petition at 6-9.

[30] SCA Petition at 7, citing Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, MM Docket No. 87-268, 14 FCC Rcd 1348, 1367 ¶ 41 (1998).

[31] SCA Petition at 8-9. *See also* 47 U.S.C. §309(j)(14)(B).

[32] SCA Petition at 9.

[33] *Ex parte* letter from Lowell W. Paxson to Chairman Michael K. Powell (filed June 6, 2001). SCA also suggests that this penetration benchmark should be reduced to 50% if the Commission adopts "full digital multicast must carry rules ... providing that all free, over-the air video programming services provided by a digital broadcast station, electing must carry, are carried by all multichannel video programming providers, *i.e.*, cable, DBS, DSL, in its market." *Id.* We note, however, that the Commission deferred consideration of similar must-carry issues that were raised earlier in this proceeding pending development of an improved record in response to the *DTV Must-Carry Order and FNPRM*, having found that those submissions did "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*." *Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2726 ¶ 53. We continue to believe that those issues should be resolved in the *DTV Must-Carry proceeding*. *See* Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2620-22 ¶¶ 52-56 (2001) ("*DTV Must-Carry Order and FNPRM*").

clearing should have the flexibility to convert to DTV at a later stage in the transition period.[34] We note that all of the commenters addressing this subject support the proposal to afford such broadcasters greater flexibility in timing their conversion to digital operations,[35] and no parties have objected. This approach is consistent with the policy applied to pending TV applicants not deemed eligible for a second 6-megahertz channel because their analog TV applications were not granted by the DTV eligibility date.[36] Under our existing DTV policy, broadcasters that were not eligible for an initial DTV paired license and therefore have only a single allotment are subject to the three-year construction period for analog stations, and may, upon application to the Commission, convert their analog facility to digital at any point up to the end of the DTV transition period.[37]

10. Accordingly, we find that the DTV conversion process as a whole will not be significantly retarded by affording this limited group of broadcasters the flexibility to complete their digital conversion at a later date.[38] Under the policy we adopt today, if a broadcaster gives up one of its channels to accommodate band clearing (pursuant to Commission authorization), that single-channel broadcaster may continue to operate in analog until December 31, 2005.[39] Moreover, if such single-channel broadcaster seeks an extension of this deadline and is able to demonstrate that less than 70% of the television households in its market are capable of receiving digital broadcast signals, we will presume that such request is in the public interest.[40] Because

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[34] *See* SCA Petition at 9; Spectrum Exchange Petition at 2; Ericsson Reply at 2.

[35] *See id.* In addition, a number of broadcasters have filed letters in support of SCA's plan. A listing of those filers is attached. *See* Appendix.

[36] *See* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, 6865 ¶ 11 (1998).

[37] *See id.* The construction period for broadcast stations was extended from two to three years. *See* 47 C.F.R. § 73.3598(a), as amended by 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket Nos. 98-43 and 94-149, *Report and Order*, 13 FCC Rcd 23056, 23090 ¶ 83 (1998).

[38] We note that, in the DTV proceeding, the Commission has afforded broadcasters flexibility to achieve broadcast-related goals where such an approach is consistent with the public interest. *See* Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, *Report and Order and Further Notice of Proposed Rule Making*, 16 FCC Rcd 5946, 5955-56 ¶ 21 (discussing licensees' flexibility in selecting transmitter locations), 5961¶ 36 (discussing flexibility permitted under *de minimis* interference allowance), 5966-67 ¶ 48 (providing flexibility to competing applicants to negotiate settlements by suspending application of settlement limitations for limited period) (2001) (*DTV Biennial Review Order*) recons. pending.

[39] We clarify that this policy will apply to all broadcasters that are left with only a single allotment as a result of an arrangement that results in the clearing of Upper 700 MHz spectrum, regardless of whether the remaining allotment is an analog or digital channel.

[40] *See* Letter from Lowell W. Paxson to Chairman Michael K. Powell, at p. 2 (filed June 5, 2001). *Cf.* 47 U.S.C. § 309(j)(14)(B)(iii) (85% digital penetration test for determining end of DTV transition period). We intend to use the same evidentiary standards in assessing whether this 70% (continued....)

the number of Channel 59-69 stations is small and because stations with low viewership may be more likely to give up their second allotment, extending the DTV construction deadline for these single-channel broadcasters should not have a significant effect on the broadcast industry's ability to meet the 85% consumer penetration target set forth in Section 309(j)(14)(B) of the Act.[41] Thus, we find that the benefits of relief from the upcoming DTV construction deadline for this group of broadcasters outweigh the potential risk that such limited relief may delay the DTV transition.

11. Our decision is made in furtherance of the Commission's existing policies in favor of facilitating the possibility of early clearing of the Upper 700 MHz spectrum.[42] The Commission's voluntary band-clearing policies have been established pursuant a statutory scheme which directs the Commission to reallocate the Channel 60-69 spectrum to new commercial and public safety services, assign commercial licenses by competitive bidding, and clear all broadcast television licensees from the band.[43] We take this approach with the intent that broadcasters continue to make progress toward achieving the DTV construction goals and penetration targets while also carrying out our band-clearing goals. We also note that we are requiring such broadcasters to construct their digital facilities prior to the end of the DTV transition period. Further, by affording these particular single-channel broadcasters such flexibility in scheduling their conversion, this policy will not only promote early clearing of this band, but will also help assure that the public's radio spectrum resource is put to its highest and most valued use.[44]

(Continued from previous page)
penetration target has been met as will be used when making similar determinations under the statutory 85% standard. We also delegate to the Chief, Mass Media Bureau, authority to implement to adopt such procedures or make such determinations as may be necessary to implement this policy.

[41] 47 U.S.C. § 309(j)(14)(B). *See also* letter from Lowell W. Paxson, Chairman, Paxson Communications Corporation, to Chairman Michael K. Powell (filed May 21, 2001) ("... the impact on the DTV transition from the Spectrum Clearing Alliance plan will be miniscule.").

[42] *See Upper 700 MHz First Report and Order*, 15 FCC Rcd 476, 534 ¶ 145; *Upper 700 MHz MO&O and FNPRM*, 15 FCC Rcd at 20860-72 ¶¶ 39-66; *Upper 700 MHz Third Report and Order*, 16 FCC Rcd 2703.

[43] *See* 47 U.S.C. § 337(a) (reallocation of 746-806 MHz band), (b) (assignment of commercial licenses by competitive bidding), and (e) (clearing of incumbent licensees); § 309(j)(14)(C) (directive to reclaim and reassign spectrum occupied by analog television licensees); and § 337(c) (recovery of broadcast licenses for reallocation or reassignment). *See also Upper 700 MHz First Report and Order*, 15 FCC Rcd 476, 534 ¶ 145; *Upper 700 MHz MO&O and FNPRM* 15 FCC Rcd at 20860-72 ¶¶ 39-66; *Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2709 ¶ 13 (statutory basis for Commission's authority to facilitate the early clearing of incumbent broadcasters).

We note that, pursuant to the DTV transition plan, the core spectrum of Channels 2-51 is to remain allocated to broadcast use indefinitely (*see* Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Notice of Proposed Rule Making*, 16 FCC Rcd 7278, 7282 ¶ 5 (2001)), and that the Commission's band-clearing policies for Channels 52-59 are under consideration in another proceeding (*see id.*, 16 FCC Rcd at 7330-35 ¶¶ 125-36).

[44] Our adoption of this postponement of the DTV construction deadline for this limited group of broadcasters having only a single allotment as a result of an arrangement that results in the clearing of Channel 59-69 spectrum does not mean that we will be adopting exceptions or granting extensions to
(continued....)

B. Interference Protection Standards

12. *Background.* The *Upper 700 MHz Third Report and Order* confirms our intention to review license modification applications associated with band-clearing arrangements under established DTV protection criteria.[45] Among those criteria are provisions that specifically allow certain levels of *de minimis* interference from proposed DTV stations to nearby full-service TV and DTV facilities.[46] Under our *de minimis* interference allowance, non-conforming DTV applications may be permitted where interference will affect less than two percent of the population served by another analog or DTV station (provided that no new interference may be caused to a station already predicted to receive interference from all other broadcasters to ten percent or more of its population).[47] The *Upper 700 MHz Third Report and Order* rejected a proposal by MSTV and other broadcast interests seeking the adoption of a new "no interference" standard that would prohibit any new involuntary interference to existing licensees.[48]

13. MSTV seeks reconsideration of this decision. MSTV argues that "the Commission has effectively taken a *de minimis* source interference standard designed to address one particular problem (the need to facilitate DTV implementation) and applied it to a completely different problem (the need to clear space in the 700 MHz band) without articulating any coherent reason for doing so."[49] Further, MSTV claims that the use of the DTV *de minimis* interference standard in the band-clearing context has a negative effect on the public's interest in free, over-the-air television while offering no offsetting, broadcast-related benefits. Finally, MSTV urges the Commission to clarify that the DTV two percent *de minimis* interference allowance does not extend to analog license modification applications.[50]

14. *Discussion.* We disagree with the premise of MSTV's argument, and affirm the policies announced in the *Upper 700 MHz Third Report and Order.* MSTV's argument is premised on its belief that issues associated with clearing of the Upper 700 MHz band are "completely different" from those of the DTV transition.[51] MSTV fails to recognize that the process of clearing the Upper 700 MHz band has long been an integral part of the DTV transition

(Continued from previous page)

those broadcasters that have two allotments. Rather, we intend to consider such requests on a case-by-case basis within the context of our on-going *DTV Biennial Review Proceeding. See DTV Biennial Review Order*, 16 FCC Rcd 5946, recons. pending.

[45] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2713 ¶ 22.

[46] *See* 47 C.F.R. § 73.623(c)(2) (2% *de minimis* interference standard).

[47] *See id.*

[48] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2713 ¶ 22. The *Upper 700 MHz Third Report and Order* characterized MSTV's proposed standard as a "new" standard reflecting the fact that this proposal would deviate from existing DTV policy. Thus, contrary to MSTV's assertion (*see* MSTV Petition at n. 13), the adoption of MSTV's proposed "no interference" standard would have been a new DTV interference standard.

[49] MSTV Petition at 5.

[50] *See id.* at 9.

[51] *Id.*

process. For example, in the *DTV Sixth Further Notice*, the Commission stated that "the recovery of spectrum continue[s] to be a key component of our implementation of DTV service."[52] Contrary to MSTV's assertion, the policies outlined in the *Upper 700 MHz Third Report and Order* do not extend the *de minimis* interference protection criteria to a new or different problem. Rather, the *Upper 700 MHz Third Report and Order* simply clarified that DTV broadcasters participating in band-clearing arrangements could continue to benefit from the flexibility allowed under the DTV technical rules.[53]

15. The Commission's DTV interference protection standards are based on our recognition that a "*de minimis* standard for permissible new interference is needed to provide flexibility for broadcasters in the implementation of DTV," a process which includes recovery and clearing of spectrum currently used for television service.[54] The *Upper 700 MHz Third Report and Order* notes that "[t]he record in this proceeding contains no basis for the Commission to conclude that a departure from established DTV interference protection criteria is warranted."[55] We find nothing in MSTV's petition that provides any basis to change our DTV interference protection policies, and therefore reject MSTV's arguments in this regard.

16. In urging the Commission to clarify that the DTV two percent *de minimis* interference allowance does not extend to analog license modification applications, MSTV contends that the *Upper 700 MHz Third Report and Order* has created an ambiguity about the circumstances in which the DTV two percent *de minimis* interference limit applies.[56] The *Upper 700 MHz Third Report and Order* did not change the interference standards for analog proposals to protect DTV service. Applicants seeking modifications of full-service analog TV stations may not cause any additional interference to DTV service, other than a 0.5% reduction in service

[52] *See* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd 10968, 10977 ¶ 18 (1996). Thus, at the outset of the *Upper 700 MHz Third Report and Order*, we observed that our objectives in this proceeding are both "to facilitate the clearing of the 746-806 MHz band to allow for the introduction of new wireless services, and to promote the early transition of incumbent analog television licensees to [DTV]." *Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2074 ¶ 1.

[53] Ericsson filed a Reply noting its support for a flexible interference policy, observing that "an interference policy which considers and adapts to the needs of broadcasters may allow broadcasters to timely clear the 700 MHz band when they would otherwise be precluded from relocating." Ericsson Reply at 4.

[54] Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, 7450 ¶ 80 (1998). This *de minimis* interference standard was adopted at the urging of MSTV and other broadcast groups. *See id.*

[55] *Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2713 ¶ 22.

[56] *See* MSTV Petition at 8-9. Other commenters found no ambiguity in the *Upper 700 MHz Third Report and Order* with regard to this standard. *See* SCA Response, Attachment 2: Engineering Statement, at 1-3 (describing application of 0.5% interference allowance).

population to account for rounding and calculation tolerances.[57]

C. DTV Replication Policy

17. *Background.* One of the Commission's goals in designing the initial DTV Table of Allotments was to design DTV service areas that would, to the greatest extent possible, allow each broadcaster to provide DTV service to a geographic area that is comparable to its existing NTSC service area.[58] This replication goal meant that each DTV channel allotment was chosen to best allow its DTV service to match the Grade B service contour of the NTSC station with which it was paired.[59] Implicit in the replication goal is the Commission's expectation that DTV stations will eventually be constructed with "full-replication" facilities.[60] In the initial stages of the DTV transition, each DTV facility will be entitled to interference protection to its existing and authorized DTV contour,[61] as well as to its April 1997 NTSC Grade B service area.[62] Although the Commission considered whether broadcasters should be required to replicate fully their analog service areas with DTV coverage,[63] the Commission decided in its recent *DTV Biennial Review Order* not to require full replication of analog facilities with DTV.[64] Instead, the Commission decided that it would "cease to give interference protection to [broadcasters'] unreplicated service area as of December 31, 2004."[65] Thus, by December 31, 2004, commercial DTV licensees must either be on-the-air replicating their April 1997 NTSC Grade B service area or lose interference protection to the unreplicated portion of this service area outside the noise-limited signal contour.[66] As we explained in that order, by eliminating such protection for broadcasters that do not replicate their analog service areas, we enable other broadcasters to make efficient use of the unused spectrum "in order to restore any service lost by viewers as a

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[57] *See* "Additional Application Processing Guidelines for Digital Television (DTV)," *Public Notice*, at 8 (MMB Aug. 10, 1998). *See also* Establishment of a Class A Television Service, *Report and Order*, 15 FCC Rcd 6355, 6388 n. 147 (2000).

[58] *See* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Sixth Report and Order*, 12 FCC Rcd 14588, 14595-56 ¶ 12 (1997).

[59] *See DTV Biennial Review Order*, 16 FCC Rcd at 5956 ¶ 22.

[60] "Full-replication facilities would entail a combination of transmitter site, effective radiated power, directional antenna characteristics and antenna height that is adequate to cover at least the same area as is served by the NTSC station." Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, *Notice of Proposed Rule Making*, 15 FCC Rcd 5257, 5263 ¶ 16 (2000).

[61] *See* 47 C.F.R. §§ 73.622.

[62] *See DTV Biennial Review Order*, 16 FCC Rcd at 5956 ¶ 22.

[63] *See id.*, 16 FCC Rcd at 5955-56 ¶¶ 21-22.

[64] *See id.* at 5956 ¶ 22.

[65] *See id.* Noncommercial DTV licensees will not lose such protection until December 31, 2005. *See id.* at 5956 ¶ 24.

[66] *See id.*

result of the lack of full replication."[67] In adopting this policy, we noted that "[w]hile we wish to assure broadcasters a measure of flexibility in constructing their DTV facilities, we continue to want to assure that viewers do not lose service and we take seriously our mandate to speed the transition and to ensure that the spectrum is used efficiently."[68] To accomplish this objective without imposing undue cost and delay on broadcasters, and to minimize environmental effects, we elected not to expressly require full replication of analog coverage with DTV service, and instead adopted this "use-or-lose" policy as an incentive for broadcasters to achieve such replication.[69]

18. In its petition, SCA asserts that, where a broadcaster does not fully replicate for purposes of implementing a band-clearing arrangement, the Commission should not eliminate interference protection from unreplicated service areas at the end of 2004.[70] SCA points out that broadcasters may have to reduce their coverage area to achieve full compliance with the *de minimis* interference standard and may not be able to maintain full replication.[71]

19. *Discussion.* We decide to create a limited exception to the DTV replication use-or-lose policy for single-channel broadcasters that do not fully replicate (operate with their full allotted facilities) after implementing a band-clearing arrangement. As with our decision on DTV construction deadlines for single-channel broadcasters,[72] we believe that this approach is supported by the congressional plan for the transition of this spectrum to new public safety and commercial uses.[73]

20. In the *DTV Biennial Review Order*, the Commission chose not to require such replication so as "to give broadcasters a measure of flexibility as they build their DTV facilities to collocate their antennas at common sites, thus minimizing potential local difficulties locating towers and eliminating the cost of building new towers."[74] We find that it is consistent with the underlying intent of that policy to afford certain broadcasters relief from the DTV replication protection deadline. For instance, in connection with a band-clearing arrangement as discussed above,[75] it would be inconsistent with the intent of the replication policy to remove DTV replication protection at the end of 2004 from a single-channel broadcaster that has been

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[67] *Id.*

[68] *Id.*

[69] *See id.*

[70] *See* SCA Petition at 8.

[71] *See id.*

[72] *See* Section III.A., *supra* (postponement of DTV construction deadline for single-channel broadcasters).

[73] *See* note 39, *supra* (statutory scheme governing reallocation of Channels 60-69 and assignment of licenses for new services).

[74] *DTV Biennial Review Order*, 16 FCC Rcd at 5956 ¶¶ 21.

[75] *See* Section III.A. *supra*.

permitted to continue its analog operations on a digital allotment until the end of 2005 (or perhaps later).[76] Instead, in such a case, we believe that a broadcaster that is left with a DTV single-channel allotment as a result of a band-clearing arrangement should retain the interference protection associated with that DTV allotment for a period of 31 months after beginning to transmit in digital. This period is equal to the period of interference protection for unreplicated areas that the Commission provided to all broadcasters in the *DTV Biennial Review Order*.[77] Although SCA seeks additional relief from the Commission's replication policy for those broadcasters that participate in band-clearing agreements under which they would retain two allotments, we will not address that issue here.[78]

D. Other Matters Relating to Early, Voluntary Band Clearing

21. A number of the issues raised in the petitions involve matters which, the petitioners argue, may promote greater certainty for parties involved in the DTV transition and band-clearing processes. Throughout this proceeding, the Commission has attempted to promote greater regulatory certainty to facilitate market-based band clearing.[79] As we have recognized in other contexts, "regulatory certainty is critical to providing the industry with incentives to make investments, including in new technologies such as 3G service."[80] SCA's petition includes a

[76] If the band-clearing broadcaster has retained its own initial DTV allotment, the allotment facilities are designed to replicate its April 1997 authorized analog TV Grade B service contour. In a three-way band-clearing agreement, if the broadcaster left with a single channel has the DTV allotment of a second broadcast licensee, the DTV allotment facilities are designed to replicate the April 1997 authorized analog TV Grade B service contour of that second licensee. Thus, a single-channel broadcaster that occupies a second broadcaster's DTV allotment will be protected within the area defined by the second broadcaster's April 1997 Grade B contour.

[77] Commercial broadcasters that are required to construct their DTV facilities by May 1, 2002 must replicate their April 1997 analog service contour by December 31, 2004 (a period of 31 months) or they will risk losing interference protection. *DTV Biennial Review Order*, 16 FCC Rcd at 5955-56 ¶ 21-24.

[78] Thus, we will address separately those petitions for reconsideration filed by certain broadcast interests, including Paxson, the National Association of Broadcasters, and others, which seek a modification or complete reversal of the DTV replication policy. *See, e.g.*, MSTV/NAB/ALTV Petition for Reconsideration, MM Docket No. 00-39 (filed March 15, 2001); Petition for Reconsideration and Clarification of Paxson Communications Corporation, MM Docket No. 00-39 (filed Mar. 15, 2001).

[79] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2709-10 ¶ 15 (greater certainty regarding approval of regulatory requests), 2720 ¶ 41 (increased certainty through the use of secondary auctions and other comprehensive clearing mechanisms); *Upper 700 MHz MO&O and FNPRM*, 15 FCC Rcd at 20846-47 ¶ 2 (providing guidance on Commission consideration of regulatory requests will provide greater certainty), 20883-4 ¶ 98 (increased certainty through the use of secondary auctions and other comprehensive clearing mechanisms).

[80] 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, Cellular Telecommunications Industry Association's Petition for Forbearance from the 45 MHz CMRS Spectrum Cap, Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Regulatory Treatment of Mobile Services, *Report and Order*, 15 FCC Rcd 9219, 9243 ¶ 51 (1999). *See also* Gregory L. Rosston & Jeffrey S. Steinberg, *Using* (continued....)

proposal to promote greater certainty for potential bidders in the Commission's spectrum auction with the use of a comprehensive, voluntary band-clearing mechanism.[81] Other such issues involve the processing of license modification applications, the treatment of currently-pending Channel 59-69 applications, and the use of other regulatory approaches to facilitate the efficient clearing of the Upper 700 MHz band.

1. Spectrum Clearing Alliance's Comprehensive Band-Clearing Plan

22. *Background.* In the *Upper 700 MHz Third Report and Order*, we found that "secondary auctions" or other such comprehensive market-oriented band-clearing mechanisms could be used to facilitate efficient band clearing. We observed in the *Upper 700 MHz Third Report and Order* that such market-based mechanisms:

> 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.[82]

23. SCA asserts that, with Spectrum Exchange and other broadcasters, it is currently in the process of developing a "comprehensive" band-clearing plan that is intended to serve as a framework for clearing the Channel 59-69 band. In its petition, SCA asks for a certain level of Commission involvement in executing its plan, and outlines certain actions to be taken by the Commission to assist in publicizing SCA's band-clearing plan.[83]

24. *Discussion.* We acknowledge that there are strong public interest benefits favoring comprehensive band clearing. However, we find that additional involvement by the Commission beyond our existing processes is not necessary to facilitate SCA's proposed private clearing arrangement (or any other comprehensive clearing plans). We note that there already appears to be significant support for SCA's plan among broadcasters in the Upper 700 MHz band and other

(Continued from previous page)
Market-Based Spectrum Policy to Promote the Public Interest, 50 Fed. Comm. L.J. 87, 111 (1997) ("If spectrum users and their financial supporters are not reasonably certain of the rules that will govern spectrum use, they will be less willing to invest in obtaining and developing the spectrum.... In the absence of such certainty, the spectrum may not be used to its full potential and the public may fail to realize its full value.")

[81] *See* SCA Petition at 2-6. *See also* SCA Reply at 1-2.

[82] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2720 ¶ 41.

[83] SCA requests that the Commission provide public notice of the submission of its band-clearing plan (including the governing agreement), which interested parties could then review. SCA anticipates that license modification applications and other regulatory requests necessary to implement band-clearing arrangements in particular markets would be submitted well in advance of the Commission's spectrum auction and most such applications would be acted upon prior to the auction, giving potential bidders greater certainty that the spectrum will be extensively cleared. *See* SCA Petition at 2-6.

interested parties,[84] and no parties have objected to SCA's proposal. Under a voluntary, comprehensive band-clearing scheme established prior to the auction, bidders in the Commission's auction will be able to bid with some certainty that the spectrum will be cleared and avoid the delay and expense of complex post-auction bargaining. We expect that, if implemented, SCA's plan would result in greater participation by Channel 59-69 broadcasters than individual, post-auction negotiations. As we have previously recognized, a comprehensive plan is also more likely than individual negotiations to lead to the clearing of the Upper 700 MHz public safety and guard bands in addition to the commercial spectrum.[85]

25. We find that this order, in addition to the existing public processes for considering modification applications and associated regulatory requests to implement band-clearing agreements, should be sufficient to maximize the likelihood that all potential participants would have actual notice of an opportunity to participate in voluntary, comprehensive band-clearing arrangements, such as that being developed by SCA.

2. Expedited Processing of Regulatory Requests

26. *Background.* In the *Upper 700 MHz Third Report and Order*, we found it unnecessary to adopt a 60-day application processing deadline advocated by Paxson, Spectrum Exchange, and others.[86] In that order, we acknowledged, however, that the goals of our voluntary band-clearing policies would be frustrated in the event of undue delays in processing regulatory requests to facilitate voluntary band-clearing agreements.[87] Thus, we announced our commitment to "processing all such requests as expeditiously as possible."[88] Further, the Commission stated that "we fully expect that routine regulatory requests will be acted on within 90 days."[89]

27. SCA requests reconsideration of the decision not to adopt an explicit timeline.[90] SCA and Spectrum Exchange argue that the absence of a processing timeline creates too much uncertainty for the band-clearing process, particularly for "non-routine" cases, and propose the adoption of a 90-day timeline to process "all technical modifications" filed in connection with SCA's plan.[91] Petitioners envision that modification applications would be granted prior to

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[84] SCA says that broadcasters representing over 70% of the analog stations operating in the Channel 59-69 band have signed on to its plan. *See ex parte* letter from Lowell W. Paxson to Chairman Michael K. Powell, WT Docket 99-168 (filed July 12, 2001). Spectrum Exchange, a signatory to the SCA Petition, also filed a separate petition in support of SCA. *See* Spectrum Exchange Petition. Ericsson also supports SCA's plan. *See* Ericsson Reply.

[85] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2720 ¶ 41.

[86] *See id.*, 16 FCC Rcd at 2715 ¶¶ 29-30.

[87] *See id.*

[88] *See id.*, 16 FCC Rcd at 2715 ¶ 30.

[89] *Id.*

[90] *See* SCA Petition at 4-5.

[91] SCA Petition at 4-5; Spectrum Exchange Petition at 2.

Auction No. 31, so that bidders would have certainty that the Commission had no problems with the broadcast operation changes contemplated as part of the clearing plan.[92]

28. *Discussion.* In light of the substantial public interest benefits associated with voluntary band-clearing agreements, we delegate to the Mass Media Bureau authority to establish a 90-day processing period for band-clearing requests. We conclude that an explicit time period would promote certainty in the clearing process. With a processing period in place, broadcasters may promptly secure authorizations for the necessary license modifications and thereby provide potential bidders with greater certainty that the spectrum can be cleared by a specific date. Greater procedural certainty for potential bidders may create a more efficient license assignment process.[93]

29. Under the approach we adopt today, license modification applications necessary to implement band-clearing arrangements would be granted at the end of the 90-day time period, unless the application is found to be defective, is opposed, or an integral request for waiver or other regulatory request cannot be granted.[94] Upon notice to the applicant, the Mass Media Bureau could toll the 90-day deadline during the period in which an applicant is responding to a staff request for additional information. The Mass Media Bureau could also, upon notice to the applicant, extend the processing period if the caseload of regulatory requests associated with band-clearing arrangements makes it administratively impractical to complete processing within a 90-day period. The 90-day processing period would not apply to those applications that do not make a *prima facie* case of meeting the presumptions previously established in this proceeding for voluntary requests associated with band-clearing arrangements or that are not otherwise

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[92] *See id.*

[93] The Commission has long recognized that awarding licenses to those who value them most highly is likely to encourage growth and competition and ensure rapid deployment of new technologies and services. *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2349-50 ¶ 5 (1994).

[94] This policy is an outgrowth of the rebuttable presumption that certain regulatory requests associated with band-clearing arrangements will serve the public interest. In the *Upper 700 MHz MO&O and FNRPM*, the Commission 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). In particular, this favorable presumption attaches to any requests that: (1) would make new or expanded wireless service, such as '2.5' or '3G' services, available to consumers; (2) would clear commercial frequencies that enable provision of public safety services; or (3) would result in the provision of wireless service to rural or other underserved communities. The applicant would also need to show that grant of the 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. *See Upper 700 MHz MO&O and FNRPM*, 15 FCC Rcd at 20870-71 ¶ 61. The Commission further indicated that when this presumption is not established, or is rebutted, it would review regulatory requests by weighing the loss of broadcast service and the advent of new wireless service on a case-by-case basis. *See id.*, 15 FCC Rcd at 20869-71 ¶¶ 60-61. Subsequently, the *Upper 700 MHz Third Report and Order* extended this general presumption, standards of review, and policies to three-way band-clearing agreements. *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2709-17 ¶¶ 13-33.

entitled to streamlined processing.[95] Staff will regularly issue notice of modifications granted pursuant to this process.

3. Proposal to Relax Waiver Policies

30. *Background.* Our previous decisions in this proceeding have provided guidance on a number of aspects of the Commission's treatment of regulatory requests associated with band-clearing arrangements. In regard to such regulatory requests, SCA proposes that the Commission adopt a "relaxed waiver standard" with respect to interference to Class A stations or where other requirements (e.g., city grade coverage) are not met.[96]

31. *Discussion.* In light of the balance that we have achieved among the various objectives in this proceeding, we decline to adopt a general "relaxed waiver" policy.[97] We find that our decisions today, together with the policies we have previously adopted, strike an appropriate balance between the objectives underlying our established interference policies and the need to provide broadcasters with greater flexibility to implement band-clearing agreements. Thus, we intend to entertain any requests for waiver on a case-by-case basis.

4. Treatment of Pending Channel 59-69 Applicants

32. *Background.* In its petition, SCA seeks clarification that full-service television applicants with pending applications for stations in the Channel 59-69 band would be entitled to participate in band-clearing arrangements.[98]

33. *Discussion.* We confirm that broadcasters with pending DTV applications will be permitted to benefit from band-clearing policies announced in this proceeding. We find no principled reason to distinguish between those broadcasters that have already been granted authority to operate in this band and those that have not yet received an authorization. Clearing of both pending applications and authorized facilities would serve the objectives of this proceeding.

5. Other Band Clearing Approaches

34. *Background.* In the 700 MHz proceeding, the Commission has chosen to rely on voluntary, market-based efforts to clear the band, rather than require mandatory relocation. The *Upper 700 MHz Third Report and Order* also states that the Commission may revisit this

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[95] The *Upper 700 MHz Third Report and Order* also adopted certain procedural changes designed to streamline the Commission's review of regulatory requests associated with band-clearing arrangements. *Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2716-17 ¶ 32.

[96] *See* SCA Petition at 9-10; Ericson Reply at 3-4.

[97] We note that statutory requirements may restrict our ability to waive certain requirements, such as those governing interference to Class A stations. *See* Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. Appendix I at pp. 1501A-594 – 1501A-598 (1999), *codified at* 47 U.S.C. § 336(f); Establishment of a Class A Television Service, MM Docket No. 00-10, *Report and Order*, 15 FCC Rcd 6355, 6370-87 ¶¶ 36-75 (2000).

[98] *See* SCA Petition at 10-11.

approach in the future "if we find it necessary." MSTV requests that the Commission reconsider its refusal to rule out mandatory band clearing as a future option.[99] SCA supports MSTV's request.[100] According to MSTV, broadcasters believe that the Commission's statement contains "an apparent threat that aggressive band clearing measures could be used in the future" and that this "invites delay and gamesmanship."[101]

35. *Discussion.* We continue to believe that voluntary agreements between broadcasters and new wireless licensees should result in the effective clearing of the 700 MHz band, and find no basis for disturbing our announced policy.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act and Paperwork Reduction Act

36. 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).[102] Because the policies and rules adopted in this Order on Reconsideration of the 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

37. Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 (voice), TTY (202) 418-7365, or at bmillin@fcc.gov. This Order on Reconsideration of the Third Report and Order can also be downloaded at http://www.fcc.gov/Bureaus/Wireless/Orders/2001/index.html.

C. Further Information

38. For further information concerning this Order on Reconsideration of the Third Report and Order, contact William Huber of the Auctions and Industry Analysis Division at (202) 418-0660 (voice), (202) 418-7233 (TTY), e-mail: whuber@fcc.gov, Wireless Telecommunications Bureau, Washington, DC 20554.

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[99] *See* MSTV Petition at 2, 4-5; MSTV Reply at 1.

[100] *See* SCA Response at 2-3.

[101] MSTV Petition at 4; MSTV Reply at 1.

[102] 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).

V. ORDERING CLAUSES

39. 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 ORDER ON RECONSIDERATION OF THE THIRD REPORT AND ORDER is hereby adopted.

40. 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 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, the Petition for Reconsideration filed by MSTV on March 16, 2001 IS DENIED, and the Petitions for Reconsideration filed by Spectrum Clearing Alliance and Spectrum Exchange Group, LLC on March 16, 2001 ARE GRANTED TO THE EXTENT DISCUSSED HEREIN.

41. IT IS FURTHER ORDERED that AUTHORITY IS HEREBY DELEGATED to the Mass Media Bureau to implement the policies for the introduction of new wireless services and to promote the early transition of incumbent analog television licensees to DTV service TO THE EXTENT DISCUSSED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX: PETITIONS FOR RECONSIDERATION, COMMENTS, REPLY COMMENTS, AND OTHER SUBMISSIONS

Parties Filing Petitions for Reconsideration and Clarification:

Association for Maximum Service Television, Inc. ("MSTV")
Spectrum Clearing Alliance ("SCA") (joint filing of broadcasters and other entities interested in band clearing policies), including:
- Paxson Communications Corporation
- Jovon Broadcasting Corporation
- Mid-State Television
- Whitehead Media, Inc.
- Spectrum Exchange Group, LLC ("Spectrum Exchange")
- WRNN-TV Associates Limited Partnership
- Daystar Television Network
- Allen & Company Incorporated
- Christian Communications of ChicagoLand, Inc.
- Bryant Broadcasting Co.
- Unicorn Communications
- B & C Kentucky, LLC
- Pappas Telecasting Companies
- Sanger Telecasters, Inc.
- Shop at Home, Inc.
- Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network
- Radiant Life Ministries
- Tri-State Christian T.V., Inc.
- Entravision Holdings, LLC
- Sinclair Broadcast Group, Inc.

Spectrum Exchange

Parties Filing In Support of Spectrum Clearing Alliance's Petition for Reconsideration and Clarification:

Butler University
Brevard Community College/WBCC-TV
Christian Television of Palm Beach County, Inc.
Connecticut Public Broadcasting
Four Seasons Peoria, LLC
Four Seasons Las Vegas, LLC
Good Companion Broadcasting Co., Inc.
High Mountain Broadcasting, Inc.
Jacksonville Educators Broadcasting, Inc.
Living Faith Ministries
McLaughlin Broadcasting, Inc./Dove Broadcasting, Inc.
Spartan TV, LLC
Venture Technologies Group, LLC
World Television of Washington, LLC

Parties Filing Responses or Oppositions to Petitions for Reconsideration and Clarification:

SCA

Parties Filing Replies:

MSTV
Ericsson, Inc.

Parties Filing *Ex Parte* Notifications:

Paxson Communications Corporation
SCA
Spectrum Exchange

CONCURRING STATEMENT OF COMMISSIONER GLORIA TRISTANI

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

I concur in today's result because it will allow viewers to continue to enjoy free, over-the-air analog broadcasts in instances where a broadcaster chooses to give up one of its two channel allotments as part of an agreement to clear the upper 700 MHz band. I write separately because preserving viewers' access to over-the-air broadcasting is a result but not a factor in today's decision, which continues the Commission's singular focus on clearing this band for new wireless services.

This proceeding involves four competing interests: the promise of new wireless services, public safety access to much needed spectrum, the transition to digital television (DTV), and the continued ability of today's viewers to enjoy free, over-the-air broadcasts. Early in this proceeding, I voted in favor of a band clearing approach that weighed these interests on a case-by-case basis, consistent with Commission precedent regarding use of spectrum and the possible loss of broadcast services.

I broke with my colleagues when the majority chose to defer spectrum use decisions to private parties and adopted a strong presumption in favor of band clearing. This policy was intended to provide wireless providers with certainty that they would be able to clear existing broadcast stations from the band. To that end, the majority abandoned the Commission's long-standing standard of review, applied on a case-by-case basis, that "once in operation, a [broadcast] station assumes an obligation to maintain service to its viewing audience, and the withdrawal or downgrading of existing service is justifiable only if offsetting factors are shown which establish that the public generally will be benefited."[1]

The majority asserted that a strong presumption in favor of clearing the band would serve two public policy purposes: "to facilitate the clearing of the 746-806 MHz band to allow for the introduction of new wireless services, and to promote the early transition of incumbent analog television licensees to [DTV]."[2] Broadcasters that relinquished their interests in a channel allotment, it was presumed, would acquire additional resources to build out DTV facilities by the Commission's May 2002 deadline. The decision concluded that today's viewers would experience a "temporary loss" of analog service that was deemed acceptable. For the millions of Americans who only receive over-the-air broadcasting – many of whom are among the nation's poorest – this temporary loss could be permanent given rising charges in the MVPD market and the high cost of DTV sets. I dissented because Congress never envisioned a Commission policy to facilitate early recovery of the broadcasters' spectrum at the expense of today's free, over-the-air viewers.

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

[2] *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions of Part 27 of the Commission's Rules,* Third Report and Order, 16 FCC Rcd 2703, 2704 para. 1 (2001).

On reconsideration, private parties assert that broadcasters need additional relief if they are to consider "giving up" their second channel allotment. Specifically, they wish to continue analog operations on their remaining channel rather than broadcast in DTV by the Commission's May 2002 deadline. Today's decision accedes to that request. Broadcasters that enter private agreements to vacate their second channel will be allowed to operate their lone channel in analog format until 2005 or beyond.

As I have noted throughout this proceeding, I am committed to preserving consumer access to free, over-the-air broadcasting. I therefore support this result as an improvement over the status quo that left viewers of these stations without broadcast service. I note, however, that this comes only at the expense of the Commission's stated goal of furthering the DTV transition.

If the majority demands across-the-board band clearing policies rather than case-by-case review, I believe that continued access to free over-the-air broadcasting must take precedence over facilitating the transition to DTV.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN ABERNATHY

In re: Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules et al; WT Docket No. 99-168, CS Docket No. 98-120, MM Docket 00-39, Order on Reconsideration and Third Report and Order, FCC 01-258 (rel. September 17, 2001)

Today's decision moves the Commission one step closer to the Congressionally mandated goal of transitioning the 746-764 and 776-794 MHz broadcast bands to new public safety and commercial uses. The Commission has struggled to balance the needs of the incumbent broadcasters and their analog viewers in these bands with the mandate to transition this spectrum prior to the end of the DTV transition. I support the prior Commission's policy of facilitating private transactions that allow for incumbents to clear the band early. This policy framework is completed in today's order by removing some lingering regulatory impediments to such transactions. In my view today's order is another example of the Commission getting it right: removing needless regulatory uncertainty to allow licensees, consistent with the public interest, to more freely exercise their rights as they see fit.

Today's order provides for regulatory symmetry between single channel broadcasters who were not eligible for a second channel and those left with a single channel as a result of a voluntary band clearing arrangement.[1] Therefore it allows broadcasters that are left with a single channel after a voluntary band clearing transaction to continue to broadcast in analog until 2005 or later -- if less than 70% of the area's households are capable of receiving a digital broadcast signal.[2] In addition, these stations are also granted the same 31-month replication period after beginning to transmit in digital that the Commission provided to all broadcasters in the DTV Biennial Review Order.[3] Finally the Commission assures licensees that it will endeavor to provide prompt service to these licensees by processing routine spectrum clearing applications within 90 days of receipt.[4]

While our goal is not to stand in the way, the Commission also does not abdicate its responsibility to analyze each transaction's impact on the public interest. There are significant public interest benefits to such transactions. For broadcasters, these transactions will speed up the inevitable – relocation from this band—while providing additional resources for the DTV transition. Congress has mandated that this spectrum be reclaimed from strictly broadcasting use and designated for new uses. Therefore delay in relocation only prolongs the period of uncertainty for all the parties involved. Private band clearing arrangements will also provide the resources for these stations to make the digital transition more smoothly. The DTV transition is an expensive proposition. For some stations in this band, the funds made available through voluntary band clearing may make the difference between going digital and going dark.

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[1] *In re* Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules et al; WT Docket No. 99-168, CS Docket No. 98-120, MM Docket 00-39, *Order on Reconsideration and Third Report and Order,* FCC 01-258 (rel. Sept. 11, 2001).

[2] *Id.* at ¶ 10.

[3] *Id.* at ¶ 20 (citing *DTV Biennial Review Order*, 16 FCC Rcd at 5956 ¶ 21).

[4] *Id.* at ¶ 28.

The private transactions will provide benefits to new commercial and public safety wireless services in these communities. In particular, spectrum clearing will speed fulfillment of the congressional mandate to provide for additional public safety spectrum for enhanced voice and data communications as well as interoperability channels that will greatly enhance the ability of multiple public safety entities to communicate with one another, particularly in emergencies. The fine work of the Public Safety National Coordination Committee (NCC) has aided the Commission in adopting the appropriate regulatory approach to this vital public safety resource.[5] The sooner the band is cleared, the sooner these services can be deployed. In addition, guard band licensees have already purchased spectrum in these bands and also await band clearing to launch their operations.[6] Finally, the Commission will auction off 30 MHz of commercial wireless spectrum for potential use for wireless advanced services, such as third generation

[5] *See* Public Safety National Coordination Committee's Recommendations to the Federal Communication Commission for Technical and Operational Standards for Use of the 764-776 MHz and 794-806 MHz Public Safety Band Pending Development of Final Rules (Feb. 25, 2000) (NCC Report). The NCC Report included detailed technical information. *See also* The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communication Requirements Through the Year 2010, WT Docket 96-86, *Fourth Report and Order and Fifth Notice of Proposed Rule Making*, 16 FCC Rcd 2020 (2000)(*Fourth R&O*). Copies of the NCC Report and the *Fourth R&O* can be obtained via the Internet at http://www.fcc.gov/wtb/publicsafety/ncc.html, or from Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554.

[6] The initial auction of 700 MHz guard band licenses was completed on September 21, 2000 (Auction No. 33), and the subsequent auction of the eight remaining Guard Band Manager licenses concluded on February 21, 2001 (Auction No. 38). See http://www.fcc.gov/wtb/auctions/.

wireless systems.[7] All of these applications await clearing of the band.

There are cases where the Commission has determined that the public interest benefits described above do not weigh as clearly in favor of spectrum clearing agreements. Therefore where the proposed transaction would result in the loss of a top four station, the sole local station, or the sole noncommercial educational broadcast service our public interest presumption in favor of the transaction does not apply.[8] It is also important to keep in mind that not a single broadcaster will ever be forced to relocate as a result of our decisions in this docket. The Commission has simply cleared away some regulatory uncertainty to permit licensees to act freely in the marketplace and to exercise more readily the bundle of rights inherent in their existing authorizations.

[7] *See* "Auction of Licenses for the 747-762 and 777-792 MHz Bands (Auction 31) is Postponed, *Public Notice*, Report No. AUC-01-31-B (rel. July 11, 2001).

[8] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules et al; WT Docket No. 99-168, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 20845, 20870-71 (2000).

CONCURRING STATEMENT OF COMMISSIONER COPPS

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

I concur in today's result. I am writing separately, however, because I am troubled by the potential disenfranchisement of American television viewers that could occur if we accelerate the mandatory conversion from analog to digital.

On balance, today's order is a positive development for consumers. But this is true only because our *Third Report and Order* otherwise would have resulted in a requirement that "single channel" licensees broadcast in a digital format on their remaining channel by 2002, leaving analog consumers without access to these channels. I don't believe that stranding these viewers next year was ever the intent of the Commission. Under today's *Order*, the single channel stations will now be able to broadcast in analog beyond the 2002 date. Strict adherence to this date would have been worse than our alteration of their final conversion responsibilities. Were it not for this unique circumstance, I would have been troubled by potentially accelerating the mandatory conversion from analog to digital.

While I strongly support the conversion to digital television, here we meet what I think is an unintended consequence – potentially leaving more analog consumers behind. I am troubled by a conversion schedule that could leave Americans without access to broadcast services.

In the future, I hope that the Commission will assign high priority to protecting consumers of free over-the-air television service and will act so as to minimize the number of consumers left without access to broadcast television when the conversion is complete.

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN

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

I am supportive of today's item, which facilitates our continuing efforts to clear the 700 MHz band for new wireless services and public safety needs while balancing the needs of incumbent broadcasters during their transition to digital television.

It is imperative that the Commission promote the deployment of next generation mobile services and spectrally efficient technologies in order to help meet the intensifying demand for mobile telephone, Internet, and data applications. It is also critical that the needs of the public safety community are met and that we are able to provide them with additional spectrum. I am fully supportive of both these goals.

As we charge forward to meet these pressing economic and public safety needs, however, it is important that we remain mindful of other requirements for a robust democracy -- including access to diverse viewpoints. I write separately to emphasize that in our quest to move incumbent broadcasters off this band, we must not lose sight of the value of free, over-the-air television services. The availability of such services and outlets helps ensure that all Americans enjoy a variety of programming and views. Policies that threaten analog broadcasts, and the resulting loss of such services, without providing for sufficient transition time to digital receivers for consumers merit significant scrutiny.

I am comfortable that this item strikes the proper balance. I agree that extending the time period in which single channel broadcasters may continue analog operations will help prevent a premature disruption of these valuable services. I am concerned, however, by the potential ramifications of the new conversion schedule for single channel stations, which seems to require a conversion when as many as 30% of viewers in a market still may not have access to a digital signal. I am troubled by the possibility that such a requirement may leave too many analog viewers behind. As no broadcaster will ever be forced to relocate as a result of our decisions here, I support allowing licensees the flexibility to engage in voluntary negotiations for band clearing. As the Commission faces the challenges associated with the digital transition, I believe we must continue to place a high priority on ensuring that viewers of free, over-the-air broadcast are not jeopardized.