

APPENDIX A

Rule Modifications

1. Section 73.623 is revised as follows:

§ 73.623 DTV applications and changes to DTV allotments

* * * * *

(h) *DTV Application Processing.*

(1) DTV applications for a construction permit or a modified construction permit pending as of January 18, 2001:

(i) shall be afforded the interference protection set forth in paragraph (c) or (d) of this section, as applicable:

(A) by all NTSC minor change applications,

(B) by NTSC new station applications, except those covered by paragraph (h)(1)(ii)(G) and (h)(1)(iii)(D) of this section,

(C) by all rulemaking petitions to amend the NTSC TV table of allotments,

(D) by DTV applications filed after January 18, 2001, and

(E) by rulemaking petitions to amend the DTV table of allotments filed after January 18, 2001;

(ii) must demonstrate the requisite interference protection set forth in paragraph (c) or (d) of this section, as applicable, to:

(A) DTV licensed stations,

(B) DTV construction permits,

(C) existing DTV allotments,

(D) rulemaking petitions to amend the DTV table of allotments for which a Notice of Proposed Rule Making has been released and the comment deadline specified therein has passed prior to the filing date of the DTV application,

(E) NTSC stations with licenses covering construction permits that were granted before the DTV application was filed,

(F) NTSC construction permits that were granted before the DTV application was filed;

(G) applications for new NTSC television stations that were in groups of mutually exclusive applications on file prior to July 1, 1997, regardless of whether they are the only applications that remain pending from their group.

(iii) that do not provide the requisite interference protection set forth in paragraph (c) or (d) of this section, as applicable, to the following applications and petitions will be deemed mutually exclusive with those applications and petitions:

(A) other DTV applications pending as of January 18, 2001,

(B) rulemaking petitions to amend the DTV table of allotments filed on or before January 18, 2001 for which a Notice of Proposed Rule Making had been released and the comment deadline specified therein had not passed prior to the filing date of the DTV application,

(C) rulemaking petitions to amend the DTV table of allotments filed on or before January 18, 2001 for which a Notice of Proposed Rule Making had not been released, and

(D) applications for new NTSC stations that are not covered by paragraph (h)(1)(ii)(G) of this section and were filed and accepted for filing on or before January 18, 2001 that:

(1) were filed by post-auction winners pursuant to Section 73.5005 of the Rules,

(2) are part of a settlement agreement on-file with the Commission that would result in the grant of the NTSC application, or

(3) are cut-off singletons.

(2) DTV applications for a construction permit or a modified construction permit filed after January 18, 2001:

(i) shall be afforded the interference protection set forth in paragraph (c) or (d) of this section, as applicable:

(A) by all NTSC minor change applications,

(B) by NTSC new station applications, except those covered by paragraph (h)(2)(ii)(H) and (I) of this section,

(C) by all rulemaking petitions to amend the NTSC TV table of allotments except those filed by NTSC applicants in those groups defined in (h)(2)(ii)(I) of this subsection for which a Notice of Proposed Rule Making has been released and the comment deadline specified therein has passed prior to the filing date of the DTV application,

(D) by later-filed DTV applications, and

(E) by later-filed rulemaking petitions to amend the DTV table of allotments;

(ii) must demonstrate the requisite interference protection set forth in paragraph (c) or (d) of this section, as applicable, to:

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- (A) DTV licensed stations,
- (B) DTV construction permits,
- (C) earlier-filed DTV applications,
- (D) existing DTV allotments,
- (E) rulemaking petitions to amend the DTV table of allotments for which a Notice of Proposed Rule Making has been released and the comment deadline specified therein has passed prior to the filing date of the DTV application,
- (F) NTSC stations with licenses covering construction permits that were granted before the DTV application was filed,
- (G) NTSC construction permits that were granted before the DTV application was filed, and
- (H) earlier-filed and accepted for filing applications for new NTSC stations that are not covered by paragraph (h)(2)(ii)(I) of this section, and that:
- (1) were filed by post-auction winners pursuant to Section 73.5005 of the Rules,
 - (2) are part of a settlement agreement on-file with the Commission that would result in the grant of the NTSC application, or
 - (3) are cut-off singletons;
- (I) applications for new NTSC television stations that were in groups of mutually exclusive applications on file prior to July 1, 1997, regardless of whether they are the only applications that remain pending from their group;
- (J) rulemaking petitions to amend the NTSC table of allotments filed by applicants defined in (h)(2)(ii)(I) of this subsection for which a Notice of Proposed Rule Making has been released and the comment deadline specified therein has passed prior to the filing of the DTV application.
- (iii) that do not provide the requisite interference protection set forth in paragraph (c) or (d) of this section, as applicable, to the following applications and petitions will be deemed mutually exclusive with those applications and petitions:
- (A) other DTV applications filed the same day,
 - (B) rulemaking petitions to amend the DTV table of allotments for which a Notice of Proposed Rule Making had been released and the comment deadline specified therein had not passed prior to the filing date of the DTV application, and
 - (C) earlier-filed rulemaking petitions to amend the DTV table of allotments for which a Notice of Proposed Rule Making had not been released.
- (3) DTV applicants, DTV applicants and NTSC applicants, or DTV applicants and DTV

rulemaking petitioners that are mutually exclusive pursuant to this section will be notified by Public Notice and provided with a 90-day period of time to resolve their mutual exclusivity via engineering amendment or settlement. Those applications and petitions that remain mutually exclusive upon conclusion of the 90-day settlement period will be dismissed.

2. Section 73.624(b) and (d) are amended by revising them to read as follows:

§ 73.624 Digital television broadcast stations.

- (b) DTV broadcast station permittees or licensees must transmit at least one over-the-air video program signal at no direct charge to viewers on the DTV channel. Until such time as a DTV station permittee or licensee ceases analog transmissions and returns that spectrum to the Commission, and except as provided in subsection (i) below, at any time that a DTV broadcast station permittee or licensee transmits a video program signal on its analog television channel, it must also transmit at least one over-the-air video program signal on the DTV channel. In addition, the DTV broadcast station permittee or licensee is subject to the simulcasting requirements in paragraph (f) of this section. The DTV service that is provided pursuant to this paragraph must be at least comparable in resolution to the analog television station programming transmitted to viewers on the analog channel.
- (i) DTV broadcast station permittees or licensees required to construct and operate a DTV station by May 1, 2002 or May 1, 2003 pursuant to paragraph (d) of this section must, at a minimum, beginning on the date on which the DTV station is required to be constructed, provide a digital video program signal, of the quality described in paragraph (b) above, during prime time hours as defined in section 79.3(a)(6). These licensees and permittees must also comply with the simulcasting requirements in paragraph (f) of this section.
- (ii) DTV licensees or permittees that choose to commence digital operation before the construction deadline set forth in paragraph (d) of this section are not subject to any minimum schedule for operation on the DTV channel.

(d)(3) Authority delegated.

- (ii) Such circumstances shall include, but shall not be limited to: (a) inability to construct and place in operation a facility necessary for transmitting digital television, such as a tower, because of delays in obtaining zoning or FAA approvals, or similar constraints; (b) the lack of equipment necessary to obtain a digital television signal; or (c) where the cost of meeting the minimum build-out requirements exceeds the station's financial resources.
- (iii) ***

- (iv) Applications for extension of time shall be filed no earlier than 90 and no later than 60 days prior to the relevant construction deadline, absent a showing of sufficient reasons for filing within less than 60 days of the relevant construction deadline.

3. Section 73.625(a)(1) is amended by revising it to read as follows:

§ 73.625 DTV coverage of principal community and antenna system.

(a) Transmitter location.

- (1) The DTV transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, the following minimum F(50,90) field strength in dB above one uV/m will be provided over the entire principal community to be served:

Channels 2-6.....35 dBu
 Channels 7-13.....43 dBu
 Channels 14-69..... 48 dBu

Note: These requirements above do not become effective until December 31, 2004 for commercial television licensees and December 31, 2005 for noncommercial television licensees. Prior to those dates, the following minimum F(50,90) field strength in dB above one uV/m must be provided over the entire principal community to be served:

Channels 2-628 dBu
 Channels 7-1336 dBu
 Channels 14-6941 dBu

APPENDIX B

Draft FCC Form 337 and Instructions

APPLICATION FOR EXTENSION OF TIME TO CONSTRUCT A DIGITAL TELEVISION BROADCAST STATION

GENERAL INSTRUCTIONS

- A. This FCC Form is to be used by all permittees to apply for an extension of time within which to construct a commercial or noncommercial educational digital television (DTV) broadcast station. The DTV construction timetable established by the Commission is set forth in 47 C.F.R. Section 73.624(d)(1). FCC Form 337 should be filed at least 60 days, but no more than 90 days, prior to the applicable construction deadline. See 47 C.F.R. Section 73.624(d)(3).
- B. **Electronic Filing of Application Forms.** The Commission is currently developing electronic versions of various broadcast station application and reporting forms, such as this application form. As each application form and report goes online, the Commission will by Public Notice announce its availability and the procedures to be followed for accessing and filing the application form or report electronically via the Internet. For a six-month period following the issuance of the Public Notice, the subject application form or report can be filed with the Commission either electronically or in a paper format. Electronic filing will become mandatory, on a form-by-form basis, six months after each application form or report becomes available for filing electronically.
- C. Applicants that prepare this application in paper form should file an original and two copies of this application and all exhibits. Applicants should follow the procedures set forth in Part 0 (Commission Organization) and Part 73 (Radio Broadcast Services) of the Commission's Rules, which are set forth in Title 47 of the Code of Federal Regulations.
- D. Applicants should provide all information requested by this application. If any portions of the application are not applicable, the applicant should so state. **Defective or incomplete applications will be returned without consideration.** Inadvertently accepted applications are also subject to dismissal.
- E. In accordance with 47 C.F.R. Section 1.65, applicants have a continuing obligation to advise the Commission, through amendments, of any substantial and material changes in the information furnished in this application. This requirement continues until the FCC action on this application is no longer subject to reconsideration by the Commission or review by any court.
- F. A copy of the completed application and all related exhibits shall be made available for inspection by the public in the applicant's public inspection file pursuant to 47 C.F.R. Sections 73.3526 or 73.3527, unless the applicant requests confidentiality consistent with 47 C.F.R. Section 0.459.
- G. **The applicant must sign the application.** Depending on the nature of the applicant, the application should be signed as follows: if a sole proprietorship, personally; if a partnership, by a general partner; if a corporation, by an officer; for an unincorporated association, by a member who is an officer; if a governmental entity, by such duly elected or appointed official as is competent under the laws of the particular jurisdiction. Counsel may sign the application for his or her client, but only in cases of the applicant's disability or absence from the United States. If the application is filed electronically, the signature will consist of the electronic equivalent of the typed name of the individual. See Report and Order in MM Docket No. 98-43 13 FCC Rcd 23056, 23064 (1998), on reconsideration, 14 FCC Rcd 17525 (1999).

QUESTION-BY-QUESTION INSTRUCTIONS

- A. **Item 1: Applicant Name.** The legal name of the applicant must be stated exactly in Item 1. If the applicant is a corporation, the applicant should list the exact corporate name; if a partnership, the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his/her office, and the name of the association; and, if an individual applicant, the person's full legal name.

Applicants should use only those state abbreviations approved by the U.S. Postal Service

FCC Registration Number (FRN). To comply with the Debt Collection Improvement Act of 1996, the applicant must enter its FRN number, a ten-digit unique entity identifier for anyone doing business with the Commission. The FRN can be obtained through the FCC webpage at <http://www.fcc.gov> or by manually submitting FCC Form 160. FCC Form 160 is available for downloading from <http://www.fcc.gov/formpage.html> or by calling 1-800-418-3676. Questions concerning the FCC Registration Number can be directed to the Commission's Registration System help desk at <http://www.CORES@fcc.gov> or by calling 1-877-480-3201.

Facility ID Number. TV Facility ID Numbers can be obtained at the FCC's Internet Website at www.fcc.gov/mmb. Once at this website, scroll down and select CDBS Public Access. You can also obtain your TV Facility ID Number by calling (202) 418-1600. Further, the Facility ID Number is now included on all TV authorizations and postcards.

- B. **Item 2: Contact Representative.** If the applicant is represented by a third party (for example, legal counsel), that person's name, firm or company, mailing address and telephone/electronic mail address may be specified in Item 2.
- C. **Item 3. Facility Information.** This question asks the applicant to specify: (1) whether commercial or noncommercial educational DTV operation is proposed; and (2) the community to which the station will be licensed.
- D. **Item 4: Purpose of Application.** This question asks whether FCC Form 337 is being filed for additional time within which to construct a new DTV station or to modify the facilities authorized in an outstanding construction permit. It also requires that the applicant identify the permit covered.
- E. **Item 5: Reason for Delay in Construction.** In the Fifth Report and Order in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997), on reconsideration, 13 FCC Rcd 6860 (1998), the Commission announced its willingness to grant, on a case-by-case basis, an extension to the applicable DTV construction deadline where a broadcaster has been unable to complete construction due to circumstances that are either unforeseeable or beyond the permittee's control, provided the broadcaster has taken all reasonable steps to resolve the problem expeditiously. The Commission also stated that it would modify its existing policies regarding extensions, taking into account problems encountered that are unique to the DTV conversion.

In responding to this question, the applicant should attest to the nature of the problem(s) preventing the timely completion of construction and provide a detailed explanation of the reason(s) requiring an additional time to construct its station's DTV facilities.

Among the problems found in specific instances to warrant the granting of additional time to construct have been such technical obstacles as equipment delivery delays, unavailability of work or tower crews, and tower safety and other construction delays; and such legal obstacles as delays in obtaining required governmental (e.g., FAA, Canadian and Mexican) clearances, outstanding judicial litigation involving zoning, and the pendency of DTV channel change rulemakings and DTV construction permit applications. See Digital Television Construction Deadline, 16 FCC Rcd 8122 (2001). In addition, such natural disasters as floods, tornadoes,

hurricanes, earthquakes and other calamities would be unforeseeable events warranting additional time to construct. Finally, in Memorandum Opinion and Order on Reconsideration (MM Docket No. 00-39), FCC 01-330 (adopted November 8, 2001), the Commission recognized that some broadcasters, despite their reasonable, good faith efforts and the Commission's reduced build-out requirements, may be financially unable to timely complete the construction of their DTV facilities. The Commission will therefore consider, on a case-by-case basis, whether a broadcaster should be afforded additional time to construct its DTV facilities because the cost of meeting the minimum build-out requirements would create an undue financial hardship. In this regard, the applicant should provide an itemized estimate of the cost of meeting the minimum build-out requirements and a detailed statement explaining why its financial condition precludes such an expenditure. The applicant should also describe its good faith efforts to meet the deadline, including its good faith efforts to obtain the requisite financing, and why those efforts were unsuccessful. To the extent that an applicant's description of its financial condition sets forth information that is proprietary and not customarily disclosed to the public, the applicant may request that the Commission treat the information as confidential. See 47 C.F.R. Section 0.459.

NOTE: Underlying documentation need not be filed with FCC Form 337. However, such documentation fully detailing and supporting the representations and descriptions provided in response to question 5 and, if applicable, question 6 below shall be kept at the station for as long as the extension of time is in effect and shall be made available upon request by the Commission. With respect to a station's claimed financial condition, the applicant should have available an audited profit and loss statement for its most recent fiscal year at the time of the filing of FCC Form 337 or similar probative financial documentation.

- F. **Item 6: Most Recent Construction Period.** Where the station had previously received an extension of time to construct, the "most recent construction period" is the period between the grant date and the expiration date of the latest extension. This application for extension of time will be evaluated according to the progress and efforts made, or circumstances which occurred, during the most recent construction period. See, Rainbow Broadcasting Company, 11 FCC Rcd 1167 (1995).
- G. **Item 7: Construction Completion Date.** In accordance with its station's DTV construction plan, the applicant should set forth the date by which it reasonably expects, under its circumstances, to complete construction. Pursuant to the Commission's rules, the staff may grant no more than two, six-month extensions of time to construct DTV facilities. See 47 C.F.R. 73.624(d)(3). Where the applicant is unable now to project its

anticipated construction completion date, it should describe the reasonable, good faith measures it is and will be taking to expeditiously resolve its incapacity to construct the station's DTV facilities.

- H. **Item 8: Anti-Drug Abuse Act Certification.** This question requires the applicant to certify that neither it nor any party to the application is subject to denial of federal benefits pursuant to the Anti-Drug Act of 1988, 21 U.S.C. Section 862.

Section 5301 of the Anti-Drug Abuse Act of 1988 provides federal and state court judges the discretion to deny federal benefits to individuals convicted of offenses consisting of the distribution or possession of controlled substances. Federal benefits within the scope of the statute include FCC authorizations. A "Yes" response to Item 8 constitutes a certification that neither the applicant nor any party to this application has been convicted of such an offense or, if it has, it is not ineligible to receive the authorization sought by this application because of Section 5301.

NOTE: With respect to this question, the term "party to the application" includes if the applicant is an individual, that individual; if the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5 percent or more of the outstanding stock or shares (voting and/or non-voting) of the applicant; all members if a membership association, and if the applicant is a partnership, all general partners and all limited partners, including both insulated and non-insulated limited partners, holding a 5 percent or more interest in the partnership.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this form. We will use the information provided in the application to determine whether approving this application is in the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your application may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your application may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC or (b) any employee of the FCC; or (c) the United States Government is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection.

If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may

also provide this information to these agencies through the matching of computer records when authorized

If you do not provide the information requested on this form, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authorization.

We have estimated that each response to this collection of information will take 1 hour and 30 minutes. Our estimate includes the time to read the instructions, look through existing records, gather and maintain the required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Paperwork Reduction Project (3060-XXXX), Washington, DC 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. Please **DO NOT SEND COMPLETED APPLICATIONS TO THIS ADDRESS**. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-XXXX.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. Section 3507.

FOR
FCC
USE
ONLY

FCC 337

APPLICATION FOR EXTENSION OF TIME TO CONSTRUCT A DIGITAL TELEVISION BROADCAST STATION

FOR COMMISSION USE ONLY
FILE NO.

1. Legal Name of the Applicant

Mailing Address

City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)		E-Mail Address (if available)
FCC Registration Number	Call Sign	Facility Identifier

2. Contact Representative (if other than Applicant)

Firm or Company Name

Mailing Address

City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)		E-Mail Address (if available)

3. **Facility Information.**

- a. Commercial b. Noncommercial Educational

c. Community of License:

City	State
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4. **Purpose of Application.** Applicant requests an extension of time in which to complete the construction authorized pursuant to (check one):

- a permit for a new DTV station Permit No. _____ Expiration Date _____
- a modification of a DTV construction permit Permit No. _____ Expiration Date _____

5. Applicant certifies that construction cannot be completed due to (check all that apply):

- technical (e.g., equipment delays)
- legal (e.g., litigation)
- financial (e.g., inability to finance)
- other reasons (e.g., natural disasters)

Describe in an Exhibit the specific reason(s) requiring additional time to construct, including the steps taken by the applicant to solve or mitigate the problem(s).

Exhibit No. 1

6. Has the construction period for this station been previously extended?

Yes No

a. If Yes, describe in an Exhibit the applicant's diligent efforts during the most recent construction period to overcome the circumstance(s) preventing construction.

Exhibit No. 2

7. Applicant requests that the time within which to complete construction be extended until: _____

a. If applicant is not able to state now when construction is expected to be completed, describe in an Exhibit the reasonable steps it is taking to resolve the problem(s) preventing timely construction.

Exhibit No. 3

8. **Anti-Drug Abuse Act Certification.** Applicant certifies that neither applicant nor any party to the application is subject to denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862.

Yes No

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith. I acknowledge that all certifications and attached Exhibits are considered material representations. I hereby waive any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and request an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)

Typed or Printed Name of Person Signing	Typed or Printed Title of Person Signing
Signature	Date

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

APPENDIX C

LIST OF PARTIES TO THE PROCEEDING

Petitions for Reconsideration

American Legacy Foundation
Association of America's Public Television Stations
Barry Telecommunications, Inc.*
Block Communications, Inc.
Consumer Electronics Association
Cordillera Communications, Inc.
Covington & Burling*
Delta College
Dispatch Broadcast Group
EchoStar Communications Corp.*
Everist, Donald G.
Fox Broadcasting Company
Harris Corp.*
Idaho Public Television
Joint Broadcasters
KM Communications, Inc. et al.
MST/NAB/ALTV
National Association of Broadcasters*
Network Affiliated Stations Alliance*
Paxson Communications Corporation
Raycom Media, Inc.*
Red River Broadcast Company, LLC
Thomas Multimedia, Inc.
Veridian Corp.*
WLTW-TV

Oppositions to or Comments on Petitions for Reconsideration

Aries Telecommunications Corp.*
Barry Telecommunications, Inc.
Consumer Electronics Association
Cox Broadcasting, Inc.
Holston Valley Broadcasting Corporation
National Cable Television Association
Paxson Communications Corp.
Pegasus Communications Corp.*

Comments on Further Notice of Proposed Rule Making

Advanced Television Systems Committee
Consumer Electronics Association
MSTV/NAB/ALTV

Motorola, Inc.
Paxson Communications Corporation
Thomson Multimedia, Inc.

* *Ex Parte* filings

APPENDIX D

Supplemental Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (“RFA”),⁹⁷ an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rule Making* (“Notice”)⁹⁸ and a Final Regulatory Flexibility Analysis (“FRFA”) was incorporated in the *Report and Order and Further Notice of Proposed Rule Making*.⁹⁹ The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. No comments were received in response to the IRFA or the FRFA. The present Supplemental Final Regulatory Flexibility Analysis (“Supplemental FRFA”) conforms to the RFA.¹⁰⁰

A. Need for, and Objectives of, the Memorandum Opinion and Order on Reconsideration

In January 2001, we released a *Report and Order and Further Notice of Proposed Rule Making* addressing a number of issues related to the conversion of the nation’s broadcast television system from analog to digital television (DTV).¹⁰¹ Among the issues addressed in the *Report and Order* were: when to require election by licensees of their post-transition DTV channel; whether to require replication by DTV licensees of their NTSC Grade B service contours (thereby providing coverage to those who receive the station’s analog signal); whether to require DTV licensees to place enhanced service contours over their principal communities (thereby serving these communities with a stronger signal); and how we should process mutually exclusive applications. We expressed our belief that resolution of these issues would provide licensees with a measure of certainty that would help them plan facilities, order equipment, and arrange for construction of facilities, all of which will speed the transition to digital service.

We received a number of petitions for reconsideration of the *Report and Order*. In this *Memorandum Opinion and Order on Reconsideration*, we revise a number of the determinations we made in the *Report and Order*, affirm other decisions, and provide clarification of certain rules and policies. We also modify, on our own motion, the minimum hours of operation of certain DTV stations and establish guidelines for television stations that may seek an extension of our May 1, 2002 and May 1, 2003 deadlines for construction of DTV facilities. We will resolve several major technical issues raised in the *Report and Order and Further Notice of Proposed Rule Making*, including the issues of receiver performance standards, DTV tuners, revisions to certain components of the DTV transmission standard, and labeling requirements for television receivers, in a separate Report and Order.¹⁰²

⁹⁷ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (“CWAAA”). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).

⁹⁸ *Notice of Proposed Rule Making* in MM Docket No. 00-39, 15 FCC Rcd 5257 (2000).

⁹⁹ *Report and Order and Further Notice of Proposed Rule Making* in MM Docket No. 00-39, FCC 01-24 (rel. January 19, 2001).

¹⁰⁰ *See* 5 U.S.C. § 604.

¹⁰¹ *Report and Order and Further Notice of Proposed Rule Making, In the Matter of Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, FCC 01-24 (rel. January 19, 2001).

¹⁰² We will incorporate into that proceeding the petitions for reconsideration and comments filed in this proceeding that address these and related issues.

B. Summary of Significant Issues Raised by Public Comments

No comments were received in response to the IRFA, and no petitions or comments were received in response to the FRFA contained in the *Report and Order*. However, a number of parties that filed petitions for reconsideration or comments in response to the *Report and Order and Further Notice of Proposed Rule Making* raised concerns about the impact of the channel election and replication protection deadlines on broadcasters, and particularly broadcasters in smaller television markets. Generally, smaller market broadcasters assert that they will not be able to obtain the financing to construct DTV facilities sufficient to replicate their analog service area,¹⁰³ and that they will not have sufficient operational experience by December 2004 (the channel election deadline for commercial stations) to determine which core channel is superior for DTV transmission.¹⁰⁴

In this *Memorandum Opinion and Order*, we respond to these concerns by allowing stations to construct more minimal initial DTV facilities designed to serve their communities of license while still retaining, for the time being, DTV interference protection to the full replication facility. We also temporarily defer the deadline by which broadcasters with two in-core allotments (television channels 2-52) must elect which channel they will eventually use for DTV at the end of the transition. In our next periodic review of the progress of the DTV transition, the Commission intends to establish a firm date by which broadcasters must either replicate their NTSC service areas or lose DTV service protection of the unreplicated areas, and by which broadcasters with two in-core allotments must elect which channel they will use post-transition. These replication protection and channel election deadlines may be earlier than but will in no event be later than the latest of either the end of 2006 or the date by which 85% of the television households in a licensee's market are capable of receiving the signals of digital broadcast stations. In addition, we also allow DTV stations required to complete construction of DTV facilities by May 1, 2002 or May 1, 2003 to operate initially at a reduced schedule by providing, at a minimum, a digital signal during prime time hours, consistent with their simulcast obligations. In order to provide parity to analog UHF stations, we will also allow stations to construct initial DTV facilities that serve their principal communities while retaining DTV interference protection to their maximized service areas for the time being, subject to the interference protection deadline we intend to establish in the next periodic review.

We do not alter, however, our decision to require stations to provide a stronger DTV signal to their communities of license than that adopted as an initial requirement in the *Fifth Report and Order*. As established in the *Report and Order*, this new city-grade service requirement will become effective December 31, 2004 for commercial stations and December 31, 2005 for noncommercial stations. The majority of petitioners that addressed this issue did not object to the Commission's increased city grade signal requirement as long as it was implemented in conjunction with a waiver policy that affords broadcasters flexibility in certain circumstances. Some commenters pointed out that broadcasters face many different configurations of terrain and geography, not all of which lend themselves to siting towers that both provide the widest possible service and cast a stronger signal over the principal community. Other commenters noted that some broadcasters have already built DTV facilities that may have to be moved or expensively reconfigured to meet the new principal community coverage requirement.¹⁰⁵

The purpose of the stronger city-grade signal strength requirement is to improve the availability and reliability of DTV service in the community of license and provide an extra measure of protection from

¹⁰³ See, *supra*, ¶¶ 9, 23.

¹⁰⁴ See, *supra*, ¶¶ 9, 15.

¹⁰⁵ See, *supra*, ¶ 38.

interference to DTV service in the community. In addition, by requiring a higher level of service over the community of license, we will limit the extent to which licensees can migrate from their current service contour. These goals are consistent with the fundamental obligation of licensees to serve the needs and interests of their communities of license. The 7dB increment in DTV service contour values that we adopted in the *Report and Order* was less than what we proposed in the *Notice*. We explained that we chose a lower signal strength increase in order to provide broadcasters with flexibility in locating their transmitters while still improving the reliability of service to the community. While we recognized that some stations' currently authorized DTV facilities might not be able to encompass their principal communities with the increased city-grade signal level, we continue to believe that the less burdensome requirement that we adopted will not force many licensees to increase their power or to move their antenna. Even in cases where licensees have already constructed facilities that do not meet our increased city-grade coverage requirement, we believe that, given the location of most DTV towers, the cost of making the necessary changes to achieve compliance will be minimal in most instances.¹⁰⁶

We also received comments and petitions requesting an extension of the remaining deadlines (May 1, 2002 commercial and May 1, 2003 noncommercial) to complete construction of DTV facilities. Generally, these parties argue that stations in smaller markets need additional time to plan and construct their DTV facilities given the expense involved in conversion and the lower level of profitability of these stations. Petitioners also argue that it is unreasonable to expect small market broadcasters to commence digital service in the midst of the uncertain market conditions created by, among other things, the issues surrounding the DTV transmission standard and the low rate of DTV receiver penetration. In addition, parties claim that many stations have yet to receive their DTV permits with only a few months left before the construction deadline, which has made it difficult for broadcasters to schedule highly-demanded tower construction crews and to coordinate the purchase of costly equipment. Several petitioners support extending the construction deadline to May 1, 2003 (the same deadline as noncommercial educational stations) for stations in markets 50-100, and to May 1, 2004 for stations in markets above 100. Others propose tying build-out requirements to a market-defined milestone, such as DTV receiver penetration levels.¹⁰⁷

In response to these views, we modify in the *Memorandum Opinion and Order* our guidelines for television stations that may seek an extension of our May 1, 2002 and May 1, 2003 deadlines for construction of DTV facilities, making extensions available to broadcasters that can demonstrate that the cost of meeting the minimum build-out requirements exceeds the station's financial resources.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules.¹⁰⁸ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁰⁹ In addition, the term "small business" has the same meaning as the term "small business

¹⁰⁶ Of course, the Commission may waive any provision of its rules upon a showing of good cause. See 47 C.F.R. § 1.3. Specifically, the FCC may exercise its discretion to waive a rule where "particular facts would make strict compliance inconsistent with the public interest" and where "special circumstances" might warrant a waiver. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) ("An applicant for waiver faces a high hurdle even at the starting gate.").

¹⁰⁷ See, *supra*, ¶ 41.

¹⁰⁸ 5 U.S.C. § 603(b)(3).

¹⁰⁹ 5 U.S.C. § 601(6).

concern” under the Small Business Act.¹¹⁰ A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

Small TV Broadcast Stations. The SBA defines small television broadcasting stations as television broadcasting stations with \$10.5 million or less in annual receipts.¹¹¹

The digital television rules we address in the *Memorandum Opinion and Order* apply to commercial and noncommercial television stations. There are approximately 1,304 existing commercial television stations and 374 existing noncommercial television stations of all sizes that may be affected by the digital television rules addressed in the *Memorandum Opinion and Order*.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *Memorandum Opinion and Order* directs the FCC’s Mass Media Bureau to issue a standard form (FCC Form 337) to be used to apply for an extension of time to construct a DTV station. We estimate that it will take applicants 1 hour and 30 minutes to complete the form.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹¹²

We made a number of determinations in the *Report and Order* that we believed would further progress on the transition from analog to digital television. Among other things, we established a deadline of December 31, 2003 by which commercial television stations that have both their NTSC and DTV operations on in-core channels must elect which of their two core channels to use for DTV operations after the transition. We gave non-commercial stations that have both their NTSC and DTV operations on in-core channels until the end of 2004 to elect their post-transition DTV channel. We determined that this early channel election would allow us to identify more quickly channels that will be available to accommodate DTV licensees with out-of-core transition channels as well as new entrants. In addition, to provide broadcasters with an incentive to provide full replication of NTSC coverage with DTV service, we determined that, after December 31, 2004, whatever portion of a commercial broadcaster’s NTSC Grade B contour is not replicated with its digital television signal will cease to be protected in the DTV Table of Allotments. Noncommercial DTV licensees were given until December 31, 2005 in which to replicate or lose such DTV interference protection.

¹¹⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

¹¹¹ 13 C.F.R. § 121.201 (SIC Code 4833).

¹¹² 5 U.S.C. § 603(c)(1)-(4).

Upon further consideration, we determine in the *Memorandum Opinion and Order* that the channel election and replication requirements may be imposing substantial burdens on broadcasters, and especially on smaller stations, without sufficient countervailing public benefits, and may in fact be contributing to difficulties faced by a substantial number of stations, particularly smaller stations, in meeting their DTV construction deadlines. A survey conducted by NAB indicates that slightly less than one-third of all stations responding to the NAB survey anticipate that they will not be able to provide a digital signal by the May 2002 deadline. A larger percentage (81.9%) of responding stations in the top 50 markets (larger market stations) anticipate that they will meet the deadline, while a smaller percentage (49.1%) of stations in markets 100 and above (smaller-market stations) indicated they will complete construction on time. Three-quarters of those stations that do not anticipate meeting the May 2002 deadline indicated they plan to seek an extension of this deadline from the FCC. Generally, smaller market broadcasters that filed petitions in this proceeding assert that they are unable to obtain financing to construct DTV facilities sufficient to replicate their analog service area. These broadcasters also claim that they will not have sufficient operational experience by December 2004 to determine which core channel is superior for DTV transmission. Broadcasters that are not capable of constructing full replication facilities by the deadline established in the *Report and Order* may be postponing construction altogether.

Upon reconsideration, we decide in the *Memorandum Opinion and Order* to allow stations to construct initial DTV facilities designed to serve at least their communities of license, while still retaining DTV interference protection to provide full replication until such deadline as the Commission shall establish in its next periodic review of the progress of the DTV transition. Thus, we temporarily defer both the replication protection and channel election deadlines we established in the *Report and Order*. In our next periodic review of the progress of the DTV transition, the Commission intends to establish a firm date by which broadcasters must either replicate their NTSC service areas or lose DTV service protection of the unreplicated areas, and by which broadcasters with two in-core allotments must elect which channel they will use post-transition. These replication protection and channel election deadlines may be earlier than but will in no event be later than the latest of either the end of 2006 or the date by which 85% of the television households in a licensee's market are capable of receiving the signals of digital broadcast stations. In order to provide parity to analog UHF stations, many of which are smaller stations, we will also allow stations to construct initial facilities that serve their principal communities while retaining DTV interference protection to their maximized service areas until the maximization deadline to be established by the Commission in its next periodic review. This alternative significantly reduces the costs associated with constructing and operating initial DTV facilities as compared to the requirements adopted in the *Report and Order*.

In contrast, the Commission could have retained its channel election and replication protection deadlines established in the *Report and Order*. However, we have determined that those deadlines may be too burdensome, and that the Commission should reexamine what deadlines are appropriate in its next periodic review in light of the record developed in the interim regarding the progress of the DTV transition. The alternative selected herein works to benefit smaller stations by facilitating their compliance with the May 1, 2002 (commercial) and May 1, 2003 (noncommercial) construction deadlines.

The *Memorandum Opinion and Order* also allows stations required to construct and operate DTV facilities by May 1, 2002 or May 1, 2003 to operate initially in digital format at a reduced schedule by providing, at a minimum, a digital signal during prime time hours, consistent with their simulcast

obligations.¹¹³ This alternative also significantly reduces the costs associated with initial operation of DTV facilities for these smaller stations. In contrast, the Commission could have retained the requirement for these stations that they operate in digital format whenever they transmit in analog format, greatly increasing their costs. Although the Commission considered reducing the minimum operating hours for all digital stations, we believe that the prime time obligation adopted in the *Memorandum Opinion and Order* for smaller stations appropriately balances our concern to reduce the burden on these broadcasters where possible with our goal of furthering progress in the transition to digital broadcasting.

In addition, in the *Memorandum Opinion and Order* we modify our guidelines for television stations that may seek an extension of the DTV construction deadlines. In the *Fifth Report and Order*, we announced our willingness to grant, on a case-by-case basis, an extension of the applicable DTV construction deadline where a broadcaster has been unable to complete construction due to circumstances that are either unforeseeable or beyond the permittee's control, provided the broadcaster has taken all reasonable steps to resolve the problem expeditiously. We indicated that such circumstances include, but are not limited to, the inability to construct and place in operation a facility necessary for transmitting DTV, such as a tower, because of delays in obtaining zoning or FAA approvals, or similar constraints, or the lack of equipment necessary to transmit a DTV signal.¹¹⁴ We stated explicitly that we did not anticipate that the circumstances of "lack of equipment" would include the cost of such equipment.

As indicated by a number of petitioners and commenters, we recognize that some broadcasters, despite their reasonable good faith efforts, may not be in a financial position to timely complete the construction of their DTV facilities. Many stations are finding it difficult to obtain the substantial sums required to construct digital television facilities. Many stations are also experiencing decreasing revenues in part as a result of the slowdown in the overall economy, which has slowed even further in the wake of the events of September 11, 2001. We also recognize that, particularly for stations in smaller markets, the capital costs of conversion may be very high relative to the station's anticipated revenue. As a result, stations with lower revenues may find it more difficult to cover these costs in time to meet the construction deadline.

For some broadcasters, these financial obstacles may be alleviated by the reduced initial build-out requirements adopted in the *Memorandum Opinion and Order*. Other broadcasters, however, may be unable, for purely financial reasons, to complete construction of even these minimum permitted facilities by the May 1, 2002 deadline. Accordingly, in the *Memorandum Opinion and Order* we determine that we will consider, on a case-by-case basis, in addition to the extension criteria outlined in the *Fifth Report and Order*, whether a broadcaster should be afforded additional time to construct its DTV facilities because the cost of meeting the minimum build-out requirements exceeds the station's financial resources. This new waiver standard should be particularly beneficial to smaller market broadcasters and those with fewer resources.

This relaxation of our extension standard will benefit small entities by giving additional leeway to stations in smaller markets that need more time to construct because of their lower revenues. By permitting these

¹¹³ See 47 C.F.R. § 73.624(b) (as revised in Appendix A). Commencing April 1, 2003, DTV television licensees and permittees are required to simulcast 50 percent of the video programming of the analog channel on the DTV channel. This requirement steps up to a 75% simulcast requirement in April 2004, and a 100% requirement in April 2005. 47 C.F.R. § 73.624(f). To the extent a station's simulcast obligations exceed the minimum digital video programming requirement in Section 73.624 of our rules, the simulcast obligation will govern.

¹¹⁴ *Fifth Report and Order*, 12 FCC Rcd 12809 at ¶ 77. The Chief of the Mass Media Bureau has delegated authority to grant up to two extension requests of six months each beyond the applicable construction deadline if the extension standard is met. Subsequent extension requests must be referred to the Commission. *Id.*

stations to delay the transition for a brief period of time, they will be able to spread the large investments needed to convert over more years. By delaying the transition for a short period for those stations that face the greatest financial challenges, these stations may also benefit from further progress overall in the transition, including greater consumer demand for digital television signals and greater advertising revenue.

We considered but declined in the *Memorandum Opinion and Order* to issue a blanket extension of the remaining DTV construction deadlines. It appears that more than two-thirds of commercial stations will be on the air in digital format by May 2002. Thus, there is substantial evidence that the conversion is progressing and that television stations are working hard to construct digital facilities. In view of the number of stations that have already made a commitment to complying with our deadlines and that have made a substantial investment in conversion, we do not believe that a blanket extension of the remaining deadlines is appropriate. Further, given the reduced build-out requirements we adopt herein, and the clear additional protection we will afford stations, including smaller stations, meeting these requirements, we believe that many of the stations that did not anticipate meeting the deadline will now be able and willing to do so.

Report to Congress

The Commission will send a copy of the *Memorandum Opinion and Order*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.¹¹⁵ In addition, the Commission will send a copy of the *Memorandum Opinion and Order*, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Memorandum Opinion and Order* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.¹¹⁶

¹¹⁵ See 5 U.S.C. § 801(a)(1)(A).

¹¹⁶ See 5 U.S.C. § 604(b).

**SEPARATE STATEMENT
OF COMMISSIONER MICHAEL J. COPPS**

*In the Matter of: Review of the Commission's Rules and Policies
Affecting the Conversion to Digital Television*

The Commission's decision today strikes a balance between moving the digital transition along on schedule and providing a measure of flexibility to stations as they build and upgrade their digital facilities within that time frame.

Pursuant to a Congressional directive, the FCC several years ago implemented an ambitious schedule for the transition to digital television. Many of the nation's television broadcasters have done a commendable job of getting their DTV stations up and running in accordance with that schedule. The NAB has reported that as many as two thirds of the nation's commercial television stations will be on the air with a digital signal by May of 2002.

Nevertheless, it appears that certain stations – particularly stations in smaller television markets – are facing costs that make it difficult if not impossible for them to meet the May deadline. Some of those costs may be related to the need for maximization of their digital signals and replication of their analog signal areas by upcoming deadlines. In order to minimize the immediate impact of those costs, we will defer the maximization and replication deadlines, and will set new deadlines that in no case will be later than the deadline for digital conversion prescribed by Congress. I am pleased that this Order so strongly reaffirms this deadline.

For those stations facing unexpected financial obstacles, not relieved by the deferral of the maximization and replication deadlines, and despite their good faith attempts to meet the May 2002 construction deadline, we will consider waiver applications. We will permit individual stations to apply on a case-by-case basis for six-month waivers of the May deadline due to lack of financial resources. I do not expect that stations will apply for these waivers absent genuine hardship, nor that the Bureau will grant them without such showing.

Finally, I am pleased that the Commission did not travel down the path of issuing a general waiver. That would have been unfair to those who are moving toward full performance and it would have been too lenient on those less far along.