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 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
	)	

To: The Commission

OPPOSITION OF THE SPECTRUM CLEARING ALLIANCE

Paxson Communications Corporation ("Paxson"), together with other television station owners has formed an alliance (see Broadcasters listed on Attachment 1) (hereinafter collectively the "Spectrum Clearing Alliance") and pursuant to the Commission's *Public Notice*,[1] Paxson submits herewith its opposition to the Petition for Reconsideration ("Petition") submitted by the Association for Maximum Service Television, Inc. ("MSTV")[2] of the Commission's *700 MHz Order on Reconsideration of*

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[1] "Petitions for Reconsideration of Action in Rulemaking Proceedings," *Public Notice*, Report No. 2516 (rel. Nov. 26, 2001); Petitions for Reconsideration of Action in Rulemaking Proceedings, 66 Fed. Reg. 59789 (Nov. 30, 2001).

[2] Petition for Reconsideration ("Petition") by the Association for Maximum Service Television, Inc. ("MSTV") filed Nov. 9, 2001.

the Third Report and Order ("*700 MHz Order on Reconsideration*")[3] in the above-captioned proceeding regarding mechanisms to facilitate the clearing of Channels 59-69 (the "Upper 700 MHz" band) to expedite the introduction of innovative wireless services. Paxson owns the largest number of stations in the Upper 700 MHz band, and together with the other parties who currently comprise the Spectrum Clearing Alliance represent over 60% of the stations having analog allotments in the Upper 700 MHz band. Other broadcasters that own and operate other stations in the band and those stations participating in any three-way agreements are expected to join the Spectrum Clearing Alliance prior to the June 19, 2002 auction of the Upper 700 MHz spectrum.

By this opposition, Paxson urges the Commission to dismiss MSTV's second petition for reconsideration as repetitious and meritless. Such replowing of ground already intensively tilled is inconsistent with the Commission's rules and the clear Congressional intent to provide public safety and new commercial wireless services with badly needed additional spectrum as rapidly as possible.

I. MSTV'S SECOND PETITION SHOULD BE DISMISSED AS REPETITIOUS.

MSTV has long helped safeguard the integrity of the Commission's technical rules, and for this Paxson is most appreciative. The Commission's procedural rules, however, apply to MSTV with equal force as to all other parties. MSTV has filed a second petition for reconsideration in this much-delayed, time-sensitive proceeding[4]

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[3] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-39, *Order on Reconsideration of the Third Report and Order*, FCC 01-258 (rel. Sept. 17, 2001) ("*700 MHz Order on Reconsideration*").

[4] The FCC originally scheduled the commercial wireless auction for May 10, 2000, but has postponed it a total of five times, mostly because of the complexities of auctioning indefinitely

requesting reconsideration of interference protection criteria and waiver standards unmodified by the *700 MHz Order on Reconsideration*. Section 1.429(j) of the Commission's Rules states, "[a]ny order disposing of a petition for reconsideration which modifies rules adopted by the original order is, *to the extent of such modification*, subject to reconsideration in the same manner as the original order," and "[e]xcept in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious." [5]

In the original order, the Commission clearly stated that

> A more stringent "no interference" standard is inconsistent with the objectives of this proceeding, which are to facilitate band clearing in a manner that is minimally disruptive to the DTV transition process and protects the public interest in continued free over-the-air analog broadcasting through the end of the DTV transition…. Moreover, we have previously recognized that, consistent with the public interest, broadcasters should be afforded as much flexibility as possible to address situations that may be unique to their particular circumstances.[6]

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encumbered spectrum. The auction now is scheduled to occur June 19, 2002, almost two years after the September 30, 2000 statutory deadline for auction proceeds to be deposited in the U.S. Treasury. *See* "Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Scheduled for June 19, 2002," *Public Notice*, DA 01-2394 (rel. October 15, 2001).

[5] 47 C.F.R. § 1.429(j) (2000) ("Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious."); *see Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, 14 FCC Rcd 12428, ¶ 7 (July 29, 1999) ("we will reconsider the Jan. 17 MO&O only to the extent that it modifies the NPRM and Order"); *Advanced Television Systems And Their Impact Upon the Existing Television Broadcast Service, Order*, 14 FCC Rcd 11572, ¶ 5 (1999) (denying petition for reconsideration as repetitious pursuant to Section 1.429(i) because it sought reconsideration of rules and policies not modified by the Second Memorandum Opinion and Order).

[6] 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, CS Docket No. 98-120, MM Docket No. 00-39, *Third Report and Order,* 16 FCC Rcd 2703, ¶ 22 (rel. Jan. 23, 2001).

In response to MSTV's first petition for reconsideration, the Commission stated that:

> We disagree with the premise of MSTV's argument [seeking the adoption of a new "no interference" standard], and affirm the policies announced in the Upper 700 MHz Third Report and Order…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.[7]

The Commission rejected MSTV's position in both the original order (the *Third Report and Order*) and its order disposing of MSTV's first petition for reconsideration (the *700 MHz Order on Reconsideration*). Accordingly, the Commission should dismiss MSTV's Petition as repetitious.

II. MSTV FAILS TO CONSIDER THE PUBLIC INTEREST BENEFITS OF EARLY BAND CLEARING.

MSTV's Petition raises no new issues that warrant reversal of the FCC's determinations in the *Third Report and Order* and *700 MHz Order on Reconsideration*. The Commission has carefully balanced the public interest benefits and interference issues in this proceeding in accordance with its statutory obligations.

MSTV argues, "Throughout this proceeding, the FCC has been focused on the 'public interest' benefits of *early* band clearing arrangements."[8] Paxson agrees. During this proceeding, the Commission has thoroughly documented the public interest benefits of clearing the 700 MHz band for commercial wireless and public safety services, which would introduce innovative mobile broadband services, advance the

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[7] *700 MHz Order on Reconsideration* at ¶¶ 14-15.

[8] MSTV Petition at 4.

nation's technological competitiveness, enhance the vitally important work of the public safety community, and accelerate the DTV transition.

As the Commission has recognized, the need for spectrum "has increased dramatically as the result of the explosive growth in wireless communications technologies, . . . propelled by . . . the growing shift of our economy towards the service sector, the increasing mobility of our workforce, and the convenience and increased efficiency produced by mobile/portable communications."[9] Public safety agencies continue to increase their dependence on radio communications, which has led to what the Commission calls a "critical shortage of public safety spectrum,"[10] made apparent in the aftermath of the September 11th terrorist attacks.

Given the paramount need for spectrum, Congress directed the Commission to reallocate the Upper 700 MHz band to advanced commercial wireless and public safety services.[11] The Commission concluded that, because Congress also protected incumbent broadcast use in the band until the close of the DTV transition,[12] the public interest benefits of accelerated clearing warranted the use of private, voluntary clearing agreements to facilitate single-channel broadcast operation outside of the 700 MHz

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[9] Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24178, ¶ 3 (2000).

[10] Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Report and Order*, ET Docket No. 97-157, 12 FCC Rcd 22953, Appendix C (1998).

[11] 47 U.S.C. § 337(a); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, *Sixth Report and Order*, *12 FCC Rcd 14588*, ¶¶ 37, 76-81 (1997).

[12] 47 U.S.C. § 337(d)(2).

band.[13] In justifying this reliance on market forces to produce valuable benefits to the country at large, the Commission cited "the benefits to consumers of the provision of new wireless services, such as next generation mobile services or Internet fixed access services," "the provision of new wireless service in rural and other relatively underserved communities," and the clearing of "spectrum for public safety use" as important to the agency's consideration of requests to clear the band of incumbent broadcast operation.[14] The Commission elsewhere astutely stated that clearing agreements

> "should facilitate the provision of new wireless services to all Americans, should help make available to the public safety community needed new spectrum that Congress has mandated be allocated for public safety use, and should help expedite a transition to DTV for broadcasters who might need assistance to implement such a transition. Such voluntary agreements are consistent with the legislative purposes of achieving an orderly DTV transition and expeditiously recovering this spectrum."[15]

In reaching its decision to apply existing rules to modification applications implementing clearing agreements, the Commission balanced the abundant and tremendous public interest benefits of band clearing against the issues that MSTV once again raises. Although MSTV ignores these public interest benefits, the Commission already has accounted for them repeatedly. MSTV instead reargues for the third time

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[13] 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, *First Report and Order*, 15 FCC Rcd 476, ¶ 145 (2000) ("*First Report and Order*").

[14] *Id.* at ¶ 145.

[15] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, Carriage of the Transmissions of Digital Broadcast Stations, Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-39, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 20845, ¶ 53 (2000) (*MO&O and FNPRM*").

that the FCC should create new rules for processing the clearing applications and adopt an inflexible no new interference and no waivers policy.[16] In support, MSTV cites Congress's statement that the Commission is to establish "additional technical restrictions *necessary* to protect [stations] during the transition to digital television service."[17] Of course, the Commission already has considered whether it was *necessary* to change the rules to be applied to clearing applications. As the Commission previously stated, "[a] more stringent 'no interference' standard is inconsistent with the objectives of this proceeding, which are to facilitate band clearing in a manner that is minimally disruptive to the DTV transition process and protects the public interest in continued free over-the-air analog broadcasting through the end of the DTV transition."[18] The Commission rightly concluded that new regulations were unnecessary. MSTV's strained analysis that Congress could never have intended voluntary band clearing arrangements due to its understandable protection of incumbent broadcast use from the services of new entrants cannot be supported.

MSTV's "no waiver" demand is similarly flawed. It is bedrock that the Commission will grant rule waivers that the agency considers to be in the public interest. In fact, it must. As stated in *WAIT Radio*, "[t]hat an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized

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[16] MSTV Petition at 7-9.

[17] *Id.*, *citing* 47 U.S.C. § 337(d)(2) (emphasis added).

[18] *Third Report and Order* at ¶ 22.

cases."[19] The Commission will grant waiver requests "when an applicant can demonstrate that the public interest will be better served by waiver in the circumstances presented than by following the terms of the rule."[20] With respect to analog short-spacing waiver requests in the digital age, the Commission has made clear that such public interest would include consideration of the DTV transition and out-of-core operation.[21] The Commission already had indicated that it would apply the *KRCA* principles to regulatory requests to clear incumbent broadcast operations from the 700 MHz band.[22] Consistent with that, the Commission announced that it would "entertain any requests for waiver on a case-by-case basis."[23]

MSTV's request that the Commission "not accept case-by-case waivers"[24] from incumbent broadcasters attempting to reduce interference that might caused by grant of a clearing application ignores existing waiver standards. Furthermore, the Commission repeatedly has considered the potential loss of service issues that might result from efforts to clear the 700 MHz band and has taken steps to ensure such losses are minimized.[25]

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[19] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (internal citations omitted, emphasis added).

[20] *KRCA License Corp*., 15 FCC Rcd 1794, ¶ 5 (1999) (citing *K-W TV, Inc.,* 7 FCC Rcd 3617, 3618 (1992)).

[21] *See generally id*.

[22] *MO&O and FNPRM* at ¶ 63.

[23] *700 MHz Order on Reconsideration* at ¶ 31.

[24] MSTV Petition at 13.

[25] *See*, *e.g.*, *Third Report and Order* at ¶ 15-17; *MO&O and FNPRM* at ¶¶ 56, 60; *First Report and Order* at ¶ 145.

In contrast to the FCC's careful balancing approach, MSTV's desire to prohibit all interference and all loss of service ignores the overwhelming, countervailing public interest benefits of early band clearing.

III. MSTV'S ARGUMENTS REGARDING THE CHANNELS 52-59 PROCEEDING ARE INAPPROPRIATELY INCLUDED IN ITS PETITION FOR THIS PROCEEDING.

MSTV's arguments regarding the Channels 52-59 proceeding[26] should be dismissed as inappropriately filed in this proceeding and not ripe for reconsideration. First, MSTV addresses issues regarding the Channels 52-59 proceeding (GN Docket No. 01-74) in this Channels 60-69 proceeding (WT Docket No. 99-168). Second, as of the date of MSTV's Petition (November 9, 2001), the Commission had not released a Report and Order in the Channels 52-59 proceeding. Accordingly, MSTV's Channels 52-59 arguments are inappropriately included in a "Petition for Reconsideration," which was filed in a different proceeding. Accordingly, the Commission should dismiss MSTV's arguments regarding the Channels 52-59 proceeding without further consideration.

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

CONCLUSION

Accordingly, for the reasons stated herein, Paxson urges the Commission to reaffirm its prior determinations that the existing interference and waiver standards will apply to all early band clearing requests and dismiss MSTV's Petition for Reconsideration.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

By /s/ William L. Watson

Name: William L. Watson
Title: Vice President and Assistant Secretary

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Date: December 17, 2001

CERTIFICATE OF SERVICE

I, **William L. Watson**, do hereby certify that on this 17th day of December 2001, I caused a copy of the foregoing **Opposition** to be served to the party below via first class mail:

/s/ William L. Watson
William L. Watson

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