

Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)
)
Remedial Steps For Failure to Comply With)
Digital Television Construction Schedule)
)
Requests For Extension of the)
October 5, 2001, Digital Television)
Construction Deadline)

MM Docket No. 02-113

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: May 16, 2002

Released: May 24, 2002

Comment Date: July 8, 2002

Reply Comment Date: July 23, 2002

By the Commission: Commissioners Abernathy, Copps and Martin issuing separate statements.

I. INTRODUCTION

1. The Commission has before it nine requests submitted by commercial television stations seeking extensions of the deadline for construction of their digital television (DTV) facilities pursuant to Section 73.624(d)(3)(iii) of the Rules.¹ Canyon Area Residents for the Environment (CARE) opposed the extension requests of the three Denver, Colorado television stations; otherwise the requests are unopposed. For the reasons set forth below, we grant the extension requests and extend the DTV construction deadlines for these stations to six months from the release date of this Order.

2. We also adopt a *Notice of Proposed Rulemaking* to seek comment on the policy we should follow when requests to extend DTV construction deadlines are denied.

II. BACKGROUND

3. To further the rapid implementation of a nationwide system of DTV, we adopted in 1997 an aggressive DTV construction schedule.² We determined that television stations affiliated with the ABC, CBS, Fox and NBC television networks would be required to build DTV facilities in the ten largest

¹ 47 C.F.R. § 73.624(d)(3)(iii). A complete list of all stations seeking extensions is included in Appendix A to this Order. The licensee of KOVR-DT, Stockton, California also filed an extension request. However, the licensee has since completed construction and KOVR-DT is on the air.

² See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809 (1997) (*Fifth Report and Order*).

television markets by May 1, 1999. Stations affiliated with these networks in television markets eleven through thirty were required to construct their DTV facilities by November 1, 1999. All other commercial stations were required to construct their DTV facilities by May 1, 2002, and all noncommercial stations must construct their stations by May 1, 2003.

4. In 2001, we considered the extension requests of those network-affiliated television licensees in the top thirty markets that had not constructed their DTV facilities.³ We granted twenty-three stations additional time to construct their DTV facilities. Of those twenty-three licensees, fourteen successfully completed construction of their facilities, leaving nine licensees to seek an additional extension. Therefore, in the top thirty television markets, one hundred and ten of the one hundred nineteen network-affiliated television stations have successfully completed construction of their authorized DTV facilities.⁴

III. DISCUSSION

A. Grants of Extension

5. Five of the licensees are operating pursuant to Special Temporary Authority (STAs) with facilities that provide required service to their communities of license but are less than their authorized facilities. On November 15, 2001, we released a Memorandum Opinion and Order in the DTV periodic review rulemaking proceeding.⁵ In that decision, we permitted television licensees subject to the May 1, 2002 (commercial) or May 1, 2003 (noncommercial) construction deadlines to build minimal initial facilities to satisfy their DTV build-out obligations. These facilities would provide the required level of DTV service to at least the licensee's community of license. We stated that licensees with a May 1, 2002, or May 1, 2003, construction deadline that have an existing construction permit for a larger facility may elect to commence digital operation with a DTV facility that complies only with the minimum initial build-out requirements and is fully subsumed by the permitted facilities. We also concluded that these licensees operating pursuant to a "minimum-facilities" STA by their respective construction deadlines (May 1, 2002, or May 1, 2003) will be considered to have met their construction deadline, and their outstanding construction permits will be extended automatically until such time as the Commission determines otherwise (for example, by requiring that licensees either construct full replication or maximization facilities or relinquish interference protection). That decision did not specifically deal with network-affiliated, top-thirty television market licensees, like the nine stations in this proceeding, which had earlier construction deadlines.

³ See Requests for Further Extension of November 1, 2000, Digital Television Construction Deadline, 16 FCC Rcd 8122 (2001).

⁴ Two network-affiliated television stations in New York City (WABC-DT and WNBC-DT), as well as three other DTV stations (WWOR-DT, WPIX-DT and WNET-DT) in that market were taken off the air as a result of the September 11, 2001 attack on the World Trade Center and have not yet rebuilt their DTV facilities. These five stations had completed construction of their DTV facilities by their applicable DTV construction deadlines (as extended) and are now, with the exception of WWOR-DT, off the air. WWOR-DT is sharing an antenna with WNYW-DT on the Empire State Building.

⁵ See In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 20,594 (2001) (*November DTV MO&O*).

6. We will not apply the minimum-facilities STA policy to network-affiliated, top-thirty television market licensees. When we adopted our DTV construction deadlines, we created a staggered approach that required network-affiliated, top-thirty television market licensees to complete construction of their DTV facilities earlier than other licensees.⁶ This is because we concluded that the most-viewed stations in the largest television markets can be expected to lead the transition to DTV and that these stations were better situated to invest the capital necessary to establish the first DTV stations.⁷ We also concluded that smaller market stations could benefit from the experience gained by the larger market stations and our staggered approach would keep the cost down for smaller market stations because equipment costs would decrease as the market matured.⁸ Finally, we concluded that our tiered approach would ensure that DTV quickly reaches a large percentage of U.S. television households while placing requirements on a relatively small number of stations best able to bear the associated costs.⁹ We continue to believe, as we did then, that construction and operation of DTV facilities by network-affiliated, top-thirty television market licensees is key to the development of a nationwide DTV system. Application of the minimum-facilities STA policy to these licensees would undermine that policy and would not serve the public interest. Therefore, we will not automatically extend the DTV construction deadlines of any of the remaining network-affiliated, top-thirty television market stations operating DTV facilities pursuant to STA. Instead, we will continue to examine extension requests on their particular facts and determine whether each station has demonstrated that a further extension is appropriate. We briefly review below the circumstances that we believe warrant further extension of the DTV construction deadline for the nine stations seeking such relief.

7. KTVT-DT states that its inability to complete construction of its DTV facilities was due to circumstances beyond its control. KTVT-DT explains that, prior to its original DTV construction deadline of May 1, 1999 there was a mechanical failure of the supporting structure for its newly-installed DTV antenna. The DTV antenna had to be removed from the structure and the structure had to be completely remanufactured. Subsequently, KTVT-DT determined that a new DTV antenna system had to be fabricated. The fabrication was completed in the fourth quarter of 2000. At that point, the replacement antenna was shipped to a far-field antenna range for final acceptance testing. However, before that testing could be completed, KTVT-DT discovered "serious mechanical deficiencies" within the antenna system. Those defects included air leaks that could lead to an accumulation of moisture in the antenna feed system, which could lead to electrical problems causing the transmission line to burn. KTVT-DT determined that the antenna system could not be accepted. KTVT-DT states that, over the next six months, it was unsuccessful in its attempt to have the original antenna vendor correct this problem and it retained a second vendor to design a new antenna system. In order to confirm that the tower could support the new antenna design, an additional structural study was conducted. The study concluded that further strengthening of the tower would be required. In March 2002, the tower manufacturer submitted a proposal for the necessary tower modifications, which KTVT-DT is currently

⁶ *Fifth Report and Order*, 12 FCC Rcd at 12841-42.

⁷ *Id.* at 12842.

⁸ *Id.*

⁹ *Id.*

evaluating. Meanwhile, the station's DTV transmitter and master control system have been delivered and are currently being utilized in the station's low power DTV operation.

8. KTVT-DT anticipates that, within the next month, it will have sought and received an additional proposal for the necessary tower modifications (that it estimates will cost more than \$500,000), evaluated that bid against the proposal it has already received from the tower manufacturer, and selected a vendor. KTVT-DT states that work on the tower modifications should begin by early Summer 2002 and should be completed by November 2002. KTVT-DT plans to order its DTV antenna by May 15, 2002, which it believes should result in the antenna's delivery by December 2002. Assuming that schedule is met, KTVT-DT states that the antenna should be installed in January 2003, with program tests commencing sometime that month.

9. WVIT-DT, New Britain, Connecticut, and WTIC-DT, Hartford, Connecticut, have had difficulty securing local zoning approval to install their DTV facilities. WTIC-DT's proposed new tower was not approved by the local zoning authority and it has been unable to obtain zoning approval for a new tower design. WVIT-DT states that its original application for zoning variance for modifications to its existing tower was also denied and it appealed that decision to the Connecticut Superior Court. Subsequently, WVIT-DT engaged a consulting engineer and revised its proposed DTV facilities in order to obtain the necessary local zoning approval. That approval was obtained in March 2002, and WVIT-DT has ordered all of the equipment for its DTV facilities, which it expects to have delivered by July 2002. Meanwhile, WVIT-DT has been working on construction of its interior building and the installation of its existing equipment.

10. WTIC-DT and WFSB-DT, Hartford, Connecticut, also cite to the ongoing problems that television stations in Connecticut have been having in implementing DTV in the Northeast Corridor, which we have previously recognized as being particularly congested.¹⁰ WTIC-DT's DTV allotment (Channel 5) is the subject of an ongoing rulemaking wherein WNYW(TV), New York, New York, is seeking to substitute Channel 31 for DTV Channel 5 for WTIC-DT.¹¹ While WTIC-DT is not opposed to this change, WFSB-DT is opposed because it believes that the change will have a detrimental effect on its DTV operation. Until that rulemaking is completed, both WTIC-DT and WFSB-DT maintain that it is impossible to inaugurate full-service DTV operation because construction is dependent on the outcome of that proceeding. The comment cycle in the rulemaking was completed in January 2002 and a Report and Order is due to be released in the next sixty days.

11. WTVJ-DT, Miami, Florida, is involved in a similar pending rulemaking proceeding which would result in the change of its DTV allotment.¹² Until that proceeding is completed and the station determines its outcome, WTVJ-DT maintains that it is unable to begin construction of its authorized DTV facilities. WTVJ-DT requested to change its DTV allotment to another channel. Paxson

¹⁰ Advanced Television Systems and Impact Upon Existing Television Broadcast Service, 13 FCC Rcd 7418, 7436 (1998).

¹¹ See Amendment of Section 73.622(b) of the Commission's Rules - Digital Television Broadcast Stations (Hartford, Connecticut), 16 FCC Rcd 18842 (2001).

¹² See Amendment of Section 73.622(b) of the Commission's Rules - Digital Television Broadcast Stations (Miami, Florida), 15 FCC Rcd 12648 (2000).

Communications Corporation (Paxson) also filed a petition for rulemaking seeking to change the DTV allotment for its station to the same channel as requested by WTVJ-DT. WTVJ-DT and Paxson subsequently entered into a settlement agreement whereby Paxson agreed to dismiss its petition for rulemaking if its application for construction permit for DTV operation on its existing channel was granted. That application is mutually exclusive with another DTV application filed by Barry Telecommunications, Inc. (Barry). Paxson and Barry have until May 30, 2002, to resolve the mutual exclusivity in their applications via settlement or engineering solution or both their applications will be dismissed.¹³

12. WBBM-DT, Chicago, Illinois, explains that it constructed its DTV station, but when it began operating there was unforeseen interference to local cable television service. Therefore, WBBM-DT was forced to terminate its DTV operation. WBBM-DT began negotiations with another television station on a channel swap that it believed would resolve this problem but has recently abandoned those negotiations due to the parties' inability to agree on terms. Therefore, WBBM-DT has focused its attention on resolving the cable interference problem. WBBM-DT has been working on low power broadcasts as part of a coordinated effort with the owner of the cable system to begin to resolve customer complaints on a phased basis. On December 14, 2001, WBBM-DT applied for an STA to operate a temporary antenna in conjunction with its efforts to resolve the interference problems. The STA was granted on December 21, 2001, and WBBM-DT is now operating under its terms.

13. The Denver television stations - KUSA-DT, KMGH-DT and KCNC-DT - all represent that they have been unable to complete construction of their DTV facilities on Lookout Mountain, outside of Denver, due to an ongoing unresolved local tower siting dispute that is the subject of another proceeding currently pending before the Commission.¹⁴ These three stations are part of a consortium seeking to build a new tower for their DTV facilities on Lookout Mountain. The local county commissioners denied their proposal. They recently reported that the consortium has been working with an engineer to devise a tower plan that would be both feasible and would satisfy the local authorities. The group has a new proposal that it plans to file with the local authorities. They have conducted public meetings on the new plan and are attempting to follow-up on comments from the public prior to submitting its new local zoning application. The zoning application must be approved by the local planning commission and then by the county commissioners. The group expects that the review process will be concluded by early Fall 2002. Assuming that approval is obtained, and the Commission subsequently grants a construction permit, the group expects to be able to complete construction of their DTV facilities by the Fall of 2003. CARE opposes the extension requests raising matters similar to those pending before us in the other proceeding. We deny CARE's request to deny the Denver DTV extension requests and to rescind the DTV construction permits, and we defer consideration of the matters raised by CARE concerning the local tower siting dispute to that other pending proceeding. Our action today is without prejudice to whatever action we may take in that proceeding.

¹³ See "Mutually Exclusive DTV Applications," *Public Notice*, DA 02-461 (rel. Mar. 1, 2002).

¹⁴ See, "FCC To Seek Comments on a Letter From the Advisory Council on Historic Preservation Relating to Communications Transmission Facilities Located at Lookout Mountain, CO," *Public Notice*, DA 99-1211 (rel. June 23, 1999); and *In the Matter of Canyon Area Residents for the Environment Request for Review of Action Taken Under Delegated Authority on a Petition for an Environmental Impact Statement*, 14 FCC Rcd 8152 (1999).

14. We find that, in each of these cases, the television licensee made reasonable and diligent efforts to construct their authorized facilities, but that each encountered delays that were unforeseeable or beyond their control and that these delays prevented timely construction of their DTV facilities. Therefore, we grant these stations an extension to six months from the release date of this order in order to complete their DTV facilities.

15. To ensure that KTVT-DT meets the timetable it has provided the Commission for completion of its authorized DTV facilities, we require that, ninety (90) days from the release date of this Order, KTVT-DT submit a report detailing its progress.

B. Proposed Remedial Steps For Failure To Comply With The DTV Construction Schedule – Notice of Proposed Rulemaking

16. We take this opportunity to restate our commitment to the rapid build out of a nationwide DTV system and to remind television stations of the importance of their construction efforts. Television stations that seek an extension of time to complete the construction of their DTV facilities must submit detailed justifications as to why they have been unable to complete construction of their facilities. All stations will be required to demonstrate that failure to construct has been due to circumstances that were either unforeseeable or beyond their control and that the station has taken all reasonable steps to resolve the problem expeditiously or, for those stations entitled to make such a showing, that failure to construct was due to legitimate financial hardship.¹⁵ We continue to expect such DTV extension requests will be supported by documentation, and that stations demonstrate each step that was taken to complete construction or to outline each unforeseeable or uncontrollable delay or event.

17. In order to prevent undue delay in the required build out of DTV facilities by licensees, should a television station fail to meet its DTV construction deadline and fail to adequately demonstrate that extension of its DTV construction deadline is justified, we seek comment on a proposed set of graduated sanctions that we would impose upon the licensee. Under the first step of our approach, we would deny the request for an unqualified extension and admonish the station for its failure to comply with its DTV construction obligation. The station would be required to submit a report within thirty (30) days outlining the steps it intends to take to complete construction and the approximate date that it expects to reach each of these construction milestones. Absent extraordinary and compelling circumstances, the construction completion date should be no later than six months from the date of admonishment. Sixty (60) days later, the station would be required to submit a report detailing its progress on meeting its proposed construction milestones and justifying any delays it has encountered. If at any time during this six month period, the station fails to demonstrate that it is taking all reasonable steps to complete construction or fails to justify the further delays it has encountered, or we otherwise find that the licensee has acted in bad faith, we would consider the imposition of additional sanctions including proceeding immediately to the second step in our approach.

18. Under the second step in our approach, if the station had not come into compliance with the DTV construction rule within the six month period, then, absent extraordinary and compelling circumstances, we would impose further sanctions against the licensee. We would issue a Notice of Apparent Liability for forfeiture to the licensee. We would require that the station report every thirty

¹⁵ See *Fifth Report and Order*, 12 FCC Rcd at 12841 and *November DTV MO&O*, 16 FCC Rcd at 20611.

(30) days on its proposed construction milestones and its efforts to meet those milestones. Once again, failure to adequately demonstrate that the station was taking all reasonable steps towards construction and to justify any additional delays that were encountered, would result in the imposition of additional sanctions.

19. Under the third and final step in our approach, if the station still had failed to come into compliance with the DTV construction rule within an additional six-month period of time (*i.e.*, one year from the date of the formal admonition), then, absent extraordinary and compelling circumstances, we would consider its construction permit for its DTV facilities to have expired and we would take whatever steps necessary to rescind the station's DTV authorization. We seek comment as to whether a hearing is necessary under section 312 or section 316 of the Communications Act prior to removal of the station's DTV authorization. We also seek comment as to whether the Commission should make the station's vacant DTV allotment available to other potential DTV broadcasters through auction, or delete the allotment from the DTV Table altogether, for example, to resolve short spacing with another allotment. In any event, however, as directed by Congress, the station will be required to surrender its analog authorization at the end of the DTV transition.¹⁶ We tentatively conclude that a licensee whose DTV authorization is rescinded under the above procedures will not be permitted to convert to digital on its analog allotment without being subject to competing applications. We seek comment on this tentative conclusion. We would reserve the right to alter this graduated enforcement scheme should circumstances in a particular case warrant our doing so. We may, for example, impose sanctions at an accelerated rate if we find that the licensee has acted in bad faith or skip to the second or third steps.

20. We seek comment on these proposed remedial steps and whether these proposed remedial steps are aggressive enough in ensuring that stations move quickly toward meeting their DTV build out responsibilities. We also seek comment on other steps we should consider in addition to the remedial steps described above. Finally, we believe that this *Notice* is important to the continued progress of the DTV build out and will issue an order in response to comments within six months of the release of this *Notice*.

C. Other Issues

21. Given the importance of this matter, we direct the Media Bureau to continue processing pending DTV extension requests on a case-by-case basis during the pendency of this rulemaking, utilizing the full range of permissible sanctions, including those set forth in this *Notice*, to ensure that licensees complete construction of their DTV facilities in an expeditious manner. As we stated in our *November DTV MO&O*, the Bureau may grant up to two six-month extension requests or deny such requests under its delegated authority.¹⁷ We will amend our DTV construction rule to clarify this point.¹⁸

¹⁶ See 47 U.S.C. §§ 309(j)(14) and 336(c).

¹⁷ *November DTV MO&O*, 16 FCC Rcd at 20612.

¹⁸ This is a procedural rule and as such may be amended without notice and comment.

IV. ADMINISTRATIVE MATTERS

22. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. 1.415, 1.419, interested parties may file comments on or before July 8, 2002 and reply comments on or before July 23, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

23. Comments filed through ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission.

24. Parties who choose to file by paper should also submit comments on diskette. These diskettes should be addressed to: Wanda Hardy, 445 Twelfth Street SW, 2-C221, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, docket number of the proceeding, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy - Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street SW, CY-B402, Washington, DC 20554.

25. The full text of this document, and comments and reply comments filed in this proceeding, are available for public inspection and copying during regular business hours at the FCC Reference Center, Portals II, 445 Twelfth Street SW, Room CY-A257, Washington, DC 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, TTY (202) 418-2555, or bcline@fcc.gov. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat. The full text of this document may also be purchased from the Commission's

duplicating contractor, Qualex International, Portals II, 445 12th Street SW, Room CY-B-402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via email qualexint@aol.com.

26. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or bmillin@fcc.gov.

27. *Ex Parte Rules.* This is a permit-but-disclose notice-and-comment rulemaking proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

28. *Initial Regulatory Flexibility Analysis.* With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix B. As required by the Regulatory Flexibility Act, see 5 U.S.C. § 603, the Commission has prepared an IRFA of the possible significant economic impact on small entities of the proposals contained in this Notice. Written public comments are requested on the IRFA. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the Notice, and must have a distinct heading designating them as responses to the IRFA.

29. *Initial Paperwork Reduction Act Analysis.* This Notice contains a proposed information collection(s) subject to the Paperwork Reduction Act of 1995, Public Law 104-13. As part of our continuing effort to reduce paperwork burdens, we invite OMB, the general public, and other Federal agencies to take this opportunity to comment on the proposed new or modified information collection(s) contained in this proceeding. Public and agency comments are due at the same time as other comments on the Notice.

30. *Additional Information.* For additional information, contact Shaun A. Maher, Media Bureau, Office of Broadcast License Policy, Video Division, (202) 418-2324 or smaher@fcc.gov.

V. ORDERING CLAUSES

31. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 73.624(d)(3)(iii) of the Commission's Rules, 47 C.F.R. § 73.624(d)(3)(iii), the requests of television stations KTVT-DT, WBBM-DT, WTVJ-DT, KMGH-DT, KCNC-DT, KUSA-DT, WFSB-DT, WTIC-DT and WVIT-DT for extension of the October 5, 2001, DTV construction deadline ARE GRANTED to the extent indicated herein and their DTV construction deadlines ARE EXTENDED to six months from the release date of this Order.

32. IT IS FURTHER ORDERED, That, ninety (90) days from the release date of this Order, KTVT-DT shall submit with the Commission a report detailing its progress on the construction of its authorized DTV facilities.

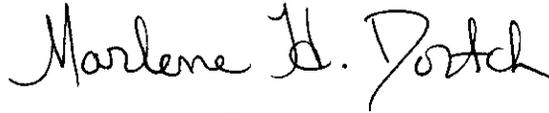
33. IT IS FURTHER ORDERED, That, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, and 309, this Notice of Proposed Rulemaking is ADOPTED.

34. IT IS FURTHER ORDERED, That the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

35. IT IS FURTHER ORDERED, That, pursuant to authority contained in sections 1, 4(i), 303, and 336(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303, and 336(f), Part 73 of the Commission's rules, 47 C.F.R Part 73, IS AMENDED as set forth in Appendix C below.

36. IT IS FURTHER ORDERED, That, the amendment set forth in Appendix C SHALL BE EFFECTIVE 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A – Network-Affiliated, Top 30 Television Market Stations Seeking an Extension of their DTV Construction Deadline

Call Sign	City	ST	Reason for Delay
WBBM-DT	Chicago	IL	Interference to cable.
KTVT-DT	Ft. Worth	TX	Delay in manufacture of new antenna system.
WTVJ-DT	Miami	FL	Pending rulemaking.
KMGH-DT	Denver	CO	Zoning delays.
KCNC-DT	Denver	CO	Zoning delays.
KUSA-DT	Denver	CO	Zoning delays.
WFSB-DT	Hartford	CT	Pending rulemaking.
WTIC-DT	Hartford	CT	Zoning delays and pending rulemaking.
WVIT-DT	New Britain	CT	Zoning delays.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),¹⁹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policy and rules proposed in this *Notice of Proposed Rulemaking (Notice)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. § 603(a). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

Need for, and Objectives of, the Proposed Rules

The Commission adopts the *Notice* to seek comment on proposed remedial steps for failure to comply with its digital television (DTV) construction schedule. The remedial steps are intended to prevent undue delay in the required build out of DTV facilities.

Legal Basis

The Commission adopts the *Notice* pursuant to sections 1, 2(a), 4(i), 303, 307, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, and 309.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will 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 proposed rules, if adopted.²⁰ The RFA defines the term "small entity" as having the same meaning as "small business," "small organization," and "small governmental jurisdiction."²¹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²² A "small business" concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria

¹⁹ 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) ("CWAA"). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

²⁰ 5 U.S.C. § 603(b)(3).

²¹ *Id.* § 601(6).

²² *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 32). Pursuant to the RFA, the statutory definition of a 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).

established by the SBA.²³

The proposals in the *Notice* will affect only full-power television broadcasters. As of September 30, 2001, the Commission had licensed a total of 1,686 full-power television stations.²⁴ SBA defines television broadcasting establishments that have \$12 million or less in annual receipts as a small business.²⁵ According to Census Bureau data for 1997, there were 906 firms in this category, total, that operated for the entire year.²⁶ Of this total, 728 firms had annual receipts of under \$10 million, and an additional 71 had receipts of \$10 million to \$24,999,999. Thus, under this size standard, the majority of the firms are considered small.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *Notice* contains proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA). It will be submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the proposed information collections contained in this proceeding.

Steps Taken to Minimize Significant Economic 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 and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or 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.²⁷

The *Notice* seeks comment on proposed remedial steps for failure of broadcast stations to comply with the DTV construction schedule. Adoption of the proposal in the *Notice* by the Commission is likely to have an insignificant and mixed impact overall on the economic opportunities for small entities. We seek comment from small entities on this issue.

²³ *Id.* § 632.

²⁴ News Release, "Broadcast Station Totals as of September 30, 2001" (released October 30, 2001).

²⁵ NAICS Code 513120.

²⁶ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size," Table 4, NAICS code 513120 (issued Oct. 2000).

²⁷ 5 U.S.C. § 603(c).

One of the sanctions that the Commission proposing using is the issuance of a notice of apparent liability for forfeiture to stations that do not comply with their DTV construction obligation. We seek comment on any small entity concerns that might affect the Commission's enforcement decisions. We note that we already take small entity status, including potential inability to pay, into account when assessing the need for, and amount of, monetary forfeitures.²⁸

Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

²⁸ See, e.g., In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to incorporate the Forfeiture Guidelines, CI Docket No. 95-6, *Report and Order*, 12 FCC Rcd 17087, 17109 (1997).

APPENDIX C

Rule Modification

1. Section 73.624(d)(3)(iii) is revised as follows:

§ 73.624 Digital television broadcast stations.

(d)(3) Authority delegated.

- (iii) The Bureau may grant no more than two extension requests upon delegated authority. Subsequent extension requests shall be referred to the Commission. The Bureau may deny extension requests upon delegated authority.

**SEPARATE STATEMENT OF
COMMISSONER KATHLEEN Q. ABERNATHY**

Re: Remedial Steps for Failure to Comply with Digital Television Construction Schedule, Requests for Extension of the October 5, 2001 Digital Television Construction Deadline, Order and Notice of Proposed Rulemaking.

I support today's decision to grant an additional six months to these nine licensees to fully construct their digital television facilities. Each has demonstrated that it has made reasonable and diligent efforts to construct its authorized facility and encountered delays that were unforeseeable or beyond its control.

I also support the NPRM that we are issuing today. While I am not unsympathetic to the challenges broadcasters are facing, we must continue to work toward moving the digital transition forward. To take into account the difficulties associated with construction in smaller markets in particular, last November, the Commission allowed broadcasters to initially commence digital operations with lower power and spread the cost of DTV transition over a longer period of time. Yet, despite this order, the Commission still received hundreds and hundreds of requests for waiver of the May 1, 2002 deadline. I recognize that in order to move the digital transition forward, we need cooperation and commitment from all parts of the industry, but broadcasters are a pivotal piece to that equation. Thus, I feel strongly that broadcasters must comply with the established transition schedule and we must strictly enforce our rules. Accordingly, I support the proposed measures we have set forth in the NPRM for those stations that fail to comply with our DTV construction schedule.

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

RE: Requests for Extension of the October 5, 2001 Digital Television Construction Deadline.

I am committed to aggressively and responsibly promote the rollout of digital television. I am therefore extremely reluctant to grant extensions to our DTV construction deadlines. I do so here both because the nine stations before us have presented the Commission with satisfactory individual explanations for their failures to meet construction obligations, and because we simultaneously set in motion a proceeding to establish guidelines on how to deal with licensees that fail to meet their deadlines in the future.

I am pleased that the NPRM not only sets forth a proposed set of remedial measures, but also asks whether this set of remedies is aggressive enough. Commenters should be sure to advise the Commission on other steps that might move us closer to full DTV rollout, as I am troubled by the possibility that a series of waivers, or a series of six-month delays, could significantly undermine our efforts. I hope that we will gather comments and produce an order examining new guidelines as soon as possible.

We have made some progress in the past few weeks on the DTV rollout and I commend our Chairman for the new energy he has imported to this important initiative, and for his commitment to get the job done on time.. I hope that, increasingly, the Commission will be able to focus its energies on positive news rather than on more delays.

**Separate Statement of
Commissioner Kevin J. Martin**

Re: Remedial Steps for Failure to Comply with Digital Television Construction Schedule, Requests for Extension of the October 5, 2001, Digital Television Construction Deadline, Order and Notice of Proposed Rulemaking.

Digital television holds much promise. Consumers will benefit from significantly sharper picture resolution; an astounding choice of video programming, including niche programs and movies on demand; CD-quality music channels of all genres; interactivity; sophisticated program guides with parental control capabilities; and innovative applications we have yet to imagine. Congress has instructed us to guide the transition to digital television, and I am committed to that task.

The item on which we vote today addresses the deadlines by when broadcasters needed to have built their digital facilities. The item both grants extensions of these deadlines for nine stations, and proposes a graduated system of penalties for those stations that do not meet these deadlines and do not merit an extension.

Broadcasters are not the only piece to the transition puzzle; content providers, cable operators, manufacturers, and consumers all have a critical role. Nevertheless, the build-out deadlines were an essential element of our plan to reach the statutory target of 85 percent digital penetration. I am extremely reluctant to extend these deadlines. I recognize, however, that compelling circumstances beyond the broadcaster's control, such as pending regulatory approval, may warrant extension of the build-out deadline. The extensions we grant today present such circumstances, and provide guidance for the industry.

I strongly support the steps we take today to set forth in clear terms the penalties we propose to impose upon broadcasters that fail to meet their build-out deadline and do not warrant an extension. I also support the interim reporting requirements, which require broadcasters to detail their progress in meeting certain milestones as they come into compliance. I believe our proposal is stringent, yet fair. I look forward to comment on this issue, including whether our proposed course of action should be accelerated.

Finally, I commend the many, many broadcasters who have met their build-out deadline.