

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

In the Matter of )  
)  
Remedial Steps For Failure to Comply With ) MM Docket No. 02-113  
Digital Television Construction Schedule )  
)  
Requests For Extension of the )  
October 5, 2001, Digital Television )  
Construction Deadline )

To: The Commission

**COMMENTS OF THE ASSOCIATION OF PUBLIC  
TELEVISION STATIONS**

The Association of Public Television Stations (“APTS”) hereby submits its comments in the above captioned proceeding.<sup>1</sup> On May 24, 2002, the Commission released a Notice of Proposed Rulemaking in which it proposed a series of graduated and increasing penalties for unexcused failure to construct DTV facilities on time. These penalties begin with admonishments and increased reporting requirements, continue with increasing forfeitures and will eventually terminate with the revocation of an offending station’s DTV construction permit and the rescinding of the station’s DTV authorization.<sup>2</sup> In such a case, the Commission has sought comment on whether it should make the station’s vacant DTV allotment available to other potential DTV broadcasters through

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<sup>1</sup> APTS is a nonprofit organization whose members comprise nearly all of the nation’s 356 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch, as well as engaging in planning and research activities on behalf of its members.

<sup>2</sup> Remedial Steps for Failure to Comply with Digital Television Construction Schedule, Notice of Proposed

auction, or delete the allotment from the DTV Table altogether.<sup>3</sup>

With 75 of its member stations already broadcasting in digital one year ahead of schedule, APTS enthusiastically supports the DTV transition and recognizes that gradual and reasonable penalties for unexcused noncompliance with the Commission's build-out rules may be necessary to encourage a swift transition from analog broadcasting.

However, APTS does not support either the auction of reserved DTV allotments or their deletion from the Table. The auction of reserved DTV channels would clearly be contrary to statute and established Commission policy, as would the auction of unreserved channels where there is a noncommercial educational applicant. Likewise, the deletion of these reserved allotments would be inconsistent with more than 30 years of Congressional and FCC policy ensuring the continuation and expansion of reserved spectrum for noncommercial educational uses.

#### **A. Auction of Spectrum for Which Noncommercial Educational Entities Have Applied**

The auction of reserved DTV allotments is contrary to the Communications Act and established Commission policy. The Commission has already determined that in the event of mutually exclusive applications, it will, consistent with the Communications Act, award licenses for the operation of noncommercial educational stations on reserved spectrum through the use of a point system.<sup>4</sup> To rule otherwise at this stage, after the

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Rulemaking, 02-150, MM Docket No. 02-113, ¶¶ 16-20 (rel. May 24, 2002).

<sup>3</sup> *Id.* at ¶ 19.

<sup>4</sup> See 47 C.F.R. §§ 73.7000, et. seq.; Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report & Order, FCC 00-120, 15 FCC Rcd 7386 (April 4, 2000) ("Comparative Standards Order"); Memorandum Opinion and Order, FCC 01-64, 16 FCC Rcd 5074 (rel. Feb. 28, 2001); and Memorandum Opinion and Second Order on Reconsideration, FCC 02-192, (rel. July 5, 2002).

Commission has established its point system on a complete and extensive record would surely be arbitrary and capricious. Moreover, it is established that the Commission's auction authority does not extend to mutually exclusive applications for unreserved spectrum where one of the applicants proposes a noncommercial educational broadcast service. In this regard, the Communications Act of 1934, as amended, provides that the competitive bidding authority does not apply to "licenses or construction permits issued by the Commission... for stations described in section 397(6) of this Act," *i.e.*, noncommercial educational stations.<sup>5</sup> In NPR v. FCC, the U.S. Court of Appeals for the D.C. Circuit specifically held that "nothing in the [Communications] Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in the unreserved spectrum," because Section 309(j)(2)(C) denies the Commission the authority to use competitive bidding "based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates."<sup>6</sup> Thus, regardless of whether the spectrum released to the Commission through its remedial mechanisms is reserved or unreserved, the Commission is under a statutory obligation to consider the proposed use of the spectrum by new applicants before deciding how to allocate that spectrum. In such situations, the Commission is obligated to use either the point system for resolving mutual exclusivities between NCE entities, or if the mutual exclusivity is between a commercial entity and a noncommercial entity, the comparative

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<sup>5</sup> 47 U.S.C. § 309(j)(2)(C). Section 397(6) states that "The terms "noncommercial educational broadcast station" and "public broadcast station" mean a television or radio broadcast station which-- (A) under the rules and regulations of the Commission in effect on the effective date of this paragraph [Nov. 2, 1978], is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes." 47 U.S.C. § 397(6).

<sup>6</sup> 254 F.3d 226, 229 (D.C. Cir. 2001).

criteria yet to be developed in accordance with the mandates of the U.S. Court of Appeals for the District of Columbia Circuit.<sup>7</sup>

## **B. Deletion of Reserved Spectrum**

APTS also objects the possibility of a reserved digital channel being deleted from the DTV Table of Allotments as part of the Commission's remedial mechanisms. This proposal is contrary to over 30 years of Congressional and Commission policy that preserves reserved noncommercial educational allotments. In 1952, the Federal Communications Commission reserved 242 channels for noncommercial educational television stations.<sup>8</sup> Since then, the FCC has consistently defended these reservations against efforts to de-reserve them,<sup>9</sup> and has reserved additional channels to further the

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<sup>7</sup> See Reexamination of the Comparative Standards for Noncommercial Educational Applicants; Association of America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81), Second Further Notice of Proposed Rulemaking, FCC 02-44, MM Docket No. 95-31 (rel. February 25, 2002).

<sup>8</sup> Amendment of Section 3.606 of the Commission's Rules and Regulations; Amendment of the Commission's Rules, Regulations and Engineering Standards Concerning the Television Broadcast Service; Utilization of Frequencies in the Band 470 to 890 MCS for Television Broadcasting, Sixth Report and Order, 41 F.C.C. 148 (1952). Since then the number of reserved channels has been increased incrementally.

<sup>9</sup> See, e.g., Television Assignments in New Smyrna Beach, Florida, 50 R.R.2d 1714 (1982); Television Assignments in Houston, Texas, 50 R.R.2d 1420 (1982); Table of Assignments in Ogden, Utah, 26 F.C.C.2d 142 (1970), *rec. den.* 28 F.C.C.2d 705 (1971); Channel assignments in Hamilton, Alabama, 21 R.R. 1577 (1961); Channel Assignments in Longview-Denton, Texas, 17 R.R. 1549 (1958), *recon. den.* 17 R.R. 1552a (1959); Channel Assignments to Des Moines, Iowa, 14 R.R. 152d (1956), *recon. den.* 14 R.R. 1528 (1956).

reach of public television service<sup>10</sup> as well as to provide better picture quality<sup>11</sup> and to permit the formation of networks of noncommercial educational stations.<sup>12</sup> Since 1952, Congress also has consistently supported the policy goal of a reserved space in the spectrum for noncommercial educational purposes through federal financing and access to multiple distribution platforms.<sup>13</sup> Deleting reserved spectrum returned to the Commission because of unexcused failure to construct a DTV facility on time would run contrary to this 30 year Federal policy commitment.

The proposal to delete a reserved digital channel is also inconsistent with the Commission's established policy of giving noncommercial educational entities greater opportunities to reserve spectrum. In conjunction with its auction decision, the FCC expanded the opportunities for future noncommercial educational applicants to request

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<sup>10</sup> See Television Channel Assignment at Anchorage, Alaska, 68 R.R.2d 1121 (1990); Television Channel Assignment at Victoria, Texas, 52 R.R.2d 1508 (1983); Television Assignment at Seaford, Delaware, 43 R.R.2d 1551 (1978); Television Channel Assignment at Mountain View, Arkansas, 38 R.R.2d 1298 (1976); Television Channel Assignment at Eufaula, Oklahoma, 35 R.R.2d 1039 (1975); Television Channel Assignment at Booneville, Mississippi, 27 R.R.2d 246 (1973); Television Channel Assignment at Parsons, Kansas, 23 R.R.2d 1707 (1972); Television Channel Assignment at the Virgin Islands, 20 R.R.2d 1659 (1970) (mileage separate requirements with co-channels in Puerto Rico waived; the most important factor for waiver is that the channels were for educational use); Television Channel Assignment in Hawaii, 11 R.R.2d 1518 (1967) (18 UHF channels assigned to Hawaii, with 9 reserved for noncommercial educational use); Television Channel Assignment at Eagle Butte, South Dakota, 10 R.R.2d 1768 (1967); Television Channel Assignment in Staunton, VA, 5 F.C.C.2d 537 (1966).

<sup>11</sup> Television Channel Assignment at Nashville, Tenn., 26 R.R.2d 1667 (1973).

<sup>12</sup> Television Channel Assignment at McGill, Nevada and Richfield, Utah, 24 R.R.2d 1855 (1972).

<sup>13</sup> See the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64 (1962), the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (1967), the Public Telecommunications Financing Act of 1978, Pub. L. 95-567, 92 Stat. 2405, the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 118 (Feb. 8, 1996), and the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (Nov. 29, 1999).

that a non-reserved channel be allotted as a reserved channel.<sup>14</sup> To delete reserved spectrum as the Commission has proposed would surely run contrary to this policy as well.

Moreover, the proposal would reverse, without a reasonable basis, the Commission's own promise to restore vacant analog allotments to the DTV Table at the end of the DTV transition. When the FCC established the core DTV channels as channels 2 through 51, it deleted all vacant, reserved, noncommercial analog allotments, and replaced as many as feasible with reserved DTV allotments.<sup>15</sup> As compensation, the FCC has stated that the balance of the reserved allotments would be restored at the end of the DTV transition.<sup>16</sup> Consistent with its policy of preserving reserved spectrum, the Commission recognized the importance of restoring even vacant reserved allotments. Deletion of reserved spectrum as part of the Commission's remedies for failure to construct would contravene the Commission's specific commitment to restore vacant reserved spectrum in the DTV table of allotments.

Lastly, it should be noted that failure of existing license holder to construct DTV facilities does not necessarily mean that another licensee may not be better able to provide noncommercial educational service to the community. Reserved spectrum should therefore be preserved so that a potential future applicant could provide a noncommercial

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<sup>14</sup> Where the need for a noncommercial educational station is shown to be greater than the need for a commercial station, an applicant may request a re-allotment. This need may be demonstrated by showing (a) that there is not an available reserved channel allotted to the community and (b) that the applicant would provide a first or second noncommercial educational television service to 2,000 or more people who constitute 10 percent of the population within the proposed allotment's Grade B contour. Comparative Standards Order, ¶ 114. See also 47 C.F.R. § 73.202(a)(1).

<sup>15</sup> Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, Sixth Report & Order, FCC 97-115, 12 FCC Rcd 14588, ¶ 112 (1997).

<sup>16</sup> Advanced Television Systems and Their Impact on the Existing Television Broadcast Service,

educational digital television service to the community.

## Conclusion

While APTS supports the Commission's decision to create increasing penalties for unexcused failure to construct digital facilities, APTS strenuously opposes the auction of any channel—reserved or unreserved— for which there are mutually exclusive applicants and one of which has proposed a noncommercial educational service. In such situations, the Commission is obligated to use either the point system for resolving mutual exclusivities between NCE entities, or if the mutual exclusivity is between a commercial entity and a noncommercial entity, the comparative criteria yet to be developed in accordance with the mandates of the U.S. Court of Appeals for the District of Columbia Circuit. APTS also objects to any remedial measure that would delete reserved DTV allotments. Such a proposal would violate over 30 years of established and consistent federal policy.

Respectfully submitted,

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July 8, 2002