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

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In the Matter of	)	
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Reallocation and Service Rules for the 698-746	)	
MHz Spectrum Band (Television Channels 52-59)	)	GN Docket No. 01-74

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 2002 **Released:** June 14, 2002

By the Commission: Commissioner Martin approving in part, concurring in part, and issuing a statement.

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Appendix A: Petitions for Reconsideration

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In the *Lower 700 MHz Report and Order*,[1] we adopted allocation and service rules for the radio spectrum at 698-746 MHz ("Lower 700 MHz Band") in order to reclaim and license this band to

[1] Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022 (2002) (*Lower 700 MHz Report and Order*).

new services in accordance with statutory mandate.[2] This action was taken as part of the transition of television ("TV") broadcasting from analog to digital transmission systems. Specifically, we reallocated the 48 megahertz of spectrum in the Lower 700 MHz Band to fixed and mobile services and retained the existing broadcast allocation for both new broadcast services and incumbent broadcast services during their transition to digital television ("DTV"). To complement this flexible allocation to new services on the Lower 700 MHz Band, we generally applied the Part 27 service rule framework to promote the efficient use of spectrum and permit service providers to select the technologies and services that the market may demand.

2. This Memorandum Opinion and Order addresses petitions for reconsideration filed by eight parties that seek changes and/or clarifications to this Commission's decisions regarding issues relating to the transition to DTV service and the rules for auctioning and licensing new services on the Lower 700 MHz Band.[3] We deny these petitions and affirm our decisions in the *Lower 700 MHz Report and Order*. Specifically, we:

- Affirm the band plan and geographic license areas adopted in the *Lower 700 MHz Report and Order*. In particular, we maintain the assignment of Block C (currently occupied by TV Channels 54 and 59) over 734 Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs").

- Affirm the decision in the *Lower 700 MHz Report and Order* to adopt a uniform maximum power limit of 50 kW effective radiated power ("ERP") for services operating on the Lower 700 MHz Band. We also leave unaltered the out-of-band emission ("OOBE") limit and other measures that were adopted in the *Lower 700 MHz Report and Order* to address and mitigate any interference that may result from 50 kW operations to systems on adjacent channels.

- Deny the petition for reconsideration of the Office of the Chief Technology Officer, Government of the District of Columbia, which argues that public safety users should be permitted to obtain Lower 700 MHz band licenses under the "public safety radio services" auction exemption found at Section 309(j)(2)(A) of the Communications Act, as amended ("Communications Act" or "Act").[4]

- Affirm the decision in the *Lower 700 MHz Report and Order* to dismiss all pending petitions for NTSC channel allotments in the Lower 700 MHz Band.

- Clarify that broadcast stations clearing from Channels 59-69 in connection with voluntary band clearing arrangements may seek a modified NTSC or DTV channel allotment on Channels 52-58.

- Affirm the decision in the *Lower 700 MHz Report and Order* not to authorize additional new NTSC construction permits in the Lower 700 MHz Band and to open a 45-day window, during which such pending applications could be modified, either (a) to provide analog or

[2] *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 § 3003 (1997) ("BBA 97") (adding new Section 309(j)(14) to the Communications Act of 1934, as amended); § 3007 (uncodified; reproduced at 47 U.S.C. §309(j) note 3).

[3] The full names of petitioners and a list of parties filing oppositions and replies are listed in Appendix A.

[4] 47 U.S.C. § 309(j)(2)(A).

digital television service in the core channels (2-51), or (b) to provide digital television service in Channels 52-58.

- Affirm the decision of the Mass Media Bureau (now the Media Bureau) adopted pursuant to the *Lower 700 MHz Report and Order* providing that, where multiple applicants have filed for a single NTSC allotment in the Lower 700 MHz Band, they must file a petition for rulemaking proposing a single replacement channel to which all applicants agree to modify their applications. Accordingly, where mutually exclusive applicants cannot agree on submission of a petition for the same replacement channel, then any petition filed by a member of such group will be dismissed.

3. By taking these steps, we seek to promote the transition to DTV, meet our statutory mandate to reclaim and license this spectrum by competitive bidding, and enable the flexible use of the Lower 700 MHz Band for a wide range of new services.

II. BACKGROUND

4. Section 309(j)(14) of the Communications Act requires the Commission to assign spectrum recovered from broadcast television using competitive bidding and envisions that the Commission will conduct an auction of this spectrum prior to September 30, 2002.[5] In meeting this requirement, the Commission must adopt rules that promote a number of objectives, including new technologies and services, economic competition and growth, commercial uses, efficient and intensive use of spectrum, and time for interested parties to develop their business plans.[6] Further, the regulations adopted by the Commission must prescribe area designations and bandwidth assignments that promote equitable distribution of licenses and services among geographic areas, economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and investment in, and rapid deployment of, new technologies and services.[7]

5. The reclamation of the Lower 700 MHz Band and the radio spectrum at 746-806 MHz ("Upper 700 MHz Band") is occurring as a result of the conversion of television broadcasting from analog to digital transmission systems together with the planned migration of broadcasters into core Channels 2-51. This reclamation of TV spectrum has been addressed in two parts, primarily as a result of different statutory requirements for the upper and lower portions of 700 MHz spectrum.[8] The Commission previously reallocated the Upper 700 MHz Band and adopted service and licensing rules for

[5] 47 U.S.C. § 309(j)(1) (codifying BBA 97 § 3003). The statute further requires analog broadcasters to cease operation in the recovered spectrum by the end of 2006 unless the Commission extends the end of the transition. *Id.* § 309(j)(14)(A)-(B). As provided in the statute, the Commission is required to extend the end of the transition at the request of individual broadcast licensees on a market-by-market basis if one or more of the four largest network stations or affiliates are not broadcasting in digital, digital-to-analog converter technology is not generally available, or 15 percent or more television households are not receiving a digital signal. *Id.* § 309(j)(14)(B)(i)-(iii).

[6] *See* 47 U.S.C. § 309(j)(3)(A)-(E).

[7] *See id.* § 309(j)(4).

[8] *See* Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Notice of Proposed Rulemaking*, 16 FCC Rcd 7278, 7282 ¶ 6 (2001).

that spectrum.[9] This Commission's *Lower 700 MHz Report and Order* provides for the reallocation and adoption of service and licensing rules for the Lower 700 MHz Band. The auction of licenses in the Lower 700 MHz Band (Auction No. 44) is presently scheduled for June 19, 2002.[10]

6. In the *Lower 700 MHz Report and Order*, we reallocated the spectrum in the Lower 700 MHz Band to flexible use by fixed, mobile and new broadcast services, as well as incumbent broadcast services during their transition to DTV.[11] We established technical criteria designed to protect incumbent television operations in the band during the DTV transition period, and adopted a mechanism by which pending broadcast applications may be amended to provide analog or digital service in the core television spectrum or to provide digital service on TV Channels 52-58.

7. We also adopted service rules required for use of the Lower 700 MHz Band by fixed, mobile, and broadcast services. We divided the Lower 700 MHz Band into five blocks across different service areas for geographic area licensing: two 6-megahertz blocks of contiguous unpaired spectrum, as well as two 12-megahertz blocks of paired spectrum, were to be assigned over six Economic Area Groupings ("EAGs"); a remaining 12 megahertz block of paired spectrum (710-716 MHz and 740-746 MHz) was designated for licensing over 734 MSAs and RSAs.[12] We decided that all operations in the Lower 700 MHz Band would be generally regulated under the framework of Part 27's technical, licensing, and operating rules.[13] However, in order to permit both wireless services and certain new broadcast operations in the Lower 700 MHz Band, we adopted maximum power limits for the Lower 700 MHz Band that would permit 50 kW ERP transmissions under certain conditions.[14] We declined to restrict any of the spectrum in the Lower 700 MHz Band exclusively to public safety or private radio services, but noted that our flexible use allocation under Part 27 permits fixed and mobile wireless uses for private, internal radio communications.[15]

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[9] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1026 ¶ 6 n.18.

[10] *See* "Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures," *Public Notice*, DA 02-563, Report No. AUC-02-44-B (Auction No. 44) (rel. Mar. 20, 2002).

[11] Section 303(y)(2) authorizes the Commission to allocate spectrum to provide flexibility of use upon making certain findings. *See* 47 U.S.C. § 303(y)(2). The Commission must make affirmative findings that such flexibility: (1) is consistent with international agreements, (2) would be in the public interest, (3) would not deter investment in communications services and systems, or technology development, and (4) would not result in harmful interference among users. *See id.*

[12] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1059 ¶ 90.

[13] *Id.* at 1049 ¶¶ 62-63.

[14] *Id.* at 1063-67 ¶¶ 102-11.

[15] *See, e.g., id.* at 1029 ¶ 13 n.43.

III. DISCUSSION

A. Service Rules

1. Band Plan and Geographic Scope of Licenses

8. *Background*. In the *Lower 700 MHz Report and Order*, we defined the band plan and geographic area licensing approach for the Lower 700 MHz Band. Specifically, we adopted a band plan that divides the 48 megahertz of spectrum in the 698-746 MHz band into three 12-megahertz blocks of paired spectrum and two 6-megahertz blocks of unpaired spectrum.[16] The three blocks of paired spectrum include Block A (Channels 52 and 57), Block B (Channels 53 and 58), and Block C (Channels 54 and 59); the two blocks of unpaired spectrum include Block D (Channel 55) and Block E (Channel 56).[17] Under this band plan, Blocks A, B, D and E will be licensed over six EAGs and Block C will be licensed over 734 MSAs/RSAs.[18]

9. We determined that a combination of large and small geographic service areas best accomplishes statutory objectives, including the obligation to promote "economic opportunity and competition" and to disseminate licenses "among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[19] We found that the majority of commenters favored the adoption of service areas much smaller than EAGs, and that the use of the smaller MSAs/RSAs may correspond to the needs of many customers, including customers of small regional and rural providers.[20] To promote opportunities for these interested parties to participate in the provision of services in the Lower 700 MHz Band, we determined that it would be in the public interest to assign a 12 megahertz block of paired spectrum from 710-716 MHz and 740-746 MHz (*i.e.*, Block C) over MSAs/RSAs.[21]

10. In petitions for reconsideration/clarification, two parties claim that the Commission should reconsider this plan for assignment of spectrum within the Lower 700 MHz Band, in particular the use of MSAs/RSAs to license Block C.[22] Spectrum Exchange/Allen and SCA argue that the use of MSAs/RSAs for Block C may create a "free-rider problem" that would reduce the value of commercial licenses in the Upper 700 MHz Band.[23] Spectrum Exchange/Allen contends that the choice of MSA/RSA license areas for a spectrum block that includes Channel 59 is inconsistent with the Commission's previously adopted provisions to facilitate band clearing in Channels 59-69, and further notes that similar band-clearing policies were not applied to Channels 52-58.[24] SCA claims that "the small area licensing scheme for

[16] *Id.* at 1053-54 ¶¶ 76-77.

[17] *Id.* at 1054 ¶ 77.

[18] *See id.* at 1053-1062 ¶¶ 76-96.

[19] *See id.* at 1061 ¶ 95 (quoting 47 U.S.C. § 309(j)(3)(B)).

[20] *Id.* at 1060-61 ¶¶ 94, 96.

[21] *Id.* at 1059, 1061 ¶¶ 90 n.258, 95.

[22] *See* Spectrum Exchange/Allen Petition at 3-12; SCA Supplement to Petition at 4-7.

[23] Spectrum Exchange/Allen Petition at 3; SCA Supplement to Petition at 6.

[24] Spectrum Exchange/Allen Petition at 5.

Channel 59 threatens to make clearing that channel all but impossible by increasing exponentially the number and the complexity of agreements that will be necessary to clear Channel 59."[25] Therefore, they urge the Commission to reassign the spectrum within the Lower 700 MHz Band in a manner such that MSA/RSA licenses are not assigned to the block of spectrum currently occupied by TV Channel 59.

11. Two commenting parties oppose these positions. Council Tree alleges that SCA's position is not in the public interest and opposes SCA's efforts to alter the band plan adopted in the *Lower 700 MHz Report and Order*.[26] US Cellular opposes both petitions and states that such proposals would delay commencement of service on MSA/RSA licenses.[27]

12. Discussion. We will not alter the band plan or geographic service areas that were adopted in the *Lower 700 MHz Report and Order*, including the assignment of MSA/RSA license areas to Block C currently occupied by TV Channels 54 and 59. Based on our consideration of the arguments raised on reconsideration and the factors previously considered in the *Lower 700 MHz Report and Order,* we reaffirm that the band plan adopted in that order represents the best approach for achieving the Commission's policy objectives for the Lower 700 MHz Band. Thus, we deny these petitions for reconsideration/clarification that raise issues regarding the band plan and geographic scope of Lower 700 MHz Band licenses.

13. In determining the optimum initial scope of licenses for the Lower 700 MHz Band, this Commission maintained its commitment to several spectrum management policies, including the statutory mandate to promote opportunities for a wide variety of applicants, including small and rural wireless providers, to obtain spectrum and participate in the provision of spectrum-based services. A primary result of this process was a band plan that assigned the majority of spectrum over large service areas defined by EAGs. This approach is consistent with the Commission's decision in the Upper 700 MHz Band proceeding to assign the majority of commercial spectrum in the Upper 700 MHz Band over EAGs.[28] As the Commission noted in the Upper 700 MHz Band proceeding, large geographic areas such as EAGs offer several advantages.[29] Significantly, large areas provide optimum opportunity to aggregate spectrum, which may be particularly useful for services that require nationwide footprints. Large geographic areas also make it easier for providers to take advantage of economies of scale, allowing existing technologies to grow and new technologies to develop. We note that large geographic areas also reduce the potential transaction costs to both auction participants seeking adjoining smaller geographic

[25] SCA Petition at 4.

[26] Council Tree Opposition (Mar. 14, 2002) at 8-9. Council Tree appears to suggest that SCA's Supplement to Petition was filed "late." *Id.* at 9. Under Section 1.429(d) of the rules, supplements to petitions for reconsideration that are filed within the 30-day period for filing petitions for reconsideration are considered timely. 47 C.F.R. § 1.429(d). SCA's Supplement to Petition was filed on March 8, 2002, which was 30 days after Federal Register publication of the summary of the *Lower 700 MHz Report and Order*. *See* 67 Fed. Reg. 5491 (February 6, 2002).

[27] *See* US Cellular Opposition at 4.

[28] *See* Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476, 500 ¶ 56 (2000) (*Upper 700 MHz First Report and Order*).

[29] *Id.* at 501-02 ¶¶ 59-60.

areas and carriers seeking to consolidate such areas post-auction.[30] Finally, these large areas may help address problems due to incumbent TV stations.[31] Because of these advantages associated with the assignment of larger licensing areas, the Commission designated the bulk of Lower 700 MHz Band spectrum as EAGs.

14. Nevertheless, based on the record, the statutory mandate of Section 309(j) of the Communications Act, and a desire to promote opportunities for a wide variety of applicants in the provision of spectrum-based services in the Lower 700 MHz Band, we also sought to define a band plan that afforded meaningful opportunities to the interested parties seeking licenses with smaller initial geographic scope. Because we decided to assign only one 12 megahertz block of paired spectrum over MSAs/RSAs,[32] it is of consequential significance to such parties whether that block is assigned to spectrum with high incumbency, potential for interference, or other obstructions to use. Given the lack of any significant difference in the relative incumbency levels on Blocks A, B, and C, this Commission focused on factors such as band plan architecture and adjacent channel interference in selecting the various license block assignments.[33]

15. Given these considerations in the *Lower 700 MHz Report and Order*, we find our assignment of MSAs/RSAs to Block C to be in the public interest. Of the three paired 12-megahertz blocks, Block B would have been the most suitable to meet the spectrum needs of the many parties interested in acquiring additional spectrum to complement existing networks of a local or smaller scale.[34] However, the use of MSAs/RSAs for Block B would have conflicted with another Commission goal that of making it possible to aggregate 24 megahertz of paired spectrum within the same EAG. As noted above[35] and in the *Lower 700 MHz Report and Order*,[36] the ability to aggregate spectrum may offer important benefits. In order to provide additional opportunities for firms seeking to aggregate paired spectrum within the same EAG, this Commission had to designate either Blocks A and B or Blocks B and C as the EAG blocks. Using Block B for MSA/RSA licenses would result in the two EAG blocks being split, frustrating this objective. Thus, the alternative locations for MSA/RSA licenses were Block A or Block C. Given these alternatives, we find Block C to be the best choice to meet the Commission's specific objective for the Lower 700 MHz Band to provide opportunities for provision of services by rural telephone companies,

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[30] *See* Amendment to the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 FCC Rcd 7700, 7732, ¶ 74 (1993) (subsequent history omitted).

[31] *See Upper 700 MHz First Report and Order*, 15 FCC Rcd 476, 501 ¶ 59.

[32] We note that one 12 megahertz block of spectrum is significant in that it represents 25 percent of the 48 megahertz reallocated in the Lower 700 MHz Band spectrum. *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1061 ¶¶ 95-96.

[33] *See, e.g., Lower 700 MHz Report and Order*, 17 FCC Rcd at 1054-55 ¶¶ 77-80.

[34] Compared to other blocks, Block B (Channels 53 and 58) is relatively "insulated" from the TDD and/or new broadcast applications that Blocks D and E (Channels 55 and 56) could readily accommodate, as well as from DTV broadcasters on Channel 51 in the core and guard band users on Channel 60.

[35] *See supra* para 13.

[36] *See, e.g., Lower 700 MHz Report and Order*, 17 FCC Rcd at 1055, 1076 ¶¶ 79, 140-42.

small businesses, and/or other entities seeking spectrum licenses of smaller geographic scope.[37]

16. We do not view the alternative, Block A, to be sufficient to meet the Commission's objectives. Compared to Blocks B through E, Block A may pose the most burdens for new licensees seeking to offer services while protecting DTV operations on Channel 51.[38] Unlike these other blocks, Block A licensees will have to meet additional Part 27 adjacent channel interference obligations involving these DTV operations on Channel 51, which are in the TV core and are therefore of a permanent nature. These permanent DTV operations on Channel 51 underscore the advantages of licensing Channel 52 across EAGs, as these large geographic areas match and can be aggregated with those used for Block B. Such aggregation may permit licensees greater flexibility to engineer their systems around Channel 51 DTV operations by the use of measures such as internal guard bands. Accordingly, compared to Block C, we find that adjacent channel protection requirements may limit the usability of Block A as a stand-alone block.

17. We reject Spectrum Exchange/Allen's proposal to rearrange the Lower 700 MHz Band licensing arrangement and/or band plan.[39] We find that their alternative proposals will not preserve the equitable distribution of licenses. In particular, we do not accept the suggestion that an unpaired block should be assigned to the current Channel 52 spectrum instead of to Channels 55 and 56. We do not find adequate support to change the existing separation between segments of the 12 megahertz paired blocks that were adopted in the *Lower 700 MHz Report and Order*. The separation between the blocks that we adopted in the *Lower 700 MHz Report and Order* is consistent with the band plan adopted in the Upper 700 MHz Band, and is appropriate for many two-way technologies to operate. Locating the 6-megahertz unpaired licenses at the center of the band plan maintains this separation.

18. We find that the spectrum policy objectives for the Lower 700 MHz Band are a balancing of a number of factors. Petitioners' specific arguments regarding the potential for Channel 59 "free-riders" to hinder band-clearing efforts on Channels 59-69 are outweighed by other considerations in the Lower 700 MHz band plan. While the Commission identified the early clearing of incumbents as an Upper 700 MHz Band consideration that would also be important in the Lower 700 MHz Band,[40] it does not follow that removing potential obstacles to band clearing on Channel 59 should be the overriding objective of our service rules for the Lower 700 MHz Band. Rather, we find that the aforementioned advantages of this band plan for a wide variety of applicants and spectrum-based services outweigh the potential that this band plan may present some obstacles to clearing Channel 59. We note that under the Commission's voluntary band-clearing policy, there has always been the potential for certain new licensees to benefit from the early clearing of a Channel 59-69 incumbent without being a party to the particular band-clearing agreement. This potential exists for new licensees on Channels 58 and 59, as well as commercial and guard band licensees in the Upper 700 MHz Band. In particular, there originally was no expectation that Lower 700 MHz licensees would contribute to Upper 700 MHz band-clearing efforts.

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[37] We do not accept the argument by Spectrum Exchange/Allen that by placing a block licensed for MSAs/RSAs next to an Upper 700 MHz block licensed for EAGs, the current band plan would "pit large bidders against small bidders" and ultimately disadvantage small bidders. *See* Spectrum Exchange/Allen Petition at 6. Rather, we find no indication that small carriers will be disadvantaged by the band plan that we adopted, and we note that no small carrier has sought our reconsideration on the issue.

[38] *See, e.g.*, US Cellular Opposition at 4 n.5.

[39] Spectrum Exchange/Allen Petition at 7-12.

[40] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1048-49 ¶ 61.

At the time the Upper 700 MHz band-clearing rules were adopted, it was assumed that Channels 52-59 would be auctioned later than Channels 60-69. Thus, placing MSA/RSA licensees on Block C does not make band-clearing more costly or difficult for petitioners than originally conceived.

2. Power and Out-of-Band Emission Limits

19. *Background*. In the *Lower 700 MHz Report and Order*, we adopted a maximum power limit of 50 kW ERP for all services operating fixed and base stations in the Lower 700 MHz Band. It found that a maximum power limit of 50 kW ERP, subject to specific requirements regarding non-interference, is practicable to maximize both flexibility and freedom from harmful interference for the widest number of potential services on this spectrum.[41] Following the approach adopted for the commercial portions of the Upper 700 MHz Band, we adopted a maximum power limit of 30 watts ERP for mobile and control stations, and 3 watts ERP for portable (hand-held) devices.[42]

20. In order to limit the potential for harmful interference, we required licensees operating base or fixed stations at power levels greater than 1kW ERP to design their systems such that transmissions from their base station produced power flux density (PFD) levels that would be no greater than the PFD levels that would ordinarily occur from stations operating at power levels of 1kW ERP or less.[43] Specifically, we required such licensees to limit the calculated PFD of the signal from their base station to 3000 microwatts per square meter at any location at ground level within 1 km of their base station transmitter. We also required licensees intending to operate base or fixed stations in excess of 1kW ERP to file notifications with the Commission and to provide notifications to all Part 27 licensees authorized on a adjacent blocks within their area of operation.[44] We found that such notice to adjacent channel licensees will provide these licensees with opportunities to mitigate potential interference to their base receive stations through attenuation in vertical antenna patterns and antenna down tilting, use of improved filtering, avoiding the use of spectrum at the edge of its authorized block, or through other measures.[45] In order to address the potential interference to adjacent channel licensees, we also adopted rules governing out-of-band emission (OOBE).[46] Specifically, we determined that licensees operating in

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[41] *Id.* at 1064-65 ¶¶ 103, 107.

[42] *See* 47 C.F.R. § 27.50(b)(2)-(3).

[43] Unlike interference resulting from out-of-band emissions (OOBE), very strong adjacent channel signals can overload a receiver to the point where the receiver filtering is unable to prevent interference.

[44] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1066 ¶ 110. Such notifications are to be provided to all adjacent channel Part 27 licensees authorized to construct and operate base or fixed stations within 75 km of the higher-power base or fixed station. Licensees filing notifications with the Commission and adjacent channel licensees must provide the location and operating parameters of all base and fixed stations operating in excess of 1 kW ERP. Such notification must be filed with the Commission and adjacent channel licensees at least 90 days prior to the commencement of station operation. *Id.* When applicable, this requirement includes notification to Part 27 commercial and guard band manager licensees operating on Channel 60 in the Upper 700 MHz Band. *See id.* n.308; *Upper 700 MHz First Report and Order*, 15 FCC Rcd at 490 ¶ 32.

[45] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1065, 1121-22 ¶ 106, App. D (¶¶ 3-4).

[46] OOBE interference results from emissions on frequencies outside a licensee's authorized band that fall within the pass band of an adjacent licensee's receiver(s). This type of interference cannot be mitigated through receiver filtering, and differs from the type of adjacent channel interference that results from emission that are contained within a licensee's authorized band, but fall just outside the pass band of an adjacent licensee's (continued....)

the Lower 700 MHz Band should be required to attenuate any emission on frequencies outside the licensee's authorized spectrum below the transmitter power (P) by at least 43 + 10 log (P) dB.[47]

21. In its petition for reconsideration, Access Spectrum requests that the Commission reconsider permitting licensees on TV Channels 57-59 to operate base stations at a power level of up to 50 kW ERP.[48] Access Spectrum argues that the interference mitigation measures adopted in the *Lower 700 MHz Report and Order* do not adequately prevent such high power base stations from causing interference to operations in the 746-747 MHz guard band.[49] As a result, Access Spectrum requests that the Commission reduce the power limit to 1 kW for base and fixed transmit stations operating in the upper segments of Blocks A, B, and C (TV Channels 57-59) of the Lower 700 MHz Band plan.[50] Motorola, Pegasus, ITA and US Cellular support Access Spectrum's petition and proposed power limit modifications,[51] while Council Tree opposes Access Spectrum's petition and supports the flexibility of the existing power and OOBE limits.[52]

22. *Discussion*. We decline to adopt Access Spectrum's proposal to reduce the power limits in the upper portions of the Lower 700 MHz Band. In the *Lower 700 MHz Report and Order*, we devoted considerable discussion to the possibility of harmful interference from 50 kW ERP operations to systems on adjacent channels operating at lower power levels."[53] Contrary to the statements of Access Spectrum and other commenting parties,[54] we evaluated fully the potential impact of 50 kW transmissions on operations in the Upper 700 MHz Band, including users of spectrum licensed to guard band managers on 746-747 MHz.[55]

23. To address the potential for adjacent channel interference resulting from operations on the Lower 700 MHz Band, the Commission adopted general rules that protect all adjacent channel licensees, whether they are operating in the Lower 700 MHz Band or in the lower portion of the Upper 700 MHz Band. By its very compliance with the PFD limit in Section 27.55(b), a Block A, B, and/or C Lower 700 MHz licensee operating at 50 kW protects mobile receivers operating on 746-747 MHz from

(Continued from previous page)
receiver(s)) (*see* note 43, *supra*). The Commission has historically addressed the problem of OOBE interference through the straightforward imposition of OOBE limits on transmitters.

[47] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1069-70 ¶ 122.

[48] Access Spectrum Petition at 1. Access Spectrum has purchased licenses to operate as a Guard Band Manager in the 746-747 MHz guard band in the Upper 700 MHz Band. *Id.* at 2.

[49] *Id.* at 1, 4-8.

[50] *Id.* at 9-10.

[51] *See* Motorola Comments at 1; Pegasus Comments at 1; ITA Reply at 1; US Cellular Reply at 1. US Cellular also supports the extension of Access Spectrum's proposal to include reduced power limits for Channel 56. *See* US Cellular Comments at 2.

[52] Opposition of Council Tree Communications, LLC to Petitions for Reconsideration at 4-5.

[53] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1064 ¶ 104.

[54] *See, e.g.*, Access Spectrum Petition at 7; Pegasus Comments at 5-6.

[55] *See* n.40, *supra*.

desensitization or front-end overload because they will experience PFD levels that are no greater than the PFD levels that could occur from stations operating at 1 kW ERP or less.

24. Moreover licensees operating at power levels that exceed 1 kW are required to notify all licensees authorized on adjacent blocks that are located within 75 km.[56] This requirement provides adjacent channel licensees, including licensees on 746-747 MHz, the opportunity to adopt measures to mitigate interference.[57] Finally, by meeting Section 27.53(f)'s limits on the power of "any emission outside a licensee's frequency band(s),"[58] which would include any OOBE on 746-747 MHz, a Block A, B, and/or C Lower 700 MHz licensee operating at up to 50 kW will protect mobile and base receive stations on 746-747 MHz from harmful interference that could arise due to out-of-band emissions.

25. Access Spectrum claims that transmitters operating at 50 kW will produce high levels of interference to mobile and portable receivers in the 746-747 MHz guard band and that the PFD limit established in the *Lower 700 MHz Report and Order* is inadequate to protect receivers in the guard band from being "overwhelmed."[59] However, on the basis of Access Spectrum's own calculations referenced in the *Lower 700 MHz Report and Order*,[60] we determined that the interference environment of mobile and portable receivers in adjacent bands, such as the 746-747 MHz guard band, would be not substantially changed with 50 kW ERP stations operating under the conditions of the PFD limit adopted in the *Lower 700 MHz Report and Order*. To protect adjacent channel mobile receivers from overload conditions,[61] we concluded that it is only necessary that 50 kW transmitters produce radio fields on the ground that are no greater than what would occur from commercial land mobile systems operating at power levels of 1 kW or less.[62] Thus, we adopted Section 27.55(b), which established a PFD limit for Lower 700 MHz Band stations operating up to 50 kW. Section 27.55(b) ensures that the interference environment for mobile and portable receivers operating on spectrum adjacent to 50 kW ERP transmitters is substantially the same as what it would be for mobile and portable receivers operating on spectrum adjacent to 1 kW ERP transmitters.[63]

26. In support of the Access Spectrum petition, Motorola filed an engineering analysis

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[56] *See* 47 C.F.R. § 2750(c)(5).

[57] The Commission made clear in the text of the *Lower 700 MHz Report and Order* that its decision contemplated the application of this mitigation requirement to guard band manager licensees operating on Channel 60 in the Upper 700 MHz Band. *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1066 ¶ 110 n.308.

[58] *See* 47 C.F.R. § 27.53(f).

[59] Access Spectrum Petition at 6.

[60] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1064-65 ¶ 105 ("We have performed calculations that demonstrate, for example, how 50 kW ERP, high antenna broadcast operations can co-exist with lower-power/low antenna height land mobile operations."); *see also id.* App. D (¶¶ 1-2).

[61] *See generally* n.39, *supra*.

[62] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1064-65, 1121 ¶¶ 104, 105, App. D (¶ 1).

[63] The Commission set a PFD maximum value on the ground to be calculated based on the technical parameters of the transmitting system. To meet the conditions of Section 27.55(b), a licensee operating a 50 kW ERP system would have to employ antennas that minimize energy at ground level near to the antenna and/or would have to locate such antennas at relatively high sites.

purporting to demonstrate that the PFD limit does not adequately protect adjacent channel licensees in the guard band. We disagree with Motorola's finding that there is a "discontinuity" in the provisions of our rules that affects systems operating below 1 kW differently from those operating at higher power levels. Motorola suggests that because of our rule, which places a particular PFD limit on above-1 KW ERP systems in the Lower 700 MHz Band, licensees will operate with antennas and antenna configurations that might put the full 3000 microwatts per square meter PFD on the ground in the vicinity of the transmitter and, therefore, cause excessively high out-of-band emissions into 746-747 MHz guard band handsets. Motorola's claimed large "discontinuity" in the level of out-of-band emissions produced when licensees operate at power levels above 1 kW suggests a sudden, large increase in emissions automatically occurring when a licensee operating at 1 kW ERP increases its power level to just above 1 kW ERP. This assertion, however, is groundless. Our 3000-microwatt per square meter rule merely places a limit on the energy a licensee operating above 1 kW can put on the ground 1 km away. In the course of operating at such power levels, and designing their systems to not exceed the 3000 mw/sq m limit, if a licensee employs a particular antenna and/or an antenna configuration in an effort to actually *reach* this rather generous PFD limit, there would, as Motorola contends, be greater out-of-band emissions into guard band receivers than we may have anticipated when we adopted our 43 + 10log P OOBE standard. However, it is far more likely that licensees designing commercial systems operating at power levels just above *and* just below 1 KW ERP will employ virtually the same antennas and antenna configurations, which, according to Motorola, would produce a much more modest 140 mw/sq m PFD level. Thus, a licensee operating at a power level above 1 kW ERP will produce no greater emissions into guard band receivers than a licensee operating below 1 kW ERP -- *i.e.*, there would be no sudden increase or "discontinuity" in emissions occurring from systems that choose to operate at power levels above 1 kW ERP.

27. It should also be noted that commercial licensees operating in the Upper 700 MHz Band, *e.g.*, the 747-752 megahertz license immediately above the guard band, could design systems that produce that same PFD level and thus create the same out-of-band emissions into guard band receivers that concern Motorola with regard to Lower 700 MHz Band systems. Thus, our rule, which is designed simply to place a limit on energy produced by high-powered systems in the Lower 700 MHz band, will not cause any greater out-of-band interference to occur to guard band receivers from commercial systems operating in Lower 700 MHz Band than could occur from commercial systems operating in the Upper 700 MHz Band.

28. Access Spectrum also claims that the use of antenna down tilting and improved filtering is inadequate to mitigate interference for users of the guard band utilizing portable handsets.[64] From this observation, Access Spectrum concludes that we failed to address the circumstances that will be faced by guard band users operating mobile or portable receivers and that the Commission's conclusions regarding interference mitigation are therefore "baseless."[65] As Access Spectrum recognizes,[66] however, antenna down tilting and filtering are measures that the Commission suggested may be applied to base station receiving receivers, not mobiles or portables.[67] Because of the potential interference scenarios involving

[64] Access Spectrum Petition at 6-7.

[65] *Id.* at 7.

[66] *Id.* at 6-7.

[67] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1065 ¶ 106 (stating that a "licensee could mitigate interference" and that "prospective licensees" should take into account any costs to incorporate these protection features when bidding on a license in the band).

base-to-base interference (*i.e.*, scenarios that the adoption of a PFD limit on the ground would not address), the Commission provided a table demonstrating how a licensee could mitigate potential base-to-base interference from 50 kW transmissions by use of a selective antenna pattern or down tilting of its base receive antenna.[68] Protection of mobiles and portables is already ensured by the PFD limitation of 3000 microwatts per square meter on the ground.[69] Thus, we squarely addressed and mitigated the potential impact to adjacent channel mobiles on 746-747 MHz by the adoption of Section 27.55(c).

29. We disagree with Access Spectrum's supposition that the notification requirement placed on licensees that intend to operate base or fixed stations in excess of 1 kW ERP provides no practical benefit for users of the 746-747 guard band.[70] Access Spectrum's position relies on a misunderstanding that the notification requirement is intended to solve a base-to-mobile interference potential. As stated above, the potential interference to mobile and portable receivers on the 746-747 MHz guard band is addressed by the PFD limitation of 3000 mw/sq m on the ground. As explained in the *Lower 700 MHz Band Report and Order*, the notification requirement is a means to implement the mitigation measures cited by the Commission to address the potential for base-to-base interference from 50 kW ERP operations.[71]

30. Access Spectrum finally contends that the OOBE limit established in the *Lower 700 MHz Report and Order* should be "significantly greater" in order to mitigate adjacent channel interference caused by high power base station operations on license blocks occupying TV channels 57-59.[72] We disagree. The OOBE limit will result in the identical out-of-band emission level for 1 kW transmitters as for 50 kW transmitters (*i.e.*, producing the absolute power of –43 dBw, or 50 microwatts, out of the transmitter). The protection afforded adjacent channel receivers is independent of the maximum power allowed for Lower 700 MHz Band operations; thus the requirement proposed by Access Spectrum is unnecessary.

31. In sum, we do not agree with Access Spectrum that the technical rules jeopardize users of the 746-747 MHz guard band. After full consideration of the arguments made by Access Spectrum, and the commenters supporting its petition, we will not alter the OOBE limit or maximum power limit of 50 kW ERP for any operations in the Lower 700 MHz Band. We also leave intact the related mitigation requirements that were adopted in the *Lower 700 MHz Report and Order* as reasonable measures to maintain the flexibility provided by the higher power limit, while mitigating the risk that any interference from stations operating in excess of 1 kW ERP will occur.

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[68] *Id.* at 1065 ¶ 106, App. D.

[69] Access Spectrum suggests that the Commission may have considered the interference impact of the 50kW limit only on licensees in the Lower 700 MHz Band and not on licensees in the adjacent Upper 700 MHz Band. *See* Access Spectrum Petition at 7 n.17. As explained above (*see* para. 27, *supra*), Access Spectrum is mistaken. Its allegation is based on the misapplication of a single statement to a general discussion that focuses on the possibility of interference to any systems on adjacent channels. *See, e.g., Lower 700 MHz Report and Order*, 17 FCC Rcd at 1064 ¶ 104 (adopting mitigation measures on recognizing that operating at power levels in excess of 1 kW creates the potential for interference "to systems on adjacent channels.").

[70] Access Spectrum Petition at 8.

[71] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1066 ¶ 110.

[72] Access Spectrum Petition at 7-8.

3. Applicability of Statutory Exemptions from Auction

32. Background. In the *Lower 700 MHz Report and Order*, the Commission applied Section 27.2 of its rules to define the permissible communications services for the Lower 700 MHz Band and allow a multitude of fixed, mobile, and broadcast uses that the market may demand.[73] We determined that this flexible use approach would allow the provision of services to the public that could include mobile and other digital new broadcast operations, fixed and mobile wireless commercial services (including FDD- and TDD-based services), as well as fixed and mobile wireless uses for private, internal radio needs.[74] We also observed that the record in this proceeding indicates demand for a number of different types of uses, including the provision of communications services to underserved rural areas and broadband services, among others.[75] Thus, we allocated the Lower 700 MHz band to permit significant flexibility of use, consistent with Section 303(y) of the Act.[76]

33. Following the approach taken for the commercial portions of the Upper 700 MHz Band, we permitted private radio uses on the Lower 700 MHz Band.[77] Although we declined to designate all or a portion of the band exclusively for the provision of private radio or public safety radio services, we noted that Part 27 Lower 700 MHz Band licensees would be permitted to use their spectrum for private fixed and mobile radio services to meet internal communications needs, and that licensees would be able to select their own regulatory status and designate that status on their FCC Forms 601.[78] We amended Section 27.10(a) to clarify that licensees on the non-public safety portions of the 700 MHz Band could designate the "private internal communications" status on the FCC Form 601.[79]

34. In its petition for reconsideration or clarification, OCTO asks that we confirm that the Part 27 service rules that have been amended in the *Lower 700 MHz Report and Order* permit public safety eligibles to apply to provide private, internal communications services in this spectrum without participating in an auction.[80] Relying on an analogy to the holding in *National Public Radio, Inc. v. FCC* regarding the auction exemption for non-commercial educational ("NCE") broadcast stations,[81] OCTO contends that under the exemption from the Commission's competitive bidding authority in Section 309(j)(2)(A) of the Communications Act, eligible public safety service providers may not be compelled to bid for Lower 700 MHz Band spectrum used for private internal radio services.[82]

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[73] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1051-10 ¶ 70; 47 C.F.R. § 27.2(a) (stating that a licensee may provide any service for which its frequency bands are allocated).

[74] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1051-52 ¶ 70.

[75] *See id.*

[76] *See id. See also id.* at 1029-32 ¶¶ 13-20.

[77] *Id.* at 1073 ¶ 132.

[78] *Id.* at 1051, 1073 n.198, ¶¶ 130, 132.

[79] Id. at 1072 ¶ 130 n.358.

[80] OCTO Petition at 1.

[81] *Id.* at 2 n.3.

[82] *Id.* at 3.

35. Discussion. We deny OCTO's petition. We did not designate any portion of the band to "public safety radio services" in the *Lower 700 MHz Report and Order.* Instead, we allocated the entire band for flexible use by fixed, mobile, and broadcast services.[83] Thus, this band is not subject to the "public safety radio services" auction exemption found at Section 309(j)(2)(A) of the Act.

36. OCTO argues that, because the *Lower 700 MHz Report and Order* permits private internal uses and public safety eligibles such as OCTO who have historically used private internal systems, the Section 309(j)(2)(A) competitive bidding exemption applies to public safety radio service eligibles that seek to acquire licenses on the Lower 700 MHz Band. In the *BBA Report and Order* and *BBA Memorandum Opinion and Order,* the Commission examined the scope of Section 309(j)(2)(A)'s exemption for public safety radio services, and concluded that the public safety radio services exemption applies to spectrum for particular services, rather than individual users of spectrum.[84] Thus, the rules for a particular service determine whether spectrum is designated for public safety radio services exclusively,[85] and Part 27 rules do not define any portion of the Lower 700 MHz spectrum as "public safety radio services" band.[86] In developing service rules in this proceeding, we relied on the record which demonstrated demand for commercial wireless and broadcast services in the Lower 700 MHz Band.[87] These service rules reflect established Commission policy that favors flexibility of use as well as the Commission's experience in allocating spectrum, predictions about future demands and technologies, and statutory and other public interest considerations.[88] To the extent that public safety users desire spectrum in a particular band, we encourage them to participate in the service rule proceedings to help craft rules conducive to public safety needs. Public safety users, such as OCTO, may apply for unassigned spectrum in the Lower 700 MHz Band pursuant to the Commission's established Section 337 procedures,[89] or apply for designated public safety spectrum.[90]

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[83] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1029 ¶ 13.

[84] Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of the American Mobile Telecommunications Association, *Report and Order and Further Notice of Proposed Rule Making,* WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, 15 FCC Rcd 22709, 22741 ¶ 66 (1999) (*BBA Lower 700 MHz Report and Order*); *Memorandum Opinion and Order*, WT Docket No. 99-87, FCC 02-82 ¶¶ 19-29 (rel. Apr. 18, 2002) (*BBA MO&O*).

[85] *BBA Report and Order*, 15 FCC Rcd at 22741 ¶ 66.

[86] We therefore find there is no need to explain "how the differing procedures for awarding commercial and public safety services licenses are to be reconciled . . . ." *See* OCTO Petition at 1.

[87] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1051-52 ¶ 70.

[88] *See id.* at 1052 ¶¶ 70-71.

[89] 47 U.S.C. § 337. *See BBA Lower 700 MHz Report and Order Report and Order*, 15 FCC Rcd at 22767-71 ¶¶ 127-36; *BBA MO&O*, FCC 02-82 ¶¶ 51-57. *See also* Amendment of Part 90 of the Commission's Rules To Adopt Regulations for Automatic Vehicle Monitoring Systems, *Order on Reconsideration of the Second Report and Order*, PR Docket No. 93-61, 14 FCC Rcd 1339, 1345 ¶ 10 (1999) (*LMS Reconsideration Order*) (denying petition for reconsideration of Hennepin County, Minnesota seeking an exemption under Section 309(j)(2) from the Commission's auction of licenses in the Location and Monitoring Service (LMS)). Subsequently, Hennepin County sought LMS frequencies under Section 337, and that application also was denied. *See* Hennepin County, *Order*, 14 FCC Rcd 19418, 19423 ¶ 10 (WTB 1999) (denying a request for waiver pursuant (continued....)

37. *National Public Radio, Inc. v. FCC*[91] does not alter our determination that the public radio services exemption in Section 309(j)(2)(A) does not apply to spectrum to be auctioned in the Lower 700 MHz Band. In *NPR*, the Court held that the Section 309(j)(2)(C) exemption from competitive bidding for non-commercial educational broadcasters ("NCEs")[92] exempts NCEs from participating in auctions for any broadcasting spectrum, whether or not the spectrum has been reserved for noncommercial educational use.[93] Because Section 309(j)(2)(C) specifically exempts NCE "stations," the court concluded that the NCE exemption "is based on the nature of the station that ultimately receives the license, not on the part of the spectrum in which the station operates."[94] In contrast to Section 309(j)(2)(C)'s NCE exemption specifically at issue in *NPR*, the public safety radio services exemption in Section 309(j)(2)(A) does not "refer[ ] to the ultimate recipient of the license."[95] Rather, it specifically refers to "public safety radio services" used by public safety entities, and not to public safety stations or licensees themselves. Thus, we have previously found that the NCE exemption addressed in *NPR* is not analogous to the application of the Section 309(j)(2)(A) exemption,[96] as OCTO claims. We therefore believe that the plain language analysis used in *NPR* supports our interpretation of Section 309(j)(2)(A) in this Memorandum Opinion and Order.

38. This interpretation of the public safety radio services exemption is also consistent with our obligations to auction and manage the Lower 700 MHz Band. Section 309(j)(14) of the Communications Act requires the Commission to reclaim and assign the Lower 700 MHz Band by competitive bidding.[97] Thus, allowing public safety entities to acquire spectrum in this band under the Section 309(j)(2)(A) exemption would undermine Congress's intent to auction this spectrum. Under Section 309(j)(3) of the Act, in using competitive bidding to assign licenses the Commission must seek to promote a number of competing objectives such as: promoting the introduction and deployment of new technologies and services for the public; encouraging economic opportunity and competition; and allowing time for interested parties to develop their business plans.[98] Once Congress has determined that a band should be licensed through competitive bidding, as here, allowing public safety eligibles to override that designation under the Section 309(j)(2)(A) exemption would undermine Congress'

(Continued from previous page)
to Section 337, which was filed five weeks before the commencement of the LMS auction, for failure to meet statutory requirements). The Commission has awarded licenses to public safety entities under its Section 337 procedures. *See, e.g.*, South Bay Regional Public Communications Authority, *Memorandum Opinion and Order*, 13 FCC Rcd 23781 (1998); County of Sacramento, California, *Order on Reconsideration*, 15 FCC Rcd 12600 (WTB 2000).

[90] Of course, public safety entities may also seek licenses through our competitive bidding process.

[91] *National Public Radio, Inc. v. FCC*, 254 F.3d 226 (D.C.Cir.2001) (*NPR*).

[92] 47 U.S.C. § 309(j)(2)(C).

[93] *NPR*, 254 F.3d at 228-29.

[94] *Id.*, 254 F.3d at 229.

[95] *See id.*

[96] *See BBA MO&O* at ¶ 27.

[97] 47 U.S.C. § 309(j)(14). *See also Lower 700 MHz Report and Order*, 17 FCC Rcd at 1024 ¶ 3.

[98] 47 U.S.C. § 309(j)(3).

directive and the Commission's auction authority.[99] Because the approach advocated by OCTO would make spectrum freely available to public safety radio service eligibles on demand, the Commission and other potential applicants would not know in advance which licenses would be available at auction.[100] Such uncertainty would cause delays in the deployment of new spectrum-based services and would frustrate the statutory objectives of reclaiming the spectrum and subjecting it to competitive bidding.[101]

39. For similar reasons, we decide, on our own motion, that NCEs are not eligible to apply for initial licenses for new services in the Lower 700 MHz Band.[102] Prohibiting NCE broadcasters from acquiring spectrum in this band under the Section 309(j)(2)(C) exemption is necessary to implement the Commission's decisions to establish flexible mixed use licenses assigned by competitive bidding.[103] By taking a flexible use approach and using competitive bidding, we established a market-based approach that allows the spectrum to be employed for a full range of allocated services, so long as such operations comply with Part 27's technical requirements.[104] We recognized in the recent *NCE Second FNPRM* that the restriction we adopt here would be consistent with the statutory language, as interpreted by the court in the *NPR* case.[105] We believe that this approach as applied to new services in the Lower 700 MHz Band will eliminate uncertainties about the outcome of the competitive bidding process and promote our goals of assigning these licenses expeditiously and promoting the intensive and efficient use of this spectrum.[106] Our decision here does not in any way prejudge the outcome that will be taken in MM Docket No. 95-31.[107] In this regard, we note that the Lower 700 MHz band is flexible mixed use spectrum, and very different considerations apply to conventional broadcast licenses regulated under Parts 73 and 74 that are the subject of that proceeding. In arriving at a decision in that proceeding, we intend to ensure that NCE broadcasters will continue to have adequate access to broadcast spectrum.

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[99] *See BBA MO&O* at ¶ 28.

[100] *See* Amendment of Part 90 of the Commission's Rules To Adopt Regulations for Automatic Vehicle Monitoring Systems, *Order on Reconsideration of the Second Report and Order*, PR Docket No. 93-61, 14 FCC Rcd 1339, 1345 ¶ 10 (1999) (denying petition for reconsideration of Hennepin County, Minnesota seeking an exemption under Section 309(j)(2) from the Commission's auction of licenses in the Location and Monitoring Service (LMS)).

[101] *See* 47 U.S.C. § 309(j)(3)(A)-(E).

[102] In arriving at this decision, we do not reach the issue of whether the Section 309(j)(2)(C) exemption applies to mutually exclusive license applications for new services in the Lower 700 MHz Band. *See* 47 U.S.C. §§ 309(j)(2)(C), 397(6).

[103] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1048 ¶ 61.

[104] *See id.*

[105] *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), 17 FCC Rcd 3833, 3837 ¶ 11 (2002) (*NCE Second FNPRM*).

[106] *See id.*

[107] *See id.*

B. DTV Transition Issues

1. Temporary Relocation of Analog Stations to Channels 52-58 to Facilitate Band Clearing

40. *Background*. In the *Upper 700 MHz Third Report and Order*, the Commission decided "not to prohibit" three-way band-clearing agreements pursuant to which a station might relocate temporarily into Channels 52-58.[108] In the *Lower 700 MHz Report and Order*, we decided to (1) dismiss pending petitions for new NTSC channel allotments on channels 52-59; and (2) dismiss pending applications for NTSC stations on channels 52-59 unless applicants modify their filings to provide analog or digital service in the core or digital service on channels 52-58. On behalf of itself and SCA, Paxson seeks clarification that the Commission's decision in the *Lower 700 MHz Report and Order* does not prohibit proposals to relocate analog stations to channels 52-58 in connection with Upper 700 MHz band clearing agreements.[109] Paxson contends that the policy of permitting band-clearing analog broadcasters to temporarily relocate into the Lower 700 MHz band is consistent with the principle of providing broadcasters with maximum flexibility to develop voluntary agreements to facilitate the early clearance of the Upper 700 MHz band.[110] Council Tree opposes Paxson's petition and seeks to prohibit any additional analog stations in the Lower 700 MHz band.[111] Council Tree argues that, if broadcasters are permitted to move temporarily to Channels 52-58, such incumbents will be in a position to seek compensation from new 700 MHz licensees twice, and that such moves will frustrate or delay the introduction of new Lower 700 MHz services.[112]

41. *Discussion*. Pursuant to our band clearing policy, we will entertain proposals to temporarily

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[108] Service Rules for the 746-764 MHz and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, Carriage of the Transmissions of Digital Broadcast Stations, CS Docket No. 98-120, Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, *Third Report and Order*, 16 FCC Rcd 2703, 2718 ¶ 36 (2001) (*Upper 700 MHz Third Report and Order)*.

[109] *See* Petition for Clarification or Reconsideration of the Spectrum Clearing Alliance, GN Docket No. 01-74 (filed Feb. 5, 2002); Supplement to the Petition for Clarification or Reconsideration of the Spectrum Clearing Alliance, GN Docket No. 01-74, 1-4 (filed Mar. 8, 2002). Paxson states that SCA is a group of television broadcasters that own Channel 59-69 stations and have developed a plan for voluntary clearing of the Upper 700 MHz band.

[110] Paxson/SCA Petition at 4-5. Paxson also argues, in the alternative, for reconsideration of this decision in the event that the Commission intended to restrict such temporary relocations. Paxson/SCA Petition at 6-9. Because we affirm the policy established in *Lower 700 MHz Report and Order* and confirm that the Commission will consider proposals to temporarily relocate analog operations to Channel 52-58 in connection with voluntary band clearing arrangements that would result the clearing of a Channel 59-69 station, we need not address the arguments concerning the adequacy of notice pursuant to the Administrative Procedure Act. *See id.*; Opposition of Council Tree Communications, LLC to Petition for Clarification or Reconsideration of the Spectrum Clearing Alliance, GN Docket No. 01-74, at 4-6 (filed Mar. 14, 2002) ("Council Tree First Opposition"); Consolidated Reply of the Spectrum Clearing Alliance to the Oppositions of Council Tree Communications, LLC and U.S. Cellular Corporation, GN Docket No. 01-74, at 5-6 (filed Apr. 1, 2002) ("Paxson/SCA Reply").

[111] Council Tree First Opposition. *See also* Notice of *Ex Parte* Communication from Steve C. Hillard to William F. Caton, GN Docket No. 01-74 (filed Apr. 11, 2002) ("Council Tree *ex parte*").

[112] *See* Council Tree Opposition at 6-8; Council Tree *ex parte* at 2.

relocate analog operations to Channel 52-58 in connection with voluntary band clearing arrangements that would result in the clearing of a Channel 59-69 station. As stated above, the Commission adopted a policy in the *Upper 700 MHz Third Report and Order* not to prohibit three-way band-clearing agreements pursuant to which a station might relocate temporarily into Channels 52-58.[113] In so doing, the Commission observed that this alternative could provide necessary flexibility to incumbents on Channels 59-69 to enter into early clearing arrangements.[114] The Commission has consistently recognized that extending flexibility to Channel 59-69 broadcasters to enter into voluntary arrangements for the early clearing of the Upper 700 MHz bands may make this spectrum available more quickly for new public safety and other services and promote the transition of analog television licensees to digital television service.[115]

42. Contrary to Council Tree's suggestion, we do not believe that this policy presents significant uncertainties for potential bidders for licenses in the Lower 700 MHz band. An analog broadcaster that seeks to move temporarily into this band must move into an existing Channel 52-58 allotment because the Commission has previously determined that it will not create new allotments in the Upper or Lower 700 MHz bands.[116] Thus, as the Commission pointed out in the *Upper 700 MHz Third Report and Order*, such temporary moves "will not increase the number of stations that will have to be cleared from Channels 52-58, but merely replace one station on those channels with another."[117] For this reason, potential new 700 MHz licensees should be able to determine prior to the auctions the number of incumbent broadcast operations that may exist in (and adjacent to) the geographic areas and frequency bands that they are interested in serving.[118]

43. We also disagree with Council Tree's argument that some broadcasters might be able to obtain excessive payments from new 700 MHz licensees in exchange for early band clearing.[119] Our voluntary band clearing policy merely permits bidders and broadcasters to negotiate for the economic

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[113] *Upper 700 MHz Third Report and Order*, 16 FCC Rcd 2703, 2718 ¶ 36.

[114] *See id.*

[115] *See, e.g., id.* at 2704 ¶ 2.

[116] *See Lower 700 MHz Report and Order*, 17 FCC Rcd at 1042 ¶ 44; Reallocation of Television Channels 60-69, The 746-806 MHz Band, ET Docket No. 97-157, *Report and Order*, 12 FCC Rcd 22953, 22971 ¶ 40 (1998) (announcing intention to provide final opportunity to amend petitions and applications, after which petitions and applications that were not satisfactorily dismissed would be dismissed).

[117] *Upper 700 MHz Third Report and Order*, 16 FCC Rcd 2703, 2718 ¶ 36.

[118] The Wireless Telecommunications Bureau has recently released public notices that provide potential bidders with additional guidance on the nature and extent of possible broadcast encumbrances in these bands. However, as those public notices state, potential bidders are solely responsible for identifying associated risks and making determinations about their ability to make use of licenses in these bands. *See* "Due Diligence Announcement for the Upcoming Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002, *Public Notice*, DT 02-903 (rel. Apr. 18, 2002); "Due Diligence Announcement for the Upcoming Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002, *Public Notice*, DT 02-904 (rel. Apr. 18, 2002).

[119] *See* Council Tree Opposition at 7-8; Council Tree *ex parte* at 2.

value of early clearing.[120] Once a particular allotment is cleared, the allotment would become part of the relevant 700 MHz license (or licenses), and no incumbent broadcast operation would be permitted to move into that allotment, except with the agreement of the new 700 MHz licensee.[121] Thus, a new 700 MHz licensee would not be liable for multiple payments to clear a single allotment. Further, this policy is entirely voluntary. There are possible uses for this spectrum that would allow new Lower 700 MHz licensees to begin operating immediately, subject to the requirement that they protect incumbent TV and DTV facilities from harmful interference. Such licensees would have full use of the licensed spectrum at the end of the DTV transition period in each market, at which time all incumbent broadcasters will be required to vacate the 700 MHz bands.[122] In addition, market forces should act to keep the total amount of all clearing payments at a reasonable level both because the interests of broadcasters and bidders in these negotiations are not congruent and because bidders that participate in band-clearing arrangements will have to outbid other wireless entities which may be willing to hold licenses for encumbered spectrum. When it extended this flexibility to Upper 700 MHz band-clearing broadcasters, the Commission explicitly recognized that, because relocations from Channels 59-69 to Channels 52-58 would be interim in nature, such moves could result in duplicative costs for broadcasters, additional disruption to viewers, and other inefficiencies.[123] However, the Commission observed that the benefits of such an arrangement "may well be substantial, and that a broadcaster will have considered the costs in its individual situation before voluntarily agreeing to move into Channels 52-58 with the knowledge that it will subsequently be obligated to vacate that allotment."[124] Consistent with our policy regarding the early voluntary clearing of the 700 MHz bands, we will consider any such public interest issues in our review of regulatory requests filed in connection with such voluntary clearing agreements.[125]

2. Pending NTSC Petitions and Applications

44. *Background*. In the *Lower 700 MHz Report and Order*, the Commission dismissed all pending petitions for new NTSC channel allotments in the Lower 700 MHz Band (channels 52-59).[126] The Commission stated that such petitioners could refile a new DTV channel allotment petition on a core channel, subject to meeting the DTV spacing requirements.[127] With respect to pending applications to construct new NTSC stations in the Lower 700 MHz Band, the Commission afforded applicants a 45-day window to modify their station proposals either (a) to provide analog or digital service on a core channel,

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[120] This additional value is not available to the Treasury so long as broadcasters are statutorily entitled to remain in the spectrum.

[121] It is possible that a particular broadcaster might receive payments for successively clearing allotments in the Upper and Lower 700 MHz bands. Such broadcaster would, however, incur additional costs associated with making two moves.

[122] *See* 47 U.S.C. § 309(j)(14).

[123] *See Upper 700 MHz Third Report and Order*, 16 FCC Rcd at 2717-18 ¶¶ 34-36.

[124] *Id.* at 2718 ¶ 36.

[125] *See id.*

[126] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1042 ¶ 44.

[127] *Id.*

or (b) to provide digital service in channels 2-58.[128] The Commission stated that it would dismiss any pending application that did not meet either of these conditions at the end of the 45-day window.[129] The Commission also determined that it would no longer accept or grant any application for channel 59 because of the adjacent channel interference that such stations could cause to new licensees in the Upper 700 MHz Band.[130]

45. Pappas/Iberia[131] and WB filed petitions for reconsideration of the Commission's disposition of petitions for NTSC allotments and applications to construct NTSC stations in the Lower 700 MHz Band. Pappas/Iberia[132] and WB argue that the Commission's rationale for not allowing additional NTSC allotments or facilities in the Lower 700 MHz Band does not support its decision.[133] Pappas/Iberia further argue that they have relied to their economic detriment on past Commission statements indicating that it would process applications for NTSC stations in the Lower 700 MHz Band.[134] Pappas/Iberia acknowledge that the Commission may change its allotment policies but argue that it has failed to provide a reasoned basis for not allowing additional NTSC allotments or facilities in the Lower 700 MHz Band. Pappas/Iberia and WB request that we process petitions for new NTSC channel allotments and applications to construct new NTSC stations in the Lower 700 MHz Band.[135] They also request that we grant certain waivers of our rules in connection with the processing of such petitions and applications.[136]

46. *Discussion*. We affirm our decision in the *Lower 700 MHz Report and Order* to (1) dismiss pending petitions for new NTSC channel allotments on channels 52-59, but permit such petitioners to refile new DTV allotment petitions on a core channel, subject to meeting DTV spacing requirements; and

[128] *Id.* at ¶ 45. The 45-day window opened January 22, 2002 and closed March 8, 2002.

[129] *Id.*

[130] *Id.*

[131] Pappas/Iberia filed a joint petition.

[132] At the time they filed their joint petition, Pappas sought authorizations for five NTSC stations in the Lower 700 MHz Band and Iberia sought one.

[133] Pappas/Iberia Petition at 2-17; WB Petition at 2-14.

[134] Pappas/Iberia Petition at 4-7.

[135] Pappas/Iberia Petition at 20-21; WB Petition at 23.

[136] Pappas/Iberia Petition at 12-13; WB Petition at 16-21. A petition for reconsideration is not the proper vehicle for raising the waiver issues. *See* 47 C.F.R. § 1.429. Moreover, because the waiver requests of Pappas/Iberia and WB presuppose that we will authorize additional NTSC facilities and allotments in the Lower 700 MHz Band, which we will not, we find that addressing their waiver requests would serve no useful purpose. Pappas/Iberia also claims that waiver relief (*e.g.*, short spacing) should be afforded to new digital facilities in the Lower 700 MHz Band. Pappas/Iberia Petition at 13. Such requests for relief are highly fact specific and therefore should be raised in the context of the particular rulemaking or application proceeding. However, we are not inclined to grant waivers that will create additional DTV incumbents in the lower 700 MHz band beyond those situations explicitly addressed in paragraphs 44 and 45 of the *Lower 700 MHz Report and Order*. Specifically, petitions originally filed requesting that we allot new NTSC channels that have been amended or refiled to propose new DTV channel allotments are not allowed to propose channels above Channel 51 pursuant to Section 73.622(a)(1) of the Commission's rules. We have not waived this rule in the past and are not persuaded on the basis of what has been presented that we should do so here.

(2) permit entities with pending applications to modify their filings to provide analog or digital service in the core or digital service on channels 52-58.

47. Univision requests that we exclude it from the category of applicants who must now amend their applications to specify an in-core channel or DTV operation, or face dismissal.[137] Univision was the winning bidder in FCC Auction No. 80 (July 2000) for NTSC Channel 52 at Blanco, Texas.[138] In the alternative, Univision asks that the Commission grant its pending petition for rulemaking (filed March 8, 2002) proposing to substitute NTSC Channel 17 for NTSC Channel 52 (Petition).[139] We require the Media Bureau to work with Univision to expedite the allotment process. In addressing the Petition, we direct the Media Bureau to consider waiver of the applicable land mobile distance separation criterion for the site proposed in Univision's petition for rulemaking based on the record in that proceeding. Such wavier relief, if granted, should be conditioned on Univision agreeing to (1) accept interference from current and future 488-494 MHz land mobile facilities operating from base stations located within 50 miles of the Houston reference point and mobile units operating within 30 miles of their associated base stations and (2) not radiate a signal in the Houston area where land mobile operation is permitted with a field strength greater than that permitted by a full-power TV station that meets the co-channel distance separation criteria (341.1 km).[140]

48. Pappas/Iberia and WB argue that the decision to permit NTSC applicants to provide digital service in the Lower 700 MHz Band will not ensure the recovery of this spectrum because DTV operations will encumber this spectrum just as much as NTSC operations.[141] WB also argues that limiting new Lower 700 MHz Band stations to DTV service would not further the transition to DTV.[142] We disagree. We continue to believe that authorizing new NTSC allotments or stations in the Lower 700 MHz Band is inconsistent with the 1997 Budget Act mandate to reclaim this spectrum for new services,[143] and to facilitate the transition to digital television service.[144] As we noted in the *Lower 700 MHz Report and* Order, digital deployment in the Lower 700 MHz Band will introduce new digital service and could promote the acquisition of digital equipment by consumers.[145] Moreover, new service providers in this band may be able to co-exist more easily with digital television stations because such

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[137] Univision Petition for Reconsideration at 24.

[138] Univision has remitted to the U.S. Treasury all sums due to this point pursuant to its bid.

[139] Univision Petition for Reconsideration at 24.

[140] *See* Amendment of Parts 2, 89, 91, and 93; Geographic Reallocation of UHF-TV Channels 14 Through 20 to the Land Mobile Radio Services for Use Within the 25 Largest Urbanized Areas of the United States; Petition Filed by the Telecommunications Committee of the National Association Of Manufacturers to Permit Use of TV Channels 14 and 15 by Land Mobile Stations in the Los Angeles Area, Docket No. 18261, RM-566, *First Report and Order*, 23 FCC2d 325 (1970) (subsequent history omitted).

[141] Pappas/Iberia Petition at 5-6; WB Petition at 3.

[142] WB Petition at 3-4.

[143] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1042-43 ¶ 45.

[144] *Id.* at 1042 ¶ 44.

[145] *Id.* at 1042-43 ¶ 45.

stations operate with less power than most analog stations and are more resistant to interference.[146] In addition, this approach can avoid the complications that could arise with requiring licensees to convert their NTSC operations to digital relatively soon after they commence operations.[147]

49. We also disagree with Pappas/Iberia's and WB's argument that the grant of additional requests for NTSC allotments and stations in the band "would constitute a negligible increase"[148] and would have a "low overall impact" on the Lower 700 MHz Band.[149] While not all of the 57 requests for new NTSC stations and allotments pending at the time we released the *Lower 700 MHz Report and Order* could have been granted, there are approximately 100 NTSC stations in this band and, even assuming that only ten of them were granted, the number of NTSC stations in the band would increase by approximately ten percent. Such an increase would not be *de minimis* and could substantially increase the burden on new licensees to protect incumbents particularly because NTSC stations are more susceptible to interference.

50. Pappas/Iberia argue that the *Lower 700 MHz Report and Order* conflicts with Section 309(l)(3) of the Act, [150] which directs the Commission to "waive any provisions of its regulations necessary to permit" settlements between mutually exclusive applicants for commercial television stations during the 180-day period beginning on the date of enactment of the 1997 Budget Act.[151] Pappas/Iberia claim that they may not be able to effectuate their settlement agreements, and that they have been deprived of due process. [152] We disagree. Neither the plain language of Section 309(l)(3) nor its legislative history suggests that Congress intended to limit our ability to require modification of settlement agreements. It is well established that the filing of an application with the FCC creates no vested rights in the applicant,[153] and that the Commission may "make midstream rule adjustments, even though it disrupts expectations and alters the competitive balance among applicants."[154] The Commission did not deprive Pappas and Iberia of their ability to have their settlement proposals considered using the same procedures as used for all other similarly situated applicants.[155] Because

[146] *Id.*

[147] *Id.*

[148] WB Petition at 9.

[149] Pappas/Iberia Petition at 9.

[150] 47 U.S.C. § 309(l)(3). Pappas/Iberia Petition at 7-9.

[151] At the time we released the *Lower 700 MHz Report and Order,* Pappas and Iberia each had a settlement pending before the Mass Media Bureau.

[152] Pappas/Iberia Petition at 8.

[153] *See Bachow Communications, Inc., et al. v. FCC,* 237 F.3d 683, 687-88 (D.C. Cir. 2001) (applicants for licenses had no "vested right" in enforcement of cut-off rules). *Chadmoore Communications, Inc. v. FCC,* 113 F.3d 235 (D.C. Cir. 1997). In *Chadmoore,* the D.C. Circuit held that the FCC's reliance upon a new regulation to deny Chadmoore's application for extended implementation authority for construction of a wide-area specialized mobile radio system was neither arbitrary nor capricious. The court stated that the Commission's action did not "impair[] a right possessed by [Chadmoore] because none vested on the filing of its application." *Id.* at 241.

[154] *Bachow* at 687-88 (citing *Maxcell,* 815 F.2d 155; and *DIRECTV, Inc. v. FCC,* 110 F.3d 816 (D.C. Cir. 1997)).

Pappas and Iberia can effectuate their settlement agreements by specifying either digital service in channels 2-58 or NTSC service in the core, the *Lower 700 MHz Band Order* does not conflict with Section 309(l)(3) of the Act.

51. Pappas/Iberia also argue that the Commission's decision not to grant additional NTSC facilities in the Lower 700 MHz Band constitutes an unjustified departure from the Commission's first local service policy.[156] In the *Lower 700 MHz Band Order*, the Commission acknowledged that several commenters, including Pappas and WB, identified the potential benefits of first local service.[157] The Commission, however, weighed competing policy considerations and found that not granting additional NTSC facilities in the Lower 700 MHz Band would further the 1997 Budget Act mandate to recover spectrum in the band.[158] Moreover, the *Lower 700 MHz Band Order* did not foreclose the ability of applicants for NTSC stations in the band to provide first local television service: the order afforded applicants an opportunity to amend their applications to specify digital operations in channels 2-58 or analog service in the core.[159]

3. Mutually Exclusive Applications

52. *Background*. On February 6, 2002, the Mass Media Bureau (now the Media Bureau) released a public notice in which it set forth filing procedures for the 45-day window for applicants for new NTSC stations on Channels 52-59 to modify their pending station proposals either (a) to provide analog or digital service on a core channel, or (b) to provide digital service in channels 2-58.[160] The Mass Media Bureau determined that where multiple applicants have filed for a single NTSC allotment, they must file a petition for rulemaking proposing a single replacement channel to which all applicants agree to modify their applications.[161] The Bureau also determined that where mutually exclusive applicants cannot agree on submission of a petition for the same replacement channel, then any petition

(Continued from previous page)

[155] *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987).

[156] Pappas/Iberia Petition at 13-15. See also WB Petition at 11-12 (allowing additional NTSC stations in the Lower 700 MHz Band would result in a first local service in some communities).

[157] *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1041-42 ¶ 42 and nn.134-37.

[158] *Id.* at 1042-43 ¶ 45.

[159] WB and Pappas/Iberia also argue that the Commission should postpone the 700 MHz band auctions. Pappas/Iberia Petition at 21; WB Petition at 10-12. On April 10, 2002, the Wireless Telecommunications Bureau declined to postpone Auction Nos. 31 and 44. See Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Thomas E. Wheeler, President/CEO, Cellular Telecommunications & Internet Association (CTIA), DA 02-857 (rel. Apr. 11, 2002). CTIA filed an Application for Review of that decision, dated April 24, 2002. On April 26, the Bureau, acting pursuant to delegated authority, established an expedited schedule for the filing of oppositions to the CTIA Application for Review. *See* "Pleading Cycle Established For Oppositions To Application For Review Of Wireless Telecommunications Bureau April 10, 2002 Letter, D.A. 02-857, Regarding Schedule For Auction Nos. 31 And 44," *Public Notice,* DA-02-971 (WTB rel. Apr. 26, 2002). We intend to address the issue of whether to postpone Auction Nos. 31 and 44 in that proceeding.

[160] *See* "Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Requests for NTSC Television Stations on Channels 52-59," *Public Notice,* DA-02-270 (MMB rel. Feb. 6, 2002). The 45-day window opened January 22, 2002 and closed March 8, 2002.

[161] *Id.*

filed by a member of such group would be dismissed.

53. KM filed a petition for reconsideration or clarification in which it requests that we overturn the Bureau's requirement that all pending mutually exclusive applicants for NTSC allotments in the Lower 700 MHz Band join in any petition or amendment to petition for rulemaking to substitute an alternate channel.[162] KM contends that it is unreasonable to expect competing applicants to agree upon the same replacement channel and that the dismissal of such competing applications for failure to agree is unduly harsh.[163] KM requests that we accept all petitions or amendments to petitions for rule making that propose new allotments and treat one as the primary petition or amendment and the remainder as counterproposals.[164] KM asks that, at a minimum, the Commission address on a case-by-case basis whether to require mutually exclusive applicants to join in a single petition or an amendment to a petition for rule making.[165]

54. Discussion. We deny KM's petition. KM does not cite any case law, statute, rule, or FCC policy in support of its arguments. Nor are we aware of any. In the DTV *Sixth Further Notice of Proposed Rulemaking*,[166] the Commission stated that elimination of vacant NTSC allotments would help it achieve its goals of full accommodation, replication and spectrum recovery.[167] The Commission stated that in some areas a DTV channel could not be accommodated unless the unused NTSC allotments were eliminated and, in other areas, the presence of unused NTSC allotments would crowd the expected service areas of DTV allotments.[168] The Commission therefore eliminated all vacant NTSC allotments. The Commission's decision in the DTV *Sixth Further Notice of Proposed Rulemaking* was founded on the need to preserve spectrum for use by new DTV stations and to avoid prolonging the DTV transition.[169] We find that grant of the relief requested by KM would hinder the DTV transition in that the uncertainty created by the filing of allotment modification petitions for different channels by mutually exclusive applicants would frustrate the efforts of parties seeking new or modified DTV allotments. Accordingly, KM's petition is denied.

IV. PROCEDURAL MATTERS AND ORDERING CLAUSES

55. Alternative Formats. Alternative formats (computer diskette, large print, audiocassette and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or at mcontee@fcc.gov. This Memorandum Opinion and Order can also be downloaded

[162] KM Petition at 1. KM's petition, albeit styled as a petition for reconsideration or clarification of the *Lower 700 MHz Report and Order*, essentially is an application for review of the procedures established by the Bureau.

[163] *Id.* at 5.

[164] *Id.* at 5-6.

[165] *Id.* at 6.

[166] Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Sixth Further Notice of Proposed Rulemaking*, 11 FCC Rcd 10968 (1996) (subsequent history omitted).

[167] *Id.* at 10991 ¶ 58.

[168] *Id.*

[169] *Id.* at 10993 ¶ 62.

at http://www.fcc.gov/cgb/dro/.

56. Authority. This action is taken pursuant to Sections 1, 2, 4(i), 5(c), 7, 201, 202, 208, 214, 301, 302, 303, 307, 308, 309, 310, 311, 314, 316, 319, 324, 332, 333, 336, 405, 614 and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 155(c), 157, 201, 202, 208, 214, 301, 302, 303, 307, 308, 309, 310, 311, 314, 316, 319, 324, 332, 333, 336, 405, 614 and 615.

57. IT IS ORDERED, that the Petitions for Reconsideration filed by Access Spectrum, LLC, Pappas Telecasting of America, a California Limited Partnership, and Iberia Communications, LLC, Spectrum Exchange Group, LLC and Allen & Company, WB Television Network, and Univision Television Group, Inc. ARE DENIED; that the Petitions for Reconsideration or Clarification filed by KM Communications, Inc., and Office of the Chief Technology Officer, Government of the District of Columbia ARE DENIED; and that the Petition for Clarification or Reconsideration filed by Spectrum Clearing Alliance IS GRANTED, to the extent indicated above, and IS OTHERWISE DENIED.

58. IT IS FURTHER ORDERED on our own motion that, pursuant to sections 1.106 and 1.108 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.108, the eligibility to apply for new services in the Lower 700 MHz Band is modified to the extent indicated above in Section III.A.3.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

PETITIONS FOR RECONSIDERATION

Access Spectrum, LLC (Access Spectrum)
KM Communications, Inc. (KM)
Office of the Chief Technology Officer, Government of the District of Columbia (OCTO)
Pappas Telecasting of America, a California Limited Partnership, and Iberia Communications, LLC (Pappas/Iberia)
Spectrum Clearing Alliance (SCA)
Spectrum Exchange Group, LLC and Allen & Company (Spectrum Exchange/Allen)
Univision Television Group, Inc. (Univision)
WB Television Network (WB)

Oppositions/Comments

Council Tree Communications, LLC (Council Tree)
Motorola, Inc. (Motorola)
Pegasus Guard Band, LLC (Pegasus)
United States Cellular Corporation (US Cellular)

Reply Comments

Access Spectrum
Industrial Telecommunications Association, Inc. (ITA)
Pappas/Iberia
SCA
Spectrum Exchange/Allen
US Cellular

SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN, APPROVING IN PART, CONCURRING IN PART

Re: *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59),* Memorandum Opinion and Order, GN Docket No. 01-74

As I recently stated, I believe the Commission should have delayed the auction for this band to allow us to consider the myriad spectrum issues before us in a more comprehensive manner. That said, I generally approve of most aspects of the allocation and service rules addressed in this item. In particular, I am pleased that we have decided to maintain the C Block allocation on an MSA and RSA basis. This allocation will allow small regional and rural providers to participate meaningfully in the auction, thereby furthering our statutory duty to promote service to rural areas.

I continue to be disappointed, however, in the Commission's approach to pending applications for construction permits to broadcast in analog on channels in the lower 700 MHz band. As I stated with respect to our earlier decision on this matter, granting these applications would result in substantial consumer benefits with little or no harm to the digital transition or the ability to auction the spectrum at issue. *See generally* Separate Statement of Commissioner Kevin J. Martin, *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59),* Report and Order, 17 FCC Rcd 1022 (2002). Indeed, had these applications been granted, nine communities would have their own local channels for the first time.

These benefits would have come at very little cost. I understand that only 16 of the pending applications are actually "grantable" from a technical perspective and that all of them are in areas that are already encumbered. The lower 700 MHz band, with 100 analog and 165 digital stations in operation, is already four times more encumbered than the upper 700 MHz band. As a result, the impact of granting a few of these applications would have been minimal.

Accordingly, for all of these reasons, I believe that the public interest would be better served by granting these applications.