

**Before The
Federal Communications Commission
Washington, DC 20554**

In the Matter of

Over-The-Air Broadcast
Television Viewers

MB Docket No. 04-210

**COMMENTS OF THE
700 MHz ADVANCEMENT COALITION
REGARDING OVER-THE-AIR BROADCAST TELEVISION VIEWERS**

August 11, 2004

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The 700 MHz Advancement Coalition (“Coalition”), an informal coalition that includes most of the Lower 700 MHz licensees who are interested in the deployment of new services in the Lower 700 MHz Band, hereby submits these Comments in response to the Commission’s May 27, 2004 Public Notice soliciting comments on ways to minimize disruption to consumers when the conversion to digital from analog television broadcasting occurs. *See Media Bureau Seeks Comment on Over-The-Air Broadcast Television Viewers*, DA 04-1497, May 27, 2004 (*Public Notice*).¹

INTRODUCTION

The Coalition was created to promote public policies that will facilitate the rapid and effective delivery of new advanced wireless services to the public using the Lower 700 MHz

¹ Time for filing was extended to August 11, 2004 by *Order*, DA 04-2002, Rel. July 1, 2004.

spectrum. Joining in the filing of these comments are those coalition members listed in Attachment A.

Paramount among the interests of the Coalition is the clearing of television operations from the 700 MHz Band. This will facilitate new 700 MHz licensees deploying their advanced wireless services. For that reason, the Coalition welcomes the Commission's interest in minimizing the disruption to consumers when the switch to digital broadcasting occurs, which could impact the availability of the 700 MHz frequencies for new services. Indeed, after the operation of the marketplace as described below, the Coalition supports the Commission's suggestion that conversion of the over-the-air consumers might be accomplished by using a portion of future auction revenues to support consumer transition to digital. Moreover, the Coalition submits that any such support should apply to a variety of choices that may be offered to the consumer, including but not limited to defraying the purchase of a digital-to-analog converter or defraying the cost of cable installation. The Coalition believes that the conversion of over-the-air consumers is not as difficult as others may have the Commission believe, and that the salutary purpose of ushering consumers into the digital world can be easily and readily accomplished by reference to existing programs.

At the same time, the Coalition strongly opposes any attempt to require prior auction winners to pay for the conversion of analog-only equipment as part of a mandatory band-clearing mechanism. Any such effort would be unconstitutional and contrary to the Commission's precedent.

DISCUSSION

I. THE COALITION SUPPORTS RELIANCE ON THE CONSUMER AND THE MARKETPLACE IN THE FIRST INSTANCE

The Coalition notes the Comments of the Whidbey Telephone Company in this docket, filed on July 9, 2004. In those comments, Whidbey describes a progression of preferences to assist over the air customers to convert to digital television technology. In the first instance, the costs associated with the risks of technological evolution and obsolescence should be borne by the consumer. Second, to the extent that is impracticable, those deploying the technologies should bear the costs. Finally, if it is deemed to be of sufficient public importance, government action could be taken, in the form of some type of assistance or subsidization program.

The Coalition agrees with Whidbey's suggested progression, but suggests that the primary issue to be addressed in this docket concerns what should happen if Steps 1 and 2 fail to capture all, or almost all, U.S. consumers. We believe that most consumers will bear the costs of the transition to digital when they purchase their new DTV equipment. Similarly, DTV manufacturers and video service providers will -- like their counterparts in the wireless industry -- find ways to subsidize technologically advanced equipment purchases, thus reducing the costs that consumers must bear. Clearly, in any panoply of transition policies, reliance on the consumer and the affected industries should be the first choice.

Nevertheless, it may be necessary to craft some publicly-funded support mechanism for those cases where desired access to television programming would be precluded by the DTV transition or where the public interest requires increasing the speed of the DTV transition. In those cases, the Coalition would support -- and even encourage -- the use of public funds as described below.

II. THE COALITION SUPPORTS USING FUTURE AUCTION REVENUES TO ASSIST IN DEFRAYING THE COST OF CONVERTING OVER-THE-AIR CONSUMERS

The Coalition urges the Commission to consider using future auction revenues to assist over-the-air consumers in making the conversion to digital television. As the Commission has previously recognized, and the Coalition fully supports, it is critical that the majority of this country's citizens are able to enjoy the many advantages of a digital world. Rather than leaving consumers behind in the analog world, the Coalition submits that the Commission should consider all reasonable steps to usher consumers into this new and exciting digital world, with its many possibilities and benefits.

As the Commission's *Public Notice* recognizes, over-the-air consumers have several choices in deciding how to convert from analog to digital, including purchasing a digital-to-analog converter box, purchasing a digital television set, or purchasing a multi-channel video service from providers that carry all local digital broadcast signals, among others. The Coalition believes that a government subsidy, funded by future auction revenues, should be available to consumers who may wish to choose among these many options, or others. Rather than limit consumers' choice to one option, the Coalition believes the broadest choice is necessary to enable – as well as encourage – the greatest number of households to make the conversion.

The Coalition recognizes, as the Commission's *Public Notice* acknowledged, that a government subsidy funded by future auction proceeds would require Congressional approval. The Coalition also realizes that such a plan would require that an offset be found to balance the revenue lost from future auction proceeds. Despite these hurdles, the Coalition believes that a government subsidy funded by future auction proceeds is the most equitable and sensible way to proceed.

While some may argue that such a program would be difficult or cumbersome to manage, with questions about means testing or number of televisions to be addressed by the subsidy program, the Coalition believes these arguments can be addressed easily and readily by reference to existing programs. With an overarching goal of making the program as simple as possible, and including as many households as possible, the Coalition believes that the Commission can borrow from ongoing programs. For example, in the Universal Service arena, the Commission has wisely determined that where households are already participating in any of a specified listing of low-income assistance programs, they are deemed also to be eligible for “Life Line and Linkup” universal service support programs. Importantly, the Coalition believes that details about household income thresholds or the type of subsidy (i.e., converter box, television, other means) should not derail plans to convert as many households as possible. By increasing the choices available to consumers, the Coalition believes that this goal can be achieved, to the benefit of all Americans.

III. FORCING PRIOR 700 MHZ AUCTION WINNERS TO CONTRIBUTE TO BAND-CLEARING EFFORTS WOULD BE UNCONSTITUTIONAL AND UNPRECEDENTED

The Commission’s *Public Notice* requested comments on whether the Commission could require, as a condition of the license, that auction winners pay for conversion of analog-only equipment as part of a mandatory band-clearing mechanism. The Coalition opposes any effort to impose a fee on past auction winners, and believes that any such attempt to reach back for fees would be unconstitutional and a sharp departure from the Commission’s prior recognition of the fundamental unfairness of retroactive action.

Limitations on the Commission’s ability to impose conditions retroactively upon the 700 MHz auction winners is found in several decisions from the U.S. Supreme Court, including, most notably, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988). There, after reiterating that

“[r]etroactivity is not favored in the law” and that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result,” the Court rejected the attempted retroactive application of rules promulgated by the Department of Health and Human Services. *Id.* at 208 (citations omitted).

Constitutional concerns are particularly acute where, as here, a rule that the prior auction winners have an obligation to defray the cost of converting the over-the-air consumers was not discussed or contemplated at the time of the auction. “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (citing provisions of the Constitution supporting an antiretroactivity principle).

These “elementary considerations of fairness” are no less applicable when the affected party is a corporation, and the question is not one of liability, but economic reality. Auction winners, including members of the Coalition, structured their winning bids based upon the requirements and landscape presently before them. To impose retroactively an additional monetary obligation would be fundamentally unfair and unconstitutional.

In fact, the Commission has previously recognized the unfairness and potential unconstitutionality of retroactively imposing rules upon licensees. For example, in *In the Matter of Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of the Paging Systems; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 14 FCC Rcd 10030 (May 24, 1999), the Commission recognized the constitutional limitation on its ability to retroactively impose coverage requirements on licensees:

We acknowledge that to the extent we decide to impose coverage requirements, it would be unfair to commence the construction period with the grant of the nationwide geographic area licenses, because these licenses would have been granted well before the adoption of any coverage requirements. However, if we adopt coverage requirements whose effect would be prospective only, giving nationwide licensees sufficient opportunity to know what the requirements are and to conform their conduct accordingly, we will not be engaging in retroactive rulemaking.

Id. at ¶ 124. Similarly, in *In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 15 FCC Rcd 12315 (July 3, 2000), the Commission stated:

We believe that conditioning new BAS licenses to require new licensees to relocate themselves serves the need of MSS applicants for a defined list of the BAS licensees with whom they would have to negotiate. At the same time, we conclude that making the license condition retroactive would be unfair to BAS licensees, who made their equipment purchases without knowing or being able to know the eventual shape of the BAS band, but who decided to begin using BAS in their operations.

Id. at ¶ 60. See also *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 (April 21, 2004) at ¶ 22 (noting that “courts have made clear that retroactive effect may be denied if the equities so require” and that “[o]ne relevant factor is whether there has been ‘detrimental reliance’ on prior announcements by the Commission”); *In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 18 FCC Rcd 4761 (March 4, 2003) at ¶ 25 (denying request for recovery for past compensation because “based on our present waiver of those standards, [that] is tantamount to applying these waivers retroactively, a result that is generally not favored under existing law” (citing *Bowen v. Georgetown Hospital*, 488 U.S. 204 (1988); *McElroy Electronics Corp.*, 10 FCC Rcd 6762 (1995))). The Coalition respectfully urges the Commission, if it finds it

necessary to impose mandatory band-clearing obligations, to limit any obligation for auction winners to assist in defraying the cost of converting over-the-air consumers to future winners, who can be apprised of this obligation prior to submitting their bids.

CONCLUSION

For these reasons, the Coalition urges the Commission: (1) to use future auction proceeds to allow the greatest number of over-the-air consumers to convert from analog to digital; and (2) not to impose a retroactive unconstitutional economic burden on prior auction winners.

Dated: August 11, 2004

Respectfully submitted,

700 MHz Advancement Coalition



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Its Attorneys

Attachment A

<p>3G Comm, LLC Acumen Technologies Airspan Networks Allcom Communications Aloha Partners Cavalier Group Chequamegon Communications Cooperative Chibardun Telephone Cooperative Citizens Telephone Cooperative City of Ketchikan Dba Ketchikan Public Utilities Corr Wireless Communications Craw-Kan Telephone Coop. D&E Communications DataCom Wireless Dickey Rural Services Dycom Holding EADS Telecom East Kentucky Network (Appalachian Wireless) First Cellular of Southern Illinois First Keystone Telecoms Group Flarion Technologies FTC Inc. Glenwood Telephone Membership Corp (GTMC) Great Lakes of Iowa (CellularOne) Great Plains Communications GTC Wireless Guadalupe Valley Communications Systems GVNW Consulting H&B Communications Harbor Wireless Kennebec Telephone Co. Lexcom Telephone Lima Directional Paging Inc. LIN Television Corp*</p>	<p>Mark Twain Communications Co. McDonald County Telephone Company McElroy Electronics Corp. Mid-Rivers Communications Milkyway Broadband Mobius Communications Monte Lee & Co MTC North Nemont Communications NTCA Panhandle Telecommunication Systems Peoples Wireless Pioneer Communications PVT Networks QUALCOMM Incorporated Rainbow Telephone Cooperative Assn. Red River Rural Tel. Assn. Redwood County Telephone Ronan Telephone Co South Missouri 700 Consortium Southern Iowa 700, LLC Swayzee Telephone TCA, Inc. Triangle Communication System Tri-County Telephone Association Union Telephone United Telecom Vermont Telephone Company Vulcan Capital Waller, Inc. Webster-Calhoun Coop. Tel. Assn. West Wisconsin Telecom Cooperative Westelcom Whidbey Telephone Co. XIT Telecommunication & Technology, Ltd.</p>
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* Does not join in Section I.