

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
QUALCOMM Incorporated) WT Docket No. 05-7
)
Petition for Declaratory Ruling)

To: Wireless Telecommunications Bureau, Mobility Division

**JOINT REPLY COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC. AND
THE NATIONAL ASSOCIATION OF BROADCASTERS TO THE
PETITION FOR DECLARATORY RULING OF QUALCOMM INCORPORATED**

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SUMMARY

The record in this proceeding demonstrates that grant of the Petition for Declaratory Ruling of QUALCOMM, Inc. would harm the public's access to free, over-the-air television services in the lower 700 MHz band during the DTV transition. The Commission has before it detailed engineering and legal analyses, including those submitted by two stations whose viewers would be directly impacted by QUALCOMM's proposal, demonstrating that grant of the Petition would not serve the public interest. In addition, QUALCOMM's Petition seeks procedurally-improper relief. Accordingly, MSTV and NAB urge the Commission to dismiss QUALCOMM's Petition, or, in the alternative, treat it as a Petition for Rulemaking.

First, if granted, QUALCOMM's Petition would sacrifice viewers' access to *free*, over-the-air television services in exchange for *subscription* wireless services. This is a fact which QUALCOMM cannot, and does not, dispute; rather, QUALCOMM expressly seeks the right to create up to two percent new interference to viewers of channels 54, 55, and 56. Contrary to the inapposite analogies put forth by a handful of 700 MHz entrants in this proceeding, QUALCOMM's request is unlike the narrowly-defined context in which the Commission allowed a "*de minimis*" interference standard while broadcasters were bringing and expanding free DTV services to their existing viewers. Rather, under QUALCOMM's "*de minimis*" standard, over-the-air viewers could lose access to a given station's signal without receiving access to any new television signal(s). Also, QUALCOMM and the 700 MHz entrants which support its Petition have severely underestimated the importance of free, over-the-air television to the American public.

Second, QUALCOMM asks that 700 MHz entrants be allowed to demonstrate "compliance" with Section 27.60 by relying on OET-69, which is a wholly inappropriate

standard for such purposes. QUALCOMM’s attempt to apply OET-69 outside a broadcast-only context creates a classic “round peg, square hole” scenario and would likely lead to grant of 700 MHz applications that would fail to fully protect the public’s television service. These miscalculations would be exacerbated by QUALCOMM’s related proposal to use OET-69 in measuring interference from a 700 MHz entrant operating *within* a station’s licensed service contour; OET-69 simply does not provide for such an analysis. None of the 700 MHz licensees which support QUALCOMM’s proposal address or even appear to be aware of these crucial limitations of OET-69. Instead, they ask the Commission to establish streamlined procedures which would overwhelmingly favor grant of applications premised on the inapplicable OET-69 interference showings – thus further compromising the public’s access to free, over-the-air television services.

Finally, even if QUALCOMM had requested relief that were less detrimental to the public interest, its Petition would suffer from serious procedural defects under the Administrative Procedure Act (APA). Before the Commission could amend its legislative decision to “fully protect” viewers of out-of-core television stations during the digital transition, it would have to follow certain notice-and-comment procedures, such as publication of an NPRM in the Federal Register. Such procedures have not been taken. The reasoning of the U.S. Court of Appeals for the D.C. Circuit in *USTA v. FCC* – a decision reached the day after the initial comments of MSTV and NAB were filed – confirms that grant of QUALCOMM’s Petition would violate the APA.

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The Association for Maximum Service, Inc. (MSTV) and the National Association of Broadcasters (NAB)¹ urge the Commission to uphold the television interference protection standards of Section 27.60 of its rules, and dismiss the Petition for Declaratory Ruling filed by Qualcomm, Inc. (QUALCOMM).² The record in this proceeding demonstrates that grant of the Petition for Declaratory Ruling would harm the public's access to free, over-the-air television services in the lower 700 MHz band during the DTV transition. Moreover, granting the Petition would be contrary to the Administrative Procedure Act.

QUALCOMM's petition seeks an unprecedented tradeoff sacrificing the public's access to free, over-the-air television services for *subscription* broadband services. First, the

¹ MSTV is a non-profit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality for the local broadcast system. NAB is a non-profit, incorporated association of radio and television stations that serves and represents the American broadcast industry.

² Petition for Declaratory Ruling, QUALCOMM Inc., WT Docket No. 05-7 (filed Jan. 10, 2005) (QUALCOMM Petition). In the alternative, the Commission could treat QUALCOMM's Petition as a Petition for Rulemaking.

Petition asks the Commission to grant 700 MHz entrants the right to interfere with up to two percent of viewers within a station's service area. QUALCOMM's unprecedented request would result in a net loss of the public's access to free, over-the-air television services. Second, QUALCOMM's request that 700 MHz entrants be allowed to use OET-69, which was designed strictly to measure broadcast-to-broadcast interference, to demonstrate "compliance" with Section 27.60 is inconsistent with sound engineering practice. OET-69 was not designed to analyze the type of interference contemplated by the Petition. Third, the requested "streamlined" procedures, which would favor applications premised on an OET-69 showing, would likely result in further interference to the public's television service.

These requests would thus contradict the Commission's stated order – announced prior to auction of any 700 MHz spectrum – that 700 MHz entrants must "fully protect" the public's television service if they choose to begin operations prior to the conclusion of the digital transition.³ QUALCOMM's Petition fails to account for the approximately 73 million television sets⁴ in households throughout the U.S. that are not connected to a pay service, as well as the high incidents of over-the-air viewership among certain minority communities.⁵ Granting the Petition would, at a minimum, result in service loss to more than four million viewers nationwide.

³ *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC Rcd. 1022, 1039 (2001)

⁴ *See* Comments of NAB and MSTV, MB Docket No. 04-210, at 5 and n. 17 (NAB/MSTV OTA Comments).

⁵ *Id.*, at Attachment A, 7.

Finally, the holding by the U.S. Court of Appeals for the D.C. Circuit in *USTA v. FCC*,⁶ released the day after initial comments were filed in this proceeding, highlights the grave procedural deficiencies of QUALCOMM's Petition. That decision and earlier precedent confirm that, absent publication in the Federal Register of a Notice of Proposed Rulemaking (NPRM) concerning QUALCOMM's proposals, the Commission cannot grant the substantive amendments to Section 27.60 sought by QUALCOMM.

I. THE RECORD DEMONSTRATES THAT GRANT OF QUALCOMM'S REQUEST WOULD HARM THE PUBLIC'S ACCESS TO FREE, OVER-THE-AIR TELEVISION.

A. Allowing 700 MHz Entrants To Create Up To Two Percent New Interference To The Public's Television Service Would Disenfranchise Millions Of Viewers.

1. The Commission Has Only Used A Two Percent "De Minimis" Standard In The Narrow Context Of The DTV Transition.

Allowing QUALCOMM and other 700 MHz entrants to create up to two percent interference to the public's reception of television service on channels 54, 55, and 56 would cause an unprecedented loss of access to free, over-the-air television services. As the record demonstrates, the Commission should reject this request, which would favor users able to pay for content over those relying on free, over-the-air television.

When the Commission temporarily established a "*de minimis*" standard in the DTV broadcast context, it did so to *promote* access to free, over-the-air television services. the Petition's request would have the opposite effect, sacrificing over-the-air access to benefit QUALCOMM's MediaFLO and other subscription services. As Pappas Southern California

⁶ *United States Telecom Ass'n. v. FCC*, No. 03-1414, 2005 WL 562744 (D.C. Cir. March 11, 2005).

License, LLC (Pappas) notes with reference to the Commission's own statements, the Commission developed the two percent *de minimis* standard in a "specific, limited context" to "start the DTV transition and, in most cases, the ability to provide new DTV service to a substantially larger number of viewers."⁷ Furthermore, the Commission has now adopted a *0.1 percent* interference standard applicable to stations' DTV channel election decisions, and has concurrently placed a freeze on any applications seeking a modification to the current DTV Table of Allotments, thereby effectively suspending the DTV-to-DTV two percent *de minimis* standard.⁸ The Commission thus has a clear policy of, at a minimum, *preserving* existing over-the-air service to the American public. Yet QUALCOMM proposes that the public suffer a net loss of free television. Under QUALCOMM's "*de minimis*" standard, over-the-air viewers could lose access to a given station's signal without receiving access to any new television signal(s).

There is accordingly no merit to the inapposite analogies advanced by 700 MHz entrants like Aloha Partners, L.P. (Aloha) attempting to support a new "*de minimis*" standard

⁷ Comments of Pappas Southern California License, LLC, WT Docket No. 05-7, at 6 (filed March 10, 2005) (Pappas Comments), *quoting* 19 FCC Rcd. 19331, ¶ 103 (2004).

⁸ See *Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes*, Public Notice DA 04-2446 (rel. Aug. 3, 2004). The freeze provides that "until further notice," the Commission will not accept for filing any petitions for rulemaking to change DTV channels within the DTV Table of Allotments, petitions for rulemaking for new DTV allotment proceedings, petitions for rulemaking to swap in-core DTV and NTSC channels, applications to change DTV channel allotments among two or more licensees, petitions for rulemaking by licensees/permittees to change analog channels or communities of license, or television modification applications that would increase a station's DTV service area in channels 2-51 in one or more directions beyond the station's authorized parameters. In deciding to impose the freeze, the Commission has stated that "[a] stable database is not only crucial to the channel election process, but is vital to the completion of the technically difficult task of developing a new DTV Table of Allotments." *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, 19 FCC Rcd. 18279, at ¶ 68 (2004).

under Section 27.60.⁹ Aloha misleads and ignores the above-described policies behind the Commission’s DTV interference standard when it claims that “a 2% of the population threshold was adopted and used in assessing the impact of new entrants on existing broadcasters.”¹⁰ In reality, those “new entrants” were existing broadcasters attempting to bring and expand free DTV services to their existing viewers. Motorola makes the same mistakes as Aloha when it argues that “[a]s the Commission found when permitting a *de minimis* level of interference resulting from new DTV stations, the establishment of a *de minimis* level of interference will promote the digital transition by encouraging the rapid deployment of advanced wireless services in the 700 MHz band even prior to the end of the digital transition.”¹¹ In fact, the “digital transition” which the Commission sought to promote when it adopted a *de minimis* standard was the digital *television* transition and the free, over-the-air services it would provide to the American public. Granting a two percent interference allowance to 700 MHz entrants would, in fact, reduce the American public’s access to such free services.

2. The Net Loss Of Free, Over-The-Air Television Services Would Harm The Public Interest.

This net loss of access to free, over-the-air television services would be a cognizable public interest harm. MSTV and NAB accordingly agree with Pappas that

⁹ See Comments of Aloha Partners, L.P., WT Docket No. 05-7, at 3 (filed Feb. 17, 2005) (Aloha Comments). See also Comments of Access Spectrum, LLC, WT Docket No. 05-7 (filed March 10, 2005) (Comments of Access Spectrum);; Comments of Corr Wireless Communications LLC, WT Docket No. 05-7 (filed March 10, 2005) (Corr Comments); Comments of Harbor Wireless, L.L.C., WT Docket No. 05-7 (filed March 10, 2005) (Harbor Comments); Comments of Motorola, Inc., WT Docket No. 05-7 (filed March 10, 2005) (Motorola Comments); Comments of the 700 MHz Advancement Coalition, WT Docket No. 05-7 (filed March 10, 2005) (Coalition Comments).

¹⁰ Aloha Comments at 3.

¹¹ Motorola Comments at 5. See also Corr Comments at 3 (“There is no reason why the [DTV *de minimis* standard] should not be applied in [the 700 MHz] context as well.”).

QUALCOMM's requested interference standard – which presumes that loss of over-the-air service is of little consequence because “most viewers subscribe to cable or satellite service and will not be affected at all”¹² – is premised upon “an incorrect and narrowminded, even elitist” understanding of the importance of free, over-the-air television to the American public.¹³ Pappas documents how interference to free, over-the-air television would negatively impact communities, and particularly those with diverse populations. Pappas is licensee of Spanish-language station KAZA-TV, Avalon, California, channel 54, in the Los Angeles DMA. In markets such as Los Angeles, many viewers “may not have the discretionary income to purchase cable or satellite service ... and hence depend upon ubiquitous free, over-the-air television broadcasting for their news and entertainment.” Pappas notes that of the approximately 1.7 million Hispanic TV households in the Los Angeles DMA, “only approximately 773,880, or 45.5 percent, subscribe to cable.”¹⁴ Thus, in the Los Angeles DMA alone, over 18,000 Hispanic viewers could experience interference and lose access to KAZA-TV's Spanish-language programming.¹⁵

Likewise, Cox Broadcasting, Inc. (Cox), licensee of KTVU-DT, Oakland, California, channel 56 in the San Francisco DMA, demonstrates the harm QUALCOMM's proposal would cause to over-the-air viewers of out-of-core DTV channels during the

¹² Coalition Comments at 8.

¹³ Pappas Comments at 8.

¹⁴ *Id.* at 8, citing Nielsen Media Research, “Top 40 DMAs Ranked by Hispanic TV Households” (Nov. 2004).

¹⁵ If 45.5 percent of the 1.7 million Hispanic viewers subscribe to a pay television service, then 55.5 percent, or 943,500, of Hispanic viewers rely solely on over-the-air television. Creating two percent new interference to the over-the-air viewers would at a minimum interfere with 18,870 viewers of KAZA-TV's Spanish-language programming. This figure does not take into account the many thousands of Hispanic cable subscribers in the Los Angeles DMA who likely have at least one television set which is not connected to a pay television service.

transition.¹⁶ Specifically, Cox submits a technical study showing that grant of QUALCOMM's proposed interference standard would cause interference to over 122,000 viewers in the KTVU-DT service area, "likely in locations where over-the-air reliance is the highest."¹⁷ Also, as Cox rightly points out,¹⁸ even if *all* viewers of an affected station subscribed to cable (which they do not),¹⁹ there is no guarantee that the members of the public losing access to a station's over-the-air signal would be able to view the station's programming. Because the Commission has allowed cable providers to deny carriage of broadcasters' DTV signals during the transition and of multicast signals at all times, viewers are only guaranteed access to a local station's full DTV programming line-up if they can receive the free, over-the-air signal.²⁰ In fact, in some communities, the over-the-air signal is the *only* means of receiving a broadcast station's HDTV programming.²¹

¹⁶ See Comments of Cox Broadcasting, Inc., WT Docket No. 05-7 (filed March 10, 2005) (Cox Broadcasting Comments).

¹⁷ Cox Comments at 8. Cox indicates that it has certified a service area of 6,107,182 persons, and that two percent of this figure is 122,124 persons. *Id.*, Engineering Statement, at 4.

¹⁸ *Id.* ("The Commission made very clear last months that stations will not obtain must-carry rights for their digital signals until the DTV transition ends and Qualcomm's encumbrances are removed.").

¹⁹ According to Nielsen Media Research/NSI, 23.8 percent of viewers in the San Francisco DMA do not subscribe to cable. See, e.g., DMA Household Universe, Nielsen Media Research/NSI Estimates, Feb. 2005, available at http://www.tvb.org/nav/build_frameset.asp?url=/rcentral/index.asp (last visited March 23, 2005).

²⁰ *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005).

²¹ See, e.g., Three Ways to Get HDTV Programming, CNET.com, available at http://www.cnet.com/4520-7874_1-5108854-3.html (last visited March 18, 2005) ("While a good number of cable networks are broadcasting in HDTV, they've been slow in rolling out the service to their customers, and there's no sign of that changing soon.").

KAZA-TV and KTVU-DT are just two examples of the potential harm posed by the proposed two percent interference standard. As MSTV and NAB explained in their initial comments, there are an estimated 73 million television sets not connected to a pay television service in the U.S.²² In other words, of the approximately 286 million total television sets in the U.S.,²³ over twenty-five percent rely exclusively on local broadcasters' free, over-the-air television services.²⁴ The creation of two percent new interference to viewers with those sets on channel 54, 55, and 56 is in no way "*de minimis*."²⁵

Indeed, just last month, the Commission found that the loss of over-the-air service to far less than two percent of a station's audience would be contrary to the public interest; it therefore refused to allow an out-of-core analog station to discontinue operations ahead of the

²² MSTV/NAB Comments at 19-21. The Government Accountability Office (GAO) estimates that 21 million households rely *solely* on free, over-the-air television. *Estimated Cost of Supporting Set-Top Boxes to Help Advance the DTV Transition: Testimony Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, U.S. House of Representatives*, Statement of Mark L. Goldstein, Director, Physical Infrastructure Issues, GAO, 7-8 (Feb. 17, 2005) (GAO Study). There are an estimated 45 million television sets in these households. *See* NAB/ MSTV OTA Comments, *passim*, Attachment A. Additionally, the GAO has reported that over ten million households that subscribe to cable have *at least* one television that is not connected to cable. GAO Study at 8. A study conducted for the NAB/MSTV OTA Comments determined that such households represent an aggregate of 28 million television sets not connected to cable. NAB/MSTV OTA Comments, Attachment A, at 5-6. Accordingly, there are an estimated 73 million television sets in the U.S. which are not connected to a pay television service and thus rely solely on the free, over-the-air signals of local broadcasters.

²³ *See* Comments of NAB and MSTV, MB Docket No. 04-210, Attachment A, at 5 (filed Aug. 11, 2004) (NAB/MSTV OTA Comments).

²⁴ Specifically, the 73 million television sets relying on over-the-air reception represent 25.52 percent of the 286 million total television sets in the U.S.

²⁵ As noted in the initial comments of MSTV and NAB, the 41 NTSC (analog) stations occupying channels 54, 55, and 56 are located in 33 markets and serve more than 109 million people with Grade B television service. In addition, there are 51 DTV stations operating on these channels in 40 television markets, serving more than 126 million people within their DTV service contour. MSTV/NAB Comments at 3-4, *citing DTV Channel Election Information and First Round Filing Election Deadline*, Public Notice, DA 04-3922, Dec. 21, 2004.

conclusion of the digital transition.²⁶ There, the requesting station submitted data showing that only 0.25 percent of its viewers received the station’s signal via over-the-air viewing.²⁷ The Commission responded that while the station did not supply the exact number of station viewers, “in a market the size of Los Angeles, the loss of analog over-the-air service to even 0.25% of a station’s audience could result in the disenfranchisement of a significant number of persons.”²⁸ In contrast, QUALCOMM seeks the right to interfere with over-the-air service, both digital and analog, to *two percent* nationwide of the audience of stations operating on channels 54-56 – without any market-based evidence concerning the number of affected households with a television set or sets not connected to a pay television service.

Accordingly, the Commission should give no weight to the self-serving claims of a handful of 700 MHz licensees that “most viewers subscribe to cable or satellite service and will not be affected at all” by the requested interference allowance.²⁹ Corr Wireless takes this already-flawed argument one step further by arguing that 700 MHz entrants be allowed to exempt from a two percent interference allowance “any households who receive the protected TV station via cable TV or satellite.”³⁰ Such a standard would, of course, ignore the many pay television households with sets that are not connected to the pay service. It also would deprive pay television households from canceling their pay service and receiving channels 54-56 over the air. Finally, Corr’s request would fail to address interference to a cable headend, as described

²⁶ Letter from W. Kenneth Ferree, Chief, Media Bureau, FCC to Barry A. Friedman, Thompson Hine, LLP, counsel to KJLA(TV), DA 05-343, Feb. 9, 2005.

²⁷ *Id.* at 1.

²⁸ *Id.* at 2.

²⁹ Coalition Comments at 8.

³⁰ Corr Comments at 3.

below.³¹ In any event, the Commission should not allow 700 MHz entrants to create *any* new interference to the public’s free, over-the-air television service.

B. OET-69 Is Not An Appropriate Tool For Measuring Interference From 700 MHz Entrants To the Public’s Television Service.

The record also demonstrates that OET-69, a broadcast interference standard, is an inappropriate tool for determining whether a 700 MHz entrant complies with the Commission’s television interference protection standards found at 47 C.F.R. § 27.60. QUALCOMM’s attempt to apply OET-69 outside a broadcast-only context creates a classic “round peg, square hole” scenario and would likely lead to grant of 700 MHz applications that would fail to fully protect the public’s television service.

As Pappas explains, QUALCOMM’s request “conveniently and cavalierly seizes upon a unique set of engineering principles and attempts to apply them wholesale to a totally different and inapposite set of circumstances.”³² MSTV and NAB discussed this unique nature of OET-69, and how OET-69 would fail to measure harm from 700 MHz operations to over-the-air reception, in their initial comments.³³ For example, OET-69 does not consider aggregate interference from multiple stations and assumes vertical elevation patterns that likely will differ

³¹ Pappas notes that OET-69 has no provision for predicting interference to cable headends and attaches maps showing locations of cable headends in the Los Angeles DMA. These maps show that QUALCOMM’s transmitters “individually or in combination with other transmitters can result in stronger TV signals than the KAZA-TV signals at the cable headends. The D/U ratio for adjacent channel protection is 0 dB, which means if Qualcomm’s signal would be equal or greater than the KAZA-TV signal at the cable headend, it would result in destructive interference to the over-the-air reception of the TV signals.” Pappas Comments, Engineering Statement, at 5-6.

³² Pappas Comments at 12.

³³ See MSTV/NAB Comments at 12-18.

from the vertical pattern(s) of the antennas QUALCOMM would employ.³⁴ Adding to these concerns, Pappas identifies how OET-69 would fail to measure harm to viewers receiving a broadcast television station's services by *cable*: "If a MediaFLO 50,000-watt transmitter were to be located in the near vicinity of a cable television system's headend, its high signal strengths on Channel 55 could degrade the headend's ability to receive and discriminate in favor of [a station's] adjacent-channel signal on Channel 54, with the result that the [adjacent station's] signal retransmitted to the cable subscribers could be degraded."³⁵

Cox echoes another concern raised by MSTV and NAB: QUALCOMM proposes to use OET-69 to measure interference from a 700 MHz entrant operating *within* a protected station's licensed service contour.³⁶ Cox explains that the D/U ratios of Section 27.60 are applicable only on the "periphery of the broadcast contour" and not, as QUALCOMM would propose, to measure interference from a transmitter within that contour.³⁷ None of the 700 MHz licensees which support QUALCOMM's proposal address or even appear to be aware of this crucial limitation of OET-69. OET-69 is not designed to measure interference from a transmitter or transmitters operating within a station's service contour.

³⁴ That is, QUALCOMM and other 700 MHz entrants will likely deploy multiple transmitter within a single market, which will have a cumulative adverse effect on reception of an affected broadcast station's over-the-air signal. And because OET-69 will assume a different antenna height than that which will likely be used by 700 MHz entrants, it will miscalculate the entrant's interference impact on viewers of the affected station(s).

³⁵ Pappas Comments at 13.

³⁶ MSTV/NAB Comments at 17 ("[T]he D/U ratios of OET-69... are only applicable to computing interference at the outer edge of the TV station's service area.[] Yet QUALCOMM proposes to operate inside the service contour but at D/U levels no stricter than those which Section 27.60 applies at the contour. Such operation would unquestionably generate harmful interference to the public's television service.").

³⁷ Cox Comments, Engineering Statement, at 3.

MSTV and NAB also agree with Flarion Technologies, Inc., a provider of technologies used by 700 MHz licensees and others, that OET-69 will inadequately measure interference from services like MediaFLO to viewers of free, over-the-air television services.³⁸ Flarion explains that “OET-69 may not be suitable to evaluate interference between broadcast towers and cellular towers because these objects will generally be in line of sight.”³⁹ It also notes that OET-69 may fail to measure interference from a 700 MHz entrant to other 700 MHz entrants.

The evidence presented by Cox, Flarion, MSTV/NAB, and Pappas discredits the unsubstantiated claims by 700 MHz entrants such as Motorola that “[t]here is no reason to believe” that OET-69 will not be “equally effective ... in analyzing interference caused to TV/DTV stations by land mobile operations” as it is in measuring broadcast-to-broadcast interference.⁴⁰ Similarly, the 700 MHz Advancement Coalition – which purports to represent *all* 700 MHz licensees – merely notes that OET-69’s value in predicting interference “is well-recognized by the broadcast community” without explaining how OET-69’s recognition as a tool for measuring broadcast-to-broadcast interference makes it a useful standard in the context of wireless services to be deployed by 700 MHz entrants.⁴¹ In fact, the broadcast community and

³⁸ See Comments of Flarion Technologies, Inc., WT Docket No. 05-7, at 3 (filed March 10, 2005) (Flarion Comments).

³⁹ *Id.* (“For example, QUALCOMM’s product, MediaFLO, may typically use antenna heights of more than 300m. Given that typical cellular base station heights are greater than 30m, line of sight will exist over a large area, potentially including hundreds of base stations. Flarion questions whether OET-69 was designed for interference analysis in such situations.”).

⁴⁰ Motorola Comments at 3-4.

⁴¹ Coalition Comments at 2. The 700 MHz Advancement Coalition broadly describes OET-69 as a method to “make predictions of radio field strength at specific geographic points based on the elevation profile of terrain between the transmitter and each specific reception point” without explaining that OET-69 has never been employed outside the broadcast television context. *Id.* (continued...)

the Commission have designed and recognized OET-69 as a technique only for measuring interference *from* a broadcast service *to* another broadcast service.⁴²

The Commission should likewise reject Motorola's request to allow 700 MHz licensees to demonstrate "compliance" with Section 27.60 using methods described in the Stanks Report.⁴³ Unlike MediaFLO and other broadband applications which 700 MHz licensees have indicated they intend to market,⁴⁴ the Stanks Report is inappropriate since it is only designed to measure interference from a narrowband signal (CW signal) simulated from a land mobile station to an analog television receiver.⁴⁵ Also, the Stanks Report relied on a sample of analog-only television sets produced in 1984 and 1985, whereas the proceeding to develop DTV standards did not even *begin* until 1987, and the Commission did not adopt a standard for DTV transmissions until 1996.⁴⁶

Other 700 MHz licensees, such as Aloha Partners, make conclusory statements similar to those put forth by the 700 MHz Advancement Coalition. *See* Aloha Comments at 2-3 (arguing that OET-69 "is a recognized standard upon which the Commission has written and with which Commission staff has a good working knowledge.").

⁴² Also, even in its appropriate broadcast-to-broadcast context, OET-69 has recognized flaws, such as its failure to protect rural viewers outside a station's service contour. Cox adds to the showing made in this respect by MSTV and NAB, noting that OET-69 does not recognize variations in the signal path of a 700 MHz entrant occurring as a result, for example, as a result of building and other manmade obstructions not accounted for in the OET-69 standard. Cox Comments, Engineering Statement, at 3.

⁴³ Motorola Comments at 4.

⁴⁴ *See, e.g.*, Corr Comments at 1 ("Corr is exploring a number of service options for the distribution of broadband services over its channel 54 and 59 spectrum.").

⁴⁵ Daniel J. Stanks, "Receiver Susceptibility Measurements Relating to Interference Between UHF Television and Land Mobile Radio Services," Office of Engineering and Technology, FCC, OET TM 87-1, at 4 (April 1986).

⁴⁶ *Id.* at 2 ("It was desired that the test sample be roughly representative of a cross section of new television receivers (circa 1984 and 1985) currently being bought and used by consumers. The test sample was composed of the following types of receivers: 11 Color, Mechanical Tuners; 12 Color, Electronic Tuners; 4 Black and White, Mechanical Tuners."). *See also Advanced* (continued...)

Finally, given the limitations of OET-69 in measuring the interference impact of a 700 MHz entrant's operations on viewers of broadcast television services, the Commission should also reject QUALCOMM's request for new streamlined procedures that would create a rebuttable presumption favoring grant of 700 MHz applications premised on the inapplicable OET-69 interference showing.⁴⁷ Also, unlike the current procedures provided by 47 C.F.R. § 901 *et seq.*, QUALCOMM's proposal would shorten the period within which a concerned party could object to a 700 MHz entrant's application from thirty days to fourteen days.⁴⁸ By sharply curtailing the objection period, QUALCOMM's request would further increase the likelihood that a 700 MHz entrant could gain approval for an operation which would fail to fully protect the public's television service. MSTV and NAB thus agree with Pappas that "QUALCOMM's suggestion of a streamlined procedure ... would make a mockery out of the stringent interference protection afforded to ... broadcast stations."⁴⁹

Television Systems and Their Impact on the Existing Television Broadcast Service, 2 FCC Rcd. 5125, 5126 (1987) ("[W]e hereby initiate a wide-ranging inquiry to consider the technical and public policy issues surrounding the use of advanced television technologies by television broadcast licensees."); 11 FCC Rcd. 17771, 17772 (1996) ("In this, the Fourth Report and Order in our [DTV] proceeding, we adopt a standard for the transmission of digital television.").

⁴⁷ QUALCOMM Petition at 22-23 ("When QUALCOMM submits a showing that it will comply with OET-69 in a particular market, the burden should then shift to any objector to show that in fact QUALCOMM will not comply. Absent the filing of such an objection, QUALCOMM should be able to go on the air.").

⁴⁸ *Id.* at 23 ("Fourteen days after the Form 601 appears on the Public Notice, comments would be due. If no comments are filed, the next weekly Public Notice would reflect acceptance of the engineering study showing. At that point the 700 MHz licensee would be free to begin operations."). 47 C.F.R. § 1.939 provides that a Petition to Deny may be filed "no later than 30 days after the date of the Public Notice listing the application or major amendment to the application as accepted for filing."

⁴⁹ Pappas Comments at 16.

II. THE 700 MHZ ENTRANTS HAD FULL NOTICE OF THE REQUIREMENT TO FULLY PROTECT FREE, OVER-THE-AIR TELEVISION SERVICES DURING THE DTV TRANSITION.

QUALCOMM and other 700 MHz entrants had full notice when they bid for their spectrum that (1) they must fully protect the public's access to free, over-the-air television services during the DTV transition⁵⁰ and (2) the DTV transition may not be complete by Dec. 31, 2006.⁵¹ Nevertheless, 700 MHz licensees such as Access Spectrum now complain in 2005 of an alleged "unfairness" because they must still protect members of the public viewing "analog broadcast stations [which they] had anticipated would be vacating their channels in the mid-2000's."⁵² The Commission should not allow 700 MHz entrants' to disregard the conditions they accepted just a few years ago and thereby degrade the public's right to free, over-the-air television services.

The rules which the Commission announced to potential 700 MHz bidders before the 2002 and 2003 auctions also undermine Motorola's claims that a "lack of clarity" is "delaying licensees' deployment of new and innovative services using this spectrum."⁵³ As Cox notes, "[t]hroughout its proceedings to reallocate the Lower 700 MHz Band, the Commission was very clear that it would protect incumbent broadcasters."⁵⁴ Cox quotes the Report & Order

⁵⁰ See, e.g., *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC Rcd. at 1039 ("We emphasize that we have an obligation to fully protect incumbent full-power analog and digital broadcasters during the transition period, and adopt rules that support this core value.").

⁵¹ *Id.* at 1028 ("[E]xisting broadcasting operations ... will likely remain in operation until the end of the transition to DTV, which may extend beyond the 2006 target date.").

⁵² Corr Comments at 1.

⁵³ Motorola Comments at 3. See also Harbor Comments at 2 (complaining about an alleged "uncertainty regarding the interference rules and the overall transition framework").

⁵⁴ Cox Comments at 3.

which established service rules for the lower 700 MHz band: “We emphasize that we have an obligation to fully protect incumbent full-power analog and digital broadcasters during the transition period, and adopt rules that support this core value.”⁵⁵ To the extent that a 700 MHz entrant’s plans would harm viewers’ access to free, over-the-air television, Section 27.60 is designed (absent a change in the entrant’s plans) to delay their deployment until the end of the transition. Thus, the “clarity” which Motorola seeks is, in fact, an amendment of the rules which would allow 700 MHz entrants to deprive the public’s television service of “full” protection.

III. RECENT D.C. CIRCUIT PRECEDENT CONFIRMS THAT GRANT OF QUALCOMM’S PETITION WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

As explained in the initial comments of MSTV and NAB, grant of QUALCOMM’s Petition would violate the Administrative Procedure Act (APA) by amending Section 27.60, a legislative rule, outside of a notice-and-comment rulemaking.⁵⁶ The reasoning of the U.S. Court of Appeals for the D.C. Circuit in *USTA v. FCC* – a decision released the day after the initial comments of MSTV and NAB were filed – confirms that QUALCOMM seeks an administratively improper request.⁵⁷

In *USTA v. FCC*, the Court upheld and expanded existing precedent finding that an agency’s action which “substantively changes a preexisting legislative rule ... can be valid only if it satisfies the notice-and-comment requirements of the APA.”⁵⁸ There, the Cellular Telecommunications & Internet Association (CTIA) had petitioned the Commission for a

⁵⁵ *Id.*, citing 17 FCC Rcd. at 1039.

⁵⁶ See MSTV/NAB Comments at 5-8.

⁵⁷ *USTA*, 2005 WL 562744.

⁵⁸ *Id.* at *8. See also *Nat’l Family Planning & Reproductive Health Ass’n. v. Sullivan*, 979 F.2d 227, 235 (D. C. Cir. 1992) (“[A]n amendment to a legislative rule must itself be legislative.”).

“declaratory ruling” finding that wireline carriers must participate in intermodal porting, whereby a wireline customer can request that his or her number be ported to a wireless carrier.⁵⁹ CTIA sought this relief by declaratory ruling – as opposed to a Petition for Rulemaking – despite an existing legislative rule which provided that wireline carriers need not participate in “location portability.”⁶⁰ A public notice seeking comments on CTIA’s proposal was published in the Federal Register. Following the comment cycle, the Commission granted CTIA’s request in its *Intermodal Order*.⁶¹ The Court found that the Commission’s action amounted to substantive amendment of a legislative rule. In reaching its decision, the Court pointed to the virtually national nature of wireless telephone service.⁶² The *Intermodal Order* thus effectively required wireline carriers to participate in location portability. Rejecting the Commission’s argument that the *Intermodal Order* merely “interpreted” the existing portability rule, the Court held that the decision to mandate intermodal porting did not “simply provide[] clarification of an existing rule.[] Rather, it ... substantively change[d] a preexisting legislative rule. Such a rule is a legislative rule, and it can be valid only if it satisfies the notice-and-comment requirements of the APA.”⁶³

⁵⁹ *USTA*, 2005 WL 562744, at *3.

⁶⁰ The rule would allow subscribers to “keep their telephone numbers when they move to a new neighborhood, a nearby community, across the state, or even, potentially, across the country.” *Id.* at *6.

⁶¹ 18 FCC Rcd. 23697 (2003).

⁶² The Court observed that the porting of a wireline customer’s number to his or her wireless telephone could allow the customer to “switch to a cell phone and retain the same number as long as [the customer] move[s] anywhere in the wireless company’s overlapping service area – even across the country.” *USTA*, 2005 WL 562744, at *6.

⁶³ *Id.* at *8.

Like the CTIA Petition at issue in *USTA v. FCC*, QUALCOMM’s Petition seeks a substantive change in a legislative rule promulgated by the Commission. As discussed above, QUALCOMM’s Petition would amend the Commission’s 2002 decision to “fully protect”⁶⁴ over-the-air broadcast services by allowing 700 MHz entrants to interfere with up to two percent of viewers served by an affected station. It also would introduce a broadcast-only interference standard, OET-69, as an acceptable method for measuring whether a 700 MHz entrant would protect broadcast services – even though (1) OET-69 would fail to accurately measure interference from a 700 MHz entrant and (2) Section 27.60 and the orders which established that rule make no mention whatsoever of OET-69.⁶⁵ Finally, QUALCOMM’s Petition would establish “streamlined” procedures which would favor interference showings inappropriately premised on OET-69 and would cut by more than fifty percent the objection period currently allowed under 47 C.F.R. § 1.939.⁶⁶ Just as grant of the CTIA Petition constituted a legislative amendment to the Commission’s rules concerning location portability, grant of QUALCOMM’s Petition would amend the Commission’s legislative rules concerning the obligations of 700 MHz entrants during the digital transition. Thus, because QUALCOMM’s Petition seeks a substantive change in a legislative rule, the Commission would have to comply with the procedural requirements of the APA before it could grant any of QUALCOMM’s requests.⁶⁷

⁶⁴ 17 FCC Rcd. at 1039.

⁶⁵ See 16 FCC Rcd. 7278 (2001); 17 FCC Rcd. 1022 (2002); and 17 FCC Rcd. 11613 (2002).

⁶⁶ As noted above, 47 C.F.R. § 1.939 allows for filing of a petition to deny within thirty days after the date of the Public Notice listing the application or major amendment to the application as accepted for filing. QUALCOMM seeks an objection period of only fourteen days. QUALCOMM Petition at 23.

⁶⁷ *USTA*, 2005 WL 562744, at *9. Compare with *Central Texas Tel. Coop., Inc. v. FCC*, No. 03-1405, 2005 WL 562741 (D.C. Cir. March 11, 2005). In *Central Texas*, a related petition by CTIA sought a declaration that wireless carriers had a duty to port numbers to other wireless (continued...)

The Court in *USTA v. FCC* ultimately found that the Commission “effectively complied” with the APA’s notice-and-comment requirements, despite the fact that it proceeded with a Petition for Declaratory ruling as opposed to a notice-and-comment rulemaking.⁶⁸ In finding that the Commission had taken sufficient procedural steps to substantively amend a legislative rule, the Court in *USTA v. FCC* approvingly noted the Commission’s decision to publish the notice concerning CTIA’s Petition in the Federal Register. It cited the APA’s express requirement that “[g]eneral notice of proposed rule making shall be published in the

carriers so long as their service areas overlapped. *Id.* at * 2. The existing legislative rule provided that wireless carriers must engage in intramodal (*i.e.*, wireless-to-wireless) porting but need not engage in location portability. *Id.* at * 1. Certain rural wireless carriers submitted comments objecting to the Petition, claiming that the ban on mandatory location portability meant that wireless carriers could be required to port a number to another wireless carrier only if the carriers have a presence in the same rate center. *Id.* at *7. The Commission disagreed with the rural wireless commenters and granted CTIA’s Petition, on the theory that in the wireless context, “customers who move, temporarily or permanently, may retain their numbers. They may do so not because there is location portability, but because, despite their moves, they are still within an area their current wireless carrier serves.” *Id.* at *6. The Court upheld the Commission’s action as an “interpretive rule” (exempt from notice-and-comment rulemaking procedures) because it merely construed the definition of location portability in the wireless context. *Id.* at *7. QUALCOMM’s Petition, however, would substantively change Section 27.60 from a rule whereby a 700 MHz entrant must “fully protect” a broadcaster’s service area to one requiring that an entrant must protect, at most, 98 percent of a broadcaster’s service area.

Central Texas also considered, in dicta, the possibility that CTIA’s Petition sought adjudicative, rather than rulemaking relief. *Id.* at *4. The Court noted correctly that “[o]rders handed down in adjudications may establish broad legal principles.” *Id.* However, such adjudicative orders, like interpretive rules, would only be appropriate to the extent they did not substantively amend a legislative rule. *See, e.g., Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (noting in dicta that a notice-and-comment rulemaking is necessary when an agency’s interpretation of a rule “adopt[s] a new position inconsistent with... existing regulations.”); *see also Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981), *describing Patel v. INS*, 638 F.2d 1199 (9th Cir. 1980) (criticizing an agency’s attempt to use “administrative adjudication . . . [to] change[] past practices through the prospective pronouncement of a broad, generally applicable requirement, amount[ing] to an agency statement of general or particular applicability and future effect.” (internal citation omitted)).

⁶⁸ The Court did, however, remand the rule to the Commission for the purpose of preparing a final regulatory flexibility analysis, which the Commission had failed to do in the *Intermodal Order*. *USTA*, 2005 WL 562744, at *11-12.

Federal Register,” 5 U.S.C. § 553(b).⁶⁹ In contrast, the Commission has not published the notice seeking comments on the QUALCOMM Petition in the Federal Register; instead, the Mobility Division of the Wireless Telecommunications Bureau has merely issued a Public Notice briefly describing QUALCOMM’s Petition.

Moreover, the Court in *USTA v. FCC* did *not* reach a “final decision as to whether the procedures attending issuance of the *Intermodal Order* fully conformed to the APA;” rather, it found that “if there was a procedural failure, it was harmless.”⁷⁰ Yet here, grant of QUALCOMM’s proposal would be more than mere “harmless” error. As the same Court held in *Sprint Corp. v. FCC*, “an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty all as to the effect of that failure.”⁷¹ In that case, the Common Carrier Bureau had issued a Public Notice seeking comment on issues raised by a “Petition for Clarification” asking that the Commission “clarify” its existing legislative rules concerning compensation of payphone carriers for “dial-around” calls.⁷² However, “the Bureau did not publish the Notice in the Federal Register or issue a notice of proposed rulemaking.”⁷³ The Commission nevertheless issued an Order providing a new method for determining which party is responsible for compensating payphone providers under the Commission’s rules. On Sprint’s appeal, the Court struck down that Order despite the Commission’s claim that “Sprint

⁶⁹ *Id.* at *9, quoting 5 U.S.C. § 553(b).

⁷⁰ *USTA*, 2005 WL 562744, at *10 (emphasis added).

⁷¹ 315 F.3d 369, 376 (D.C. Cir. 2003), quoting *Sugar Valley Cane Growers Coop. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002).

⁷² *Id.* at 372.

⁷³ *Id.*

has failed to show prejudice from the Commission’s procedural shortcomings.”⁷⁴ The Court found that notwithstanding the Bureau’s Public Notice, Sprint – which submitted comments in response to that notice – may have “more thoroughly presented its arguments had it known that the Commission was contemplating a rulemaking.”⁷⁵ Therefore, the Court vacated the rule because of the Commission’s “failure to issue a new NPRM to afford proper notice and opportunity for comment.”⁷⁶

As in *Sprint*, the Commission has not issued an NPRM putting potentially affected parties on notice of the full nature of the rule changes that may ultimately result if the Commission chooses to grant one or more of QUALCOMM’s requests. Indeed, many more broadcast stations and related parties may have participated in the comment cycle had a full NPRM been issued by the Commission.⁷⁷ Also, the Public Notice concerning QUALCOMM’s request was issued by the Wireless Telecommunications Bureau, even though broadcasters are more likely to look to the Media Bureau’s notices for announcements that may concern their interests. Absent issuance of a full NPRM, the Commission could not proceed with any substantive change in Section 27.60 because “the effect of the Commission’s procedural errors” would be “uncertain.”⁷⁸

⁷⁴ *Id.* at 376.

⁷⁵ *Id.*

⁷⁶ *Id.* at 377.

⁷⁷ The Notice given to date is clearly inadequate, as it would require broadcast licensees to monitor the releases of the FCC’s Wireless Telecommunications Bureau, which generally does not issue rules or regulations that affect television broadcasting.

⁷⁸ *Sprint*, 315 F.3d at 377.

CONCLUSION

The record in this proceeding does not support QUALCOMM's efforts to amend 47 C.F.R. § 27.60 to provide considerably less than full protection to the public's television service during the digital transition. Accordingly, MSTV and NAB respectfully urge the Commission to dismiss QUALCOMM's Petition or, in the alternative, treat it as a Petition for Rulemaking.

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