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David L. Donovan
President

November 22, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Ex Parte Communication
WT Docket No. 05-7

Dear Ms. Dortch:

On November 21, 2005, David Donovan, president of the Association for Maximum Service Television, Inc., along with John Griffith Johnson of Paul, Hastings, Janofsky & Walker, LLP; Peter Pappas, executive vice president of Pappas Telecasting Companies; Anne Lucey, vice president, regulatory affairs for Viacom, Inc. and Kevin Reed, counsel for Cox Enterprises, met with Heather Dixon, media legal advisor to Chairman Martin, regarding the above-referenced docket.

The attached document regarding: "The Incompatibility of QUALCOMM's Petition for Declaratory Ruling With the Administrative Procedure Act (APA); WT Docket No. 05-7" was distributed at the meeting.

Sincerely,

David L. Donovan
President

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VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: Incompatibility of QUALCOMM's Petition for Declaratory Ruling With the Administrative Procedure Act (APA); WT Docket No. 05-7

Dear Ms. Dortch:

As the Association for Maximum Service Television, Inc. ("MSTV") and National Association of Broadcasters ("NAB") have previously documented,[1] the relief sought by QUALCOMM Inc. ("QUALCOMM") in its above-referenced "Petition for Declaratory Ruling" would substantively amend Section 27.60 of the Commission's rules outside of a notice-and-comment rulemaking, in plain violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*[2] The Commission should accordingly reject QUALCOMM's latest attempt to end-run the APA by mischaracterizing Section 27.60 as a "vague" rule and cloaking the

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[1] *See* Joint Comments and Informal Objection of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters to the Petition for Declaratory Ruling of QUALCOMM Incorporated, WT Docket No. 05-7 (filed March 10, 2005) ("MSTV/NAB Comments"); 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, WT Docket No. 05-7 (filed March 25, 2005) ("MSTV/NAB Reply Comments").

[2] Petition for Declaratory Ruling, QUALCOMM Inc., WT Docket No. 05-7 (filed Jan. 10, 2005) ("QUALCOMM Petition").

substantive effects of its far-reaching proposal for preferential "streamlined" processing of 700 MHz applications.[3]

A. "Streamlined Procedures" Would Substantively Alter Rights That Section 27.60 Is Designed to Protect.

As QUALCOMM acknowledges, the notice-and-comment procedures of the APA apply even to rulemakings that are ostensibly "procedural" in nature if the proposed rule would "alter the rights or interests of parties" rather than merely "the manner in which the parties present themselves of their viewpoints to the agency." *JEM Broadcasting Co., Inc. v. FCC*, 22 F.2d 320 (D.C. Cir. 1994) (citation omitted). Having acknowledged this basic principle, it is curious that QUALCOMM continues to push for adoption of the proposed "streamlined procedures" for 700 MHz applications outside of a notice-and-comment rulemaking. The proposed "streamlined" procedures would have significant substantive effect, changing Section 27.60 from a rule requiring a 700 MHz entrant to demonstrate that it would *not* harm reception of over-the-air broadcast services to one requiring providers or consumers of such services to come forward to demonstrate that the 700 MHz entrant *would* cause such harm.[4] And unlike the current procedures provided by 47 C.F.R. § 1.901 *et seq.*, the proposed "streamlined procedures" would cut the period within which a concerned party could object to a 700 MHz entrant's application by more than half, from thirty days to just fourteen days.[5]

JEM Broadcasting, the case on which QUALCOMM principally relies in attempting to circumvent a notice-and-comment rulemaking, is readily distinguished from its request for "streamlined procedures."[6] There, the U.S. Court of Appeals for the D.C. Circuit upheld the Commission's decision to permit amendment to FM radio license applications only during a 30-day window. The Court noted that "the Commission always has required applications to be complete in all critical respect by *some* date or suffer dismissal," and held that "a license applicant's right to a free shot at amending its application is not so significant as to have required the FCC to conduct notice and comment rulemaking." *JEM Broadcasting*, 22 F.2d at 327 (emphasis in original). The Court emphasized "[t]he critical fact ... that the [new policy] did not change the *substantive standards* by which the FCC evaluates license applications." *Id*

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[3] *See* Letter from Dean R. Brenner, QUALCOMM to Marlene H. Dortch, FCC (filed Oct. 19, 2005) (requesting "clarification" of certain "gaps" in Section 27.60); Letter from Dean R. Brenner, QUALCOMM to Marlene H. Dortch, FCC (filed Sept. 22, 2005).

[4] *See* QUALCOMM Petition at 22.

[5] *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."

[6] *See* Letter from Dean R. Brenner, QUALCOMM to Marlene H. Dortch, Secretary, FCC (filed Sept. 22, 2005).

(emphasis in original). If QUALCOMM's procedures were adopted, absent a third party's objection the Commission would routinely grant applications by 700 MHz entrants that fail to meet the interference protection requirements of Section 27.60. This burden-shifting rule would not be "comfortably within the realm of the procedural,"[7] as QUALCOMM claims, but rather would ensure that many applications do not get properly evaluated under the substantive interference criteria established by Section 27.60.

Furthermore, *Lamoille Valley*, a case upon which the *JEM* court relied, highlights the procedural deficiency of QUALCOMM's proposal to shorten the objection period to a mere fourteen days. *Lamoille Valley RR Co. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983). In *Lamoille Valley*, the Court upheld a rule shortening from 90 to 60 days the period in which competitors could file responses fell at the "procedural end of the spectrum." *Lamoille Valley*, 711 F.2d at 328. The Court emphasized, however, that "[w]hen a rule prescribes a timetable for asserting substantive rights, we think the proper question is whether the time allotted is so short as to foreclose effective opportunity to make one's case on the merits." *Id.* QUALCOMM's proposal would do just that, curtailing to a mere fourteen days the timeframe within which a concerned party must analyze and, if appropriate, file an objection to a 700 MHz entrant's application.

It bears emphasis that even if the "streamlined procedures" sought by QUALCOMM were not so extreme, the D.C. Circuit has counseled that "adherence to congressional purpose [in the APA] counsels a construction of [the procedural] exemption that excludes from its operation action which is likely to have considerable impact on ultimate agency decisions." *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974). Plainly, the relief that QUALCOMM seeks is extreme and unlike the "housekeeping" rules contemplated by the procedural exception to the notice and comment requirements.

B. Section 27.60 Does Not Allow For Creation Of New Interference To The Public's Free, Over-The-Air Television Service.

Section 27.60 leaves no doubt as to the amount of interference a 700 MHz entrant is allowed to create to the public's free, over-the-air television service absent the broadcaster's consent: none. There is accordingly no merit to QUALCOMM's claim that Section 27.60 is "vague" and in need of "interpretation" because it "does not explain ... what level of interference is de minimis."[8] To "interpret" Section 27.60 in such a manner would run "counter to the plain meaning of the regulation" and thus constitute a constructive amendment of the regulation, which cannot be achieved outside of a notice-and-comment rulemaking. *Nat'l Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992).

First, Section 27.60 is in no way "vague," but is rather a classic "go/no-go" rule in which compliance with the particular technical requirements is prerequisite to grant of an application. Subsection (a) of the rule defines the TV/DTV protection requirement: the entrant "must choose site locations that are a sufficient distance from co-channel and adjacent channel

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[7] *Id.* at 2.

[8] Comments of QUALCOMM Inc., GN Docket No. 04-163, at 16 (filed April 22, 2005).

TV and DTV stations" and/or "use reduced transmitting power or transmitting antenna height such that" specific desired-to-undesired signal ratios "are met." Subsection (b) then defines four methods by which an entrant can show that its operations will "meet the TV/DTV protection requirements." QUALCOMM points to the third such method – submission of an engineering study to justify the proposed separations between the broadcast station and entrant (as opposed to using predefined geographic separation tables) – as somehow justifying creation of two percent new interference to a broadcast station. Yet this provision simply demonstrates (*i.e.*, justifies) the licensee's claim that the interference requirements are met. It cannot alter the underlying interference requirements.

Second, in other proceedings, the Commission has implicitly recognized that establishment of a "*de minimis*" allowance to an interference standard can only be achieved in a notice-and-comment rulemaking. For example, when the Commission applied the two percent/ten percent *de minimis* interference standard to three-way band clearing agreements in the upper 700 MHz service band, it did so after announcing and describing the proposal in a Notice of Proposed Rulemaking[9] duly published in the Federal Register.[10] The Commission took the same steps when it modified the standard for DTV source interference from a "no new interference" to a "two percent/ten percent *de minimis*" standard.[11] In contrast, QUALCOMM has asked the Commission to merely "interpret" Section 27.60 to include a *de minimis* interference standard of two percent.[12] In light of the plain meaning of Section 27.60 and the

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[9] *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*,15 FCC Rcd 20845, 20881 (2000)

[10] 65 Fed. Reg. 42,960 (July 12, 2000).

[11] *Sixth Further Notice of Proposed Rulemaking*, 11 FCC Rcd 10968 (1996) (seeking comment on technical criteria for establishment of DTV service and related issues); 61 Fed. Reg. 43,209 (Aug. 21, 1996) (publishing *Sixth FNPRM* in the Federal Register); *Sixth Report and Order*, 12 FCC Rcd 14588 (1996) (announcing DTV Table of Allotments and related technical criteria); 62 Fed Reg. 26,684 (May 14, 1997) (publishing *Sixth Report & Order* in the Federal Register); *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, FCC, Report No. 2207 (rel. June 27, 1997) (announcing and opening pleading cycle re: petitions for reconsideration of the *Sixth Report & Order*, including one petition requesting a *de minimis* interference standard); 62 Fed Reg. 36,066 (July 3, 1997) (publishing announcement of petitions for reconsideration in the Federal Register); *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, 7450 (1998) (adopting, on reconsideration, the two percent/ten percent *de minimis* standard for DTV source interference).

[12] Moreover, when the Commission has decided to provide for a *de minimis* standard subject to future interpretation, it has expressly said so. For example, the Commission announced a 0.1 percent interference standard for evaluating proposed DTV channel elections in the *Report and Order* to the *Second DTV Biennial Review*, following issuance of an NPRM duly published in the Federal Register. *See Notice of Proposed Rulemaking*, 18 FCC Rcd 1279 (2003); 68 Fed. Reg. 7737 (Feb. 18, 2003); *Report and Order*, 19 FCC Rcd 18279 (2004); 69 Fed. Reg. 59500 (Oct. 4, 2004). The *Report & Order* expressly provided that for stations attempting to elect their only in-core channel, the Commission would "permit the 0.1 percent additional interference limit to be exceeded on a limited basis." 19 FCC Rcd at 18302-03 ¶ 56. In accordance with the (continued...)

Commission's own precedent, adoption of QUALCOMM's request would unlawfully circumvent notice-and-comment requirements by labeling as "interpretive" a new rule that changes an underlying regulation. *See, e.g., United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005).

C. Section 27.60 Does Not Contemplate Use of OET-69 To Demonstrate "Compliance" With The Interference Protection Requirements.

The APA also mandates that the Commission dismiss QUALCOMM's request for a declaration that 700 MHz entrants may use the broadcast OET-69 methodology to demonstrate compliance with the television interference protection requirements. The OET-69 methodology, developed to measure DTV-to-DTV interference, is not mentioned in Section 27.60 or in the numerous Orders to date that have established the television interference protection requirements for lower 700 MHz entrants.[13] This was no mistake: as MSTV and NAB have previously explained, OET-69 cannot reliably predict interference from wireless services like QUALCOMM's MediaFLO to TV and DTV stations.[14] Adoption of QUALCOMM's request would thus "substitute... a totally different meaning" for the current provisions of Section 27.60, not merely "interpret" them. *Nat'l Family Planning*, 979 F.2d at 231.

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leeway provided by the *Report and Order*, the Commission subsequently announced that such stations could create an additional 1.9 percent interference to other station's elections. *See DTV Channel Election*, Public Notice, DA 05-2233 (rel. Aug. 2, 2005) ("In the *Second DTV Periodic Review*, the Commission ... stated that it would allow licensees with out-of-core DTV channels to exceed [the 0.1 percent] interference level to afford these licensees an improved opportunity to select their in-core NTSC channels. In general, the staff intends to approve such in-core elections if they do not cause more than 2.0 percent additional interference to other stations.").

[13] The Commission expressly provides for the use of OET-69 in determinations of interference when it decides that OET-69 is appropriate. *See* MSTV/NAB Comments at 13 and n.32, *citing* 47 C.F.R. §§ 73.613, 73.622, 73.623, 73.683, 74.703, 74.705, 74.707 and 74.710.

[14] *See, e.g.*, MSTV/NAB Comments at 13-15.

Even more troubling than the overwhelming procedural deficiencies of QUALCOMM's petition is the significant interference its proposals would cause to the 51 DTV and 41 NTSC stations operating on channels 54, 55 and 56, just as the DTV transition enters a critical "home stretch." MSTV and NAB, as well as many others, have already documented these public interest harms to the Commission.[15] This unprecedented sacrifice of *free*, over-the-air television services in exchange for promotion of *subscription* wireless services should not be allowed. To protect the integrity of the rulemaking process and the public's free, over-the-air television service, MSTV accordingly reiterates its request that the Commission dismiss QUALCOMM's petition.

Respectfully submitted,

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[15] *See, e.g.*, Comments of Cox Broadcasting, Inc., WT Docket No. 05-7 (filed March 10, 2005); Comments of Pappas Southern California License, LLC, WT Docket No. 05-7 (filed March 10, 2005); Reply Comments of Capitol Broadcasting Company, Inc., WT Docket No. 05-7 (filed March 25, 2005); MSTV/NAB Comments; MSTV/NAB Reply Comments.