

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

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In the Matter of
Third Periodic Review of the
Commission's Rules and Policies
Affecting the Conversion
To Digital Television
MB Docket No. 07-91

NOTICE OF PROPOSED RULEMAKING

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separate statements.

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION 1
II. EXECUTIVE SUMMARY 2
III. BACKGROUND 3
IV. PROGRESS REPORT 7
A. Status of DTV Operations 8
B. Status of Consumer Capability to Receive DTV Signals 12
C. Status of Broadcasters' Transition 16
1. Category One: Stations remaining on their current DTV in-core channel 21
2. Category Two: Stations returning to their analog in-core channel 24
3. Category Three: Stations moving to a completely new in-core channel 28
4. Singleton stations 29
V. ISSUE ANALYSIS 33
A. Reduction and Termination of Analog Service 37
B. Return of Pre-Transition DTV Channel; Flash Cut Requests 48
C. Construction Deadline for Full, Authorized DTV Facilities 53
1. Stations Whose Post-Transition Channel is Different From Their Pre-Transition DTV
Channel 60
2. Stations Whose Post-Transition Channel is the Same as Their Pre-Transition DTV
Channel 67
3. Other Situations 72
4. Extension/Waiver of DTV Construction Deadlines 79

5. Early Transition	88
6. Additional Proposals to Provide Regulatory Relief.....	89
D. Applications to Construct or Modify DTV Facilities.....	92
E. Expanding Facilities.....	97
F. Interference Standards.....	100
1. Proposed Interference Criteria.....	103
2. Pre-Transitional Operations.....	113
G. Other Issues.....	114
1. DTV Transmission Standard (ATSC A/53).....	114
2. Program System and Information Protocol (“PSIP”) Standard	117
3. Fees for Ancillary and Supplementary Services.....	120
4. Station Identification.....	121
5. Coordination with Cable Operators, Satellite Systems and Other MVPD Providers	124
VI. PROCEDURAL MATTERS	126
A. Initial Regulatory Flexibility Act Analysis	126
B. Initial Paperwork Reduction Act of 1995 Analysis.....	127
C. Ex Parte Rules.....	131
D. Filing Requirements	132
VII. ORDERING CLAUSES	138
APPENDICES	
APPENDIX A - Proposed Rule Changes	
APPENDIX B - Proposed Changes to FCC Forms	
APPENDIX C - Initial Regulatory Flexibility Act Analysis	
APPENDIX D - List of Stations Believed Ready to Commence Post-Transition Operations	

I. INTRODUCTION

1. Congress has mandated that after February 17, 2009, full-power broadcast stations must transmit only in digital signals, and may no longer transmit analog signals.¹ With this Notice of Proposed Rule Making (“Notice”), we begin our third periodic review of the transition of the nation’s broadcast television system from analog to digital television (“DTV”).² We conduct these periodic reviews in order to assess the progress of the transition and make any necessary adjustments to the Commission’s rules and policies to facilitate the introduction of DTV service and the recovery of spectrum at the end of the transition. Here, we consider how to ensure that broadcasters complete construction of their final, post-transition (digital) facilities by the statutory deadline.

¹ See Digital Television and Public Safety Act of 2005 (“DTV Act”), which is Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (“DRA”) (*codified at* 47 U.S.C. §§ 309(j)(14) and 337(e)). DTV Act § 3002(a) amends Section 309(j)(14) of the Communications Act to establish February 17, 2009 as a new hard deadline for the end of analog transmissions by full-power stations. 47 U.S.C. § 309(j)(14)(A). DTV Act § 3002(b) directs the Commission to “take such actions as are necessary (1) to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009; and (2) to require by February 18, 2009, ... all broadcasting by full-power stations in the digital television service, occur only on channels between channels 2 and 36, inclusive, or 38 and 51, inclusive (between frequencies 54 and 698 megahertz, inclusive).” 47 U.S.C.A. § 309 Note. DTV Act § 3005(a) also created a coupon program to subsidize the purchase of digital-to-analog (“D-to-A”) converter boxes. *Id.* See *infra* notes 35 and 36.

² The Commission has conducted two prior periodic reviews: the first in MM Docket No. 00-39 and the second in MB Docket No. 03-15. See *infra* notes 7 and 8.

II. EXECUTIVE SUMMARY

2. In this Third DTV Periodic Review, we (1) provide a progress report on the transition; (2) describe the status and readiness of existing stations to complete the transition; (3) analyze and propose the procedures and rule changes necessary to complete the transition; and (4) address other issues related to the transition. Stations that have not completed construction of their post-transition channels must focus their full attention on the construction efforts necessary to move from analog to digital transmission no later than the February 17, 2009 deadline established by Congress. Specifically, we propose the following actions to facilitate the transition for full-power television stations:³

- We tentatively conclude that February 17, 2009 will be the construction deadline for stations that are building digital facilities based on their new channel allotments in the new DTV Table of Allotments (“DTV Table”) and accompanying Appendix B (“new DTV Table Appendix B”), which will be established by an order in the Commission’s DTV proceeding, MB Docket No. 87-268 (*i.e.*, stations whose DTV channel for pre-transition operation is not their channel for post-transition use).⁴ [Section V.C.1. and proposed rule 47 C.F.R. § 73.624(d)(1)(v) in Appendix A]
- We propose that stations whose post-transition channel is the same as their pre-transition DTV channel, who are not facing unique technical challenges, and who are granted either an extension in the *Construction Deadline Extension Order* or a waiver in the *Use-or-Lose Order* must complete construction of their DTV facilities by the deadline established in those orders (*i.e.*, six months from the release date of the orders). These stations have had their post-transition channel assignments for several years. [Section V.C.2.]
- We propose that February 17, 2009 will be the construction deadline for stations facing unique technical challenges, such as those with side-mounted digital antennas or similar situations in which the operation of their analog service prevents the completion of their full, authorized digital facilities. [Section V.C.3.]
- We tentatively conclude that stations that have not completed construction of full, authorized facilities on their pre-transition channel may be excused from completion of construction if this is not their post-transition channel.⁵ These stations will be permitted to carry-over protection to their full, authorized facilities. [Section V.C.1.]

³ We note that the statutory transition deadline applies only to full-power stations. See 47 U.S.C. §§ 309(j)(14) and 337(e). We will address the digital transition for low power television (“LPTV”) stations in a separate proceeding. The Commission previously determined that it has discretion under 47 U.S.C. § 336(f)(4) to set the date by which analog operations of stations in the low power and translator service must cease. *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, Report and Order, 19 FCC Rcd 19331, 19336 ¶ 12 (2004) (“*LPTV DTV Report and Order*”). Accordingly, the Commission decided not to establish a fixed termination date for the low power digital television transition until it resolved the issues concerning the transition of full-power television stations. *Id.* at 19336 ¶ 19.

⁴ The Commission proposed channel assignments and reference facilities for stations’ post-transition operations in a 2006 Notice of Proposed Rule Making in MB Docket No. 87-268. See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MB Docket No. 87-268, Seventh Further Notice of Proposed Rule Making, 21 FCC Rcd 12100 (2006) (“*Seventh FNPRM*”). The *Seventh FNPRM* sets forth a channel for each eligible broadcast TV station in the proposed new DTV Table. The details of each station’s channel assignment, including technical facilities and predicted service and interference information, are set forth in the proposed new DTV Table Appendix B.

⁵ Our proposal applies to stations that have pending construction permits (“CPs”), that have requested CP extensions, that have been granted CP extensions, that have been granted waivers of the use-or-lose deadlines, and that have waivers for their checklist facility deadline.

- We propose to restrict the situations in which grants of an extension of time to construct digital facilities will be considered for construction deadlines prior to the end of the transition. In addition, beginning February 17, 2009, we propose to apply the existing “tolling” standard applied to analog stations to requests for additional time to construct digital facilities and will toll the construction deadline only in limited and unavoidable circumstances. [Section V.C.4. and proposed rule 47 C.F.R. § 73.624(d)(3) in Appendix A]
- We propose to require all full-power television stations to file a form with the Commission detailing their current transition status, additional steps necessary in order to be prepared for digital-only operation on February 17, 2009, and a timeline for making those steps. [Section V., ¶ 35 and Appendix B]
- We consider whether and, if so, under what circumstances we should accept new requests by stations to return their pre-transition-only DTV channel (*i.e.*, a DTV channel that is not their final, post-transition channel) before the end of the transition and “flash cut” from their analog channel to their post-transition channel. [Section V.B.]
- We examine the circumstances in which a station may be allowed to reduce or terminate its analog service to facilitate construction of its final, DTV facility on its post-transition channel. [Section V.A.]
- We propose to allow stations to operate on newly allotted post-transition facilities before the transition deadline provided they would not interfere with existing, pre-transition service. [Section V.C.5.]
- We request comment on additional proposals to provide stations with regulatory flexibility to facilitate stations’ construction of their post-transition facilities by the statutory deadline. [Section V.C.6.]
- We propose to offer expedited processing to a station applying for a CP to build its post-transition channel, provided that its application (i) does not seek to expand the station’s noise-limited service contour in any direction beyond that established by the new DTV Table Appendix B; (ii) specifies facilities that match or closely approximate those new DTV Table Appendix B facilities (*i.e.*, if the station is unable to build precisely the facilities specified in the new DTV Table Appendix B, then it must apply for facilities that deviate no more than five percent from those new DTV Table Appendix B facilities with respect to predicted population); and (iii) is filed within 45 days of the effective date of Section 73.616 of the rules adopted in the Report and Order in this proceeding. We propose to revise FCC Forms 301 and 340 accordingly. [Section V.D. and Appendix B]
- We tentatively conclude that we will not accept applications to expand post-transition facilities until we have completed processing the applications to build authorized facilities, but we seek comment on ways to consider expansion applications sooner without delaying the transition. [Section V.E.]
- We tentatively conclude to adopt a new 0.5 percent interference standard to apply to maximizations and to new channel allotments after the transition. [Section V.F. and proposed rule 47 C.F.R. § 73.616 in Appendix A]
- We propose to update the Commission’s rules to reflect any revisions to the ATSC standards concerning DTV transmission and PSIP since the adoption of the *Second DTV Periodic Report and Order*. [Sections V.G.1. and V.G.2. and proposed rule 47 C.F.R. § 73.882(d) in Appendix A]
- We seek comment on whether the Commission can and should revise Section 73.624(g) to require DTV stations that are permittees operating pursuant to a DTV STA or other FCC authorization for DTV transmission to file FCC Form 317 and pay fees on any revenue derived from feeable ancillary or supplementary services in the same way required of DTV licensees. [Section V.G.3.]
- We invite comment on whether further amendments are needed to the station identification

rules and, in particular, whether the current rules provide for appropriate identification of multicast channels. [Section V.G.4.]

- We invite comment on whether coordination is needed between broadcasters and MVPDs to ensure a smooth transition, whether this coordination is underway, and what actions the Commission should take to assist broadcasters with their coordination efforts. [Section V.G.6.]

III. BACKGROUND

3. Congress specifically requires the Commission to evaluate the progress of the nation's transition to digital television.⁶ The first DTV periodic review began in March 2000⁷ and the second in January 2003.⁸ In addition to these periodic reviews, the Commission has continued to conduct its DTV proceeding, through which it has developed new channel allotments and assignments.⁹ The Commission recently issued a *Seventh FNPRM* in connection with the DTV proceeding.¹⁰

4. The *Second DTV Periodic Report and Order* established a three-round channel-election process through which eligible broadcast licensees and permittees (collectively, "licensees") selected their

⁶ See 47 U.S.C. § 336(g).

⁷ See *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, Notice of Proposed Rule Making, 15 FCC Rcd 5257 (2000) ("*First DTV Periodic NPRM*"). As a result of this proceeding, the Commission made a number of determinations in furtherance of the digital transition. See *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, Report and Order, 16 FCC Rcd 5946 (2001) ("*First DTV Periodic Report and Order*") (addressing channel election and interference protection deadlines), *on recon.*, 16 FCC Rcd 20594 (2001) ("*First DTV Periodic MO&O*"), Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15978 (2002) ("*DTV Tuner Order*") (addressing DTV receiver standards and labeling requirements). See also Third Memorandum Opinion and Order on Reconsideration, 17 FCC Rcd 18571 (2002) (denying a Petition for Reconsideration of the determination that DTV area expansion applications must protect certain earlier-filed NTSC applications).

⁸ See *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 03-15, Notice of Proposed Rule Making, 18 FCC Rcd 1279 (2003) ("*Second DTV Periodic NPRM*"). The Commission, among other things, determined how the channel-election process would operate and established replication and maximization deadlines. *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 03-15, Report and Order, 19 FCC Rcd 18279, 18281 (2004) ("*Second DTV Periodic Report and Order*").

⁹ The Commission established the initial DTV Table of Allotments in 1997. See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Sixth Report and Order, 12 FCC Rcd 14588 (1997) ("*Sixth Report and Order*"). The details of each station's channel assignment under the initial DTV Table, including technical facilities and predicted service and interference information, were set forth in the initial Appendix B of the Sixth Report and Order ("initial Appendix B"). See *Sixth Report and Order*, 12 FCC Rcd at 14693, app. B. The initial Appendix B was amended in 1998. See Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, 13 FCC Rcd 7418 (1998) ("*DTV Sixth Memorandum Opinion and Order*") and Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders, 14 FCC Rcd 1348 (1998). Simultaneous with the adoption of the *Sixth Report and Order*, the Commission announced DTV channel assignments for eligible licensees in the *Fifth Report and Order* in the same docket. See *Fifth Report and Order*, 12 FCC Rcd 12809, 12892, app. E (1997) ("*Fifth Report and Order*").

¹⁰ See generally *Seventh FNPRM*, *supra* note 4.

post-transition channels inside the core TV spectrum (*i.e.*, channels 2-51).¹¹ At the start of this process, licensees proposed their post-transition facilities.¹² After each channel election round, the Commission announced proposed post-transition channels – called tentative channel designations (“TCDs”).

5. The channel election process culminated in the adoption of the *Seventh FNPRM*, which proposed a new DTV Table.¹³ The proposed new DTV Table provides eligible stations with channels for post-transition operations inside the core TV spectrum. The DTV Table is based on the TCDs announced for stations, as well as the Commission’s efforts to promote overall spectrum efficiency and ensure that broadcasters provide the best possible service to the public, including service to local communities.¹⁴ The proposed DTV Table will ultimately replace the current DTV Table.¹⁵

6. In early 2006, Congress enacted significant statutory changes to the DTV transition in the DTV Act. Most importantly, it set February 17, 2009, as the date certain for the end of the DTV transition, at which time all full-power television broadcast stations must cease their analog transmissions.¹⁶ The DTV Act does not provide for waivers or extensions of this deadline for cessation of analog broadcasts.¹⁷ The DTV Act also requires broadcast licensees to cease operations outside the core spectrum after February 17, 2009 in order to make that spectrum available for public safety and commercial wireless uses.¹⁸ Full-power TV broadcast stations must be operating inside the core TV

¹¹ *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18292 ¶ 33. The Commission received 11 petitions for reconsideration of the *Second DTV Periodic Report and Order*, raising a number of issues, most of which have been rendered moot by the completion of the channel election process.

¹² In November 2004, licensees filed certifications via FCC Form 381 in order to define their proposed post-transition facilities. In these certifications, licensees chose whether to (1) replicate their allotted facilities, (2) maximize to their currently authorized facilities, or (3) reduce to a currently authorized smaller facility. See Public Notice, “DTV Channel Election Information and Deadlines,” 19 FCC Rcd 19569 (MB 2004) (“*Certification Deadline PN*”). Stations that did not submit certification forms by the deadline were evaluated based on replication facilities. See *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18296 ¶ 41.

¹³ Comments on the proposed new DTV Table were due January 25th and replies were due February 26th. See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MB Docket No. 87-268, Order Granting Extension of Time for Filing Comments and Reply Comments, 22 FCC Rcd 188 (MB 2007) (extending the comment filing dates established in the *Seventh FNPRM*).

¹⁴ *Seventh FNPRM*, 21 FCC Rcd at 12105 ¶ 15.

¹⁵ The *Seventh FNPRM* proposes to codify the new DTV Table in 47 C.F.R. § 73.622(i). *Seventh FNPRM*, 21 FCC Rcd at 12123, app. A. The current DTV Table, which is contained in 47 C.F.R. § 73.622(b), will become obsolete at the end of all authorized interim DTV operations. The current NTSC Table, which is contained in 47 C.F.R. § 73.606(b), will become obsolete at the end of the transition, when all full-power analog operations must cease.

¹⁶ 47 U.S.C. § 309(j)(14) (“A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond February 17, 2009.”). See also 47 U.S.C. § 337(e).

¹⁷ Previously, 47 U.S.C. § 309(j)(14) provided an exception to the earlier December 31, 2006 transition deadline if the Commission determined that less than 85 percent of the television households in a licensee’s market were capable of receiving the signals of DTV broadcast stations through various means (*i.e.*, via over-the-air reception, cable or satellite, or digital-to-analog conversion technology). 47 U.S.C. § 309(j)(14)(B)(iii) (2005). Congress eliminated the statutory provisions authorizing market-specific extensions of the DTV transition, including the 85 percent benchmark for DTV reception. This new hard deadline obviates the need for any further discussion of how to interpret and implement the former Section 309(j)(14)(B) of the Act, an issue previously deferred by the *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18282 ¶ 6.

¹⁸ See 47 U.S.C. § 337(e)(1).

spectrum and only in digital upon the end of the transition on February 17, 2009.¹⁹

IV. PROGRESS REPORT

7. The transition to DTV is a complex undertaking, affecting virtually every segment of the television industry and every American who watches television. The Commission has been facilitating the migration to DTV by adopting a standard for digital broadcasting, creating an initial DTV Table, awarding DTV licenses, establishing operating rules for the new service, monitoring the physical build-out of DTV broadcast stations, and helping to educate consumers about the transition. At the end of the transition, television broadcast operations will be limited to the core TV spectrum,²⁰ enabling the recovery of a total of 108 MHz of spectrum (*i.e.*, TV channels 52-69).²¹ Twenty-four megahertz of spectrum currently used for TV broadcast channels 63, 64, 68, and 69 have been reallocated for critically important public safety needs. The remaining 84 MHz (currently TV broadcast channels 52-62 and 65-67) have been or will be auctioned for new wireless services.²²

A. Status of DTV Operations

8. In 1997, the Commission granted eligible licensees a paired channel for digital operations during the transition and set dates for construction and operation of broadcasters' facilities on their allotted DTV channels.²³ Pursuant to the construction schedule set forth in Section 73.624(d) of the Commission's rules, affiliates of the top four networks in the top ten television markets were required to complete construction of their DTV facilities by May 1, 1999; top four network affiliates in markets 11-30 by November 1, 1999; all remaining commercial television stations by May 1, 2002; and all noncommercial educational ("NCE") television stations by May 1, 2003.²⁴

9. As of April 2, 2007, 1,702 television stations in all markets (representing approximately 98.8 percent of all stations) have been granted a DTV construction permit ("CP") or license.²⁵ A total of 1,603 stations are now broadcasting a digital signal. Of these, 1,215 stations are authorized with licensed facilities or program test authority and 388 stations are operating pursuant to special temporary authority ("STA") or experimental DTV authority.

10. In the top 30 television markets, all 119 top-four network-affiliated television stations are

¹⁹ *Id.*

²⁰ The "core spectrum" is comprised of low-VHF channels 2 to 4 (54-72 MHz) and 5 to 6 (76-88 MHz), VHF channels 7 to 13 (174-216 MHz) and UHF channels 14-51 (470-698 MHz), but does not include TV channel 37 (608-614 MHz), which is used for radio astronomy research. *See Second DTV Periodic Report and Order*, 19 FCC Rcd at 18292 ¶ 33; *DTV Sixth Memorandum Opinion and Order*, 13 FCC Rcd at 7419 ¶ 5. *See also* 47 C.F.R. § 73.603(c).

²¹ *See* 47 U.S.C. § 337(e)(1) ("Any full-power television station licensee that holds a television broadcast license to operate between 698 and 806 megahertz may not operate at that frequency after February 17, 2009.").

²² Channels 60-69 (746-806 MHz) were reallocated for public safety and wireless communications services in 1998. *See Reallocation of Television Channels 60-69, the 746-806 MHz Band*, ET Docket No. 97-157, Report and Order, 12 FCC Rcd 22953 (1998). Channels 52-59 were reallocated for new wireless services in 2001. *See 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*"). *See also* 47 U.S.C. §§ 309(j)(14)(B), (15)(C) and 337(e)(1).

²³ *See supra* note 9.

²⁴ 47 C.F.R. § 73.624(d)(1).

²⁵ This data is publicly available and is frequently updated. *See* <http://www.fcc.gov/mb/video/dtvstatus.html>.

on the air in digital, 110 with licensed DTV facilities or program test authority and nine with STAs. In markets 1-10, all 40 top-four network affiliated stations are providing digital service, 38 with licensed DTV facilities and two with STAs. In markets 11-30, all top-four 79 network affiliated stations are providing DTV service, 74 with licensed DTV facilities and five with STAs.

11. Approximately 1,230 commercial television stations were due to commence digital broadcasts by May 1, 2002. As of April 2, 2007, 1,136 of these stations (92.4 percent) are broadcasting a digital signal. In addition, approximately 373 NCE television stations were required to commence digital operations by May 1, 2003. As of April 2, 2007, 348 (93.3 percent) of these stations are broadcasting a digital signal.²⁶

B. Status of Consumer Capability to Receive DTV Signals

12. In connection with the 2006 Competition Report, the Commission requested information about the number of households relying solely on over-the-air broadcast television for programming.²⁷ In comments filed to that proceeding, the National Association of Broadcasters (“NAB”) indicated that there are approximately 69 million television sets are not connected to any MVPD service.²⁸ Specifically, NAB reported that nearly 19.6 million households rely solely on over-the-air broadcast television, and there are approximately 45.5 million sets in those homes.²⁹ NAB states that “in these 19.6 million over-the-air households, there are approximately 1.3 million over-the-air digital sets.” Thus, according to NAB, “[t]here are roughly 18.7 million over-the-air households with only analog sets, and these households have about 44.2 million analog sets.” NAB reports that an additional 23.5 million television sets in 14.7 million MVPD households remain unconnected to the MVPD service. NAB states that this 2006 data showing large numbers of over-the-air television sets is consistent with two surveys conducted in 2005.³⁰

13. The demand for DTV sets has grown with increased availability of DTV programming and receiving equipment and a steady drop in the price of such equipment. The Consumer Electronics Association (“CEA”) reports that the consumer electronics industry has invested \$66.7 billion in DTV products since 1998.³¹ Moreover, CEA reports more than \$75 billion in consumer investment in DTV products. According to CEA, 23.9 million DTV sets and monitors were sold in 2006. CEA predicts that 29.2 million DTV products will be sold in 2007, 33.4 million in 2008, 35.2 million in 2009 and 36.4 million in 2010.³² CEA estimates that DTV sales will represent 69 percent of all TV sales in 2006.³³

²⁶ The commercial and NCE TV stations that have not commenced digital broadcasts were required to file a request for extension of additional time to complete construction of their DTV facilities by the deadline established for them in 47 C.F.R. § 73.624(d)(1).

²⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Notice of Inquiry, 21 FCC Rcd 12229, 12308 ¶ 57 (2006). The Commission also sought information about the number of cable and satellite households that rely on over-the-air service on one or more of their television sets not connected to a multichannel video programming distributor (“MVPD”). *Id.*

²⁸ *Id.*

²⁹ See NAB comments in MB Docket No. 06-189 at 2 (citing Knowledge Networks/Statistical Research, Inc., Home Technology Monitor Ownership Survey (Spring 2006); Nielsen Media Research, Television Household Estimates (2005-2006)).

³⁰ *Id.*

³¹ See *Ex Parte* comments of CEA in MB Docket No. 03-15 (dated April 2, 2007) (“CEA *Ex Parte*”).

³² *Id.*

³³ *Id.* CEA projects that DTV sales will represent 92 percent of all TV sales in 2007.

14. In order to promote the availability of reception equipment and protect consumers by ensuring that their television sets continue to work in the digital world just as they do today, the Commission established a DTV tuner mandate, which requires, as of March 1, 2007, that all television receiver equipment (e.g., TV sets (all sizes), VCRs, digital video recorders, and any other TV receiving devices) manufactured or shipped in interstate commerce or imported into the United States, for sale or resale to the public, must be capable of receiving the signals of DTV broadcast stations over-the-air.³⁴

15. In addition, subsidized digital-to-analog (“D-to-A”) converter boxes will be available to eligible consumers starting January 2008, further promoting access to digital reception equipment.³⁵ This subsidy program, which was created by the DTV Act, will allow consumers with analog-only TV sets to receive over-the-air broadcast programming after the February 17, 2009 transition date, when analog broadcasting ends. Without a D-to-A converter box, consumers will not be able to view full-power TV broadcasts after the transition date unless they purchase DTV sets (television sets with a built-in digital tuner) or subscribe to a pay television service. Congress directed the National Telecommunications and Information Administration (“NTIA”) of the U.S. Department of Commerce to administer this subsidy program.³⁶ In March 2007, NTIA issued final rules to implement the program, which subsidizes the purchase of D-to-A converter boxes.³⁷

C. Status of Broadcasters’ Transition

16. Stations are responsible for meeting the statutory deadline for the DTV transition. The Commission has no discretion to waive or change this transition date.³⁸ Full-power broadcast stations not ready to commence digital operations upon expiration of the deadline for the transition on February 17,

³⁴ 47 C.F.R. § 15.117(a). In 2002, the Commission initiated the DTV tuner mandate, with a phase-in period based on screen size to minimize the cost impact on consumers. *DTV Tuner Order*, 17 FCC Rcd at 15996 ¶ 40 (requiring that all TV receivers manufactured or shipped in the U.S. with screen sizes 13 inches and above be capable of receiving DTV signals over-the-air no later than July 1, 2007); see also *Consumer Electronics Ass’n v. F.C.C.*, 347 F.3d 291 (D.C. Cir. 2003) (upholding the *DTV Tuner Order*). In 2005, the Commission accelerated the implementation of the DTV tuner mandate to become effective on March 1, 2007 and expanded the mandate to include television sets less than 13 inches. *Requirements for Digital Television Receiving Capability*, ET Docket No. 05-24, Second Report and Order, 20 FCC Rcd 18607 (2005) (“2005 DTV Tuner Order”).

³⁵ DTV Act § 3005(c)(1)(A); 47 U.S.C.A. § 309 Note. See *Rules to Implement and Administer a Coupon Program for Digital-to-Analog Converter Boxes*, NTIA Docket No. 0612242667-7051-01, Final Rule, 72 FR 12097 at ¶ 8 (rel. March 12, 2007) (“*NTIA Coupon Program Final Rule*”); 47 C.F.R. § 301. Starting January 1, 2008, all U.S. households will be eligible to request up to two \$40 coupons to be used toward the purchase of up to two, D-to-A converter boxes, while the initial \$990 million allocated for the program is available. 47 C.F.R. § 301.3-4. If the initial funds are used up and the additional funds (up to \$510 million) are authorized, eligibility for the coupons will be limited to over-the-air-only television households. *NTIA Coupon Program Final Rule*, 72 FR 12097 at ¶ 8. Eligible consumers will have until March 31, 2009 to make a request for these coupons. DTV Act § 3005(c)(1)(A).

³⁶ DTV Act § 3005(a)(1) directs the Assistant Secretary for Communications and Information to “implement and administer a program through which households in the United States may obtain coupons that can be applied toward the purchase of digital-to-analog converter boxes.” *Id.* The purpose of the program is to enable consumers to continue receiving broadcast programming over the air using analog-only televisions not connected to cable or satellite service. *NTIA Coupon Program Final Rule*, 72 FR 12097 at ¶ 2; see 47 C.F.R. § 301.1.

³⁷ See generally *NTIA Coupon Program Final Rule*, *supra* note 35. NTIA established rules for the coupon program in 47 C.F.R. § 301. The rules became effective April 16, 2007.

³⁸ See 47 U.S.C. §§ 309(j)(14) and 337(e)(1).

2009 must go dark and risk losing their authorizations to operate after the transition date.³⁹

17. We have proposed post-transition channel assignments for all eligible stations.⁴⁰ In the proposed new DTV Table, 1,812 stations received proposed post-transition DTV channels.⁴¹ Of these, 1,178 stations received the DTV channel on which they are currently authorized, 517 stations received the NTSC channel on which they are currently authorized, and 117 stations received a different channel from which they are currently authorized.

18. The process of transitioning the entire TV broadcast industry to digital-only operation on each station's final channels will be complex. Accordingly, stations already should be planning their transition to digital-only service on their post-transition channel. Some stations may now be ready, or very close to ready, to make their transition. We have provided a list of 752 stations in Appendix D hereto that we believe fall into this category and seek input from those stations regarding our assessment.⁴²

19. Most stations, however, will need to take significant steps to accomplish their transition. Stations' situations will vary based on their final channel assignments in the new DTV Table and whether, and if so to what extent, they must change their transmission facilities to operate on their post-transition channels. As described below, stations may seek to change their antenna or tower locations.⁴³ Stations may also need to change their effective radiated power (ERP), antenna height above average terrain (HAAT) or antenna pattern as set forth in the new DTV Table Appendix B, as adopted.

20. Before discussing the issues that must be addressed to complete the transition, we first categorize the circumstances that stations are in to describe what stations in each group must accomplish.

³⁹ A station failing to meet its construction deadline may be subject to license revocation procedures (47 U.S.C. § 312), the issuance of forfeitures (47 U.S.C. § 503), or other remedial measures, such as admonishment. For example, we remind licensees that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary." 47 U.S.C. § 312(g). If discontinuing operations, stations must also be mindful of the Commission's rules. *See, e.g.*, 47 C.F.R. §§ 73.1615 (operation during modification of facilities), 73.1690 (modification of transmission systems), 73.1740 (minimum operating schedule) and 73.1750 (discontinuance of operation).

⁴⁰ These post-transition channel assignments largely were based on the choices made by licensees during the channel-election process. Eligibility for a proposed post-transition channel assignment was limited to existing Commission licensees and permittees. *See Seventh FNPRM*, 21 FCC Rcd at 12117-18 ¶ 50.

⁴¹ This total includes 1,806 stations announced in Appendix A to the *Seventh FNPRM* and six additional stations announced in a subsequent Public Notice. *See id.* at 12123, app. A; and Public Notice, "Tentative Channel Designations To Be Added to the DTV Table of Allotments Proposed in the Seventh Further Notice of Proposed Rulemaking," DA 07-20 (MB rel. Jan. 8, 2007) ("*New Permittees PN*"). Additional new permittees may also be announced before the transition deadline. *See Seventh FNPRM*, 21 FCC Rcd at 12118 ¶ 53.

⁴² *See* Appendix D, "List of Stations Believed Ready to Commence Post-Transition Operations," to this Notice. Appendix D includes those stations whose post-transition channel is the same as their pre-transition DTV channel and that have constructed their full, authorized DTV facilities as defined in the new DTV Table Appendix B.

⁴³ A station that must change its DTV tower location may face a considerable challenge, especially if the station must construct a new tower. Such a station must consider whether there are any existing towers that can be used or if a new tower must be constructed. Because of the lead times involved in purchasing or leasing land with appropriate FAA clearances, local and state zoning requirements, and varying timelines for designing the new tower, ordering equipment, delivery of equipment, and construction-related issues, such a station must begin planning as soon as possible in order to transition by the deadline. In some cases, building a new tower at this stage in the process may no longer be a viable option.

First, there are stations that will remain on their current DTV in-core channel. Second, there are stations that will return to their analog in-core channel. Third, there are stations that will move to a completely new in-core channel. In addition to these three general categories, stations without a paired channel ("singleton stations")⁴⁴ that will flash cut⁴⁵ from broadcasting on their analog channel to broadcasting on a digital channel raise unique issues that we will consider separately. We seek comment on these categories and circumstances in general and on the particular tentative conclusions, proposals and queries in the Issue Analysis (section V), below.

1. Category One: Stations remaining on their current DTV in-core channel

21. There are 1,178 stations remaining on their current DTV in-core channel for post-transition operations, based on the proposed new DTV Table.⁴⁶ Most of these stations will have a relatively simple transition because they already have the authorizations necessary to operate at their proposed post-transition facilities as specified in the proposed new DTV Table Appendix B. In fact, many of these stations have already constructed and received licenses for their post-transition facilities,⁴⁷ and so will simply turn off their analog service to complete their transition.

22. Some stations in this category, however, may not have completed their authorized construction. This would include a station that has not built anything and has a CP or extension of its "checklist" deadline⁴⁸ and a station that has constructed a reduced facility and is operating pursuant to Special Temporary Authority ("STA"). In addition to turning off their analog service, these stations may need to make changes to match their post-transition facilities as specified in the new DTV Table Appendix B. The difficulty faced by these stations will depend on the type of change and degree of change required to complete their authorized construction.⁴⁹

⁴⁴ As noted *infra* in ¶ 29, "singletons" or "single-channel licensees" refers to those licensees that do not have a second or "paired" channel to convert to DTV. See *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18300 ¶ 49, n.101 (citing to *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, 13 FCC Rcd 6860, 6865 ¶ 11 (1998) ("*Service Reconsideration Order*").

⁴⁵ "Flash-cut" refers to the situation where a station gives up its pre-transition digital channel and transitions to digital service using its analog channel or a newly allotted channel. See *infra* discussion of flash cutting in section V.B.

⁴⁶ See *supra* ¶ 17.

⁴⁷ See Appendix D.

⁴⁸ See *infra* ¶ 56 (explaining the deadline established for building "checklist" facilities).

⁴⁹ For example, stations in this category may need to adjust their transmitter power, their antenna design, their antenna location, or some combination thereof. We expect that relatively minor adjustments to operating power can be done easily, perhaps through the use of in-house engineers. See Ex Parte Comments of Capitol Broadcasting Company, Inc. in MB Docket No. 03-15 (dated April 27, 2005) ("*Capitol Ex Parte*"). Changes involving more significant power changes and/or changes to transmitting antennas may require more time and effort. For example, a number of stations currently have a top-mounted analog antenna and a side-mounted digital antenna, and to provide full digital service will need to re-mount the digital antenna to the top of the tower. According to Capitol Broadcasting, it may take a crew approximately two to three weeks to complete the installation once the necessary hardware and crew are on site, assuming the same tower site and good weather. See *id.* See *infra* discussion in section V.C.3. Also, if an entirely new transmission line and/or antenna must be installed, additional time will be needed to order the transmission line and antenna and have it delivered to the site. According to Capitol Broadcasting, it may take up to six months to design, order, receive and install a new antenna. See *id.* Other stations may need to install a new DTV transmitter. Harris Corporation expects that a large number of new digital (continued....)

23. Furthermore, some of these stations may have pending applications with unresolved international coordination issues. Licensees in this category with pending applications should consult with the Commission staff about the timing for action on their applications. In addition, they should coordinate with Commission staff regarding necessary modifications to their applications that will result in international approval. They may need to proceed with constructing authorized facilities to the extent approved by Canada or Mexico if the issues delaying action on their applications cannot be resolved in time to allow construction to be completed before the end of the transition.⁵⁰

2. Category Two: Stations returning to their analog in-core channel

24. There are 517 stations that will return to their current analog in-core channel for post-transition operations, based on the proposed new DTV Table.⁵¹ Stations in category two may face each of the category one challenges involving tower construction, antenna replacement or relocation, and transmitter replacement or power adjustments.

25. In addition, these stations may need to determine whether they can use any of their analog or digital transmission equipment (*e.g.*, transmitter, transmission line or waveguide, and antenna).⁵² If a station finds it has a transmitter that it could use, it will also need to determine whether that transmitter can provide the appropriate power level. It is our understanding that a station that is going to stay within a spectrum band (low-VHF, high-VHF or UHF) and change its frequency within 5 or 6 channels (36 MHz or less) will most likely require fewer technical changes than if the change of broadcast frequency is more than 6 channels.⁵³ We expect that channel moves of fewer than 5 or 6 channels may require only minor modifications to the station's digital transmitter, whereas more significant changes may require major modifications or an entirely new transmitter.⁵⁴ We seek comment on these assumptions.

26. Stations that will return to their current analog channel also may need to determine whether their current analog or DTV antenna can be used. Generally, the design, condition and channel of operation of their current antennas, as well as the stations' directional antenna characteristics established in the new DTV Table Appendix B, as adopted, must be considered when these stations evaluate the suitability of their antennas for post-transition DTV operation. The ability of these stations to use an existing digital antenna may depend upon how significant the change in channel numbers will be for these stations as they move from their current DTV channel back to their current analog in-core channel. It is our understanding that channel moves of more than 5 or 6 channels will likely require a

(Continued from previous page)

transmitters will need to be ordered, manufactured, and installed. *See Ex Parte Comments of Harris Corporation in MB Docket No. 03-15 (dated April 3, 2007) ("Harris Ex Parte")*.

⁵⁰ These stations may be required to adjust their transmitter power, their antenna location, their antenna design, or some combination thereof.

⁵¹ *See supra* ¶ 17. This group of stations includes some analog singletons and flash-cutters.

⁵² According to Harris Corporation, it may take 1 to 4 weeks for a station to assess whether its analog transmitter is digital capable or if its digital transmitter can be retuned. If a new transmitter is needed, Harris estimates it may take 3-4 months to obtain. If a new channel mask filter also is needed, Harris estimates it may take 6 months to obtain. *See Harris Ex Parte*.

⁵³ *See id.*; Capitol Ex Parte.

⁵⁴ According to Capitol Broadcasting, if only minor parts are required, the parts may be available on a vendor's shelf. If major components are required, it may take up to two months to receive. The modifications may take four to five days once the parts are at the transmitter site. *See Capitol Ex Parte*.

new antenna and transmission line or new waveguide.⁵⁵ We seek comment on these assumptions.

27. These stations also must consider the impact on their analog TV service, which might be disrupted entirely or limited in reach to a smaller area during periods of work on the tower. For example, a temporary reduction in coverage might be due to reduced power analog TV operation at a backup site in order to facilitate construction on the main tower facility.⁵⁶

3. Category Three: Stations moving to a completely new in-core channel

28. There are 117 stations that will move to a completely new in-core channel for post-transition operations, based on the proposed new DTV Table.⁵⁷ These stations face similar challenges to those returning to their analog (in-core) channel. In addition, these stations will need to coordinate with other stations to complete their move. For example, another station may occupy the relocating station's post-transition channel or it may occupy an adjacent channel (located in the same or a nearby area) to the relocating station's post-transition channel. Also, these stations may find that their tower site cannot support three antennas at once, as may be necessary to accommodate their current analog and DTV operations while preparing for broadcasting on their post-transition channel.

4. Singleton stations

29. There are 137 stations that do not have a paired channel (*i.e.*, stations that do not have both an analog and a digital channel), based on the proposed new DTV Table. These stations are commonly referred to as "singletons." These stations fit in one of the preceding three categories, but they may encounter different challenges and circumstances that deserve special consideration in this review. Specifically, for this discussion, "singletons" include (1) those stations described in footnote 101 of the *Second DTV Periodic Report and Order* as licensees that did not receive a second or "paired" channel to use during the transition to DTV;⁵⁸ (2) those stations that had a paired DTV channel and that we authorized to discontinue providing analog TV service;⁵⁹ (3) those paired-channel stations that gave up their interim DTV channel pursuant to "flash cut" approval;⁶⁰ and (4) those paired-channel stations that we propose to allow to "flash cut."⁶¹ Singletons include DTV and analog TV stations, and can be unbuilt, operating at reduced facilities, or fully constructed and licensed. Analog TV singletons will be flash

⁵⁵ According to Capitol Broadcasting, it could take up to eight months to receive the new antenna and transmitter, if ordered today, depending upon demand. *See Capitol Ex Parte*. Waiting until closer to the end of the transition, when there is more likely to be even greater demand for such equipment, could result in even greater delays. According to Capitol Broadcasting, it generally will take approximately two weeks to take the old antenna down and can take up to two months to put the new antenna and waveguide up. *See id.*

⁵⁶ *See id.*

⁵⁷ *See supra* ¶ 17.

⁵⁸ *See Second DTV Periodic Report and Order*, 19 FCC Rcd at 18300 ¶ 49, n.101. As explained in this footnote, TV station permittees whose applications for a new station were not granted on or before April 3, 1997 were not eligible for an initial DTV paired license. In 1998, the Commission decided that such single-channel stations could build their authorized analog TV station and later convert to DTV on their single channel (but must convert by the end of the transition) or modify their authorization to DTV and build their new DTV station on their single channel. *See Service Reconsideration Order*, 13 FCC Rcd at 6865 ¶ 11.

⁵⁹ As noted in section V.A., *infra*, we have permitted these stations to turn in their analog channel and be digital-only.

⁶⁰ *See Public Notice*, "DTV Transition – Approval of 'Flash-Cut' Requests," DA 07-1847 (MB rel. April 25, 2007) ("Flash Cut PN").

⁶¹ *See infra* section V.B.

cutting from broadcasting on their analog channel to broadcasting on a digital channel. Flash-cutting often will involve singletons ending their analog TV operation and beginning their DTV operation on their current analog channel, but in some cases will require that a station change to a new channel for post-transition operation. Singleton stations, like those with paired channels, are responsible to ensure that they have completed the construction of their digital facilities by the February 17, 2009 deadline, except for stations whose initial CPs expire later.⁶² After February 17, 2009, stations that have not constructed analog facilities may only construct digital facilities on their post-transition channel.

30. Singleton licensees and permittees should have a post-transition channel in the proposed new DTV Table and proposed facilities specified in the proposed new DTV Table Appendix B, provided such permittee status is announced by Public Notice before the order establishing the new DTV Table is adopted.⁶³ DTV singletons remaining on their current DTV channel for post-transition operations face the same challenges identified in category one above. These stations must complete authorized construction consistent with the new DTV Table Appendix B, as adopted. Stations that have done so and are operating and licensed need not take any further steps at this time. DTV singletons that have not completed construction must do so as discussed below.⁶⁴ A few DTV singletons are moving to different channels in the new DTV Table, including some currently authorized for out-of-core operations. In addition to the potential challenges described for paired stations going to a new channel for post-transition operation (category three in the preceding section), unbuilt DTV singletons must complete their required construction by their CP expiration date, whether that date is before or after the transition deadline.

31. Analog singletons that will remain on their currently authorized channel for post-transition operations face the same challenges identified in category two above. Unbuilt analog singletons must also meet their CP expiration date requirements. Depending on the time left for them to complete construction, most of these stations should consider requesting that the Commission modify their authorization to specify DTV operation, particularly stations that have recently received CP grants.⁶⁵ Stations in this situation that choose to construct their authorized analog broadcast facility for operation until February 17, 2009 should plan for its conversion to DTV when they purchase their transmitter and antenna system.

32. Analog singletons moving to a new channel for post-transition operations face the same issues identified in category three above. Some also have a CP for their analog channel that expires either before or after the transition deadline. Stations that have an analog CP expiring before the transition deadline should consider applying for a modification of their analog CP to make it easier to complete the required analog channel construction while also building their post-transition facility. They also should take steps to efficiently complete this simultaneous dual-channel construction of both their pre-transition analog and post-transition facilities (for example, having a tower crew install both antennas at the same time or ordering an antenna or transmitter that can be readily converted from analog operation to DTV operation). They may also want to explore the possibility of requesting that their single-channel analog authorization be modified to specify pre-transition DTV operation on their post-transition channel. Such

⁶² Single-channel stations receive a CP with a three-year construction period. 47 C.F.R. § 73.3598(a). Thus, new stations whose CPs were granted after February 2006 will have construction deadlines later than February 17, 2009.

⁶³ See *Seventh FNPRM*, 21 FCC Rcd at 12117-18 ¶¶ 50-53, 12123, app.A, 12147, app.B.

⁶⁴ See *infra* section V.C.

⁶⁵ See, e.g., *New Permittees PN*, *supra* note 41. Stations that receive a new CP and that will remain on this channel for post-transition operations may either construct their analog facilities (for use until the end of the transition) or apply to the Commission for permission to construct a digital facility on their analog channel for post-transition operations. *Seventh FNPRM*, 21 FCC Rcd at 12118-19 ¶ 54.

a modification would require interference protection to be provided to all potentially affected stations and construction to be completed before the station's CP expires. Stations whose analog CP will expire after the transition deadline should consider applying for a modification of their analog CP to specify the post-transition facilities that they will need to complete before their CP expires. As noted above, February 17, 2009 is the deadline for all full-power television broadcast stations to end analog transmissions.

V. ISSUE ANALYSIS

33. In this Third DTV Periodic Review, we consider how to ensure that full-power TV broadcast stations complete their transition to digital-only operations by the statutory deadline. Specifically, we consider when stations may and must cease operating on their analog channel, when stations may and must begin operating on their post-transition channel, and what regulatory flexibility we can provide to facilitate these efforts. By statute, stations must cease analog operations by 11:59 p.m. on February 17, 2009. Stations, thus, should have their digital facilities in place and ready to commence operations no later than 12:00 a.m. on February 18, 2009.

34. We seek comment on what actions the Commission should take to facilitate broadcasters' completion of the transition by the statutory deadline. We seek comment on how to ensure that broadcasters (1) complete construction of their post-transition facilities in a timely and efficient manner; and (2) have in place (in-core) facilities that can reach their viewers. In view of the statutory change from a soft to a hard transition deadline, the Commission's focus has moved beyond simply ensuring that stations are operating in digital. Our focus is now on overseeing broadcasters' construction of their final, post-transition channel with facilities that will reach viewers in their authorized service areas by the time they must cease broadcasting in analog.

35. We begin by proposing that every full-power television broadcast station file a form with the Commission that details (1) the current status of the station's digital transition; (2) the additional steps, if any, the station needs to take to be prepared for the switch-over deadline; and (3) a plan for how it intends to meet that deadline. These filings will be posted on the Commission's website. We believe that these forms will assist the Commission, industry, and the public in assessing progress and making plans for the digital switchover date.

36. We also consider when stations may reduce their current (pre-transition) television service in order to complete their transition. Next, we consider the deadlines by which stations must construct and operate their current DTV channels or lose interference protection – or even authority to operate – on those channels. Third, we propose deadlines for the construction and operation of post-transition facilities and consider the ability of stations to transition early. We also consider the steps necessary for broadcasters to construct and operate their post-transition channels. Issues raised in this section include the rules, procedures and interference standards for stations to file applications for CPs to build their post-transition DTV facilities and to request authorization to maximize their facilities. Finally, we address other issues related to the DTV transition.⁶⁶

A. Reduction and Termination of Analog Service

37. In this section, we consider the reduction and termination of stations' analog TV service. Until February 17, 2009, the Commission's rules require stations to continue operating their existing

⁶⁶ While we recognize the Commission's rules for full-power television will need to be updated to eliminate outdated references to analog and out-of-core television service and clarify engineering issues that differ for digital transmission and analog transmission, these housekeeping matters will be addressed in a separate rulemaking in the DTV proceeding, MB Docket No. 87-268. We, nonetheless, seek comment on whether resolution of any housekeeping issues requires more immediate attention.

licensed analog facilities.⁶⁷ To best achieve their respective transitions, however, some stations may find it desirable to reduce or terminate their analog operations before the February 17, 2009 transition date. In some cases, stations may need to reduce or end their analog service because such operations may impede construction and operation of post-transition (digital) facilities. Such circumstances may include, but are not limited to: (1) stations that would like to switch their side-mounted digital antenna with their top-mounted analog antenna before the end of the transition;⁶⁸ (2) stations that need to add a third antenna to their tower but cannot do so without reducing or ending analog service because the tower cannot support the additional weight; and (3) stations that are terminating analog service early as part of a voluntary band-clearing arrangement. We seek comment on these and other circumstances where stations can facilitate their transitions by reducing or terminating their analog service in advance of the transition deadline.

38. Background. The Commission generally has not favored reductions in television service. Proposals that would result in a loss in TV service have been considered to be *prima facie* inconsistent with the public interest, and must be supported by a strong showing of countervailing public interest benefits.⁶⁹ Consistent with this precedent, the Commission allows stations to reduce their service from that required by their licenses only upon an appropriate public interest showing.⁷⁰ Losses in service may be justified, for example, to facilitate the station's transition to DTV.⁷¹ The Commission is generally most concerned where there is a loss of an area's only network or NCE TV service,⁷² or where the loss results in an area becoming less than well served, *i.e.*, served by fewer than five full-power over-the-air signals.⁷³ In cases in which a station seeks to reduce analog TV service, it can also use an engineering

⁶⁷ 47 U.S.C. § 312; *see also* 47 C.F.R. §§ 73.1615, 73.1690, 73.1740, 73.1745 and 73.1750. Moreover, the public has a legitimate expectation that existing broadcast services will be maintained. *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14230 ¶ 34 (2006); *see also* 47 U.S.C. § 307(b)..

⁶⁸ *See infra* discussion in section V.C.3.

⁶⁹ *See West Michigan Telecasters, Inc.*, 22 FCC 2d 943 (1970), *recon. denied*, 26 FCC 2d 668 (1970), *aff'd*, *West Michigan Telecasters, Inc. v. FCC*, 460 F. 2d 883, 889 (D.C. Cir. 1972) (finding that losses in service are *prima facie* inconsistent with the public interest); *Triangle Publications, Inc.*, 37 FCC 307, 313 (1964) (finding that "once in operation, a station assumes an obligation to maintain service to its viewing audience and the withdrawal or downgrading of existing service is justifiable only if offsetting facts are shown which establish that the public generally will be benefited"); *Television Corporation of Michigan v. FCC*, 294 F.2d 730 (1961) (finding that deprivation of service to any group was undesirable, and can be justified only by offsetting factors); *and Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956) (finding that a curtailment of service is not in the public interest unless outweighed by other factors).

⁷⁰ *See, e.g.*, *KTVO-TV, Inc.*, 96 FCC 2d 472 (1983) (upholding initial decision that found loss of TV service was outweighed by the provision of a new first service and additional service gains).

⁷¹ The Commission has placed a very high priority on accelerating the television industry's transition to DTV. *See, e.g.*, *Fifth Report and Order*, 12 FCC Rcd at 12842-45 (1997). *See also In Re Applications of KRCA License Corp., KSLs, Inc., Golden Orange Broadcasting Co. Inc.*, 15 FCC Rcd 1794 (1999) (allowing stations to collocate their NTSC and DTV facilities as a means to speed DTV conversion).

⁷² *See, e.g.*, *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Lima, OH; Muncie, IN, Rockford, IL, and Grand Rapids, MI)*, MM Docket No. 87-417, Memorandum Opinion and Order, 7 FCC Rcd 5933 (1992) (denying request to reduce TV service because it would deprive a community of its only currently allotted NCE TV channel).

⁷³ *See, e.g.*, *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Columbus and Monona, WI)*, MB Docket No. 05-122, Memorandum Opinion and Order, 21 FCC Rcd 10012 (MB 2006) (noting that most of the loss area is well served with five or more aural services).

analysis performed in accordance with the Office of Engineering and Technology's OET Bulletin No. 69 ("OET 69") methodology⁷⁴ to show that the area where service would be reduced is area that is already terrain shielded such that viewers located in that area do not actually receive the station's signal over-the-air now.

39. Notwithstanding the strong public interest in maintaining TV service, the Commission does permit the early return of out-of-core (TV channels 52-69) analog channels under certain circumstances in order to facilitate the DTV transition. The Commission established policies to facilitate voluntary "band-clearing" of the 700 MHz bands to allow for the introduction of new public safety and other wireless services and to promote the transition of out-of-core analog TV licensees to DTV service inside the core TV spectrum.⁷⁵ Generally speaking, these policies provide that the Commission will approve voluntary agreements between incumbent broadcasters and new licensees to clear the 700 MHz band early if consistent with the public interest. The Commission has approved several such requests to return out-of-core channels in accordance with this band-clearing policy.⁷⁶

40. The Commission's 700 MHz band-clearing policies differ somewhat depending on whether a station is located on TV channels 59-69, which might affect use of the upper portion of the band, or on TV channels 52-58, which would only affect use of the lower portion of the band. Envisioning the early recovery of TV channels 60-69, the Commission established a "rebuttable presumption" favoring requests for voluntary band-clearing involving channels 59-69.⁷⁷ In contrast, the

⁷⁴ See *OET Bulletin No. 69*, "Longley-Rice Methodology for Evaluating TV Coverage and Interference," (Feb. 6, 2004) ("OET Bulletin No. 69"), available at www.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet69/oet69.pdf.

⁷⁵ See WT Docket No. 99-168 and GN Docket No. 01-74. See also *infra* notes 77 and 78.

⁷⁶ See, e.g., *Johnson Broadcasting of Dallas, Inc.* (KLDT, Lake Dallas- Fort Worth, TX), 21 FCC Rcd 13459 (2006) (returning NTSC Channel 55); *Associated Christian Television System* (WACX, Leesburg, FL), 20 FCC Rcd 12425 (MB 2005) (returning NTSC Channel 55); *Puget Sound Educational TV* (KWDC, Tacoma, WA), 20 FCC Rcd 12423 (MB 2005) (returning NTSC Channel 56); *WLNY-TV, Inc.* (WLNY, Riverhead, NY), 20 FCC Rcd 14765 (MB 2005) (returning NTSC Channel 55); *WRNN TV Associates LP* (WRNN, Kingston, NY), 19 FCC Rcd 12343 (MB 2004) (returning NTSC Channel 62); *Commonwealth Public Broadcasting Corp.* (WNVN, Goldvein, VA), 18 FCC Rcd 18517 (MB 2003) (returning NTSC Channel 53); and *Lenfest Broadcasting, LLC* (WWAC, Atlantic City, NJ), 17 FCC Rcd 19148 (MB 2002) (returning NTSC Channel 53). In each of these cases, the Commission has granted authority to stations to (i) cease analog broadcasting on their NTSC channel and surrender their license for that channel prior to the end of the DTV transition period and (ii) thereafter operate as a single channel, digital-only television station.

⁷⁷ The Commission established its policies on voluntary band-clearing for TV Channels 59-69 in a series of orders. The Commission initially stated that it would "consider specific regulatory requests needed to implement voluntary agreements" between incumbent broadcasters and new licensees to clear the Upper 700 MHz Band early, if consistent with public interest. 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 (2000). Next, the Commission established a rebuttable presumption favoring the grant of requests that would both result in certain specific benefits and avoid specific detriments. See *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845, 20870-71 ¶ 61 (2000). These policies were further extended to "three-way" band clearing arrangements, in which non-Channel 59-69 broadcasters were also potential parties. 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, 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). Finally, the Commission provided certain additional flexibility to facilitate voluntary agreements for early clearing and granted a request for relief from two specific (continued....)

Commission did not anticipate recovery of TV channels 52-59 until after the DTV transition was complete and, as a result, decided to consider requests for voluntary band-clearing involving those channels on a case-by-case basis.⁷⁸ In this case-by-case review, the Commission considers whether grant of the request would result in public interest benefits, such as making new or expanded public safety or other wireless services available to consumers, especially in rural or other underserved communities.⁷⁹ The Commission weighs these benefits against any likely public interest harms, such as the loss of any of the four stations with the largest audience share in the designated market area, the loss of the sole service licensed to the local community, the loss of a community's sole service on a channel reserved for NCE TV broadcast service, or a negative effect on the pace of the DTV transition in the market.⁸⁰

41. Discussion. In light of the hard deadline for the cessation of analog TV service, we believe the most significant public interest objective should be to ensure that stations meet the transition deadline. The original statutory provision requiring the termination of analog broadcasts established December 31, 2006 as the last day for analog operations, but allowed that deadline to be postponed if an 85 percent DTV reception benchmark was not reached in a given market.⁸¹ The Commission's goal under this former approach was to increase DTV operations as quickly as possible without causing significant analog service loss.⁸² We believe, however, that Congress' adoption of the hard deadline of February 17, 2009, now weighs in favor of an increasing tolerance for the loss of analog service as we near the switch-over date and where it will facilitate the transition.

42. Stations with Out-of-Core Analog Channels. As noted above, stations that might affect the upper 700 MHz band (*i.e.*, TV channels 59-69) can receive a "rebuttable presumption" favoring their requests to terminate analog service. We believe the disparate band-clearing treatment with respect to stations in the lower 700 MHz band (*i.e.*, TV channels 52-58) is no longer appropriate. The hard deadline applies equally to both portions of the 700 MHz band. In addition, Congress has mandated that the Commission begin the auction of recovered analog broadcast spectrum in the 700 MHz band no later than January 28, 2008.⁸³ Accordingly, we propose to apply the same "rebuttable presumption" standard to voluntary agreements for clearing TV channels 52-58 as now applies to such agreements for clearing TV channels 59-69.⁸⁴ Moreover, we propose to apply the relaxed "rebuttable presumption" to out-of-core stations seeking to reduce rather than terminate their analog service. Requests to reduce or terminate analog service would be made in accordance with the Commission's rules.⁸⁵ We seek comment on our

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DTV-related requirements. See Order on Reconsideration of the Third Report and Order, 16 FCC Rcd 21633 (2001) ("*Third R&O Recon*").

⁷⁸ See *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1095-96 ¶ 184.

⁷⁹ See *id.* at n. 549. See also cases in *supra* note 76.

⁸⁰ See *Lower 700 MHz Report and Order*, 17 FCC Rcd at 1096 ¶ 184 n.549.

⁸¹ See 47 U.S.C. § 309(j)(14)(B) (2005); and *supra* note 17.

⁸² See *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18311-19 ¶¶ 72-87.

⁸³ DTV Act § 3003 unified the timing of auctions for the assignment of remaining spectrum from TV Channels 52-69. The Communications Act now requires the Commission to commence the auction of recovered analog broadcast spectrum no later than January 28, 2008 and deposit the proceeds of such auction in the Digital Television Transition and Public Safety Fund no later than June 30, 2008. 47 U.S.C. § 309(j)(15)(C)(v).

⁸⁴ In other words, we propose to apply the relaxed "rebuttable presumption" standard to all out-of-core stations seeking to return their analog TV channels. See *supra* ¶ 40 (discussing "rebuttable presumption" standard).

⁸⁵ Stations making requests to reduce analog TV service should do so in accordance with the rules to modify an existing license or authorization by using FCC Form 301 (commercial stations) or FCC Form 340 (NCE stations). (continued....)

proposed treatment of out-of-core stations seeking to reduce or terminate their analog service.

43. Stations with In-Core Analog Channels. In contrast to out-of-core stations' return of their analog channels, in-core stations' requests to reduce and terminate analog service have been less favored to this point. We believe it may now be appropriate to examine the circumstances under which we will allow in-core stations to reduce or discontinue analog TV broadcasting. We seek comment on the factors and circumstances we should consider when evaluating in-core stations' requests to reduce or terminate their analog TV service before the February 17, 2009 transition date. We invite comment on ways to ensure that stations meet the statutory transition deadline, while still minimizing the loss of TV service to consumers. If we permit early reduction or termination of analog service, how do we ensure that the public continues to have access to news and information, including emergency and other public safety information during the transition?

44. First, with respect to a station requesting to reduce its analog service – short of terminating its analog broadcasting, we seek comment on whether we should establish a presumption that any reduction in a station's analog TV service is in the public interest if:

- (1) the proposed reduction is directly related to the construction and operation of post-transition facilities and would ensure that the station or another station can meet the deadline;
- (2) the proposed reduction in analog service is less than five percent of either the station's service area or its population served;
- (3) the proposed reduction does not cause the loss of an area's only top-four network or NCE TV service;
- (4) the proposed reduction does not result in an unreasonable reduction in the number of services available in that area;⁸⁶
- (5) the broadcast station proposing the reduction is able to deliver its signal to cable and satellite providers so that the reduced analog signal does not prevent cable and satellite carriage; and
- (6) the broadcast station proposing the reduction commits to on-air consumer education about the station's transition and how to continue viewing the station.

We seek comment on the usefulness and timing of this proposal, including whether there are other factors or situations where we should presume that a reduction in service would be, or would not be, in the public

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See 47 C.F.R. §§ 73.1615, 73.1690, 73.3533, 73.3538. Stations making requests to terminate TV service should do so in accordance with the rules to modify an existing license or authorization and to discontinue operations. See *id.* See also 47 C.F.R. § 73.1750. Stations discontinuing only one service of their paired license, however, should not return their license or authorization, as would otherwise be required by 47 C.F.R. § 73.1750. In addition, stations making requests to reduce service may, if more applicable, instead apply for an STA pursuant to 47 C.F.R. § 73.1635. Consistent with the rules for license modification and discontinuance of operation, stations terminating their service may send a letter to the Video Division of the Media Bureau and send an e-mail to analog@fcc.gov in lieu of filing an application. See 47 C.F.R. §§ 73.1690, 73.1750.

⁸⁶ We seek comment on what that number of services would be. For example, the Commission has previously been concerned where the loss results in an area becoming less than well served, *i.e.*, with fewer than five full-power over-the-air signals; see *supra* note 73. In other contexts, such as the satellite context, we note that the Commission has considered whether an area would become "underserved," *i.e.*, an area with two or fewer full-service stations. *Television Satellite Stations Review of Policy and Rules*, MM Docket No. 87-8, Report and Order, 6 FCC Rcd 4212, 4215 ¶ 19 (1991) ("[A] proposed satellite's community of license is considered underserved if there are two or fewer full-service stations already licensed to it."). We propose to allow stations to minimize the loss of service to their service area or population and satisfy this condition through the use of analog translators. As previously noted, the statutory deadline applies only to full-power stations. See *supra* note 3; see also 47 U.S.C. §§ 309(j)(14) and 337(e). Stations interested in the temporary use of analog translators should file requests for STA in accordance with 47 C.F.R. § 73.1635.

interest. For example, should we consider the level of cable and satellite penetration in the areas that will lose over-the-air service? We also seek comment on whether and, if so, how these factors should be relaxed as we approach the DTV transition date. As noted above, requests to reduce analog service would be made in accordance with the Commission's rules.⁸⁷

45. If a station is unable to qualify for the above proposed presumption, we propose to consider the station's request to reduce analog TV service (on an in-core channel) on a case-by-case basis. We invite comment on the appropriate showing and balancing of factors to consider in such a case-by-case analysis. As above, we seek comment on whether we should permit an increasing amount of analog TV service loss the closer we get to the end of the transition. What information must stations provide to demonstrate that reduced analog service would be in the public interest? We would expect that our case-by-case analysis would involve consideration of the factors discussed above. For example, we believe that broadcasters must be able to deliver their signals to cable and satellite providers so that reduced analog signals do not prevent cable and satellite carriage. In addition, we believe that broadcasters must also commit to on-air consumer education about the station's transition and how to continue viewing the station. We seek comment on these proposals.

46. Some broadcasters have side-mounted antennas and similar problems that prevent them from completing the build-out of their digital facilities while they are still operating their full analog facilities.⁸⁸ Such stations, if they are providing DTV service to 100 percent of their replication area, may want to wait until February 17, 2009 to move their digital antenna into its final position.⁸⁹ This approach may be acceptable provided there is a minimal disruption of service after the deadline due to post-deadline construction activities. We seek comment on this approach and urge each station operating under these circumstances to consider how much of their replicated area is served by their side-mounted digital antenna. It is critically important that analog over-the-air viewers who obtain the necessary digital receivers (whether TV sets or D-to-A converters) are able to receive DTV service over-the-air upon expiration of the deadline for the transition on February 17, 2009. If it is necessary for stations to reduce analog service before the transition to be sure all viewers have digital service on and after the transition date, we will consider such requests.

47. With respect to a station requesting to terminate its analog TV service on an in-core channel, we seek comment on whether and, if so, under what conditions we would permit such an action. We would expect to apply a stricter standard to the early termination of analog in-core service than to a reduction in service. We believe our analysis of requests to terminate analog service would at least involve consideration of the relevant factors discussed above for a reduction of service. We seek comment on this proposal, and also on whether we should require a station requesting termination of analog in-core service to demonstrate that a reduction in service is an unacceptable alternative. As noted above, requests to terminate in-core analog service would be made in accordance with the Commission's rules.⁹⁰

⁸⁷ See *supra* note 85.

⁸⁸ See, e.g., *DTV Build-Out; Applications Requesting Extension of the Digital Television Construction Deadline*, Order, FCC 07-91 at section III.C. (rel. May 18, 2007) ("*Construction Deadline Extension Order*"); and *DTV Build-Out; Requests for Waiver of July 1, 2005 and July 1, 2006 "Use or Lose" Deadlines Requests for Waiver of the August 4, 2005 "Checklist" Deadline*, Order, FCC 07-90 at section III.C. (rel. May 18, 2007) ("*Use or Lose Order*"). Both orders recognize the unique technical challenges faced by stations with side-mounted antenna-related issues.

⁸⁹ See *infra* discussion in section V.C.3. (addressing stations with special circumstances).

⁹⁰ See *supra* note 86.

B. Return of Pre-Transition DTV Channel; Flash Cut Requests

48. In this section, we consider whether and, if so, when to allow additional stations to return their pre-transition-only DTV channel (*i.e.*, a DTV channel that is not their final, post-transition channel) and flash cut at or before the transition deadline from their current analog channel to their post-transition channel. The *Second DTV Periodic Report and Order* permitted stations in certain situations to surrender their pre-transition DTV channel, operate in analog on their analog channel, and then flash cut to digital by the end of the transition on their post-transition channel.⁹¹ As the Commission noted, the potential public interest benefits of flash cuts include freeing the station to focus its efforts on completion of its post-transition channel and the creation of opportunities for the provision of public safety and other wireless services on the pre-transition DTV channel.⁹² Based on the criteria established in the *Second DTV Periodic Report and Order*, the Media Bureau has approved the flash cut requests of numerous stations.⁹³ In this Third DTV Periodic Review, we consider expanding the range of circumstances in which we will allow stations to flash cut.

49. Background. In the *Second DTV Periodic Report and Order*, the Commission permitted satellite stations to flash cut because of their unique status and circumstances and provided for these stations to notify the Commission of their decision to flash cut by their initial channel election deadline.⁹⁴ The Commission stated that satellite stations opting to flash cut would retain their interference protection (defined in the proposed new DTV Table Appendix B) as if they had met the applicable replication/maximization build-out requirements.⁹⁵

50. The Commission also permitted stations with out-of-core DTV channels to flash-cut under certain conditions and required notification of their decision to flash cut by their initial channel election deadline.⁹⁶ The Commission presumed that granting such requests would be in the public interest if the station demonstrated that (1) it was assigned an out-of-core DTV channel,⁹⁷ and (2) grant of the request would not result in the loss of a DTV channel affiliated with one of the four largest national television networks (ABC, CBS, NBC, or Fox).⁹⁸ In the case of requests that did not meet these criteria,

⁹¹ The *Second DTV Periodic Report and Order* required the Media Bureau to approve a station's request to surrender its pre-transition DTV channel and election to flash cut in certain circumstances. *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18321-18323 ¶¶ 95-97, 18325 ¶¶ 102-104.

⁹² *Id.* at 18323 ¶ 96.

⁹³ *Flash Cut PN*, *supra* note 60.

⁹⁴ *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18325 ¶ 102. TV satellite stations are full-power broadcast stations authorized under Part 73 of the Commission's rules to retransmit all or part of the programming of a parent station that is typically commonly owned. *Id.* at 18323 ¶ 98. Unlike full-service stations, satellite stations have chosen to forego or relinquish full-service status and instead retransmit the programming of a parent station because full-service operation of the satellite facility is not economically viable. Eligible satellite stations were assigned a paired DTV channel in the current DTV Table. The *Second DTV Periodic Report and Order* recognized that most satellite stations operate in small or sparsely populated areas that have an insufficient economic base to support full-service operations. *Id.* at 18324 ¶ 100.

⁹⁵ *Id.* at 18325 ¶ 104.

⁹⁶ *Id.* at 18322 ¶ 95.

⁹⁷ *Id.* The Commission noted the "greater potential for wasted expenditures in DTV facilities built in the 700 MHz band (since there will not be an opportunity to remain in that band after the transition)" and "the potential for earlier use of this spectrum by public safety and other 700 MHz licensees." *Id.*

⁹⁸ The Commission has "relied on affiliates of the four largest national television networks to achieve the necessary milestones throughout the DTV transition." *Id.* The Commission also noted that the presumption is neither (continued....)

the Commission stated that it would consider all the relevant public interest factors in deciding whether to approve the request. These factors include the advancement of the provision of wireless and public safety services, the acceleration of the DTV transition, and the loss of broadcast service. Like satellite stations, full-service out-of-core stations that are permitted to flash cut would retain their interference protection (defined in the new DTV Table Appendix B, as adopted) as if they had met the applicable replication/maximization build-out requirements.⁹⁹ The Commission also stated in the *Second DTV Periodic Report and Order* that stations would not be eligible to flash cut if they “have been denied an extension of the construction requirements and admonished because they failed to demonstrate that they are meeting the necessary criteria for an extension and have not come into compliance.”¹⁰⁰

51. The Media Bureau recently approved by Public Notice the flash cut requests of 32 stations based on the criteria established in the *Second DTV Periodic Report and Order*. These stations were approved to turn off or discontinue construction of their pre-transition DTV channel.¹⁰¹ In addition, the Public Notice invited any other station to flash cut if it meets the criteria established in the *Second DTV Periodic Report and Order*.¹⁰²

52. **Discussion.** We seek comment on whether and, if so, under what circumstances we should accept new requests by stations to return their pre-transition DTV channel before the end of the transition and “flash cut” from their analog channel to their post-transition channel (which must be different from their pre-transition DTV channel).¹⁰³ For instance, we seek comment on the following factors: (1) whether the DTV station is operating on TV channels 52-69; (2) whether the station is affiliated with one of the four largest national television networks (ABC, CBS, NBC, or Fox); (3) whether the station’s pre-transition DTV channel is allotted to another station for post-transition use and the station’s return of the channel will facilitate the other station’s construction of its post-transition digital facility; and (4) the station’s financial hardship. We invite comment on these criteria and on other criteria that may be relevant. We encourage commenters to address the public’s desire to continue to receive DTV signals that are currently available and the impact that allowing stations to turn off pre-transition DTV signals would have on the successful and timely completion of the transition. We also seek comment on the impact of this proposal on cable and satellite subscribers. Consistent with the decision in the *Second DTV Periodic Report and Order*, stations that have been admonished by the Commission for failure to meet their construction deadline would not qualify to flash cut.¹⁰⁴

C. Construction Deadline for Full, Authorized DTV Facilities

53. In light of the short amount of time remaining before the transition deadline, it is critical that stations finalize construction of their post-transition facilities expeditiously to ensure the provision of TV broadcast service to the public when analog transmissions cease. In this section, we consider whether to require stations to continue construction of pre-transition channels that are not going to be used by the station after the transition. We also consider the deadline by which we will require TV broadcast stations

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conclusive nor dispositive and that special circumstances raised by the resulting loss of digital broadcast service could rebut the presumption. *Id.* at 18323 ¶ 96.

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 18323 ¶ 97.

¹⁰¹ *Flash Cut PN*, *supra* note 60.

¹⁰² *Id.*

¹⁰³ Stations may continue to obtain flash cut approval pursuant to the *Second DTV Periodic Report and Order* and *Flash Cut PN*.

¹⁰⁴ *See Second DTV Periodic Report and Order*, 19 FCC Rcd at 18321 ¶ 95.

to complete construction of their post-transition facilities.

54. As discussed below, we are proposing to adopt a different approach for the remainder of the transition with respect to deadlines for construction of DTV facilities and interference protection. Until now, a primary focus of the Commission has been to facilitate the initiation of DTV service to the public during the transition.¹⁰⁵ This approach was designed, in part, to accomplish the goal of completing the transition by the December 31, 2006 “flexible” deadline originally established by Congress, which allowed for exceptions to the deadline.¹⁰⁶ Now that Congress has established a “hard” deadline for completion of the transition, with no exceptions, we believe our emphasis should shift toward ensuring that DTV stations will be providing service on their final, post-transition channels by that date. In general, we now must focus on striking the appropriate balance between the public interest in assuring that post-transition channels are fully constructed by February 17, 2009, and the public interest in pre-transition digital and analog service. These, like other issues raised in this Notice, require careful self-assessment by licensees to determine how best to serve the public while at the same time making efficient use of the resources available (manufacturing capacity, tower crews, etc.) available to them.

55. Previous Construction Deadlines and Use or Lose Policies. As discussed above, the DTV construction schedule adopted by the Commission in 1997, provided for varying construction deadlines based on the size of the market and type of station, with all stations required to construct by May 1, 2003.¹⁰⁷ In 2004, the Commission established two deadlines by which stations were expected to either replicate or maximize DTV service on their current (pre-transition) DTV channel or lose interference protection to the unserved areas on that channel.¹⁰⁸ By July 1, 2005, top-four network affiliates in the top 100 markets were required to fully replicate or maximize if they will remain on their DTV channel after the transition. If these stations will move to another channel post-transition, they were required to serve at least 100 percent of their replication service population by July 1, 2005. By July 1, 2006, all other stations were required to fully replicate and maximize if they will remain on their current DTV channel after the transition. If they will move to another channel post-transition, they were required to serve at least 80 percent of their replication service population by July 1, 2006.¹⁰⁹ The Commission stated that stations that met the applicable “use-or-lose” deadline and that are going to move to a different channel after the transition would be permitted to carry over their authorized maximized areas to their new channels.¹¹⁰ In addition, these “use-or-lose” replication/maximization deadlines became the new deadlines for stations operating temporary DTV facilities pursuant to STA to complete construction of

¹⁰⁵ See *id.* at 18314-17 ¶¶ 78-80.

¹⁰⁶ See *supra* note 17. Guided by this statutory directive, the Commission established construction deadlines and “use or lose” policies that provided incentives to stations to provide DTV service during the transition, which in turn gave viewers an incentive to purchase equipment that would enable them to view these signals. See *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18314-15 ¶ 78.

¹⁰⁷ See section IV.A., *supra*. Under this schedule, television stations in the 10 largest TV markets and affiliated with the top four television networks (ABC, CBS, Fox, and NBC) were required to build DTV facilities by May 1, 1999. Stations affiliated with those networks in television markets 11 through 30 were required to construct their DTV facilities by November 1, 1999. All other commercial stations were required to construct their DTV facilities by May 1, 2002, and all noncommercial stations were to have constructed their DTV facilities by May 1, 2003. 47 C.F.R. § 73.624(d)(1).

¹⁰⁸ *Second DTV Periodic Report and Order*, 19 FCC Rcd at 18311-18319 ¶¶ 72-87.

¹⁰⁹ *Id.* at 18314-18315 ¶ 78.

¹¹⁰ *Id.* at 18317-18318 ¶¶ 85-86.

their licensed DTV facilities.¹¹¹ Approximately 80 percent of the stations in each of these categories met their respective deadlines.

56. In the *Second DTV Periodic Report and Order*, the Commission noted that certain stations had not yet been granted an initial DTV construction permit. The Commission required that, by August 4, 2005, all such stations construct and operate “checklist” facilities that conform to the parameters of the DTV Table and other key processing requirements. The Commission stated that it would consider requests for waiver of the August 4, 2005 deadline on a case-by-case basis, using the criteria for extension of DTV construction deadlines.¹¹²

57. In two separate orders adopted subsequent to the adoption of this Notice, the Commission addressed applications filed by stations for extensions of time to construct DTV facilities and/or waivers of the deadline by which stations must build DTV facilities in order to retain the ability to carry over interference protection to their post-transition channel (so-called “use or lose” waivers).¹¹³ In the *Construction Deadline Extension Order*, the Commission considered 145 requests for an extension of time to construct a DTV facility.¹¹⁴ For 107 stations whose pre-transition DTV channel is the same as their post-transition channel, the Commission granted these applications and gave these stations an additional six months from the release date of the *Construction Deadline Extension Order* in which to complete construction.¹¹⁵ For 29 stations whose pre-transition DTV channel is different from their post-transition channel, the Commission granted these applications and gave these stations until 30 days after the effective date of the amendments to Section 73.624(d) of the rules adopted in the Report and Order in this Third DTV Periodic Review proceeding in which to complete construction.¹¹⁶ In the *Use or Lose Order*, the Commission considered 192 requests for waiver of the “use or lose” deadlines.¹¹⁷ For 102

¹¹¹ In 2001, the Commission temporarily deferred (until the Second DTV Periodic Review) the establishment of construction deadlines for these stations, provided they constructed initial DTV facilities designed to serve at least their communities of license. See *First DTV Periodic MO&O*, 16 FCC Rcd at 20597-98 ¶ 10, 20603-04 ¶ 24.

¹¹² *Second DTV Periodic Review Report and Order*, 19 FCC Rcd at 18327-18328 ¶ 111. See 47 C.F.R. § 73.622(f)(2); Public Notice, “Commission Details Application Filing Procedures for Digital Television,” 1997 WL 637847 (MB rel. Oct. 16, 1997). “Checklist” facilities have power and antenna height equal to or less than those specified in the DTV Table and are located within a specified minimum distance from the reference coordinates specified in the DTV Table. Because these facilities comply with the interference requirements specified in the rules, no further consideration of interference is required. In addition, because the DTV Table has been coordinated with Canada and Mexico, “checklist” facilities generally do not require further international coordination.

¹¹³ See generally *Construction Deadline Extension Order*, *supra* note 88; and *Use or Lose Order*, *supra* note 88.

¹¹⁴ See *Construction Deadline Extension Order*, *supra* note 88, at ¶ 1. The Commission granted 140 of these extension requests, 110 of which were to stations remaining on their current DTV channel for post-transition use. *Id.*

¹¹⁵ See *id.* at ¶ 1, and section III.A.

¹¹⁶ See *id.* at ¶ 1, and section III.B. As discussed *infra* in section V.C.3., ¶ 73, the Commission also granted four stations, facing unique technical challenges (e.g., side-mounted antenna-related issues) preventing them from completing construction of their DTV facilities, CP extensions until February 17, 2009. See *id.* at ¶ 1, and section III.C. As discussed *infra* in section V.C.3., ¶ 77, the Commission denied the extension requests of five stations: two of which met their DTV construction obligations and were permitted to continue to operate their licensed facilities, while the other three stations were admonished for failing to meet their DTV construction obligations. See *id.* at ¶ 1, and sections III.D. and III.E.

¹¹⁷ See *Use or Lose Order*, *supra* note 88, at ¶ 1. The Commission granted 185 of these “use-or-lose” waiver requests, 130 of which were to stations remaining on their current DTV channel for post-transition use. *Id.* The *Use or Lose Order* was adopted simultaneously with the *Construction Deadline Extension Order*.

stations whose pre-transition DTV channel is the same as the station's post-transition DTV channel, the Commission granted these stations a waiver and gave them an additional six months from the release date of the *Use or Lose Order* in which to complete construction.¹¹⁸ For 38 stations whose pre-transition DTV channel is different from the station's post-transition channel, the Commission granted these stations a waiver and gave them until 30 days after the effective date of the amendments to Section 73.624(d) of the rules adopted in the Report and Order in this Third DTV Periodic Review proceeding in which to complete construction.¹¹⁹ In both of these orders, the Commission reminded stations that the hard deadline for termination of analog TV service prevents consideration of any request for extension of full-power analog TV service beyond that date. The Commission advised stations given an extension or waiver to utilize this time to take all steps possible to complete construction as further extension or waiver requests may be evaluated under a more stringent standard.¹²⁰ We intend to treat similarly any stations that have a construction permit for which the original time to complete construction has not yet have expired. These stations still have time remaining on their original construction permit to complete the build-out of their pre-transition DTV facilities or they may have had their original construction permit extended and the extended deadline has not yet expired. Thus, these stations are not addressed in the *Construction Deadline Extension Order* or *Use-or-Lose Order*. These stations should continue to follow existing rules and procedures (*i.e.*, continue to build their current DTV CP and, if that CP expires before they have completed construction, file a request for extension of the CP). Once final rules are adopted in this proceeding and become effective, stations will be subject to the new rules, including changes to Section 73.624(d).

58. Revised Construction Deadlines and Use or Lose Policy. Going forward, we propose to establish construction deadlines for DTV facilities that vary based on a station's channel assignments for pre- and post-transition operation and other circumstances affecting the station's ability to complete final, post-transition facilities.¹²¹ We believe this revised approach will best permit stations to focus their efforts on completing construction of final, post-transition facilities in the time remaining before the end of the transition. In conjunction with this approach, we propose to tighten the standard by which we evaluate future requests for extension of time to construct a DTV facility.¹²² In addition, with respect to construction deadlines of February 17, 2009 or later, we propose to evaluate all requests for additional time to construct under the "tolling" standard currently applied to analog broadcast TV stations and DTV

¹¹⁸ See *id.* at ¶ 1, and section III.A.

¹¹⁹ See *id.* at ¶ 1, and section III.B. As discussed *infra* in section V.C.3., ¶ 73, the Commission also granted 45 stations, facing unique technical challenges (*e.g.*, side-mounted antenna-related issues) preventing them from meeting the applicable replication/maximization requirements, "use or lose" waivers and CP extensions until February 17, 2009. See *id.* at ¶ 1, and section III.C. As discussed *infra* in section V.C.3., ¶ 78, the Commission denied the "use or lose" waiver requests of seven stations. See *id.* at 1, and section III.D. As discussed *infra* in section V.C.3., ¶ 75, the Commission granted 10 stations their requests for waiver of the "checklist" deadline (the August 4, 2005 deadline established for all television stations to construct and operate "checklist" DTV facilities), four of which were to stations remaining on their current DTV channel for post-transition use. See *id.* at 1, and section III.E.

¹²⁰ See *Construction Deadline Extension Order*, *supra* note 88, at ¶¶ 2-3; and *Use or Lose Order*, *supra* note 88, at ¶¶ 3-4.

¹²¹ See *infra* sections V.C.1-3.

¹²² See *infra* section V.C.4. (¶¶ 79-84) (proposing a stricter standard to evaluate pre-transition requests for an extension of time to construct DTV facilities). See also proposed rule 47 C.F.R. § 73.624(d)(3) in Appendix A.

singleton stations.¹²³

59. In this section, we consider construction deadlines for differently situated stations. First, we consider stations whose post-transition channel is different from their pre-transition DTV channel. These are stations that will be starting over with a new channel for DTV service. Second, we consider stations whose post-transition channel is the same as their pre-transition DTV channel. Unlike the first group, these are stations that have long been assigned the channel that they will use for post-transition operations. Third, we consider stations in other situations, including those facing unique technical challenges. Finally, we consider alternatives that might afford stations with regulatory flexibility. We seek comment on the proposed deadlines and tentative conclusions below, and also seek comment on alternative deadlines for these stations.

1. Stations Whose Post-Transition Channel is Different From Their Pre-Transition DTV Channel

60. For stations whose pre-transition DTV channel is different from their post-transition channel, we propose not to require further construction of their pre-transition DTV channel and propose to establish February 17, 2009 as the deadline by which these stations must complete their final, post-transition facilities. These stations face a greater challenge than stations that will remain on the same DTV channel for post-transition operations. Stations moving to a new channel must apply for a construction permit on that channel and build new facilities based on the channel allotments in the new DTV Table Appendix B, as adopted.¹²⁴ Our proposal is designed to give stations facing the challenges associated with moving to a new DTV channel the maximum possible time to complete their post-transition facilities before analog transmissions must cease. We seek comment on this approach, and on whether an earlier construction date would still be appropriate in some circumstances.

61. With the establishment of the hard deadline, we believe the focus must turn to facilitating stations' efforts to construct their permanent DTV facilities that will be used to provide service after the transition. Therefore, at this stage in the DTV transition, we propose to allow a station to terminate further construction of its pre-transition DTV channel if this channel is not the station's post-transition channel. We request comment on this proposal. We believe that requiring stations to build or expand facilities that would only be operated until the end of the transition – *i.e.*, for less than two years – potentially could undermine the larger public interest objective of ensuring a timely transition to digital broadcasting by diverting limited resources from what is a far more important goal: the construction of final, post-transition facilities.

62. At the same time, however, we recognize that many stations whose pre-transition DTV channels are not the channels they will operate on post-transition have been diligent in meeting the deadlines established by the Commission for completing construction of their pre-transition facilities in order to provide DTV service to the public and to be permitted to carry over interference protection to their permanent DTV channel. It is not our intent to treat these stations unfairly or reward stations that have been less diligent in providing DTV service during the transition. However, as noted above, it is critical at this juncture to focus on the completion of final DTV facilities. In order to accomplish this goal, we believe we must permit stations to cease investing time and resources in completing facilities that will be used for the remainder of the transition simply in order to retain interference protection on their final, post-transition channels. Instead, we need to ensure that stations are focused on finalizing

¹²³ See *infra* section V.C.4. (¶¶ 85-87) (proposing to use the tolling standard in 47 C.F.R. §73.3598(b) to evaluate requests for additional time to construct DTV facilities with construction deadlines occurring post-transition, *i.e.*, February 17, 2009 and later). See 47 C.F.R. §73.3598(b) (rule for analog CPs and singletons).

¹²⁴ See *infra* discussion of application requirements in section V.D.