

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
Implementation of the DTV Delay Act)	MB Docket No. 09-17
)	
DTV Consumer Education Initiative)	MB Docket No. 07-148
)	
Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television)	MB Docket No. 07-91
)	
Implementation of Short-term Analog Flash and Emergency Readiness Act; Establishment of DTV Transition "Analog Nightlight" Program)	MB Docket No. 08-255
)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands)	WT Docket No. 06-150
)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules)	WT Docket No. 06-169
)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band)	PS Docket No. 06-229
)	
Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010)	WT Docket No. 96-86
)	

To: The Commission, Office of the Secretary

COMMENTS OF ZGS PHILADELPHIA, INC.

ZGS Philadelphia, Inc. ("ZGS"), licensee of WWSI(TV), Atlantic City, New Jersey (Facility Id Number - 23142), by its attorney, hereby submits comments in response to the above-referenced rule making proceeding regarding changes to the procedures governing the transition to

digital television.¹ As detailed further below, the Commission's reversal of its earlier policies regarding the termination of analog service in the 90 days prior to the transition deadline and its recent proposal to bar stations from terminating analog service prior to April 16, 2009, does not best serve the public interest in all cases. Specifically, with regard to WWSI(TV), the public is better served by allowing this out-of-core analog station, which is unaffiliated with any of the big four networks, to terminate its analog operations on March 14, 2009 as planned. As the station notified the Commission previously, WWSI(TV) is operating at barely 50% of its authorized power having suffered an equipment failure last year. Initially, WWSI(TV) intended to terminate analog operations on February 17, 2009, and would almost assuredly have been allowed to do so. Having continued operation in furtherance of the Commission's goal of ensuring consumers are informed about the transition and have additional time to comply, WWSI(TV) now faces the prospect of being penalized for its good service. Accordingly, ZGS respectfully submits that WWSI(TV) should be permitted to terminate its remaining analog service on March 14, 2009 as planned.

BACKGROUND

WWSI(TV) is licensed to Atlantic City, New Jersey, which is part of the Philadelphia, Pennsylvania television market. The station broadcasts in analog on Channel 62 and in digital on Channel 49, where it has been fully constructed and licensed since 2002. WWSI(TV) is affiliated with the Telemundo Network and proudly serves Spanish-language viewers in the Philadelphia market. ZGS, a small, minority-owned, independent operator, acquired the station in early 2008, and has brought to the station its long-standing commitment to community service and improved

¹ *Implementation of the DTV Delay Act, etc.*, Second Report and Order and Notice of Proposed Rulemaking, MB Docket 09-17, FCC 09-11 (Feb. 20, 2009) (hereinafter "*Second Report and Order and NPRM*").

local news and entertainment, as evidenced by ZGS's operation of low power and full power television stations in nearly a dozen markets. Although dealing with the general economic downturn and changes in the broadcast industry, ZGS is making plans for the station's future improvement, and has obtained a construction permit to maximize WWSI-DT's authorized power.

Last year, following the failure of a tube in its analog transmitter, WWSI(TV) was forced to reduce its analog operating power to approximately 50% of its authorized power. A request for Special Temporary Authority reflecting this power reduction was requested on June 13, 2008, and remains pending. (See FCC File No. BSTA-20080613ABB.) Given the analog station's already reduced power operation, on January 28, 2009 – prior to the passage and enactment of the DTV Delay Act² – ZGS notified the FCC that WWSI(TV) intended to terminate its remaining analog operations on February 17, 2009, consistent with the then-applicable deadline.

Following the Commission's issuance of its *February 5 Public Notice*,³ ZGS decided to follow the Commission's guidance and delay the termination of its analog service for an additional four weeks in order to assist consumers by continuing analog service for a bit longer. Thus, on February 9, 2009, WWSI(TV) reversed its earlier election and notified the Commission that it did not intend to terminate its analog service on February 17, 2009.

Thereafter, in reliance on the Commission's extensive guidance in, *inter alia*, its (1) *Third DTV Periodic Order*,⁴ (2) *February 5 Public Notice*, and (3) *Report and Order and Sua Sponte Order on Reconsideration*,⁵ on February 12, 2009, ZGS notified the Commission that WWSI(TV)

² DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009) (hereinafter "*DTV Delay Act*").

³ *FCC Announces Procedures Regarding Termination of Analog Television Service On or After February 17, 2009*, Public Notice, FCC 09-6, rel. Feb. 5, 2009 (hereinafter "*February 5 Public Notice*").

⁴ *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Report and Order, FCC 07-228 (rel. Dec. 31, 2007) (hereinafter "*Third DTV Periodic Order*").

⁵ *Implementation of the DTV Delay Act, etc.*, Report and Order and *Sua Sponte Order on Reconsideration*, MB Docket 09-17, FCC 09-9 (Feb. 13, 2009).

intended to terminate analog operations on March 14, 2009, consistent with the procedures for the termination of service in the 90 days prior to the transition date. Following ZGS's notification, however, the Commission subsequently issued its *Second Report and Order and NPRM* proposing to change its rules and to no longer allow stations to terminate analog service prior to April 16, 2009. Accordingly, ZGS hereby submits its comments in this rule making proceeding and seeks authority for WWSI(TV) to terminate its analog service on March 14th as planned.

DISCUSSION

First and foremost, the Commission's proposal to bar stations from terminating analog service prior to April 16, 2009, is utterly contradictory to Congress' clear statement in the DTV Delay Act that "[n]othing in this Act is intended to prevent" early termination "in accordance with the [FCC's] requirements **in effect on the date of enactment of this Act**, including the flexible procedures established" in the *Third DTV Periodic Order*. (*DTV Delay Act* at Section 4(a), emphasis added.) There is no question that Congress intended to allow stations the continued flexibility to terminate analog service based on the procedures set forth in the *Third DTV Periodic Order* that were in effect on the date the DTV Delay Act was enacted. These procedures include allowing stations to terminate analog service during the 90 days prior to the transition date based on a simple 30-day advanced notice to the Commission and 30-days worth of viewer notification spots to the public. The Commission's attempt to now retroactively change these termination procedures and to restrict the ability of stations such as WWSI(TV) to terminate analog service as authorized by Congress is inequitable and ultimately unsupportable.

However, setting aside for a moment these significant issues and the tension between the Commission's proposal and the governing statute, in this case, numerous factors exist that support allowing WWSI(TV) to terminate its analog operations as planned on March 14, 2009, as detailed below.

- Equipment Failure First, WWSI(TV)'s analog facilities have been operating at 50% of authorized power since June of last year following an equipment failure. Accordingly, the station is not providing service to its entire authorized area today, drastically reducing the community's reliance on WWSI(TV)'s analog signal and the ultimate impact of an early termination. Further, the Commission's recent *Second Report and Order and NPRM* indicates that equipment failure is an exception to the proposal that stations will generally not be permitted to terminate analog service prior to June 12, 2009.⁶
- Non-Big 4 Affiliate Second, the station is affiliated with the Telemundo Network and not one of the big four English-language networks. As the Commission has indicated, the termination of service by stations unaffiliated with the major networks has a much smaller impact on the public than the termination of a station affiliated with ABC, CBS, Fox, or NBC.⁷
- Out-of-Core Channel Third, WWSI(TV)'s analog channel is out-of-core on Channel 62. As the Commission has recognized repeatedly, facilitating the migration of television stations from out-of-core channels 52 – 69 to in-core channels is in the public interest, as it will speed the introduction of new commercial services and access to the recovered spectrum by public safety entities.⁸ In this case, allowing WWSI(TV) to terminate what remains of its analog Channel 62 operations will clear the way for future spectrum users, furthering Commission and Congressional goals alike.

⁶ *Second Report and Order and NPRM* at ¶ 26.

⁷ *Second Report and Order and NPRM* at ¶ 47.

⁸ See, e.g., *Third DTV Periodic Order* at ¶ 129; see also, *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, First Report and Order, 15 FCC Rcd 476 (2000); Order on Reconsideration of the Third Report and Order, 16 FCC Rcd 21633 (2001).

- Conservation of Resources Fourth, WWSI(TV) is owned and operated by a small, independent minority owner. Especially in the present economy, continuing to operate the analog station, even for an additional 30 to 45 days, becomes a drain on the station's limited resources. Allowing ZGS to shut down the analog facility will allow the station to focus its financial and engineering resources on maximizing service from WWSI(TV)'s digital operations, both in terms of improving the programming and the physical plant, to the benefit of its viewers.
- Consumer Confusion Fifth, preventing the station from terminating the analog service as planned will cause even greater consumer confusion. WWSI(TV) has been notifying its viewers for two weeks now that the analog station will permanently cease operation on March 14, 2009. These announcements come after the station had initially been notifying viewers that the analog service was terminating on February 17th, along with all other analog television service in the country. If the Commission denies WWSI(TV) the authority to terminate its analog on March 14th, the station will be forced to change its message yet again and to inform jaded viewers that the station will instead terminate on April 16, 2009, the next earliest date permitted. Such conflicting and repeated messaging is ultimately harmful to the public, as viewers become inured to, and ignore, the information.
- The Market is Well Served by Other Analog Stations Sixth, virtually no other stations in the Philadelphia market have terminated analog operations, meaning that the market continues to be well served by over-the-air analog signals. Among the stations continuing to provide analog service in the market is Spanish-language station WUVP-TV affiliated with the Univision Network.

- Successful Soft Tests Seventh, over the past four months, the station has done a couple of soft tests by temporarily suspending analog operations during the broadcast day to gauge viewers' readiness. Those tests, which involved suspending analog service for several minutes on two different occasions pointed to no issues regarding the readiness of WWSI(TV)'s audience.

In its *Second Report and Order and NPRM*, the Commission stated that it is requiring "all full-power television stations that have not terminated their analog service as of February 17, 2009, to decide on a firm date by which they intend to terminate their regular analog television service and to notify us of that date no later than Tuesday, March 17, 2009. We tentatively conclude that stations may terminate no earlier than April 16, 2009, to give all parties at least 30 days from the notification date to prepare and educate consumers."⁹ This, however, is precisely what WWSI(TV) is in the process of doing. The station notified the FCC 30 days in advance of the planned termination. It has been airing viewer notifications to inform its viewers of the planned termination and will provide 30 days of intensive information. And it has coordinated with cable and satellite operators in the market to ensure continuity of service. Thus, the Commission's goal of "at least 30 days from the notification date to prepare and educate consumers" has been achieved. No further benefit can be gained by prolonging the operation of WWSI(TV) until April 16, 2009. Accordingly, for these reasons, allowing the station to terminate its remaining analog service is in the public interest.

⁹ *Second Report and Order and NPRM* at ¶ 48.

CONCLUSION

Ultimately, WWSI(TV) would almost assuredly have been allowed to terminate its analog service on February 17, 2009. Having attempted to further the Commission's goals by providing consumers with additional time to prepare for the transition, the station is now facing the prospect of being penalized for its efforts. To deny the station the flexibility to terminate on March 14 when it could have easily done so on February 17 is not only arbitrary and capricious, it is patently inequitable. Thus, for the reasons stated above, ZGS respectfully requests that WWSI(TV) be allowed to terminate its analog operations on March 14, 2009, consistent with the procedures set forth in the Commission's *Third DTV Periodic Order*.

Respectfully submitted,

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