

I. STATIONS SHOULD BE PERMITTED TO TERMINATE ANALOG PRIOR TO APRIL 16, 2009.

The Commission proposes that stations that did not terminate their analog operations on or before February 17, 2009, will not be permitted to terminate until April 16, 2009. As a practical matter, the Commission already has begun implementing this proposal by ordering stations not to submit service termination notifications at this time, and by rejecting service termination notifications that had been submitted to it in the past several weeks prior to the release of the *NPRM*. APTS urges that the Commission reverse this position with regard to public television stations, begin accepting service termination notifications immediately, and reinstate any notifications previously submitted so that public television stations that have intended to terminate their analog operations between now and April 16, 2009, may do so. The Commission's proposed rule contravenes the express intent of Congress in the DTV Delay Act that stations should have the flexibility to terminate analog operations at any time before June 12, 2009, and the rule would cause significant financial hardship for public television stations that had relied on the language of the DTV Delay Act in formulating plans to terminate their analog service in March or early April. Furthermore, as the experiences of the past several months have shown, a rolling cessation of analog broadcasting has worked smoothly so far and offers benefits in terms of increasing consumer awareness.

A. The DTV Delay Act Expressly Permits Early Analog Termination At Any Time Prior to June 12, 2009.

Congress explicitly stated in the DTV Delay Act that stations who wished to terminate their analog service prior to June 12, 2009, would be permitted to do so under the FCC's rules then in existence:

Nothing in this Act is intended to prevent a licensee of a television broadcast station from terminating the broadcasting of such station's analog television

signal . . . prior to [June 12, 2009] so long as such prior termination is conducted in accordance with the Federal Communications Commission’s requirements in effect on the date of enactment of this Act, including the flexible procedures established in the Matter of Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television (FCC 07-228, MB Docket No. 07-91, released December 31, 2007).³

In the *Third Periodic Review Report and Order*, the Commission provides that stations may terminate their analog service within 90 days before the transition date, without obtaining Commission approval, by filing a notification with the Commission 30 days in advance of the planned service termination.⁴ Thus, it was clearly the intent of Congress that stations should be permitted to terminate their analog service within 90 days of the June 12, 2009, hard date—i.e., on or after March 14, 2009—by providing a notification to the Commission 30 days in advance.

The Commission asserts that Section 4(c) of the DTV Delay Act, which authorizes the Commission to “adopt or revise its rules, regulations, or orders or take such other actions as may be necessary or appropriate to implement the provisions, and carry out the purposes, of this Act,” permits the Commission to alter the procedures for early termination established in the Third Periodic Review.⁵ However, Congress clearly states that stations should be permitted to terminate analog operations in accordance with the procedures established in the *Third Periodic Review Report and Order* on December 31, 2007, and not in accordance with any new procedures later established. The Supreme Court has made it clear on numerous occasions that “first, always, is the question whether Congress has directly spoken to the precise question at

³ DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009), § 4(a).

⁴ *In re Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, Report and Order, 233 FCC Rcd. 2994, 3058, ¶ 133 (2007) (“*Third Periodic Review Report and Order*”).

⁵ *NPRM* ¶ 30.

issue. If the intent of Congress is clear, that is the end of the matter.”⁶ Thus, while the FCC may—and indeed must—revise its rules in certain other areas, such as consumer education or the “analog nightlight” program, it is not authorized to override its existing flexible procedures for early analog termination.

B. The Inability to Terminate Analog Prior to April 16, 2009, Would Impose Significant Financial Hardship On Many Public Television Stations.

Public Television is strongly committed to ensuring that no viewer is left behind by the digital transition, and many local public television stations have elected to continue broadcasting in analog until June 12, 2009. However, other public television stations have made the difficult decision to terminate their analog transmissions early due to a range of factors, the common denominator of which is economic hardship. The added, unplanned expenses of remaining on the air after February 17, 2009—including the costs of electricity, equipment maintenance, additional tower rent, renegotiating tower leases, rescheduling tower crews, storing new equipment until it can be installed—compound the extraordinary financial difficulties many public television stations are confronting in these difficult economic times. These stations have determined that their best chance of continuing to serve their communities in digital in the long run is to terminate analog early.

Approximately 40 percent of local public television stations have already terminated their analog transmissions, but some were able to remain on in analog to serve their communities for a while longer, and have planned to end analog services in March or early April. For the same reasons that many stations terminated on or before February 17, it would be a significant hardship for these stations to be forced to continue their analog transmissions until at least

⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). See, e.g., *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978).

April 16. Furthermore, this proposed rule has the undoubtedly undesired effect of punishing stations for attempting to remain on in analog for as long as possible rather than terminating on or before February 17.

As you will hear from many individual licensees, public television stations are enduring unprecedented economic difficulties because of a confluence of diminished state and local funding, corporate underwriting, and individual contributions. Requiring stations to continue analog transmissions for a month or more beyond what they had budgeted would have profound negative implications on their financial futures. Thus, APTS urges the Commission to permit stations to terminate analog transmissions at any time upon 30 days' notice.⁷ In the case of stations that have already submitted notifications, APTS urges the Commission to reinstate those notifications retroactive to the date of filing and to allow stations, where necessary, to engage in expedited viewer notification requirements similar to the procedures set forth in the First DTV Delay Order⁸ for stations terminating on February 17.

C. A Gradual Analog Cessation Has Worked So Far and Benefits the Public.

Finally, public television stations should be permitted to terminate analog transmissions at any time before June 12, 2009, because the Commission's experience to date has shown that a

⁷ In addition to permitting analog terminations prior to April 16, APTS urges the Commission to permit stations to terminate analog, upon 30 days' notice, at any time before June 12. For example, some public television stations will need to terminate analog earlier in the week before June 12, because terminating analog on a Friday night would require numerous station technical and audience service staff to work over the weekend to respond to viewer inquiries. (Data shows that call volume is highest in the first few days after analog termination.) Such weekend work necessitates overtime pay, which presents an undue burden for many public television stations. Milwaukee Area Technical College, licensee of stations WMVS and WMVT, is filing separate comments on this issue, and it impacts many other public television licensees.

⁸ *In re Implementation of the DTV Delay Act*, MB Docket No. 09-17, Report and Order and *Sua Sponte* Order on Reconsideration, FCC 09-9 (rel. Feb. 13, 2009).

gradual, rolling cessation of analog works relatively well and benefits the public. Well over 600 full-power stations have already ended analog transmissions—more than 400 did so on February 17—and the Commission has noted that the results were “encouraging” and the disruption less than expected.⁹ The FCC’s call centers received thousands of calls from consumers, most of whom had questions about reception and technical issues. But the call centers were not overwhelmed, calls diminished as the week progressed, and viewers resolved their issues in advance of the full market transition.

It makes sense for the transition to proceed on a gradual basis, with stations turning off analog throughout the next several months leading up to June 12. A certain number of calls to the call centers are inevitable, but each station that shuts off early motivates more and different viewers to make the transition and address any technical issues that may arise, thus avoiding a situation where the call centers become overwhelmed on April 16 or June 12. Furthermore, with each station that terminates analog early, the Commission and broadcasters learn more and can better revise their outreach leading up to June 12. The DTV Delay Act has given us the opportunity to carry out this transition in a gradual, measured fashion to minimize viewer disruption, and so far it has worked. We should take advantage of this chance by continuing to give stations the flexibility to take their own best road to digital-only broadcasting.

II. VIEWER NOTIFICATION PERIOD SHOULD NOT BE EXTENDED.

The *Third Periodic Review Report and Order* requires stations to notify their viewers about a planned analog service termination at least 30 days in advance.¹⁰ In the NPRM, the Commission seeks comment on whether to require a longer viewer notification period, up to 60 days. APTS believes that the existing 30-day period is appropriate and should be maintained.

⁹ FCC News Release, *Initial Phase of DTV Transition Encouraging*, Feb. 19, 2009.

¹⁰ *Third Periodic Review Report and Order*, 23 FCC Rcd. At 3058, ¶¶ 133-34.

First, a longer period would potentially complicate the ability of stations to terminate their analog transmissions prior to April 16 and might even lead to a restriction on stations transitioning before May 16, which would be 60 days after the March 17 date on which the Commission has required all stations to notify it of their intended transition dates. For all the reasons stated in the previous section, it is both necessary and expressly intended by Congress that stations should be permitted to terminate analog freely prior to June 12, and this change would hinder that result. Second, these viewer notifications are in addition to the on-air consumer education requirements established in the Commission's DTV Consumer Education Initiative proceeding, so the stations are already airing a significant amount of consumer education. A 30-day period for the more pointed messages required by the *Third Periodic Review Report and Order* is sufficient to provide viewers notice of a station's particular early termination plans.

Conclusion

In the DTV Delay Act, Congress made clear that stations should retain the right to terminate analog transmissions before June 12. The resultant analog terminations of several hundred stations on February 17 resulted in less-than-expected viewer disruption and provided the Commission with valuable lessons to apply toward the remainder of the transition. In light of Congress' express intent and the benefits of a rolling transition, the Commission should refrain from implementing any rules—including a prohibition on terminations before April 16 or a 60-day viewer notification period—that would impinge on stations' flexibility to carry out early analog shutoff plans.

Respectfully submitted,

/s/

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