

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
)
Assessment and Collection of) MD Docket No. 10-87
Regulatory Fees for)
Fiscal Year 2010)

To: The Commission

COMMENTS OF VHF DIGITAL STATIONS

Sky Television, L.L.C., Spanish Broadcasting System, Inc., and Sarkes Tarzian, Inc. (“VHF Digital Stations”) hereby comment on the above-captioned Notice of Proposed Rule Making (“NPRM”) concerning regulatory fees and classifications for Fiscal Year 2010. VHF Digital Stations are all licensees of full service digital television stations that operate on VHF channels. VHF Digital Stations urge the Commission (1) to eliminate the separate regulatory fee categories for VHF and UHF commercial television stations and (2) to substitute a new category for full power digital television stations generally, while retaining the sub-categories based on market size.

Previously, the Commission has suggested that when it started collecting regulatory fees from digital television stations, it would create a separate regulatory fee category. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2009*, 24 FCC Rcd 5966, 5969 ¶ 9 (2009); *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, 24 FCC Rcd 6388, 6406 ¶ 45 (2008) (“sought comment on whether to establish a regulatory fee category for digital broadcasters”). The NPRM confirms that beginning with Fiscal Year 2010, the Commission will collect annual regulatory fees

from digital full-power television stations, which had previously been exempt. NPRM ¶ 7.

The NPRM, however, contains no discussion of a separate fee category for digital stations, and the proposed FY 2010 Schedule of Regulatory Fees makes evident that the Commission intends to retain the historical distinction between VHF and UHF channels and to collect more from television stations operating on VHF channels than from television stations operating on UHF channels. NPRM at Appendix B. The differential is substantial, as shown below:

	VHF	UHF	VHF as a % of UHF
Markets 1-10	\$ 78,000	\$ 25,300	308%
Markets 11-25	\$ 60,525	\$ 24,850	244%
Markets 26-50	\$ 40,675	\$ 13,750	296%
Markets 51-100	\$ 22,725	\$ 8,225	276%
Remaining Markets	\$ 5,875	\$ 2,025	290%
Construction Permits	\$ 5,875	\$ 2,025	290%

It makes no sense in the digital era to continue to make a distinction between VHF channels and UHF channels. If anything, television stations operating on VHF channels should pay less than television stations operating on UHF channels, not two and one-half to three times as much.

Presumably, the historical reason for collecting more from VHF than from UHF channels was that analog stations operating on VHF channels generally covered larger service areas than stations operating on UHF channels.¹ Certainly, analog VHF channels have historically been perceived to be better than analog UHF channels.²

¹ We cannot find any explanation of the reason for the distinction, other than that the original Schedule of Regulatory Fees set forth at Section 9(g) of the Act provided for different fees for VHF and UHF stations. Originally, there was only a slight difference between the two classifications. For example, Section 9(g) of the Act provided that VHF stations in Markets 1-10 would initially be assessed \$18,000 and

In the digital era, however, UHF channels are demonstrably preferred over VHF. Low VHF channels (Channels 2-6) are so inferior that television stations initially assigned low VHF digital channels were given the right to participate in a special round in the permanent digital channel election process. *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18306 ¶ 63 (2004). Indeed, *Connecting America: The National Broadband Plan* (released March 16, 2010) contains the following recommendation:

The FCC should pursue additional options to address VHF reception issues, such as increased power limits or adoption of enhanced antenna and receiver standards. Without these measures, VHF stations may continue to request channel reassignments to the UHF band, complicating efforts to reallocate spectrum from that band to mobile broadband use.

Id. at 92 (footnote omitted).

The NPRM's proposal to charge digital VHF stations 244-308% of the amount charged digital UHF stations is not consistent with the National Broadband Plan recommendation. Nor is it consistent with Section 9(b)(1)(A) of the Communications Act, which requires the Commission to take into account "service area coverage" in determining the amount of regulatory fees. "[T]he statutory fee schedule generally reflects higher fees for types of regulatees that are authorized to use larger amounts of, or

UHF stations would be assessed \$14,400. The differential was consistent across all markets. In all markets, VHF stations paid 125% of the fee paid by UHF stations. In Public Law 104-134, Congress required the Commission to change the fee schedule to reduce the amount paid by stations in smaller markets. Pub. L. No. 104-134 (1996). But the VHF/UHF differential in the 1996 fee schedule remained in 125-131% range. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1996*, 11 FCC Rcd 18774, 18786 ¶ 30 (1996). There is no justification in the history of the Commission's regulatory fee decision for a 244-308% differential as proposed for FY 2010.

² In 2001, the FCC rejected a request to reduce regulatory fees for UHF stations. The request was based, among other things, on "UHF's competitive handicaps." *Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, 16 FCC Rcd 13525, 13534 ¶ 27 (2001). As explained below, the roles have reversed, and stations operating on UHF channels may now have a competitive advantage over stations operating on VHF channels in terms of service coverage and receivability.

more desirable, spectrum, or that are larger and have more customers.” *Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, 19 FCC Rcd 11662, 11666 ¶ 8 (2004) (emphasis added). As indicated above, VHF channels have no coverage advantage over UHF channels in the digital world and may in fact be inferior.

Under Section 9(b)(3) of the Act, the Commission is required to “add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.” The conversion from analog to digital is just such a change. As a consequence, the Commission should create a new regulatory fee category for digital stations, as it has previously indicated it would do.

There is one other problem with the proposed FY 2010 Schedule of Regulatory Fees. In determining the amount of the fees, the Commission appears to have assumed that fees would be paid by 479 full service digital VHF television stations. *See* NPRM at Appendix A (including all of the FY 2010 Payment Units in the VHF classification except for construction permits). This estimate appears to be based on the number of VHF payment units in FY 2009 (490), which was based on the number of analog stations operating on VHF channels prior to the conversion from analog to digital. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2009*, 24 FCC Rcd 5966, 6019 (2009) (Appendix H).

In estimating the amount to be collected from VHF stations for FY 2010, the Commission appears to have missed that fewer stations operate on VHF channels than in the past. Many television stations that previously broadcast on analog VHF channels made the election to move permanently to digital UHF channels. As a result, there are

significantly fewer stations operating on VHF channels than in prior years. For example, Appendix A assumes that there will be 41 payment units in VHF Markets 1-10. A quick search of CDBS reveals that today there are in fact approximately 26 commercial television stations operating on VHF channels in the top 10 markets. (The search was performed at http://licensing.fcc.gov/cdbs/cdbs_docs/pa/dtvsearch/dtv_search.cfm.) It therefore seems evident that the Commission has overestimated expected FY 2010 revenues from VHF stations.

Because VHF channels are no better – in fact are probably worse – than UHF channels for broadcasting digital television signals, VHF Digital Stations respectfully urge the Commission to adopt a separate regulatory fee category for full service digital television stations, adjusted for market size, and to eliminate the anachronistic distinction between VHF and UHF stations.

Respectfully submitted,

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