

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
)
Amendment of Parts 73 and 74 of the) MB Docket No. 03-185
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)
)

COMMENTS OF SMARTCOMM, L.L.C.

Smartcomm, L.L.C. (“Smartcomm”), through its counsel, submits the following comments in response to the *Further Notice of Proposed Rulemaking* (“FNPRM”) issued by the Commission to consider issues that need to be resolved to complete the low power digital television (“LPDTV”) transition.¹

I. INTRODUCTION AND SUMMARY

Smartcomm is a limited liability company headquartered in Arizona that is interested in applying for and holding commercial wireless radio licenses (either by itself or in joint ventures with others),² as well as partnering with licensees for the provision of

¹ 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, *Further Notice of Proposed Rulemaking and Memorandum Opinion and Order*, FCC 10-172 (rel. Sept. 17, 2010) (“*LPDTV Transition FNPRM*”).

² Smartcomm was founded in 2007 by Ms. Carole Downs and Mr. Pendleton Waugh. For purposes of full disclosure, Smartcomm notes that the Commission has raised certain character-related questions regarding the qualifications of Mr. Waugh; questions that Mr. Waugh is anxious to answer at the appropriate time.

broadband to the home, especially in rural areas where the need for broadband options is often acute.

Smartcomm's interest in the LPDTV spectrum results from the fact that, as the Commission has recognized, the broadcast spectrum is quite suitable for end user two-way broadband services, including Internet access.³ The Commission has also correctly pointed out that an "either/or" broadcast-or-broadband choice may not be necessary for this spectrum. Rather, to a certain extent, both uses can be accommodated. In that vein, the Commission has permitted all digital broadcasters, including low power stations, to provide ancillary and supplementary services.⁴ Smartcomm is interested in working with low power broadcasters to provide fixed and mobile broadband services using the LPDTV spectrum. It is these services, then, that are the exclusive focus of Smartcomm's comments. Smartcomm does not take a position on the other issues raised in the proceeding.

In brief, the Commission should recognize that LPTV stations are more precariously positioned than full-power broadcasters. A penny can represent the difference between breakeven and accumulated losses for them to a greater extent than their full-power kin. Not only is the coverage of low power stations smaller, but their coverage areas are rural to a much greater extent than for full-power broadcasters. These differences are not sufficiently captured merely by the arithmetic differences between the

³ See 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, *Report and Order*, 19 FCC Rcd. 19331, 19349-51, ¶ 54-57 (2004) ("*LPDTV Order*").

⁴ *Id.* ¶¶ 54-57; 47 C.F.R. § 74.791(i); 47 C.F.R. § 73.73.624(c) (examples of ancillary and supplementary services include computer software distribution, data transmissions, aural messages, paging services, audio signals and subscription video).

audiences of the two kinds of stations. Thus, passing through the 5% fee could have a greater downward effect on the demand for services among the lower per capita income demographics of some rural areas. This means that a uniform application of the 5% ancillary and supplementary fee across the board for all broadcasters would have unduly harsh consequences for low power broadcasters and their consumers. The Commission should thus not extend the 5% fee to the low power construction permittees that hold STA.

The Commission should also consider (if necessary by means of a further rulemaking) exempting low power broadcast licensees from that obligation. Such an exemption would become especially appropriate, and indeed imperative, if broadband access were to become subject to universal service contribution obligations. At a minimum, the Commission should exempt all LPTV ancillary and supplementary services from the fee for revenues below a certain threshold. This treatment would be analogous to the *de minimis* exemption to the Universal Service Fund (“USF”) for carriers with a calculated contribution of less than \$10,000 per year. Finally, the Commission should consider certain other measures giving LPDTV stations additional flexibility to provide ancillary and supplementary services.

II. LPTV Ancillary and Supplementary Services Support Broadband Deployment

A. LPTV Ancillary and Supplementary Uses Can Promote Wireless Broadband

Deployment of wireless broadband, including affordable new service to areas of low population density and urban pockets that do not have sufficient choice in broadband

providers, is in the public interest.⁵ Rather notoriously, there is a spectrum shortage that is hampering fulfillment of this need.⁶ The LPDTV transition presents an opportunity in that respect, as the broadcast spectrum is very well suited for end user two-way broadband services – and fixed and mobile broadband and LPDTV services can co-exist over that spectrum.⁷ The Commission has recognized the potential of this opportunity by permitting LPDTV stations to provide the same subscription-based, non-broadcast ancillary services on their spare digital capacity as their full-power colleagues.⁸

B. The Commission Should Avoid Burdening the LPDTV Transition

The Commission’s 2004 decision to permit ancillary and supplementary use of the low power digital broadcast spectrum was prescient. The Commission noted, in particular, that the need for LPDTV broadcasters to develop additional revenues from ancillary services” applies with “equal or greater force” than for full-power broadcasters, in large part due to the different economies of scale between the two services.⁹ As the transition has progressed, the difficulties posed for LPDTV stations have manifested themselves rather starkly. The LPDTV transition is proving to be a difficult one for the

⁵ See Federal Communications Commission, Connecting America: The National Broadband Plan at 186 (2010) (“[T]he broadband availability gap is greatest in areas with low population density.”).

⁶ See *id.* at 85 (“[U]ltimately, the cost of not securing enough spectrum may be higher prices, poorer service, lost productivity and untapped innovation.”).

⁷ 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, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd. 18365, 18376 ¶ 24 (2003) (noting that the spectrum can be used “dynamically”).

⁸ See *LPDTV Order*, 19 FCC Rcd. at 19349-50, ¶ 54.

⁹ *Id.*

low power broadcasters as low power stations are not simply mirrors of their full-power brethren. They do not have the mass market audiences that full-power stations tend to enjoy. In addition, and notwithstanding the Digital Television Transition and Public Safety Fund,¹⁰ many LPDTV stations are struggling to finance the costs associated with the digital transition. The Commission should continue to recognize these realities by not imposing “cookie cutter” contribution obligations upon full-power and LPDTV stations alike.

The Commission has already extended the 5% contribution fee to LPDTV licensees.¹¹ In the *FNPRM*, the Commission now seeks to expand the fee obligation to all LPDTV stations, including those operating pursuant to STA,¹² as it did for full-powered licensees in 2007.¹³

Smartcomm opposes this additional burden on LPDTV stations. While the Commission has the authority to impose this fee, the Communications Act does not prescribe the amount of the fee nor does it deny the Commission the discretion to not impose it in particular cases. All that the Commission is required to do in that respect is “establish a program to assess and collection” annual fees, and design that program based

¹⁰ See Deficit Reduction Act of 2005, § 3009, Pub. L. No. 109-171, 120 Stat. 4, 26 (2006). The Digital Television Transition and Public Safety Fund provides up to \$65 million to reimburse low power television stations in eligible rural communities for their cost of upgrading to digital equipment.

¹¹ *Id.* at 19390-91 ¶¶ 178-81.

¹² *LPDTV Transition FNPRM* ¶ 36.

¹³ Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, *Report and Order*, 23 FCC Rcd. 2994, 3083 (2007)

on certain criteria.¹⁴ This mandate does not preclude the inclusion in the program of reasonable exemptions from the fee requirement. This encompasses the equitable flexibility to take into account the additional costs LPDTV stations are incurring in the digital transition. The public interest militates for as much of an exemption from the 5% fee as possible.

C. The Commission Should Proactively Promote LPTV Ancillary and Supplementary Use

For that reason, rather than imposing additional fees, Smartcomm suggests that the Commission should act in the opposite direction and consider not imposing the 5% fee on any ancillary or supplementary use of the LPDTV spectrum. Such a broader exemption, too, would be well within the Commission's discretion and is analogous to the *de minimis* exemption for USF contributions.¹⁵ Such an exemption would become especially appropriate, and indeed imperative, if broadband access were to become subject to universal service contribution obligations. At a minimum, the Commission should exempt all LPTV ancillary and supplementary services from the fee for revenues below a certain threshold. As mentioned, this would be analogous to the *de minimis* exemption to the USF for carriers with a calculated contribution of less than \$10,000 per year.

The Commission should also consider relaxing the operating requirements for LPDTV stations so that an LPDTV licensee can offer more ancillary and supplementary services in certain circumstances during periods of the day when it is not broadcasting.

¹⁴ 47 U.S.C. § 336(e).

¹⁵ While that exemption is contemplated by statute, the threshold is not statutory. *See* 47 U.S.C. § 254 (d). The Commission's leeway within the mandate of designing a "program" of ancillary and supplementary fees makes the analogy instructive. *See* 47 U.S.C. § 336 (e)(1).

