

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

In the Matter of )  
 )  
Innovation in the Broadcast Television Bands: ) ET Docket No. 10-235  
Allocations, Channel Sharing and )  
Improvements to VHF )

---

**REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL**

---

STEFANIE A. BRAND  
DIRECTOR, DIVISION OF RATE  
COUNSEL

Division of Rate Counsel  
31 Clinton Street, 11<sup>th</sup> Floor  
P.O. Box 46005  
Newark, NJ 07101  
(973) 648-2690 - Phone  
(973) 624-1047 – Fax  
[www.rpa.state.nj.us](http://www.rpa.state.nj.us)  
[njratepayer@rpa.state.nj.us](mailto:njratepayer@rpa.state.nj.us)

On the Comments:  
Christopher J. White

Economic Consultant:  
Susan M. Baldwin

April 18, 2011

## TABLE OF CONTENTS

SUMMARY .....	ii
I. INTRODUCTION .....	1
II. NPRM .....	1
Spectrum is a public good, which should be treated as such and used accordingly. ....	1
Any changes should not jeopardize the viability of noncommercial educational television. ....	5
The FCC's rules should not facilitate control of information and video by a highly concentrated wireless industry. ....	7
In its rush to free up spectrum, the FCC should not lose sight of public interest considerations. ....	9
Improving the reception of VHF TV Service may not be feasible. ....	9
III. CONCLUSION .....	11

## SUMMARY

Initial comments raise significant issues of concern about the potential impact of the plans of the Federal Communications Commission (“FCC” or “Commission”) to “repurpose” a portion of the UHF and VHF frequency bands for later use by fixed and mobile wireless communications services. This has the potential to adversely affect public broadcasting, noncommercial educational television, and consumers. The New Jersey Division of Rate Counsel urges the FCC to reallocate spectrum in a manner that does not jeopardize the FCC’s commitment to program diversity and local programming by broadcasters, and to pursue a path that does not cede yet more “gatekeeper” control of information to the increasingly concentrated wireless industry. The FCC clearly possesses the authority to control the use of the nation’s spectrum, and any repurposing would not be a “taking.” However, the return of any spectrum should be entirely voluntary. Spectrum is a public good, and any policy concerning its use should treat it as such. Changes should not jeopardize the financial viability of public television nor should they jeopardize noncommercial educational television.

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

In the Matter of )  
 )  
Innovation in the Broadcast Television Bands: ) ET Docket No. 10-235  
Allocations, Channel Sharing and )  
Improvements to VHF )

---

**REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL**

---

**I. INTRODUCTION**

The New Jersey Division of Rate Counsel (“Rate Counsel”) hereby replies to the comments submitted in response to the notice of proposed rulemaking released by the Federal Communications Commission (“FCC”) regarding the “repurposing of a portion of the UHF and VHF frequency bands” for later use by fixed and mobile wireless communications services, including mobile broadband.<sup>1</sup>

**II. NPRM**

**Spectrum is a public good, which should be treated as such and used accordingly.**

---

<sup>1</sup>/ Notice of Proposed Rulemaking, ET Docket No. 10-235, In the Matter of Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, released November 30, 2010 (“NPRM”).

The FCC's authority to modify licenses and to recapture spectrum is clear.<sup>2</sup> Among other things, the FCC recently explained that "Section 332 does not bar the Commission from establishing spectrum usage conditions based upon [its] Title III authority."<sup>3</sup> Accordingly, the Commission need address only those portions of initial comments that go to the issues of policy rather than those that pertain to legal authority.

Rate Counsel supports the following recommendation by the Association of Public Television Stations, National Public Radio, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively representing the country's system of public television and radio) ("Public Broadcasting"):

Public Broadcasting supports close consideration by the Commission of alternative approaches to highly regulatory, disruptive and expensive spectrum repurposing options such as the incentive auctions, channel sharing and band repacking contemplated in the NPRM. If we are serious about making spectrum available for wireless services on an efficient and timely basis, market-based alternatives deserve a thorough evaluation.

Among those alternatives might be allowing TV stations, including public TV stations, to "lease" excess digital capacity on their stations pursuant to the Commission's established Secondary Market leasing rules. As Public Broadcasting suggested in the Future of Media proceeding, the Commission should consider permitting public TV stations to lease such excess digital capacity in circumstances such as: (1) where there are stations with overlapping service contours so that leasing capacity on one station does not deprive any viewer of the ability to receive service; and (2) where a single station is able to maintain a minimum level of over-the-air service while also leasing excess bandwidth or digital throughput. Public Broadcasting is not suggesting at this time that public TV licensees be permitted to lease 100% of their channel capacity, but greater regulatory flexibility combined with private sector creativity and technical and financial resources could go a long way towards helping relieve the perceived spectrum crisis.<sup>4</sup>

---

<sup>2</sup> / In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, Second Report and Order, released April 7, 2011 ("Roaming Order"), at paras. 57, 69. Paragraph 69 explains why imposition of the data roaming rule under Title III does not amount to regulatory taking.

<sup>3</sup> / *Id.*, para. 66.

<sup>4</sup> / Public Broadcasting, at 17-18, cites omitted.

The FCC is seeking to prepare for and to address the mobile service demand in the United States<sup>5</sup> and also is pursuing voluntary auctions.<sup>6</sup> However, Rate Counsel urges the Commission to heed concerns such as those raised by the University of North Carolina (“UNC”) that some of the Commission’s proposal could “result in increased interference, which may threaten MVPD carriage of UNC-TV’s stations because the quality, reach, and integrity of UNC-TV’s signals, if moved into the VHF band, would be undermined. UNC-TV’s stations have historically operated in the UHF band, and any re-packing of television stations into the VHF spectrum would disproportionately affect UNC-TV.”<sup>7</sup>

Some initial comments (particularly those submitted by the wireless industry) urge the FCC to pursue its goal of making spectrum available for mobile broadband services expeditiously.<sup>8</sup> Cablevision Systems Corporation (“Cablevision”) supports the FCC’s proposal to make broadcast television spectrum available for flexible use.<sup>9</sup> Cablevision observes that “the overwhelming majority of households in the United States subscribe to cable or satellite services” and that “[l]ess than ten percent of the U.S. population relies on over-the-air TV.”<sup>10</sup> Rate Counsel does not oppose spectrum reallocation, but any changes should not harm the “less than ten percent” of consumers who

---

<sup>5</sup> / See *TR Daily*, April 15, 2011, “Panel: Incentive auctions will help meet mobile service demand, panel says.”

<sup>6</sup> / *TR Daily* reported that during a recent panel discussion, a senior adviser on broadcast spectrum in the FCC’s Media Bureau, “stressed that the FCC is not forcibly taking away spectrum, or local and community programming, nor the right of broadcasters to use spectrum.” *Id.*

<sup>7</sup> / UNC, at iv.

<sup>8</sup> / See, e.g., CTIA – The Wireless Association (“CTIA”), at 4; T-Mobile USA, Inc. (“T-Mobile”), at 3; see also *id.*, at 4 (providing data showing the substantial growth in demand for mobile wireless). Minority Media and Telecommunications Council (“MMTC”) supports increased spectrum efficiency in part because of minorities’ dependence on wireless broadband. MMTC, at 3-4. MMTC proposes that the FCC create an Advisory Committee to “determine the best use of Channels 5 and 6 post-DTV transition.” *Id.*, at 4. See also, *id.*, at 5 proposing that “new spectrum allocations should be expressly designed to foster greater minority participation in the wireless industry.”

<sup>9</sup> / Cablevision, at 3.

<sup>10</sup> / *Id.*, at 5. See also, CTIA, at 7, asserting that the Commission should consider that consumer demand for wireless broadband outweighs consumer demand for over-the-air television.

continue to rely on over-the-air TV. Furthermore, as the National Association of Broadcasters and the Association for Maximum Service Television, Inc. (“NAB/MSTV”) explain, the FCC should recognize that wireless broadband and broadcasting are complementary: “Because two-thirds of the predicted new wireless demand is for distribution of mobile video services, and because broadcast programming represents a large part of the universe of high-demand content, broadcasters are well-positioned to meet the mobile video demand in the most spectrally-efficient manner.”<sup>11</sup>

The FCC should address more fully the role of “broadcast’s spectrally-efficient, one-to-many distribution technology” as part of the broadband solution.<sup>12</sup> Local Television Broadcasters raise concerns that the “NPRM’s proposals will undermine these innovations and deprive the public of the unique and substantial benefits of local broadcasting,”<sup>13</sup> and other comments assert that changes to allocations are premature:

In particular, Public Broadcasting is concerned that the actual impact of changes to the U.S. Table of Frequency Allocations to add fixed and mobile services allocations to the U/V Bands is unclear. If the Commission were proposing to license wireless services in the bands at this time, there has been no technical showing that such band sharing can be successfully implemented. If allocation changes do not themselves lead to wireless licensing in the bands, they are not yet necessary and therefore premature.<sup>14</sup>

Initial comments also persuasively raise serious concerns about the use of the VHF band:

Stations cannot operate in the VHF band for the same reason wireless broadband cannot operate there – interference levels are too high. Over-the-air service to the millions of Americans who rely on public TV as their primary source of information would be dealt a serious blow if relocated to the VHF band. The proposed VHF improvement measures do not relieve the Commission of the need to deal with the

---

<sup>11</sup> / NAB/MSTV, at 4, cite omitted.

<sup>12</sup> / *Id.*, at 7; *see also*, Cox Media Group, Inc. (“Cox”), at 3.

<sup>13</sup> / Local Television Broadcasters, at 2. *See id.*, at 12, asserting that “a co-primary designation will devalue local television stations . . . making it much more difficult for broadcasters to meet their public interest obligations.”

<sup>14</sup> / Public Broadcasting, at 3. *See also* Harris Corporation (“Harris”), at 3, stating: “Broadcasters’ service is unique because of its nationwide footprint, one-to-many delivery method, highly reliable infrastructure, and public interest obligations.”

various DTV technical issues in connection with any plans to restructure the U/V Bands.<sup>15</sup>

Contrary to Cablevision's assertion that the "Commission's proposal to change the U.S. Table of Frequency Allocations . . . is thus unquestionably a good proposal,"<sup>16</sup> other initial comments suggest that it is premature to restructure the bands:

To the extent that the Commission's intention is to lay the groundwork for future proceedings that would authorize wireless operations and restructure the band, the proposal here is unnecessary, premature and overbroad. It is unnecessary and premature because the U.S. Table of Allocations can be modified just as easily, and far more appropriately, if and when the Commission actually adopts a plan for authorizing wireless services in the band. It is overbroad because the proposal here is to put wireless designations throughout the *entire* UHF and VHF bands, when even the Commission's own aspiration is to make only a portion of the UHF band (as much as 120 MHz) available for wireless services. It is generally understood that the VHF band, by virtue of its technical characteristics, is not an appropriate band for mobile services, including both wireless broadband and mobile DTV.

Public Broadcasting does not see any imperative at this time to change the Table of Allocations. Appropriately tailored changes in the Table can be made if and when the Commission decides, after thoroughly considering technical and policy issues, to move forward to license wireless service in specific portions of the UHF Band.<sup>17</sup>

**Any changes should not jeopardize the viability of noncommercial educational television.**

Rate Counsel concurs with comments that the FCC's efforts to use spectrum more efficiently should not jeopardize noncommercial education television. As UNC explains:

While the *Notice* attempts to reserve for another day the thorny issues surrounding the *Plan's* proposal to re-pack television stations into a significantly smaller amount of spectrum, UNC-TV respectfully requests that any future proposal to re-pack television stations take into account the special characteristics of public, non-commercial television stations that the Commission has repeatedly recognized and that the Commission make any channel changes truly voluntary for UNC-TV and other public, non-commercial broadcasters.<sup>18</sup>

---

<sup>15</sup> / Public Broadcasting, at 4.

<sup>16</sup> / Cablevision, at 6, cite omitted.

<sup>17</sup> / Public Broadcasting, at 8, emphasis in original.

<sup>18</sup> / UNC, at 6, cite omitted.

Initial comments raise practical matters, including, among others, a serious concern that channel sharing would pose substantial financial hardship for many public television stations. UNC-TV states:

As a practical matter, channel sharing that would require changing channels and transmission equipment and a second re-packing and channel-change are not economically feasible for UNC-TV or for many other public television stations, especially in light of widespread state budget crises and cut-backs and ongoing attacks on federal funding for public television.<sup>19</sup>

It is essential that any channel sharing be entirely voluntary.<sup>20</sup> NAB/MSTV raises essential questions about the meaning of “voluntary”:

[W]hat is truly voluntary? For example, is it voluntary if those who do not participate in an auction would face new, higher spectrum fees? Similarly, is it voluntary if non-participating broadcasters would suffer diluted critical interference and coverage area protections?<sup>21</sup>

Furthermore, in its zeal to free up spectrum, the FCC should not jeopardize the technical and financial viability of public television and noncommercial educational programming. The FCC should consider and protect the unique role of public television. Rate Counsel concurs with the following observation and recommendation:

The reservation of spectrum exclusively for noncommercial and educational use, which dates back to the earliest days of FM and television regulation, serves a vital public interest and has been critical to the growth of public broadcasting. Any de-reservation of TV channels would be an extraordinary step that must be carefully evaluated. Any rule changes that would permit a reserved channel to be shared with a commercial station must ensure that certain essential safeguards remain in place. Specifically, channel sharing should: (i) take place on an entirely voluntary basis; (ii) not result in the loss of universal public TV service; (iii) permit the public TV station to continue to support its local public service mission; (iv) ensure that at least one of the stations licensed to share a reserved channel is an NCE station that would operate consistent with Section 73.621 of the Commission’s Rules; and (v) guarantee that, at all times, there will be a continuing place on the reserved channel for NCE service.<sup>22</sup>

---

<sup>19</sup> / *Id.*, at 11.

<sup>20</sup> / *See, e.g.*, Public Broadcasting, at 9; Harris, at 1, 4; NAB/MSTV, at 11-12.

<sup>21</sup> / NAB/MSTV, at 12.

<sup>22</sup> / Public Broadcasting, at 11.

**The FCC's rules should not facilitate control of information and video by a highly concentrated wireless industry.**

Initial comments question the wisdom of facilitating a shift in video distribution to the wireless industry:

But even if the bandwidth and environmental obstacles could be overcome (which they cannot), putting greater spectrum resources in the hands of the wireless industry—dominated by only *four* companies—will expand exponentially the “gatekeeping” market power of these entities. Can any regulatory structure safeguard a citizenry whose principal means of interconnectivity to public safety, news, information, and entertainment video content may soon be controlled by just four corporate entities?<sup>23</sup>

Of course if AT&T acquires T-Mobile, only three companies will control the wireless industry (with two of them controlling the vast majority).<sup>24</sup> The FCC should not rush into a decision that turns over yet more control of the nation's spectrum to a few “gatekeeper” companies. CBC questions the FCC's priorities, specifically as they affect broadcasters:

The *Plan* goes further, proposing a “repacking” of television spectrum in which wireless companies will be permitted to operate with the most desirable “beach front” spectrum while broadcasters will be relegated to the less desirable “landfill” spectrum of the VHF frequencies which are cluttered with man-made noise—the detritus of the airwaves.<sup>25</sup>

CBC also raises issues regarding the relative inefficiency of wireless for delivering bandwidth-intensive video as opposed to incorporating a broadcast component with the wireless infrastructure.<sup>26</sup> Others also urge the Commission to “look to broadcasters as partners in the

---

<sup>23</sup> / Capitol Broadcasting Company (“CBC”), at v, emphasis in original.

<sup>24</sup> / See also, NAB/MSTV, at 8, stating that the proposed “spectrum policies would have the effect of shifting spectrum away from large numbers of diversely-owned broadcasters to a small number of wireless operators.”

<sup>25</sup> / CBC, at v.

<sup>26</sup> / CBC states: “Broadcasting, plainly, is both environmentally “greener” and more spectrally efficient than wireless mobile. There are and will continue to be far fewer television broadcast towers than cell towers required to deliver high-volume, bandwidth-intensive video, and, for the most part, they have all already been built. The construction of innumerable additional cell towers throughout the nation will have a negative impact on the environment of monumental proportions. Television broadcasting uses only 294 MHz of spectrum to reach virtually

wireless broadband future, not simply as a source of spectrum.”<sup>27</sup> Rate Counsel supports fully FCC efforts to encourage innovation in the broadcast industry to accommodate consumers’ changing patterns of demand, particularly where such measures will leave spectrum in the hands of the public rather than controlled by a few wireless companies, an approach that also combines the benefits of broadcast and wireless technologies. CBC explains:

Wireless carriers and broadcasters can work together *now* to leverage the benefits of existing broadcast technologies to deliver video content in connection with wireless broadband services. Just as wireless carriers already seek to offload as much content to Wi-Fi networks as feasible (and are exploring greater offloading opportunities to femtocells), so, too, can high demand video content be offloaded to broadcasters. It is hardly rational to promote millions of *point-to-point* two-way unicast sessions for wireless carriers when the most popular content—primarily broadcast television content— can be more efficiently delivered to mobile devices by *point-to-multipoint* television broadcasting.<sup>28</sup>

Rate Counsel also supports MMTC’s recommendation that the FCC “ensure the history of structural discrimination in traditional forms of communication platforms is not carried over to emerging industries.”<sup>29</sup> Any changes that the FCC adopts in this proceeding should facilitate the delivery of diverse viewpoints and information over public spectrum. However, in its rush to close the digital divide,<sup>30</sup> the FCC should exercise caution that modifications to existing television stations not jeopardize consumers’ access to local news and information. Rate

---

every American. By contrast, the *Plan* is seeking 500 MHz of additional spectrum to be combined with the 547 MHz of existing spectrum for wireless broadband deployment. Yet even this 1+ GHz of spectrum will never be capable of delivering on-demand mobile video to all potential users *without a broadcast component.*” CBC, at 13, cites omitted, emphasis in original.

<sup>27</sup> / Cox, at 4.

<sup>28</sup> / CBC, at 18, emphasis in original.

<sup>29</sup> / MMTC, at 13.

<sup>30</sup> / *Id.*, at 16.

Counsel supports MMTC's recommendation that the Commission analyze the impact of its policies on minorities and women.<sup>31</sup>

**In its rush to free up spectrum, the FCC should not lose sight of public interest considerations.**

Rate Counsel continues to urge the FCC to ensure that any FCC efforts to "maximize" the value of spectrum not overshadow the FCC's historic commitment to public interest criteria in spectrum allocation. Ultimately, any reallocated spectrum should be used for the public interest. Instead of seeking to maximize revenues from auctions, the FCC should consider making the spectrum (which is a public good) available without fees to those wireless providers that can demonstrate they will offer wireless service at affordable rates. If the FCC does not adopt this recommendation, Rate Counsel urges the FCC to allocate any proceeds from any auction of spectrum toward ensuring affordable, ubiquitous broadband service.

Broadcasting has a long history of incorporating public interest obligations, which the wireless industry have not yet incorporated. Furthermore, broadcasters have demonstrated their resiliency and important public safety role during disasters, which contrasts with the fragility of telecommunications infrastructures.<sup>32</sup>

**Improving the reception of VHF TV Service may not be feasible.**

Initial comments also address the FCC's consideration of establishing indoor antenna performance standards.<sup>33</sup> Rate Counsel acknowledges that some oppose government-mandated

---

<sup>31</sup> / *Id.*, at 17-18.

<sup>32</sup> / *See Harris*, at 7-8, describing local broadcasters' ability to inform citizens during Hurricane Katrina and, more recently, NHK broadcasting in Japan, when networks were unable to function adequately to deliver information.

<sup>33</sup> / *See, id.*, at 5, urging the Commission to consider implementing antenna requirements, as well as NAB/MSTV, at 19-23. *See id.*, at 20: "However, we believe that, while some of the Commission's proposals could improve VHF reception in particular cases, neither individually nor in combination would they solve the basic service inequities of the VHF band relative to the UHF band for both regular digital broadcast services and for new mobile DTV services."

specifications for dipole antenna (“rabbit ears”),<sup>34</sup> and also recognizes that all customers may not seek re-designed antenna.<sup>35</sup> RadioShack Corporation (“RadioShack”) asserts that the problem of poor reception affects only a “small minority of consumers.”<sup>36</sup> Rate Counsel certainly supports industry-generated innovation, but it seems that precisely because there is only a small universe of consumers affected, industry, left to its own, may not devote the time and money to researching and developing products to assist a dwindling number of consumers. Precisely because the potential market for “better rabbit ears” is likely small, market pressures may not lead to a solution. Some type of compromise approach may be called for, where the FCC gives companies a specified period of time to develop a solution.

RadioShack also emphasizes the importance of allowing consumer choice to purchase a small attractive antenna at a lower cost rather than only being able to choose a potentially less aesthetic, more expensive alternative.<sup>37</sup> NAB/MSTV asserts that antenna standards cannot resolve the noise problem that affects VHF reception, and also observes that in the all-UHF markets, an all-band antenna requirement would require those consumers to bear the VHF-related costs.<sup>38</sup> In response to such requests for developing solutions that address consumer-defined needs, the FCC could facilitate a consumer advisory group meeting with industry. In the absence of government intervention, this small group of customers may be overlooked by industry.

---

<sup>34</sup> / See, e.g., RadioShack, at 5-8; Consumer Electronics Association, at 14-17.

<sup>35</sup> / See, however, T-Mobile, at 14 (supporting minimum performance standards for indoor TV antenna so as to minimize requests by VHF stations for migration to the UHF band).

<sup>36</sup> / RadioShack, at 7.

<sup>37</sup> / *Id.*, at 8.

<sup>38</sup> / NAB/MSTV, at 22.

Alternatively, the FCC should address whether, as Local Television Broadcasters contend, “the difficulties experienced by VHF broadcasters largely flow from shortcomings in immutable VHF propagation characteristics, which are based on the law of physics.”<sup>39</sup> If, as Local Television Broadcasters contends, the NPRM’s two proposed solutions (allowing increased maximum power in Zone 1 and improving performance standards for indoor antenna) will likely have minimal practical effect,<sup>40</sup> then the FCC should abandon these two approaches and acknowledge that VHF bands are not capable of providing reception comparable to that offered with UHF channels. In any event, the outcome of this or any related future FCC proceedings should not be that public television is relegated to inferior spectrum.

### III. CONCLUSION

Rate Counsel urges the Commission to use publicly owned spectrum for public uses rather than for private gain.<sup>41</sup> The FCC should not be in any hurry to facilitate unfettered control by a few companies over increasing amounts of spectrum.<sup>42</sup> The Commission’s rules should bolster local and diverse programming and not cede any more control of spectrum to an already concentrated wireless market. While it is prudent to take steps to allocate spectrum more efficiently in order to accommodate consumers’ exponentially growing demand for wireless services, it is also imperative that the FCC retain and exercise oversight of the rates, terms,

---

<sup>39</sup> / Local Television Broadcasters, at 25, cite omitted.

<sup>40</sup> / *Id.*, at 27.

<sup>41</sup> / See NAB/MSTV, at 9 stating that “[t]here are public interest costs and potential consumer harms to reallocating spectrum away from the nation’s free, over-the-air television service to the providers of pay services (including pay mobile video services that would compete with broadcasters’ mobile DTV services).”

<sup>42</sup> / Commissioner Copps recently raised a gatekeeper concern: “So regardless of whether it’s a traditional or new media context, the real question remains the same: will we allow a few huge companies to control consumers’ access to information?” Remarks of FCC Commissioner Michael J. Copps, The National Conference for Media Reform, Boston, Massachusetts, April 9, 2011, at 1.

conditions, and quality of wireless services, and seek to establish public interest obligations that parallel those traditionally associated with broadcasters. Furthermore, the return of any spectrum should be voluntary, and should not result in degraded public broadcasting nor should it lead to diminished noncommercial educational television.

Respectfully submitted,

STEFANIE A. BRAND  
DIRECTOR, DIVISION OF RATE  
COUNSEL

Christopher J. White, Esq.  
Deputy Rate Counsel

Economic Consultant: Susan M. Baldwin

Dated: April 18, 2011