

**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)
)

**JOINT REPLY COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS**

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Summary

While appreciative of Chairman Genachowski's remarks before the breakfast audience at the NAB Convention and his dialogue at the NAB Convention with the Executives of a number of State Associations, the State Associations continue to have very serious misgivings about the approach being taken by the Commission to remove even more of the spectrum that is used for free, local, over-the-air, commercial and noncommercial television broadcasting.

In the opinion of the State Associations, the Commission's approach as contained in its NPRM to solving any user congestion challenges that the wireless industry may face in the future rests on assumptions that have not been supported and cannot be supported at this time. The DTV transition is new, ongoing and challenging, and the fruits of its public interest potential have yet to be fully realized. The Commission's choice of TV spectrum for reclamation is not the necessary product of an independently conducted spectrum inventory audit. Furthermore, the Commission's notion of "voluntary," in connection with its incentive auction proposal, is questionable in the absence of legally binding FCC assurances that no monetary or non-monetary adverse effect, condition or consequence will befall any station which has not agreed to participate in the auction. Finally, the Commission's "problem solving" approach as set forth in the NPRM is too regulatory and not sufficiently marketplace-driven.

For these reasons, the proceeding should be held in abeyance until at least (i) a truly independent spectrum inventory has been commissioned and the results are made part of the record for public comment, (ii) the Office of Engineering and Technology's Allotment Optimization Model ("AOM") is made a part of the record for public comment, and (iii) the Commission has issued a legally binding commitment to the effect that no television station will be caused to suffer any adverse monetary or non-monetary effect, condition or consequence as a result of choosing not to turn in all or a portion of its spectrum via auction or otherwise.

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Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of

Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and the Wyoming Association of Broadcasters (collectively, the “State Associations”), hereby file their Joint Reply Comments in connection with the FCC’s above-captioned Notice of Proposed Rulemaking.¹ These Joint Reply Comments are timely filed by virtue of the extension granted by the Commission on April 14, 2011.²

Introduction

At the outset, the State Associations wish to express their appreciation to FCC Chairman Julius Genachowski for taking time out of his busy schedule during the 2011 National Association of Broadcasters (“NAB”) Convention in Las Vegas, Nevada to meet with the Presidents of more than twenty State Broadcasters Associations on the topic of TV spectrum reallocation and incentive auctions. The State Associations would also like to acknowledge the outstanding work performed by William T. Lake, Chief of the Media Bureau, Rebecca Hanson, Senior Advisor/Special Counsel of the Media Bureau, and Krista Witanowski, Legal Advisor of the Media Bureau, in producing the numerous webinars conducted across the nation on the subject of incentive auctions. The State Associations were pleased to promote these webinars to the commercial and noncommercial television stations in their respective states and territories.

¹ *In the Matter of Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Notice of Proposed Rulemaking, ET Docket No. 10-235, 25 FCC Rcd 16498 (rel. Nov. 30, 2010) (the “NPRM”).

² See DA 11-686.

Discussion

While appreciative of Chairman Genachowski's remarks before the breakfast audience at the NAB Convention and his dialogue at the Convention with the Executives of a number of State Associations, the State Associations continue to have very serious misgivings about the approach being taken by the Commission to remove even more of the spectrum that is used for free, local, over-the-air, commercial and noncommercial television broadcasting.

In the opinion of the State Associations, the Commission's approach as contained in its NPRM to solving any user congestion challenges that the wireless industry may face in the future rests on assumptions that have not been supported and cannot be supported at this time. The DTV transition is new, ongoing and challenging, and the fruits of its public interest potential have yet to be fully realized. The Commission's choice of TV spectrum for reclamation is not the necessary product of an independently conducted spectrum inventory audit. Furthermore, the Commission's notion of "voluntary," in connection with its incentive auction proposal, is questionable in the absence of legally binding FCC assurances that no monetary or non-monetary adverse effect, or condition or consequence will befall any station which has not agreed to participate in the auction. Finally, the Commission's "problem solving" approach as set forth in the NPRM is too regulatory and not sufficiently marketplace-driven.

For these reasons, the proceeding should be held in abeyance until at least (i) a truly independent spectrum inventory has been commissioned and the results are made part of the public record for public comment, (ii) the Office of Engineering and Technology's Allotment Optimization Model ("AOM") is made a part of the record for public comment, and (iii) the Commission has issued a legally binding commitment to the effect that no television station will

be caused to suffer any adverse monetary or non-monetary impact, condition or consequence as a result of choosing not to turn in all or a portion of its spectrum via auction or otherwise.

A. The Rule Making's TV Spectrum Reclamation Proposal Rests on Material Assumptions That Have Not Been and Cannot Be Adequately Supported

1. The DTV Transition is New, Ongoing and Challenging, and the Fruits of its Public Interest Potential Have Yet to be Fully Realized

Implicit in the Commission's NPRM proposal to reduce the amount of TV spectrum available for the commercial and noncommercial television broadcast industry, is the FCC's value weighing assumption that the public interest would be better served by transferring 120 MHz of spectrum from the television broadcast industry to the wireless industry based on their perceived future needs. That assumption, with which the State Associations strongly disagree, however, fails to take into consideration that the television industry's transition from analog to digital is ongoing and challenging, and that the potential for DTV is only beginning to be fully realized. Accordingly, it is simply too early for the FCC to make the requisite, informed judgment weighing any perceived, future channel congestion-related needs of the wireless industry, on the one hand, against the full public interest value of 120 MHz used by the Nation's television broadcast industry, on the other hand. Thus, the Commission's proposal to clear 120 MHz of TV spectrum, whether by incentive auction and/or forced restacking of TV spectrum and other spectrum clearing techniques, rests on assumptions that cannot yet be supported and should not go forward

To the point, the recent transition of the television broadcast industry from analog to digital required television broadcasters to spent approximately \$15 billion as well as give up 108 MHz of UHF spectrum, approximately 1/4 of their overall spectrum, so that it could be made

available for new services.³ Furthermore, while the deadline for television stations to begin operating solely in the digital mode occurred on June 12, 2009, the operational challenges caused by the transition to digital operations continue to exist for many television stations. Some stations have moved or still need to move from VHF to UHF digital operations to better insure the delivery of a satisfactory coverage. Numerous stations continue to seek other types of facility modifications to maintain their pre-transition coverage, *e.g.*, power increases.

Furthermore, an increasing number of television stations are using their digital channels to expand their service offerings in ways that they could not achieve with their analog channels. For example, as the Open Mobile Video Coalition (“OMVC”) and others have pointed out in this proceeding, television broadcasters have greatly expanded the use of their digital bit streams to even more efficiently provide, for example, multicast channels and Mobile DTV services, all based upon the public’s increasing demand for such services.⁴ As NAB and the Association for Maximum Service Television, Inc. (“MSTV”) point out in their opening joint comments, “[B]y the end of 2010, the total number of digital channels provided by broadcasters (including HD channels, multicast channels, and mobile DTV channels) jumped to 2,518 — more than double the number of broadcast offerings available before 2008.”⁵ All of these efforts reflect the robust, sustained, but early post-DTV transition deadline efforts by the television broadcast industry to further increase its efficient use of spectrum and the effectiveness of its over-the-air broadcast platforms in the public interest. Those strides are also precisely what the Congress and the Commission envisioned when they touted the potential of digital television.

³ See Gordon Smith, President, National Association of Broadcasters, State of the Industry Address at 2010 NAB Show (Apr. 12, 2010).

⁴ See generally Comments of OMVC.

⁵ NAB/MSTV Comments, at 12 (citation omitted).

We are less than two-years after the massive and multi-billion dollar digital transition deadline. Given the progress already being made to fully realize the benefits of that transition, it seems unreasonable on its face to talk now about taking spectrum away from television broadcasters. For those reasons, the State Associations are deeply troubled with the pace and direction of this proceeding and urge the Commission to stop long enough to allow the citizens of our Nation to reap the full benefits of the DTV transaction.⁶

2. The Commission's Choice of TV Spectrum For Reclamation is Not the Necessary Product of an Independently Conducted Spectrum Inventory Audit

The record in this proceeding amply demonstrates the conjecture about future congestion within the wireless industry. The State Associations agree with the conclusion of LIN Television Corporation's comment that before the Commission reacts "to a presumed spectrum shortage, the FCC must first undertake a rigorous assessment of projected demand for mobile services and other services that require spectrum in the television bands and it must compare that projected demand to a careful assessment of the capacity of existing allocations."⁷

Even if one were to agree (and the State Associations do not) that the wireless industry has adequately shown the need for more spectrum, there remains this important question: where should that spectrum come from? The answer to that question turns on what spectrum remains fallow, who has been assigned what spectrum, and how is that spectrum being used, if at all. The State Associations acknowledge that Chairman Genachowski recently stated that a spectrum inventory "was not needed and [that the FCC] already knows because they are the ones

⁶ As Sinclair Broadcast Group, Inc. ("Sinclair") stated in its opening Comments (at 7), "It is ... premature to start prescribing cures for ills that have neither been confirmed nor carefully diagnosed."

⁷ See Comments of LIN Television Corporation ("LIN"), at 4. See also, Comments of Sinclair, at 3 (the FCC "should conduct a fulsome spectrum inventory and use study, attempting to match available spectrum bands to their most efficient use").

regulating every aspect of the spectrum.”⁸ The State Associations respectfully disagree, and submit that a spectrum inventory conducted by an independent third-party – and available for public comment – is an indispensable condition precedent for evaluating what spectrum-based “solution,” if any, should be adopted. This is the only way to insure that the FCC can make informed, credible judgments about availability, alternatives, utility, and potential adverse consequence of various spectrum choices, which considerations comprise at least some of the elements for necessary “public interest” findings and conclusions. We note in passing that it was the Commission’s staff, not the Commission itself, that formulated and adopted the National Broadband Plan and that its staff were the ones who “chose” the spectrum that supports their own plan.⁹ In any event, as NAB/MSTV point out, conducting an independent spectrum inventory is consistent with “various pieces of proposed legislation [that] have urged, the Commission [to] follow through with a detailed and comprehensive review and selective field survey of spectrum usage under its jurisdiction.”¹⁰ Furthermore, an inventory conducted in this manner best insures that a proposed “solution” is driven by the results of an in depth inventory, and not the reverse. Making such an independently conducted spectrum inventory audit, open for public comment, is also necessary condition for a legally adequate record in this proceeding.

For these reasons, it is unquestionably premature for the Commission to offer to adopt any proposals that would have, as their purpose, the reclamation of spectrum from the television broadcast industry.

⁸ See, e.g., Broadcasting & Cable EXCLUSIVE: FCC Chairman Holds Private Meeting With State Broadcasters, John Eggerton (April 14, 2011).

⁹ And, critically for this proceeding, as LIN points out in its opening Comments (at 4), the National Broadband Plan “does not reflect findings on which the FCC may make fundamental policy shifts. The NBP task force was not making rules.”

¹⁰ Comments of NAB/MSTV, at 8 (citations omitted).

3. The Commission’s Notion of “Voluntary,” in Connection with its Incentive Auction Proposal, is Questionable in the Absence of Legally Binding FCC Assurances that No Monetary or Non-monetary Adverse Effect, Condition or Consequence Will Befall any Station Which Has Not Agreed to Participate in the Auction

The Commission’s reclamation proposal suffers from a very serious defect. Not only is this proceeding premature, it is framed in a way that creates the illusion that only voluntary action by licensees will be involved, particularly with respect to “incentive auctions.” It is true that “voluntary” action is involved at one level – a licensee may choose whether to participate in the spectrum auction by agreeing to relinquish all or a portion of its spectrum for no less than a reserve price set by the licensee. However, the Commission is requiring that such decision be made without the licensee knowing what consequence could befall it if it, and/or others similarly situated in a market, chose not to participate in the auction or participated but did not prevail. In the view of the State Associations, any decision-making that is not fully informed, due to the lack of government disclosure, falls far short of the legal equivalent of voluntary action.¹¹

To be specific, some of the most important information required for informed decision-making by both the FCC, and individual licensees, is contained in the Office of Engineering and Technology’s AOM, which has not yet been made available to the public. As the Local Television Broadcasters demonstrate in their opening Comments, “flexible use of broadcast spectrum is allowed under the Communications Act only if the Commission makes a finding that there will not be harmful interference among users; the *NPRM*, however, does not even

¹¹ The State Associations agree with the observations of NAB/MSTV in their Comments (at 12) that there are a host of questions the FCC needs to resolve in order to insure that any incentive auctions are truly voluntary:

But, a key question remains: what 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? Such a specter could well have the effect of driving broadcasters to surrender spectrum against their will. Congressional proposals consistently have stressed that the process must be *truly* voluntary and must take into account these indirect mechanisms that could coerce broadcasters into surrendering their spectrum.

acknowledge its prior concerns about incompatibility or seek any comment on the subject.”¹²

Until the OET releases its interference AOM, it is too soon for the FCC to expect parties to be able to provide any meaningful comment regarding the kinds of coverage, interference and other challenges that they would face as a result of the FCC’s proposals.¹³

At bottom, a television station’s decision to participate or not participate in any auction must be truly voluntary based on a legally binding assurance from the FCC that there will be no short-term or long-term, monetary or non-monetary adverse effect, conditions or consequence for the station, if it chooses not to participate in any auction, or participates in the auction but does not prevail.¹⁴ The State Associations would regard any action by the Commission to force a licensee to share its own or another licensee’s frequency or facilities, or to reduce or otherwise change a station’s effective coverage and interference protection, to constitute unacceptable, material adverse consequence.

Chairman Genachowski and other Commission officials and staff have uniformly declined to express anything less than complete optimism that the auctions will result in the paid surrender of a sufficient number of licenses so that additional regulatory steps will not be necessary. That expression of optimism, the State Associations submit, is not a substitute for the needed assurances identified above. Admittedly the Commission has revealed its intention to reimburse stations that decide to change channels. Yet nothing in the NPRM provides the necessary assurances that non-participating television stations will not be forced to pay a

¹² Comments of Local Television Broadcasters, at 6.

¹³ See, also, Comments of NAB/MSTV (at 11): “As a critical step, the Commission should release its Allotment Optimization Model, which will be used to design a repacking plan, and the results of its spectrum studies using this model.”

¹⁴ The State Associations agree fully with NAB and MSTV who argue in their Comments that the FCC needs to recognize the value of local television service and hold broadcasters harmless should they not wish to participate in any planned incentive auctions in the future. *Id.* at 11-14.

spectrum fee or to suffer diminished, reliable coverage in the form of reduced interference protections, new co-primary allocations, channel repacking, cross-border concurrence issues, and the like. Surely by now the Commission has evaluated numerous, market-by-market scenarios, taking into account which stations may or may not participate in auctions and what impact their decisions will have on the Commission's band clearing project. Where is the necessary transparency?

The State Associations submit that this proceeding should be held in abeyance at least until (i) the results of an independently conducted spectrum inventory are made available for public comment, (ii) the Commission releases the AOM, with opportunity for comment and (iii) the Commission has issued a legally binding commitment to the effect that no television station will be caused to suffer any adverse monetary or non-monetary impact, condition or consequence as a result of choosing not to turn in all or a portion of its spectrum via auction or otherwise.

B. The Commission's Proposed "Problem Solving" Solution is Too Regulatory and Is Not Sufficiently Marketplace-Driven

A fully marketplace-driven solution to the perceived spectrum needs of the wireless industry should be preferred over the Commission's regulatory approach. The FCC's auction proposal is too regulatory. In adopting the 1996 Telecommunications Act, Congress allowed television broadcasters to provide ancillary broadcast services in order "[t]o ensure [the] industry's ability to compete effectively in a multichannel media market . . . [and] to reflect the new marketplace realities."¹⁵ As the Commission recognized more recently, alternative uses of spectrum can lead to "a robust and effective secondary market for spectrum usage rights [which] . . . help alleviate spectrum shortages."¹⁶ One of the alternatives available today, and which

¹⁵ H.R. Rep. No. 104-204, at 55 (1995).

¹⁶ Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24178, 24178-79 (2000).

would require no additional action by Congress, would be for the Commission to encourage and permit television stations to consider leasing some of their digital spectrum capacity for wireless use.

A strong market-driven alternative to spectrum reclamation for wireless broadband is Mobile DTV. The State Associations fully support the comments submitted in this proceeding by the NAB/MSTV, OMVC, and Pearl Mobile DTV Company, LLC which demonstrate that broadcasters are advancing the vast potential of Mobile DTV and that Mobile DTV promises to make the public interest benefits of television broadcasting available to more consumers and in more ways than ever before. For example, OMVC's opening comments show that the public demand for broadcast Mobile DTV is growing exponentially. The Commission should recognize that the public is already embracing the technology.¹⁷ And according to OMVC, more than 70 stations have already commenced mobile DTV service.¹⁸ Mobile Content Venture ("MCV") has publicly stated that it plans to provide Mobile DTV to 40% of the population in the U.S. by the end of the year.¹⁹ Stations belonging to the MCV jointly cover more than 87% of the country.²⁰ Stations belonging to the Mobile500 Alliance jointly cover more than 92% of the country.²¹

This trend is going to continue given that Mobile DTV solves the "one-to-one communications architecture" capacity challenges of wireless broadband because "Mobile DTV, which relies on an efficient one-to-many video broadcast transmission system, can meet consumer demand while actually freeing up network capacity for innovation and investment in

¹⁷ See Comments of OMVC, at 4-12.

¹⁸ *Id.* at 5-6.

¹⁹ *Id.*

²⁰ See http://www.tvnewscheck.com/article/2011/04/18/50648/mcvs-mobile-tv-coverage-stands-at--87?utm_source=Listrak&utm_medium=Email&utm_term=MCV's+Mobile+TV+Coverage+Stands+At++87%25&utm_campaign=KAUT+Oklahoma+City+Seeks+Military+Viewers (visited April 18, 2011).

²¹ See http://www.mobile500alliance.com/Mobile500_CES_release.pdf.

other wireless broadband applications and services.”²² As Sinclair correctly stated, “[U]nlike the delivery of mobile video by wireless broadband providers, Mobile DTV does not suffer from inherent capacity problems associated with one-to-one communications because it relies on an exponentially more efficient one-to-many architecture ... thus, by its very nature, Mobile DTV is able to better meet consumer demand while freeing up spectrum capacity.”²³ The Commission should recognize that advancing any proposals that may diminish the ability of television broadcasters to provide Mobile DTV to consumers would be contrary to “preserving the free, over-the-air broadcast television service and maintaining the diversity of local voices and important informational and entertainment benefits it provides the American public.”²⁴

As an alternative to the disruptive reallocation of spectrum from the television industry, Mobile DTV, as a very capable, marketplace-driven approach, is well demonstrated by Capitol Broadcasting Company (“CBC”) which describes Mobile DTV in its opening comments as “opportunities to offload wireless broadband bandwidth overload to broadcasters utilizing the current mobile DTV technology.”²⁵ Under CBC’s proposal, television broadcasters and wireless providers could enter into private agreements, whereby television stations could receive and re-broadcast video that is in high consumer demand at any given moment.²⁶ In other words, wireless carriers would be able to “offload” high demand video programming to broadcasters much in the same way they already “offload” content to WiFi networks. As CBC points out, the idea makes infinite sense because it is “hardly rational to promote millions of *point-to-point* two-

²² See Comments of OMVC, at 5 (“consumers have demonstrated a strong demand for broadcast Mobile DTV services; Mobile DTV devices have entered the market; over 70 Mobile DTV stations across the country have commenced service; and broadcasters are working, through ventures such as the Mobile Content Venture⁷ and the Mobile 500 Alliance,⁸ to develop business models for Mobile DTV”).

²³ Sinclair Comments, at 8.

²⁴ NPRM, ¶ 13.

²⁵ CBC Comments, at 22.

²⁶ *Id.* at 18.

