

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

In the Matter of)
)
Expanding the Economic and Innovation)
Opportunities of Spectrum Through Incentive Auctions) GN Docket No. 12-268

COMMENTS OF MEDIA GENERAL, INC.

Media General, Inc. (“Media General”), by its attorneys, hereby submits its comments in response to the *Notice of Proposed Rulemaking* (“NPRM”) released by the Federal Communications Commission (“FCC”) in the above-referenced proceeding.¹

The NPRM seeks comment on myriad aspects of the FCC’s implementation of the Middle Class Tax Relief and Jobs Creation Act of 2012, otherwise known as the “Spectrum Act.”² With respect to one particular provision, § 6403(g)(1)(B), the NPRM notes that the Spectrum Act

. . . *specifically prohibits* the Commission from allowing a UHF channel substitution until completion of the entire incentive auction process unless: (i) doing so would not decrease the amount of UHF spectrum available for reallocation; or (ii) a request to do so was pending on May 31, 2011, the date the Commission imposed a freeze on the filing of such requests.³

The NPRM continues that, since the FCC cannot currently determine whether UHF channel substitutions would reduce UHF spectrum available for allocation, the agency “cannot” grant any requests filed before May 31, 2011.⁴ Finally, with respect to still pending UHF channel

¹ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Notice of Proposed Rulemaking*, GN Docket No. 12-268, released Oct. 2, 2012.

² Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat 156 (2012).

³ NPRM at ¶ 117 (emphasis supplied).

⁴ *Id.*

substitution requests that may have been filed before May 31, 2011, the *NPRM* states that the agency “propose[s] to exercise [its] discretion not to act at this time . . . in order to ensure that we do not unnecessarily compromise our flexibility in the repacking process.”⁵

Media General disagrees with the FCC’s conclusion that the agency has discretion to refrain from acting on such VHF-to-UHF allocation requests filed before May 31, 2011. As established below, the statutory language, the history of its adoption, and principles of statutory construction all compel the FCC to act on these petitions. The Spectrum Act mandates that the FCC take such action, which is not left to its discretion.

I. FACTUAL BACKGROUND

Media General is a leading provider of news, information, and entertainment across broadcast television, digital media, and mobile platforms, serving consumers and advertisers in strong local markets, primarily in the Southeast. The company’s broadcast operations include 18 network-affiliated television stations and their associated digital and mobile media services.

Between April 27, 2011 and May 25, 2011, Media General filed petitions for rulemaking seeking to amend the DTV Table of Allotments to specify UHF channels for six of its stations that had received VHF channels as part of the DTV transition.⁶ As Media General noted in the filings, the channel changes were necessary to more meaningfully replicate the stations’ previous analog service areas and provide more reliable service for viewers within their service areas.

⁵ *Id.*

⁶ The stations for which Media General requested the UHF channels are as follows: WFLA-TV, Tampa, FL (DMA #14); WVTM-TV, Birmingham, AL (DMA #39); WJTV(TV), Jackson, MS (DMA #93); WJHL-TV, Johnson City, TN (DMA #96); WNCT-TV, Greenville, NC (DMA #99); and WBTW(TV), Florence, SC (DMA #103).

On May 31, 2011, the FCC issued a public notice “freezing,” as of that date, the filing of rulemaking requests to change television channel allotments.⁷ In the penultimate sentence of the notice, the FCC stated, “[t]he Media Bureau will continue its processing of rulemaking petitions that are already on file with the Office of the Secretary.”⁸

As the *NPRM* notes, only 10 such petitions seeking to modify a full-service, operating television station’s allotment from a VHF to a UHF channel remain pending.⁹ Although the FCC has never released an official tally, in the months following the May 31, 2011 “freeze” date, the agency acted upon several other pre-“freeze” VHF-to-UHF allotment petitions of the type Media General had filed. Despite the small number of Media General’s pending pre-“freeze” petitions, all of which could be processed well before the FCC commences any aspect of incentive auctions or the repack, the *NPRM* mistakenly proposes that the FCC “exercise [its] discretion” not to process them.

II. THE SPECTRUM ACT MANDATES THAT THE FCC PROCESS PRE-“FREEZE” ALLOCATION PETITIONS

In adopting the Spectrum Act, Congress mandated that the FCC process pending VHF-to-UHF allotment petitions that, like Media General’s, were pending at the FCC before the agency imposed the “freeze” on May 31, 2011. The language of the statute, the history of its adoption, and principles of statutory construction collectively demonstrate that the FCC must process such petitions.

⁷ FCC Public Notice, “Freeze on the Filing of Petitions for Digital Channel Substitutions Effective Immediately,” DA 11-959, released May 31, 2011.

⁸ *Id.* This was consistent with past FCC practice; the FCC has commonly excepted requests already on-file as of the date of a “freeze” from the effect of such action. *See, e.g.*, FCC Public Notice, “Freeze on the Filing of TV and DTV ‘Maximization’ Applications in Channels 60-69,” DA 03-46, released Jan. 24, 2003; FCC Public Notice, “Freeze on the Filing of TV and DTV ‘Maximization’ Applications in Channels 52-59,” DA 02-1440, released Jan. 18, 2002.

⁹ *NPRM* at ¶ 117 n.180.

A. As the FCC’s Own Discussion in the *NPRM* Demonstrates, the Statutory Language, by Its Specific Terms, Clearly Requires Processing of the Petitions

Section 6403(g)(1)(B) of the Spectrum Act provides as follows:

(g) LIMITATION ON REORGANIZATION AUTHORITY.—

(1) IN GENERAL.—During the period described in paragraph (2), the Commission may not—

.....

(B) reassign a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel, unless—

(i) such a reassignment will not decrease the total amount of ultra high frequency spectrum made available for reallocation under this section; or

(ii) a request from such licensee for the reassignment was pending at the Commission on May 31, 2011.

Despite use of the words “may not” rather than “shall not” in the introductory phrase, Congress meant to prohibit, as a mandatory matter, the reassignment of VHF to UHF channels unless two exceptions were met, and it did not leave the FCC discretion to choose whether or not to trigger the exceptions. Parsing the specific words of § 6403(g)(1)(B) demonstrates this intent.

The words “may not” come at the very beginning of § 6403(g)(1); they direct any action the FCC takes in implementing the entire subsection. First, this verb phrase governs the FCC’s initial, preliminary determination as to whether or not it is permissible to “reassign a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel.” Next, this statutory directive governing when the Commission “may” act is qualified in two situations: first, the FCC is barred from making such reassignment unless the reassignment would not decrease the amount of UHF spectrum available for reallocation, or, second, unless a requested allotment petition was pending before May 31, 2011.

The FCC itself, in the *NPRM*, describes the use of “may not” at the beginning of § 6403(g)(1) as establishing a “specific[] prohibit[ion]” when it applies to preventing a UHF

channel substitution before completion of the entire incentive auction process.¹⁰ It is not surprising that, given the FCC’s interest in maximizing the amount of UHF spectrum available for the forward auction and, ultimately, for the repack, the agency would read the words “may not” in this context as mandatory. The words “may not,” since they come at the very beginning of the subsection, however, direct the FCC’s action both with regard to any UHF channel substitution and the exceptions to such prohibited substitutions as well. Since the FCC has interpreted “may not” as a mandatory term for purposes of the general provision on UHF substitutions, the same conclusion must apply to action under the exceptions. The identical words -- “may not” -- precede both the general provision and the exceptions. Thus, if “may not” means “shall not” for part of § 6403(g)(1)(B), as the FCC has determined, it must mean “shall not” for all of § 6403(g)(1)(B), thereby commanding that the FCC process the pre-“freeze” petitions. The structure and terms of the statute do not allow any variation.

B. The History of Adoption of the Exception in § 6403(g)(1)(B)(ii) Demonstrates Congress Fully Intended the FCC To Process Pre-“Freeze” Allocation Petitions

The Spectrum Act has its roots in H.R. 3630, which passed the House of Representatives on December 13, 2011. The version of H.R. 3630 adopted by the House began with the same “may not” phrase and included the language that ended up as § 6403(g)(1)(B)(i) of the Spectrum Act -- the first exception relating to the overall availability of UHF spectrum -- but did not include the exception in § 6403(g)(1)(B)(ii) related to the processing of pending pre-“freeze” petitions.¹¹ The exception requiring the FCC to process pre-“freeze” petitions was added in

¹⁰ *NPRM* at ¶ 117, third sentence.

¹¹ H.R. 3630, as passed by the House on Dec. 13, 2011, provided as follows:

(g) LIMITATION ON REORGANIZATION AUTHORITY.—

(1) IN GENERAL.—During the period described in paragraph (2), the Commission may not—

conference, once the Senate had passed its own spectrum legislation. The conferees simply added the exception language requiring the FCC to process pre-“freeze” petitions, along with the word “or,” immediately after what was formerly the only exception allowing VHF to UHF reallocations, that is, that the amount of UHF spectrum would not be decreased.¹²

As is not unusual for language added in conference, the legislative history lacks an explanation for the change. Despite the absence of contemporaneous explanation, however, four Senators and five House Members wrote the FCC shortly after passage of the Spectrum Act.¹³ One letter specifically explained that any hesitation in processing the pre-“freeze” petitions was contrary to the legislative intent behind inclusion of the second exception added during conference committee deliberations.¹⁴ All were unanimous in asking the FCC to move forward with the pending petitions, and these letters provide further evidence that Congress, in adopting § 6403(g)(1)(B)(ii), clearly intended that the FCC would continue to process pre-“freeze” allocation petitions. As the *NPRM* itself acknowledges, “may not” must be read as mandatory in this case.

.....
(B) reassign a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel, unless such a reassignment will not decrease the total amount of ultra high frequency spectrum made available for reallocation under this section.

Middle Class Tax Relief and Job Creation Act of 2011, H.R. 3630, 112th Cong. § 4104(g) (2011).

¹² H.R. Rep. No. 112-399, at 75 (2012) (Conf. Rep.).

¹³ See letters attached as Exhibit A.

¹⁴ See letter from Senators Hagan, Graham, and Chambliss at 2.

C. Both Principles of Statutory Construction and Case Law Establish That § 6403(g)(1)(B)'s Direction to the FCC Is Mandatory

A number of principles of statutory construction and ample case law interpreting language similar to that of § 6403(g)(1)(B) further compel the conclusion that the FCC does not have the discretion to refrain from processing the pending pre-“freeze” petitions.

First, Congress’ adoption of the reference to pre-“freeze” petitions came less than a year after the FCC had issued its public notice announcing the “freeze.” That notice had explicitly stated that the Media Bureau would continue to process allotment petitions filed before May 31, 2011. Congress is presumed to be aware of and to preserve, not abrogate, the background of existing regulatory provisions and policies with respect to which it legislates.¹⁵ Although Congressional acquiescence may sometimes be derived from nothing more than silence in the face of an administrative policy,¹⁶ here Congress took specific action to codify an exception to the statute’s prohibition on VHF to UHF changes, echoing in § 6403(g)(1)(B)(ii) the Media Bureau’s commitment to continued processing of pre-“freeze” allocation petitions. The Congressional adoption of the exception mandating the processing of pre-“freeze” petitions acknowledges and underscores that the FCC is to continue with the processing policy it announced on May 31, 2011.

Second, in addition to the FCC’s acknowledgment in the *NPRM* that “may not” means “shall not,” the principle of statutory construction that meaning must be given to a law’s every word supports the conclusion that the second exception Congress added is mandatory, not permissive. In this case, “may” must be read as mandatory because otherwise the “unless”

¹⁵ See, e.g., *United States v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002); *Hernstadt v. FCC*, 677 F.2d 893, 902 n.22 (D.C. Cir. 1980) (citing *Helvering v. Griffiths*, 318 U.S. 371, 395-97 (1943)); *Wachovia Bank & Trust Co. v. Nat’l Student Mktg. Corp.*, 650 F.2d 342, 359-60 (D.C. Cir. 1980).

¹⁶ *Haig v. Agee*, 453 U.S. 280, 300 (1981) (citing *Zemel v. Rusk*, 381 U.S. 1, 11 (1965)).

clause would be superfluous if “may” were construed as merely permissive. There would be no reason to provide exceptions if the FCC’s initial decision whether to make VHF to UHF assignments was discretionary. Reading the “unless” clause out of the statute would clearly be contrary to Congressional action in adopting both exceptions and at odds with the basic tenet that effect must be given to every word in a statute.¹⁷

Third, based on context, courts have acknowledged that “may” and “shall” are at times interchangeable¹⁸ and have held “may” to represent a mandatory requirement.¹⁹ In this case, the FCC’s previous policy statement indicating processing would continue, the structure of the statutory provision, and the history of the exception’s adoption provide the contextual evidence establishing an affirmative obligation to process the pending pre-“freeze” allocation petitions. Even more compelling are a wide variety of cases finding that, as in this case when “may” is combined with “not,” the ordinary meaning of “may not” in the statute is mandatory.²⁰

¹⁷ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *U.S. v. Barnes*, 295 F.3d 1354, 1360 (D.C. Cir. 2002); *Murphy Exploration & Prod. Co. v. U.S. Dep’t of Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001), *opinion modified on denial of reh’g sub nom.*, 270 F.3d 957 (D.C. Cir. 2001); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1362 (D.C. Cir. 1980).

¹⁸ See *Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 432 n.9 (1995) (*citing* D. Mellinkoff, Mellinkoff’s Dictionary of American Legal Usage 402-403 (1992) (“shall” and “may” are “frequently treated as synonymous” and their meaning depends on context); B. Gormer, Dictionary of Modern Legal Usage 939 (2d ed. 1995) (“[C]ourts in virtually every English-speaking jurisdiction have held – by necessity – that *shall* means *may* in some contexts, and vice versa.”)).

¹⁹ *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 412 (9th Cir. 2011); *Photopaint Techs., LLC v. SmartLens Corp.*, 335 F.3d 152, 156 (2d Cir. 2003); *Nevada Power Co. v. Watt*, 711 F.2d 913, 920 (10th Cir. 1983); *Thompson v. Clifford*, 408 F.2d 154, 157-61 (D.C. Cir. 1968).

²⁰ *E.g.*, *In re Brandt*, 437 B.R. 294, 298 (M.D. Tenn. 2010) (“In a statute, the phrase “may not” has exactly the same meaning as “shall not.””) (citation omitted); *Woolls v. Superior Court*, 25 Cal. Rptr. 3rd 426, 435 (Cal. Ct. App. 2005) (“‘May not’ is prohibitory, as opposed to permissive.”); *Stringer v. Realty Unlimited, Inc.*, 97 S.W.3d 446, 448 (Ky. 2002) (“may not” “is mandatory and not permissive or discretionary”); *Hodges v. Thompson*, 932 S.W.2d 717, 720 (Tex. App. 1996) (“The phrase ‘may not’ means ‘shall not’ and is therefore mandatory.”); *Ryan*

Finally, Congress' reference in § 6403(g)(1) to a specific time period in § 6403(g)(2) governing FCC action further establishes that Congress' use of the term "may not" and its direction to the FCC was mandatory. If the prohibition in § 6403(g)(1)(B) were discretionary, there would be no reason to time limit it. Given that the use of "may not" at the beginning of the statutory provision here is mandatory, the verb phrase's application to the two exceptions is similarly mandatory. The FCC has an affirmative duty to process the pending pre-"freeze" petitions.

III. THE FCC'S FAILURE TO PROCESS THE PENDING PRE-"FREEZE" PETITIONS WOULD NOT ONLY BE CONTRARY TO STATUTE BUT ARBITRARY AND CAPRICIOUS

The "freeze" public notice that the FCC issued on May 31, 2011 was perfectly clear: "The Media Bureau will continue its processing of rulemaking petitions that are already on file with the Office of the Secretary."²¹ The FCC's determination now that it has the discretion to refrain from processing the few pending pre-"freeze" petitions is not only contrary to statute but amounts to imposition of a retroactive "freeze" without any notice.

The FCC's proposal in the *NPRM*, if adopted, would also inequitably treat petitioners with remaining VHF-to-UHF pre-"freeze" requests differently from other similarly situated VHF-to-UHF channel proponents who saw their pre-"freeze" petitions result in the issuance of notices of proposed rulemaking after May 31, 2011.²² Nothing set forth in the actions issued by

v. Montgomery, 240 NW.2d 236, 238 (Mich. 1976) ("May not be recounted" means "shall not be recounted").

²¹ FCC Public Notice, *supra*, note 7.

²² Although the FCC does not release statistics on such matters, electronic database searches reveal that the FCC, post-"freeze," issued at least three notices of proposed rulemaking proposing VHF to UHF allotment changes. See MB Docket Nos. 11-159, 11-140, and 11-139. Post-"freeze," the FCC has also issued at least three decisions approving VHF-to-UHF allotment changes; presumably, the petitions for rulemaking in those cases were submitted pre-"freeze." See MB Docket Nos. 11-140, 11-100, and 11-74.

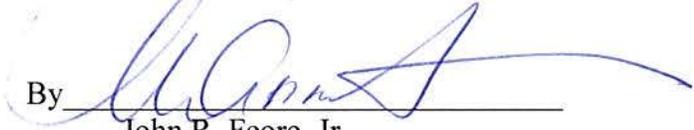
the FCC identifies any factors that would allow these cases to be distinguished from Media General's petitions. Given this fact, the FCC's proposal to refrain from processing Media General's petitions, in light of these other actions, would be contrary to the well-established requirement that the FCC treat similarly situated parties the same.²³

IV. CONCLUSION

In adopting the Spectrum Act, Congress mandated that the FCC process VHF-to-UHF allocation petitions that were pending before the agency imposed a "freeze" on May 31, 2011. The language of the statute compels that result, as the *NPRM* acknowledges in interpreting the operative words in the relevant provision. The history of the Spectrum Act's adoption and principles of statutory construction further require that result. The FCC has sufficient time to process the few pending petitions in expedited fashion well before commencement of any auctions and repack. The FCC must move quickly to do so.

Respectfully submitted,

MEDIA GENERAL, INC.

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of

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Its Attorneys

January 25, 2013

²³ *Melody Music v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) (FCC's refusal to explain different treatment of similarly situated license applicants was error).

EXHIBIT A

United States Senate

WASHINGTON, DC 20510

May 1, 2012

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Genachowski:

We understand that the Commission has before it a small number of rulemaking petitions seeking to change television stations' allocations from digital VHF to UHF channels. To inform review of these petitions, we would like to draw your attention to a provision in the recently adopted spectrum provisions of the Middle Class Tax Relief and Job Creation Act of 2012 and the legislative history that preceded its adoption.

Section 6403(g)(1)(B) of the Act prohibits the Federal Communications Commission, beginning on the date of enactment and proceeding until a reverse spectrum auction is completed or certain findings related to auction revenue are made, from reassigning a broadcast television license from a VHF channel to a UHF channel unless (i) such reassignment would not decrease the amount of UHF spectrum available for reallocation through auction or (ii) a request for such reassignment was pending before the FCC on May 31, 2011. On that date, the FCC had issued a public notice "freezing" the filing of VHF-to-UHF reallocation petitions.

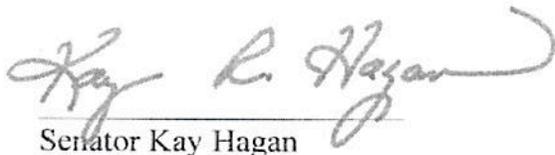
Earlier versions of the statute had not included this exception for requests pending as of the imposition of the "freeze." Prior to adoption of the final Act, the bipartisan conferees included the exception for requests pending as of the "freeze" date. This change was inserted to allow those broadcasters who had invested the time and resources necessary to file reallocation petitions to have their petitions considered in accordance with existing Commission standards and processes.

Since adoption of the legislation, we understand that there may be some reluctance on the part of your staff to process the remaining reallocation petitions filed before the "freeze."

We believe that such a position is counter both to the specific legislative intent behind inclusion of the "freeze" exception and to principles of fairness that entitle parties, who have proceeded in accordance with FCC rules and deadlines, not to have their rights truncated unexpectedly.

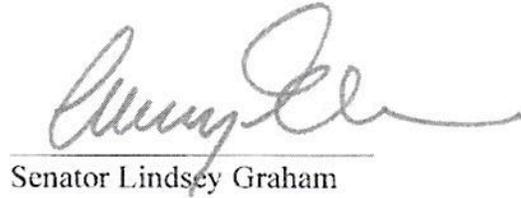
Thank you for your attention to this matter.

Very truly yours,



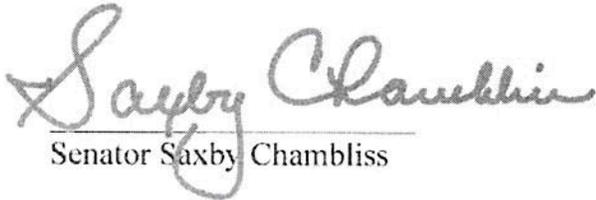
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Senator Kay Hagan



Handwritten signature of Lindsey Graham in cursive script.

Senator Lindsey Graham



Handwritten signature of Saxby Chambliss in cursive script.

Senator Saxby Chambliss

Congress of the United States

Washington, DC 20515

July 26, 2012

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Genachowski:

We understand that the Commission has before it a small number of rulemaking petitions seeking to change television stations' allocations from digital VHF to UHF channels. We are concerned that unless the Federal Communications Commission (FCC) acts quickly to move forward with these petitions, our constituents will be denied full access to local news and informational programming and the benefits of emerging technologies like Mobile DTV.

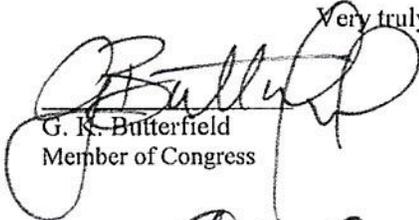
We trust you are familiar with Section 6403(g)(1)(B) of the recently adopted Middle Class Tax Relief and Job Creation Act of 2012 and the legislative history that preceded its adoption. While that section bars the FCC from reassigning a broadcast television license from a VHF channel to a UHF channel, there are two important exceptions. The first exception applies to reassignments that would not decrease the amount of UHF spectrum available for reallocation through auction. The second exception applies to requests for reassignment pending before the FCC on May 31, 2011. On that date, the FCC had issued a public notice "freezing" the filing of VHF-to-UHF reallocation petitions.

Earlier versions of the statute did not include the exception for requests pending as of the imposition of the "freeze." Before adoption of the final Act, the bipartisan conferees included the exception for requests pending as of the "freeze" date. This change was included to allow those broadcasters who had invested the time and resources necessary to file reallocation petitions to have their petitions considered in accordance with existing Commission standards and processes.

We understand that your agency is working hard to implement the legislation. However a position on the "pre-freeze" petitions is in direct conflict with both the legislative intent behind the "freeze" exception and principles of fairness. These principles entitle parties, who have proceeded in accordance with FCC rules and deadlines, not to have their rights truncated unexpectedly. The FCC's position on this issue will disadvantage our neighbors, limiting the service they receive from the affected stations now and in the future as newer services, like Mobile DTV, are offered.

Thank you for your attention to this matter.

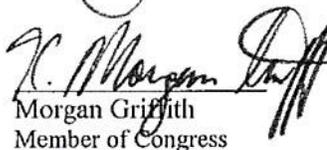
Very truly yours,



G. K. Butterfield
Member of Congress



Kathy Castor
Member of Congress



Morgan Griffith
Member of Congress



Gregg Harper
Member of Congress



Cliff Stearns
Member of Congress

United States Senate

WASHINGTON, DC 20510-4606

May 16, 2012

The Honorable Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Genachowski,

I write to draw your attention to some spectrum reallocation petitions, which are currently before the Commission.

It is my understanding that these petitions seek to transfer select digital VHF frequencies to UHF frequencies. Further, it is my understanding that these petitions were submitted prior to the Commission's May 31, 2011 public notice, which curtailed the submission of additional reallocation petitions.

Based on the public record, it appears that since June 2009, at least twenty-three applications for VHF to UHF reassignment have been approved by the Commission, including six in 2011 and one in 2012. The Commission also approved thirteen UHF to UHF reassignments during the same period of time.

As you know, Section 6403 of the Middle Class Tax Relief and Job Creation Act of 2012 permits the Commission to consider requests for VHF to UHF reassignment, which were pending before the May 2011 deadline. Therefore, I ask for every appropriate consideration for such petitions in accordance with the Commission's existing standards and processes.

Thank you for your attention to this request. I would appreciate any updated information regarding this matter at your convenience.

Sincerely,



Mark R. Warner