

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Second Periodic Review of the)	MB Docket No. 03-15
Commission's Rules and Policies)	
Affecting the Conversion to)	RM 9832
Digital Television)	
)	
Public Interest Obligations of TV)	MM Docket No. 99-360
Broadcast Licensees)	
)	
Children's Television Obligations of)	MM Docket No. 00-167
Digital Television Broadcasters)	
)	
Standardized and Enhanced Disclosure)	MM Docket No. 00-168
Requirements for Television Broadcast)	
Licensee Public Interest Obligations)	

To: the Commission

COMMENTS OF ALOHA PARTNERS, L.P.

Respectfully Submitted,

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To: the Commission

COMMENTS OF ALOHA PARTNERS, L.P.

Aloha Partners, L.P. (“Aloha”), by its attorneys, and pursuant to the Commission’s Notice of Proposed Rulemaking in the captioned proceeding¹ hereby submits its comments in that proceeding. As set forth below, Aloha submits that the public interest would be best served by the Commission taking the action prescribed herein both to clear quickly the Lower 700 MHz Band and to facilitate the transition to digital television.

¹ Note of Proposed Rulemaking in MB Docket No. 03-15, RM 9832, 68 Fed Reg 7737 (February 18, 2003) FCC Rcd ____ (2003) (the “NPRM”).

I. ALOHA'S INTEREST

Aloha's interest in its proceeding stems directly from its considerable presence in the Lower 700 MHz Band.² When Lower 700 MHz spectrum was auctioned last summer, Aloha figured most prominently in the auction. It was the successful high bidder for 77 licenses, having gross high bids of \$43,341,200. It has already paid to the Commission that amount, in full and on time. It is now the licensee of record for each of those stations and is the largest 700 MHz licensee. Moreover, Aloha has submitted an application to participate in Auction No. 49, also involving the 700 MHz band, and thus could obtain an even larger presence in the Lower 700 MHz.

II. INTRODUCTION

The Commission's overarching goal in the NPRM was to "ensure continued progress on the digital transition". NPRM, at Para 1. Towards that end, the Commission properly addressed a considerable number of issues in the NPRM, ranging from a report on digital transition progress to matters such as Closed Captioning and V-Chips. Rather than address each of those matters, Aloha will in these comments focus on those that are more critical to transitioning television stations out of the "non-core" spectrum that is within the Lower 700 MHz Band. Those issues include (a) generally how best to promptly transition broadcasters off of Lower 700 MHz Band spectrum without disrupting existing reception; (b) what steps should be implemented sequentially, and when, to facilitate the transaction; and (c) in the event that the "15% exception" to transition obligation is triggered, what rules should be promulgated so that the issues pertaining to that exception can be resolved in an efficient manner. Aloha also asks

² That band consists of frequencies 698-746 MHz (the "Lower 700 MHz Band".)

the Commission to urge Congress to amend the Act, by prescribing an absolute end-of-transition date, to further facilitate the transition.

III. DISCUSSION

A. Non-Operating DTV Stations Must Be Fully Build Promptly, Or Abandoned.

The Public Interest would be served by the Commission clarifying that digital stations in the Lower 700 MHz Band that are not now operational must be fully constructed (i.e. full replication and maximization) on or before June 30, 2004, or abandoned. If licensees chose to abandon their digital station they will be afforded an opportunity later to commence digital service by virtue of “flash-cutting” from their existing analog operation to digital.

Those broadcasters who hold digital allocations in the Lower 700 MHz Band will not be unfairly disadvantaged by this proposal. They have already had appropriate opportunity to build, yet chosen not to do so. They will be afforded additional opportunities now. Only those who again choose not to build will lose any authorization. Even then, the broadcasters will be given an opportunity to later operate in a digital format, by “flash-cutting” from their analog operations to digital ones.

Perhaps most significantly, the public will not be disadvantaged by this. No one will be denied an opportunity to view any channel that is now operational.

This proposal has several advantages. First, if broadcasters elect not to build, it should clear some or all over 100 existing and non-operational allocations from the Lower 700 MHz Band. If they build instead, the overall digital transition will be advanced. Lastly, this proposal presents an element of straight-forwardness that provides an incentive for licensees of

unbuilt DTV stations to make a reasonable choice rather than to continue to delay. While this is not a panacea, it would constitute meaningful progress in an area that has been stagnated for quite some time.

B. The Commission Should Now Specify Processes to Be Utilized in the Event the 15% Exception is Claimed to Exist.

The NPRM devotes some 26 paragraphs to addressing proposed implementation of the 15% exception included in 47 U.S.C. § 309(j) 14. See NPRM, Paras 69-95. Matters addressed therein range from market definition to the availability of digital-analog converters, to how to calculate the 15%, to who has the burden of proof on various aspects of any “15% test” inquiry.

As an initial matter, the Commission’s discussion of these several complicated sub-issues illustrates how complicated and all-consuming this process will be. It is for this reason, among others, that Aloha urges that the Commission make known such complications so that Congress may act to resolve as many as possible, as quickly as possible, perhaps through use of a “firm date” for digital transition. See Section IV, infra.

At the onset of its discussion regarding resolution of 15% issues, the Commission inquires as to whether it is possible for the Commission to grant a “blanket exception” to all stations in a market, or nationally. In view of the complications associated with the process, the question is insightful. Unfortunately, the answer is that blanket exceptions do not appear to be appropriate, except perhaps on an “entire market” basis, and certainly not on a nationwide basis. Review of Section 47 U.S.C. § 309(j)(4) demonstrates that Subsection (B)(i) cannot be applied nationally, for it requires that the Commission make a finding that the station at issue, if not operating digitally, has exercised all “due diligence” in its efforts to do so. This necessarily

requires a station-specific analysis. Similarly, Subsection (B)(iii) addresses market-specific subscription and reception issues that, by definition, also do not lend themselves to nationwide analysis.³

The Commission also addressed “fact finding” related to the 15% test. NPRM, at Para 93. Here the Commission poses question regarding who has the burden of proof and who shall be required to conduct surveys providing answers to the questions at issue.

It is clear that what is at issue is an extension of an otherwise applicable deadline (i.e., December 31, 2006). 47 U.S.C. § 309(j) 14. It is also clear that the Commission is preparing specific forms through which such requests are being made. NPRM at Para 71. It is also clear that applicants before the Commission, either for extensions of time or other relief, bear the initial burden of proving their entitlement to the relief requested. There is nothing here that would cause normal Commission procedures not to apply. Accordingly, the applicant for an extension should bear all burdens associated with its requests.

There is another reason that the applicant should bear the burden of proof. It is their market, and they are familiar with the viewing habit of the residents and other market specific conditions. The Commission is neither well augmented with individual market characteristics nor sufficiently staffed to take the lead on production in each market at issue.

Similarly, the Commission cannot reasonably be expected to conduct surveys to find the relevant facts. The Commission’s expertise is not in survey undertaking, and they do not have the resources for it. What the Commission should do, however, is set standards that govern

³ Subsection (B)(ii) could lend itself to nationwide analysis in that availability of the converter equipment on an Internet basis should remove this issue from market-by-market analysis. But non-availability through the Internet would then raise only the issue of whether it the technology is available in specific markets though some more localized source

