

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**COMMENTS OF SINCLAIR BROADCAST GROUP, INC.
ON NOTICE OF PROPOSED RULE MAKING**

Kathryn R. Schmeltzer
David S. Konczal
Christopher J. Sadowski

Counsel for Sinclair Broadcast Group, Inc.

Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Dated: April 21, 2003

TABLE OF CONTENTS

TABLE OF CONTENTS i

SUMMARY ii

I. Introduction.....2

II. Difficulties in the Transition Process.....5

III. DTV/Analog In-Core Channel Swaps7

IV. Replication and Maximization Protection Deadlines for In-Core Channels9

V. Replication and Maximization Protection Deadlines for TV Channels 52-69.....11

VI. Interference Protection for Replicated and Maximized Service Areas of TV Channels 52-69 From New Wireless Operators12

VII. Simulcasting and Effect on Prime Time Broadcasting Requirements.....14

VIII. Section 309(j)(14).....15

A. Filing of Extension Requests15

B. Converter Technology Test.....15

C. The 15 Percent Test17

D. Fact Finding Under 309(j)(14)(B)20

IX. DTV Receivers Should Be Clearly Labeled to Indicate Their Reception Limitations.....21

X. DTV Public Interest Obligations24

CONCLUSION25

SUMMARY

Sinclair Broadcast Group, Inc. (“Sinclair”) is filing these Comments to address some of the technical and regulatory problems that have plagued the digital transition. Sinclair has invested tens of millions of dollars in constructing digital facilities and is very anxious to see digital television succeed. Unfortunately to date, there are few, if any, consumers that can watch digital facilities over-the-air because there are no receivers on the market today that can pick up a digital over-the-air signal with a simple indoor antenna with the kind of robustness that characterizes the existing over-the-air NTSC signal. As Commissioner Adelstein pointed out in his Separate Statement to the Notice of Proposed Rule Making (“NPRM”): “Above all, we must ensure that the public continues to have access to free over-the-air broadcasting in the digital world, so that broadcasting will remain the vital source of news, information, and programming for all Americans that it is today.” The Commission needs to take action in response to the NPRM to make certain that this vision is realized.

Sinclair’s Comments set forth some of the difficulties that broadcasters have faced during the transition process and the steps that the Commission can take in response. For instance, there are applications pending that can be granted; the Commission can speed up the process for obtaining Canadian concurrence; and the Commission can encourage the co-location of NTSC and DTV facilities by changing outdated gain/loss policies that stem from the 1970s. Such policies are no longer applicable in an era when analog broadcasts will disappear. The Commission should retain its policy of permitting DTV/Analog in-core channel swaps through the rulemaking process as opposed to an application process because there are substantial differences in the interference requirements for analog and digital facilities and the NPRM simply does not address this issue with the necessary clarity.

Two inescapable facts concerning the digital transition compel Sinclair's comments: (1) television receivers on the market today are currently incapable of acceptably receiving over-the-air DTV signals regardless of the power level at which broadcasters transmit; and (2) even if receivers were capable of receiving over-the-air DTV signals, there is a dearth of digital content. For these and other reasons, the Commission should adopt a replication/maximization protection deadline for both in-core and out-of-core channels that coincides with the date on which a station must return its analog channel, including any extensions of the December 31, 2006 statutory deadline. Sinclair supports the Commission's tentative conclusion that fully replicated DTV facilities on Channels 52-69 should be protected from new wireless operators as "actual," regardless of whether the DTV station is currently operating or has filed an application to operate. The Commission should retain the current (pre-April 1, 2003) minimum operating schedule until such time as licensees are required to return their analog spectrum. Sinclair's recommendations are based on the overriding premise that until the Commission resolves the serious issues concerning the public's ability to receive over-the-air digital signals, requiring broadcasters to go to the expense of replicating or maximizing their service will not result in any public benefit or expedite the digital transition process.

The NPRM raises questions regarding the appropriate interpretation of 47 U.S.C. § 309(j)(14). Sinclair submits that under § 309(j)(14)(B), the Commission should grant a blanket extension to all stations in a market until the facts giving rise to the extension no longer exist. Sinclair reads the converter technology test of § 309(j)(14)(B)(ii) to require that converter boxes capable of receiving all digital formats must be available from all cable operators in a market, from all electronic retail outlets in a market, as well as over the Internet, and that such converters must be available at a price affordable to lower income consumers. The 15 percent test set forth

in § 309(j)(14)(B)(iii) is clear on its face and requires that an MVPD carry all of the television stations broadcasting a digital signal or that a household be capable of receiving via a simple indoor antenna the digital signal of each television station from which the household receives an analog signal. Finally, Sinclair agrees that the statutory language and legislative history of § 309(j)(14) imposes on the Commission the burden of assessing whether an extension of time is required.

The NPRM also requests comment on DTV labeling requirements. Sinclair submits that receivers designed for digital cable or satellite-only reception should be clearly labeled to indicate their inability to receive over-the-air reception. DTV sets that include over-the-air tuners should include a label that states: (i) that over-the-air reception is not possible with a simple indoor antenna; (ii) that instructs the consumer as to what type of antenna must be purchased and installed to have any potential of receiving over-the-air DTV signals; and (iii) that provides a contact number at the FCC where consumers can lodge complaints.

Finally, while Sinclair takes its public interest responsibilities very seriously, it believes that the Commission must give careful consideration to the question whether such obligations can legally be imposed in an environment that does not provide for or protect over-the-air broadcast television.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**COMMENTS OF SINCLAIR BROADCAST GROUP, INC.
ON NOTICE OF PROPOSED RULE MAKING**

Sinclair Broadcast Group, Inc. (“Sinclair”), by its attorneys, hereby submits its comments in response to the Commission’s Notice of Proposed Rule Making (“NPRM”), FCC 03-8, released January 27, 2003, in the above-captioned proceeding. Sinclair is one of the largest over-the-air television broadcasters in the United States today. The company currently owns and operates, programs, or provides sales services to 62 television stations in 39 markets. Its television stations reach approximately 24% of U.S. television households and include affiliates of the ABC, CBS, NBC, Fox, WB, and UPN networks.

Sinclair is deeply committed to ensuring that the digital transition is a success. Sinclair has invested heavily in the DTV transition, spending tens of millions of dollars to ensure that its stations meet Commission-mandated deadlines for building out DTV facilities. Over the years,

the company has been involved in a number of Commission rulemaking proceedings concerning the technical aspects of digital television—from its early comments advocating the use of COFDM over 8-VSB as a digital television standard to more recent comments urging the Commission to adopt DTV receiver performance standards.¹ Sinclair has also filed comments urging the Commission to make certain that digital cable compatible television sets implemented pursuant to the Memorandum of Understanding between representatives of the cable and consumer electronics industries are capable of providing quality reception of over-the-air digital signals with a simple indoor antenna.²

I. INTRODUCTION

The Commission should take note that at the present time the digital television transition is fodder for comedians. Just recently, during the Academy Awards Ceremony, the host, Steve Martin, commented that the program was being broadcast in high definition digital “to the three people at Circuit City who may be watching.” While the NPRM claims that “[m]ost Americans now have available to them an over-the-air signal from at least one digital television station and many Americans have several DTV signals available to them,” *NPRM* at ¶ 9, there is simply no support for this claim. Moreover, while a number of stations may be broadcasting a digital signal, the very few members of the public who are able to receive a digital signal are primarily receiving that signal through a cable or satellite system rather than over the air. And the Americans who are able to watch a digital broadcast on the television set they have hooked up to the cable system are not able to pick up that same broadcast on the other television sets they have

¹ See *Sinclair Broadcast Group, Inc., Petition for Partial Reconsideration*, MM Docket No. 00-39 (Nov. 8, 2002); *Reply Comments of Sinclair Broadcast Group, Inc.*, ET Docket No. 02-135 (Feb. 28, 2003).

at home that are not connected to cable. That is because there are no receivers on the market today that can pick up a digital over the air signal with a simple indoor antenna with anything even remotely approaching the robustness and ubiquitousness with which existing television sets can receive over-the-air analog signals.³ In a recent article in “HDTV Guide” (Winter 2003 ed.), the Consumer Electronics Association (“CEA”) recognized the problem of over-the-air receivability. The article points out that in many markets the ability to receive digital signals will depend on the use of a directional antenna that must be rotated as channels are changed or the use of multiple antennas all facing different directions. In markets where digital transmissions are being broadcast on both UHF and VHF channels, the article suggests the use of a “173 foot long” antenna might be required. Although CEA’s article is no doubt correct in pointing out that “[t]he old 1955-style rooftop antenna isn’t likely to fly in 2002,” CEA seems to have missed the important point that neither are numerous antennas placed strategically around a room or rotating antennas which require reorientation each time a channel is changed.

As a broadcast company with no cable interests, Sinclair is very concerned about the public’s ability to receive over-the-air digital programming.⁴ The over-the-air free broadcast system is not only important to serve the numerous members of the public who cannot afford

² *Comments of Sinclair Broadcast Group, Inc.* CS Docket No. 97-80 and PP Docket No. 00-67 (Mar. 28, 2003).

³ The President of the National Cable and Telecommunications Association recently noted that “most DTV sets sold do not include broadcast tuners.” Robert E. Sachs, Speech Delivered at the Annual Meeting of the Advanced Television Systems Committee, Mar. 11, 2003 *available at* http://www.ncta.com/pdf_files/RJS_ATSC_3-11-03.pdf (last visited Mar. 29, 2003).

⁴ Sinclair is particularly concerned with the unwillingness of equipment manufacturers to do anything that would facilitate the ease of reception of over-the-air DTV, as demonstrated by their appeal of the Commission’s decision to require new receivers to include over-the-air tuners and to pursue legislation to overturn this over-the-air DTV tuner mandate. *See Consumer Electronics Association v. FCC*, Case No. 02-1312 (D.C. Cir., filed October 11, 2002); *see also* “TV Consumer Choice Act of 2003,” H.R. 426, 108th Congress (introduced January 28, 2003).

cable or satellite service but also as a significant source of emergency news and information, particularly in these difficult times.⁵

Sinclair is concerned that some members of the Commission have the apparent belief that over-the-air television is already dead.⁶ Such a belief overlooks the fact that twenty million households in the United States currently rely solely on over-the-air television reception.⁷ Moreover, including that portion of the eighty-five million households that currently subscribe to a multiple video program delivery service but also have one or more television sets that are not hooked up to such service, more than eighty-one million broadcast-only television sets exist.⁸ Finally, U.S. consumers continue to purchase non-digital television sets in numbers far, far above the number of digital sets sold. Recent CEA data reveals that 30,000,000 analog

⁵ Michael K. Powell, Chairman of the Federal Communications Commission, Remarks at the Media Institute, Mar. 27, 2003 *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-232701A1.pdf (last visited Apr. 2, 2003) (“Broadcast TV offers important content to citizens without charge. It can be accessed from virtually any location. And, it is vital in emergency situations—be it weather or terrorist attack.”).

⁶ Ted Hearn, *Could TV Stations Lose Their Spectrum*, Multichannel News, June 18, 2001, *available at* http://www.multichannel.com/index.asp?layout=story_stocks&articleid=CA89647 (last visited March 29, 2003) (quoting the Commission’s Chairman and Mass Media Bureau Chief suggesting that as cable and satellite penetration rises there will no longer be a need to protect broadcast television spectrum).

⁷ The Commission itself has cited a study estimating that 29.2% of all households (20.7 million) are broadcast only. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, 17 FCC Rcd 1244 (2002) at ¶ 79.

⁸ In the same report, the Commission cited another study indicating that “81 million television sets, or approximately 30.3% of the 267 million sets in the U.S.” are not connected to any MVPD service and receive all broadcast signals over-the-air. *Id.*; *see also Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, Separate Statement of Chairman Michael K. Powell*, 17 FCC Rcd 15978 (2002):

There are approximately 81 million television sets in the U.S. (over 30% of the total) that are not connected to any subscription video service and rely solely on free, over-the-air broadcasting. Of those sets that rely on over-the-air service, about 46.5 million are in broadcast-only homes and 34.5 million are in homes that subscribe to a multichannel video programming service.

television sets were sold in 2002 alone compared to the 542,659 digital receivers that have been sold over the past six years.⁹ These statistics demonstrate that consumers are unaware that analog sets are scheduled to become obsolete in as little as 3.5 years.

In these Comments, Sinclair has chosen to address certain aspects of the NPRM which it considers the most critical. However, Sinclair hopes that the Commission will give careful consideration to all of the matters that have been raised and the comments that are filed and come up with a program that will enable broadcasters and the Commission to work together to produce a successful transition that protects the free over-the-air broadcast system.

II. DIFFICULTIES IN THE TRANSITION PROCESS

At the outset, the NPRM invites comment on the extent to which broadcasters continue to face problems in building their digital facilities. The initial problem that many broadcasters face is obtaining grant of pending applications. For instance, Sinclair now has forty stations that are operating digitally at either full or low power. However, Sinclair has another six stations that have long pending digital applications that have not been granted. In some cases, the applications initially involved interference to another digital application but in all of those instances, interference agreements were submitted to the Commission in mid-2002. In other instances, stations have been waiting for Canadian clearance for years. For instance, Sinclair station WNYO-TV, Buffalo, New York, is a checklist application yet it has been waiting for Canadian clearance for over four years. There is no apparent reason why these applications cannot be processed and granted (particularly a checklist application such as that of WNYO-TV), and Sinclair submits that this would speed up the transition process.

⁹ *Be Kind to the FCC: Donate Calendars*, TV Technology, Mar. 19, 2003, at 24-25.

Sinclair has faced other difficulties in the course of constructing its numerous digital facilities and these difficulties have faced other broadcasters as well. In many cases, in order to construct full power digital facilities, existing towers must be strengthened. This requires careful tower studies and then construction work. The process cannot be done hastily, carelessly, or inexpensively for there is an ever present danger that the tower will collapse as has recently happened on a number of occasions in the past year. In addition, tower construction crews are in short supply. There are only a limited number of people with the expertise to construct or reinforce towers and they are difficult to schedule. Obtaining equipment in a timely manner has also been a continuing problem. There are not enough companies building digital transmitters and digital antennas. Nor is there likely to be an increase in the number of companies in this area because the digital transition involves a short spurt of activity that does not justify the expanding business. In a few cases, Sinclair has been forced to seek extensions of digital construction permits because it was waiting for the delivery of equipment and the equipment manufacturer could not make the deliveries in time to meet Commission deadlines.

Construction of towers for digital operations has been delayed by the bankruptcy of some tower companies and by the inability of companies to obtain the necessary zoning approvals. For example, Sinclair station WDKY-DT, Danville, Kentucky, is currently operating at low power and Sinclair does not know when it will be able to construct its proposed full power facility because World Tower, which was supposed to construct the tower for WDKY-DT's full power operation, was not able to obtain zoning approval and has given up on its plan to build a tower in Danville, Kentucky.

As if the digital transition were not difficult enough for broadcasters, the Commission has made the process more difficult by refusing to permit broadcasters to co-locate their analog and

digital antennas on the same tower in all cases. Co-location serves the useful purpose of allowing viewers to orient their antennas in one direction to receive both the analog and digital channels. In addition, co-location avoids a proliferation of towers, thereby easing zoning and FAA problems. Moreover, any concerns that the Commission may have about loss or gain areas are temporary at best given the fact that the analog channel will be given up. Therefore, the Commission should adopt a policy of presuming that co-location will serve the public interest.¹⁰

As the digital transition moves forward, the Commission should also take a look at the problems that Class A stations pose for full power television stations. Full power stations must now protect Class A stations and many stations have found that Class As have caused a problem for the build-out of their full-power facilities, particularly in instances where a modification application must be filed because a tower owner is now unable to construct where it had planned. Until all digital stations have been able to construct their full power facilities, applications to modify Class A stations should be frozen so that they will not interfere further with the construction of digital facilities.

III. DTV/ANALOG IN-CORE CHANNEL SWAPS

As the NPRM points out, at the present time, a station with in-core DTV and NTSC channels can only swap those channels through a dual rulemaking proceeding to change both the DTV and NTSC Table of Allotments. The Commission seeks comment on whether it should allow such channel swaps through an application process instead of the rulemaking process.

NPRM at ¶ 28.

¹⁰ See *Beasley Broadcasting of Philadelphia, Inc.*, 100 FCC 2d 106 (1985) (public interest benefits of co-locating transmission facilities); *Amendment of Parts 1, 17, and 73 to Provide for the Establishment and Use of Antenna Farm Areas*, 8 FCC 2d 559 (1967).

At the outset, the proposal in the NPRM is far too vague to address in a meaningful way. There are vastly different interference requirements for DTV and NTSC facilities and it is not clear how the Commission proposes to deal with those or to deal with the fact that the DTV Table of Allotments has been frozen. If an application process were used, the applicants would still have to meet all of the interference requirements that are set forth for DTV and NTSC. Furthermore, the Commission has provided no guidance as to how it would handle situations where multiple broadcasters wished to swap DTV and NTSC channels as could well be the case. The NPRM simply does not provide sufficient information about the “application process” for parties to comment on in order to provide the Commission a full, complete and informed record on which to base a decision. For example, Sinclair can only guess that such an application would be an application for a major change under 47 C.F.R. § 73.3572(a)(1). The Administrative Procedure Act prohibits agencies from forcing parties to speculate about the nature of a proposed rule in a notice and comment rule making. 5 U.S.C. § 553(b)(3).

Furthermore, Sinclair believes that allowing stations to swap their DTV and NTSC channels through an application process and not a rulemaking proceeding to change the Table of Allotments will not sufficiently address interference issues. An application process will not afford interested parties an adequate opportunity to conduct the necessary engineering analysis to determine whether the proposed channel swap would cause harmful interference. Fundamental fairness mandates that potentially-affected stations be given sufficient opportunity, time, and procedural protections to study interference issues raised by a proposed channel swap considering the substantial investment of resources made by licensees to commence digital operation.

IV. REPLICATION AND MAXIMIZATION PROTECTION DEADLINES FOR IN-CORE CHANNELS

In the NPRM, the Commission seeks comment on appropriate replication¹¹ and maximization¹² protection deadlines. *NPRM* at ¶¶ 29-34. The Commission tentatively concludes that the replication/maximization protection deadline for top-four network affiliates (*i.e.*, ABC, CBS, Fox, and NBC) in markets 1-100 will be July 1, 2005. *Id.* at ¶ 33. For all other commercial and noncommercial DTV licensees, the Commission proposes a replication/maximization protection deadline of July 1, 2006. *Id.* According to the NPRM, establishing specific dates for lifting interference protection will prompt broadcasters to expand their digital service areas and will thus speed the transition. *Id.* at ¶ 34.

Sinclair urges the Commission to adopt a replication/maximization protection deadline that coincides with the date on which a station must return its analog channel, which should also reflect any extensions of the December 31, 2006 statutory deadline. Any earlier replication/maximization protection deadline serves no useful purpose for two reasons: (1) receivers are currently incapable of receiving over-the-air DTV signals regardless of the power levels at which broadcasters transmit, and (2) even if receivers were capable of receiving over-the-air DTV signals, there is a dearth of digital content that can be broadcast due to copyright concerns.

¹¹ The replication deadline refers to the date by which broadcasters must either replicate their NTSC service areas or lose DTV service protection to the unreplicated areas.

¹² The maximization deadline refers to the date by which broadcasters with authorizations for maximized facilities must either provide service to their expanded coverage areas or lose DTV service protection to the uncovered areas.

As Sinclair has documented in other proceedings, current DTV receivers on the market today are incapable of receiving over-the-air DTV signals with a simple indoor antenna.¹³ As a result, consumers are unwilling to invest in expensive new DTV receivers that cannot provide the same ease of reception available with analog receivers. Requiring broadcasters to increase power and expand their coverage area prior to the return of their analog channel will do nothing to remedy the fundamental shortcomings of current over-the-air DTV receiver performance. Sinclair notes that the Commission's Spectrum Policy Task Force ("SPTF") recently concluded that "receiver robustness generally has not been taken into account in Commission regulations" and that the Commission's "transmitter-centric policy is not necessarily efficient in today's spectrum environment."¹⁴ The NPRM's proposal to require broadcasters to increase power and coverage area, while remaining silent on the poor performance of over-the-air DTV receivers, is quintessential "transmitter-centric" policy. To expedite the DTV transition, the Commission should be focusing on the performance of over-the-air DTV receivers, not mandating that broadcasters increase transmitter power and coverage area.

Even if broadcasters were required to replicate or maximize their coverage areas, there will be very little digital content available until the Commission or Congress resolves copyright protection issues.¹⁵ Thus, even if electronics manufacturers produce receivers capable of over-

¹³ See *Comments of Sinclair Broadcast Group, Inc.*, CS Docket No. 97-80 and PP Docket No. 00-67 (Mar. 28, 2003); *Reply Comments of Sinclair Broadcast Group, Inc.*, ET Docket No. 02-135, MM Docket No. 00-39, ET Docket No. 02-380, CS Docket No. 97-80, and PP Docket No. 00-67 (Feb. 28, 2003).

¹⁴ *Spectrum Policy Task Report*, ET Docket No. 02-135 (Nov. 2002) at 31 ("*SPTF Report*").

¹⁵ *Digital Broadcast Copy Protection, Notice of Proposed Rule Making*, MB Docket 02-230, FCC 02-231 (Aug. 9, 2002) ("The current lack of digital broadcast copy protection may be a key impediment to the transition's progress. . . . Without adequate protection, digital media, unlike its analog counterpart, is susceptible to piracy because an unlimited number of high quality copies can be made and distributed in violation of copyright laws. In the absence of a

the-air reception, the benefits of requiring broadcasters to replicate or maximize their coverage areas by a certain date are questionable as there will be little content to broadcast.

V. REPLICATION AND MAXIMIZATION PROTECTION DEADLINES FOR TV CHANNELS 52-69

In the NPRM, the Commission also seeks comment on whether a different replication/maximization protection deadline should apply to stations operating on TV channels 52-69. *NPRM* at ¶ 39. The Commission notes that these channels have been reallocated to other services and thus stations operating on these channels must be relocated to in-core channels (TV channels 2-51). *Id.* The Commission asks whether establishing an earlier replication/maximization protection deadline for broadcasters on channels 52-69 will speed the clearing of the band. *Id.* at ¶ 40. As discussed above, Sinclair does not believe that requiring broadcasters to replicate or maximize their service areas will expedite the DTV transition. Until the Commission resolves issues regarding the inability of current DTV receivers to receive over-the-air DTV signals and the lack of digital programming due to copyright protection concerns, requiring a station to replicate or maximize its service area will accomplish very little to facilitate the DTV transition. For these same reasons, requiring stations on Channels 52-69 to replicate or maximize their service areas prior to the date established for stations in the core will not expedite the clearing of Channels 52-69. In addition, even assuming that requiring stations to replicate or maximize their service areas would facilitate the DTV transition, requiring one class of stations (Channels 52-69) to replicate or maximize prior to others (Channels 2-51) would not expedite the transition. The date by which a station must return its analog channel is dependent upon more

copy protection scheme for digital broadcast television, content providers have asserted that they will not permit high quality programming to be broadcast digitally.”).

than the ability of households to receive its particular DTV signal. *See* 47 U.S.C. § 309(j)(14)(B), discussed *infra*.

VI. INTERFERENCE PROTECTION FOR REPLICATED AND MAXIMIZED SERVICE AREAS OF TV CHANNELS 52-69 FROM NEW WIRELESS OPERATORS

In the NPRM, the Commission explains that incumbent broadcasters are permitted to continue to operate on Channels 52-69 during the DTV transition despite the fact these channels have been reallocated to other services. *NPRM* at ¶ 39. The Commission notes that licensees of new public safety, commercial wireless, and other services are also permitted to operate on these channels prior to the end of the transition, provided they comply with Commission rules intended to prevent interference to incumbent analog and digital broadcasters. *Id.* at ¶¶ 47-48, *see* 47 C.F.R. §§ 27.60(b); 90.545(c).¹⁶ One of these rules provides for the submission of an engineering study justifying the proposed geographic separation between facilities based on the “actual” parameters of the land mobile station and the “actual” parameters of the TV or DTV station that the new land mobile station is trying to protect. *See* 47 C.F.R. § 27.60(b)(1)(ii); 47 C.F.R. § 90.545(c)(1)(ii).

The NPRM seeks comments on how to interpret the “actual” parameters of a broadcast station on Channels 52-69 for purposes of providing that station with interference protection from the new wireless operators and other services. *NPRM* at ¶¶ 49-54. The Commission asks whether, in addition to protecting authorized or applied for facilities, it should also provide

¹⁶ Specifically, wireless operators and other new services can either (i) operate pursuant to geographic separation as specified in tables in the Commission’s rules (47 C.F.R. § 27.60(b)(1)(i); 47 C.F.R. § 90.545(c)(1)(i)); (ii) submit engineering studies to justify proposed separations based on the “actual” parameters of the land mobile station and the “actual” parameters of the TV/DTV stations that the land mobile station is trying to protect (47 C.F.R. § 27.60(b)(1)(ii); 47 C.F.R. § 90.545(c)(1)(ii)); or (iii) obtain written concurrence from the applicable TV or DTV station (47 C.F.R. § 27.60(b)(1)(iii); 47 C.F.R. § 90.545(c)(1)(iii)).

protection of fully replicated facilities, regardless of whether the DTV station is currently operating, or has filed an application to operate, pursuant to those facilities. *NPRM* at ¶ 52.

Sinclair supports the Commission's tentative conclusion that fully replicated DTV facilities on Channels 52-69 should be protected as "actual," regardless of whether the DTV station is currently operating, or has filed an application to operate, pursuant to those facilities. *NPRM* at ¶ 52. Sinclair urges the Commission to protect fully maximized DTV facilities on Channels 52-69 as "actual" as well. Affording broadcasters on Channels 52-69 interference protection for less than fully replicated or maximized DTV facilities would not serve the public interest. Many broadcasters are operating with DTV facilities today that provide only a minimum permissible level of service because current receivers are incapable of providing over-the-air reception and because there is a lack of digital content to broadcast due to copyright concerns. If these issues are resolved, however, broadcasters will have every incentive to replicate or maximize on their DTV facilities. If the Commission does not protect as "actual" the replicated or maximized service area of a DTV station, then the new wireless or public safety providers operating in the replicated or maximized service area would be forced off the air and commercial wireless or public safety services would be disrupted when the DTV station decides to replicate or maximize. Alternatively, if the Commission chooses to protect the new wireless operators rather than the DTV station when the DTV station decides to replicate or maximize, TV households in the replicated or maximized service area would be deprived of DTV service. Under either scenario, the Commission would be placed in the difficult position of endorsing the disruption of vital services to the public.

The Commission also asks whether it should establish earlier replication or maximization deadlines for DTV stations on Channels 52-69 in order to allow for new services to be provided

in those portions of replication areas that a DTV licensee may never plan to serve. *NPRM* at ¶¶ 53-54. The Commission asks whether an earlier replication protection deadline on Channels 60-69 would increase the incentive of broadcasters to complete construction of their allotted facilities. *Id.* at ¶ 53. Again, Sinclair emphasizes that a DTV licensee's incentive to replicate or maximize its DTV facilities will be driven by the ability of households to receive over-the-air DTV signals and the existence of digital content for broadcast. The Commission should not confuse a DTV licensee's failure to replicate or maximize by a certain date as an indication that it does not plan to serve certain areas. Until reception and copyright issues are resolved, the Commission should not establish different replication or maximization protection deadlines for different channels.

VII. SIMULCASTING AND EFFECT ON PRIME TIME BROADCASTING REQUIREMENTS

The Commission's pre-April 1, 2003 minimum requirements should remain in effect until licensees are compelled to return their analog spectrum. Pursuant to Section 309(j)(14), return of a station's analog spectrum is linked to the point in the future when digital broadcasting reaches a minimum level of public acceptance and marketplace viability. Only at such time may increased digital broadcasting requirements be justified. Any rule forcing stations to broadcast a digital signal when no one is capable of receiving such a signal is arbitrary and capricious. Such a requirement only imposes unnecessary costs on broadcasters without any corresponding benefit to the public. To the extent that the Commission's current rule only imposes these artificial costs during prime time, Sinclair supports the rule in its current form.

VIII. SECTION 309(j)(14)

Section 309(j)(14)(A) limits the term of an analog television broadcast license to December 31, 2006. Section 309(j)(14)(B), however, requires the Commission to extend the term of license beyond December 31, 2006 if the Commission finds that the market in which the station is located does not satisfy certain tests.

A. Filing of Extension Requests

Sinclair submits that in the event that any television station requests and is granted an extension pursuant to Section 309(j)(14)(B), the Commission should grant a blanket extension to all stations located in the same market. Adopting this blanket extension policy will prevent duplicative requests and conserve the Commission's limited resources. Section 309(j)(14)(B) allows stations to continue to serve their communities through analog service in markets where sufficient digital penetration does not yet exist. Under the statute, the Commission evaluates a station's request in reference to the market in which the station is located, and an individual station's unique circumstances play no role whatsoever. Thus, if one station in a market is entitled to an extension, then every station in that market is entitled to an extension.

Sinclair also submits that any extension of a station's license term should continue until such time as the facts giving rise to the extension are no longer in place. For example, an extension of time based upon the 15 percent test should last until fewer than 15 percent of households in the market satisfy the elements of the test. An extension for a lesser period of time would frustrate the intent of Congress to allow for the continuation of analog service until such time as digital service is sufficiently available in the market.

B. Converter Technology Test

Under 309(j)(14)(B)(ii) of the Communications Act, the Commission must grant a station an extension of the December 31, 2006 deadline for reclaiming its analog channel if the

Commission finds that “digital-to-analog converter technology” is not “generally available” in the station’s market. 47 U.S.C. § 309(j)(14)(B)(ii). The intent behind this provision is to ensure that at the end of the DTV transition, consumers who have not replaced their analog TV receivers can still receive broadcast signals by converting DTV signals into analog format. In the NPRM, the Commission seeks comment on how to define “digital-to-analog converter technology” and how to interpret the phrase “generally available” as used in Section 309(j)(14)(B). *NPRM* at ¶¶ 82-83.

The Commission asks whether it should consider as a “digital-to-analog converter” a unit that is not capable of converting and displaying all digital formats. *NPRM* at ¶ 82. For example, the Commission notes that some digital cable boxes can display in analog format digital signals originally broadcast in the equivalent of 480i format but not other digital formats, including HDTV. *Id.* Sinclair urges the Commission to define a “digital-to-analog converter” as a unit that is capable of converting and displaying *all*, not just some, digital formats. There is currently no industry agreement or Commission mandate as to what digital signal format broadcasters will transmit. Some broadcasters may transmit HDTV signals while other broadcasters may transmit in standard formats. To qualify as a “digital-to-analog converter,” a converter should be able to convert all digital formats. The intent behind 309(j)(14)(B)(ii) is to ensure that at the end of the DTV transition, consumers who have not replaced their analog TV receivers can still receive the same broadcast signals they are used to receiving on their analog sets. Certainly, the intent behind Section 309(j)(14)(B)(ii) would not be served if available converters can only provide consumers with some of the broadcast signals they are used to receiving.

With respect to interpreting the phrase “generally available,” the Commission asks whether the availability of digital-to-analog converter boxes must be widespread to be

considered “generally available.” *NPRM* at ¶ 83. For example the Commission asks whether availability in one retail chain, from one cable operator, or over the Internet qualifies as “generally available” and whether price should be considered. *Id.* Sinclair believes that to qualify as “generally available,” converter boxes must be available from all cable operators in a market, from all electronic retail outlets in a market, as well as over the Internet, and that such converters must be available at a price affordable by lower income consumers. Those consumers who are likely to rely on digital-to-analog converter boxes at the end of the DTV transition are those consumers who are not wealthy enough to purchase a new DTV receiver. For these consumers, availability over the Internet may be worthless if they cannot afford Internet access. Thus, Sinclair believes that availability of converter boxes should be widespread, and available at an affordable price, to ensure that all consumers have the ability to purchase such converters.

The Commission also asks what the impact will be if cable systems provide signals downconverted from digital to analog at the cable headend so that a digital-to-analog converter is not necessary to view DTV signals. *NPRM* at ¶ 83. Sinclair believes that such a development should have absolutely no relevance for an extension request under 309(j)(14)(B)(ii). The ability of cable systems to convert signals themselves is useless for those millions of Americans who cannot afford or simply do not choose to subscribe to cable television. At the end of the DTV transition, millions of Americans will still rely exclusively on over-the-air reception and a substantial percentage of these Americans will not be able to afford new DTV receivers. Thus, the ability of cable systems to convert digital signals to analog format should have no relevance in analyzing whether digital-to-analog converters are “generally available.”

C. The 15 Percent Test

Section 309(j)(14)(B)(iii) requires the Commission to grant an extension to any station in a market where 15 percent or more of the television households in that market do not subscribe

to a multichannel video programming distributor (“MVPD”) that “carries one of the digital television service programming channels of each television station broadcasting such a channel in a market” and do not have a television receiver capable of receiving the digital television signal of the television stations licensed to that market or a digital-to-analog converter capable of receiving the digital signals of the station licensed in that market. The NPRM requests comment on several aspects of Section 309(j)(14)(B)(iii). *NPRM* at ¶¶ 84-92.

Section 309(j)(14)(B)(iii)(I) is clear on its face and requires an MVPD to be carrying all of the television stations broadcasting a digital channel to fulfill this element of the 15 percent test. Any attempt to read additional qualifications into this requirement—such as the quality of signal provided to the headend or having must-carry rights—would ignore the clear, unambiguous language of the statute. Statutes must be interpreted literally where no ambiguity exists. *See, e.g., United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 95-96, 5 L. Ed. 37 (1820) (Marshall, C. J.) (“Where there is no ambiguity in the words, there is no room for construction.”); *Watt v. Alaska*, 451 U.S. 259, 285 (1981) (Stewart, J., dissenting) (“the most basic of all canons of statutory construction: that statutes mean what they plainly say.”). Moreover, any agency interpretation of a statute that ignores the plainly manifested intent of Congress fails under *Chevron* Step One. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

If the Commission is somehow attempting to suggest ambiguity with the legislative history quoted in the NPRM, then its attempt is, at best, mistaken. *NPRM* at ¶ 86. Contrary to the inference made by the NPRM, the Conference Report’s reference to “must-carry obligations”

perfectly tracks the language of Section 309(j)(14)(B)(iii)(I). Just as the statute requires MVPDs to carry “one of the digital television service programming channels”¹⁷ of each television station in the market, the Conference Report merely states that the provision does not prejudice any Commission decision regarding the must-carry obligations of MVPDs with respect to stations that broadcast multiple video programming channels via their digital spectrum.¹⁸ In sum, the Conference Report in no way contradicts Section 309(j)(14)(B)(iii)(I)’s requirement that an MVPD must carry all television stations broadcasting a digital signal for purposes of determining the 15 percent test.

The NPRM also sought comment on how to interpret the phrase “capable of receiving the digital television service signals of the television stations licensed in such market.” *NPRM* at ¶ 91. Sinclair submits that a viewer’s ability to receive digital signals over-the-air using a simple indoor antenna must be included in any interpretation. Although Sinclair would not go so far as to require a household to be capable of receiving all digital television stations over-the-air, Sinclair does believe that for purposes of calculating the 15 percent test a household must be capable of receiving via a simple indoor antenna the digital signal of each television station from which the household receives an analog signal.

Consumers purchasing television sets today expect television sets to be capable of providing reception of both cable and over-the-air television signals. When cable systems suffer one of their frequent outages, consumers have come to rely on the ability to still receive over-the-air television reception with a simple indoor antenna. These expectations will not change simply because cable operators and broadcasters have converted to digital technology. More

¹⁷ The Conference Report is actually clearer on this point as it re-states this element of the 15 percent test as “one or more of the digital television service programming channels.”

importantly, the ability to receive over-the-air DTV signals serves many public safety objectives. When cable systems experience outages, over-the-air broadcasting is the only source of vital news and information, including emergency broadcasts. Thus, the ease of reception of over-the-air television is crucial in times of emergency even for those consumers who rely on cable, especially given the unreliability of many cable systems. In light of the vital public interest benefits of over-the-air television, the Commission cannot ignore the need for quality over-the-air DTV reception, even for those sets consumers purchase primarily to operate with digital cable systems. Unfortunately, Sinclair’s experience has been that sets with over-the-air DTV tuners on the market today are not capable of providing quality reception of over-the-air signals.¹⁹

D. Fact Finding Under 309(j)(14)(B)

Sinclair agrees that the statutory language and legislative history of 309(j)(14) imposes on the Commission the burden of assessing whether an extension of time is required. *NPRM at ¶ 93*. Furthermore, the Commission should bear the burden given that the purpose of the statute is “to ensure that a significant number of consumers in any given market are not left without broadcast television service.” *Conference Report*. Given that the statute is designed to protect consumers, it is little wonder that Congress “expect[s] that the Commission will perform its own analysis, and that it will base this analysis . . . on statistically reliable sampling techniques.” *Conference Report*.

The *Conference Report* also guarantees that a station requesting an extension must “be afforded an opportunity to submit information and comment on the Commission’s analysis with

¹⁸ Sinclair reserves its right to comment on the must-carry obligations of MVPDs with regard to digital signals at such time as the Commission initiates a rule making on the subject.

¹⁹ Sinclair incorporates by reference the following submissions in other proceedings. *See Comments of Sinclair Broadcast Group, Inc.*, CS Docket No. 97-80 and PP Docket No. 00-67

respect to those tests.” This procedural protection recognizes that a broadcast licensee’s desire and obligation to serve its local community serves as a useful counterbalance to the Commission’s desire to reclaim spectrum.

IX. DTV RECEIVERS SHOULD BE CLEARLY LABELED TO INDICATE THEIR RECEPTION LIMITATIONS

In the NPRM, the Commission asks whether manufacturers are planning to produce DTV receivers that can receive digital transmissions via cable or satellite but that cannot receive over-the-air digital signals. *NPRM* at ¶ 97. As an initial matter, Sinclair notes that the Commission is currently seeking comment on a Memorandum of Understanding (“MOU”) between representatives of the cable industries and consumer electronics industries regarding a cable “plug and play” standard that will allow consumers to attach their DTV receivers to cable systems without the need for a cable set-top box.²⁰ In that proceeding, Sinclair has noted that the digital cable compatible sets proposed under the MOU include all of the necessary elements for a fully functioning digital television set, with the one glaring exception of any over-the-air DTV reception capability.²¹ Thus, it appears that manufacturers are in fact planning to produce DTV receivers that can receive digital transmissions via cable but that cannot receive over-the-air digital signals. Given the vital public interest benefits of over-the-air DTV and the frequent outages plaguing cable systems, Sinclair has urged the Commission to ensure that digital cable

(Mar. 28, 2003); *Reply Comments of Sinclair Broadcast Group, Inc.*, ET Docket No. 02-135 (Feb. 28, 2003).

²⁰ See *Implementation of Section 304 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking*, CS Docket No. 97-80, PP Docket No. 00-67, FCC 03-3 (Jan. 10, 2003) (“*FNPRM*”).

²¹ *Comments of Sinclair Broadcast Group, Inc.*, CS Docket No. 97-80, PP Docket No. 00-67 (Mar. 28, 2003).

compatible sets implemented pursuant to the MOU also have the capability of providing quality reception of over-the-air DTV signals with a simple indoor antenna.²²

At a minimum, however, Sinclair believes that digital cable or satellite compatible receivers that do not have over-the-air DTV reception capability should be clearly labeled to advise consumers as to their reception limitations. As Sinclair has explained in the “plug and play” proceeding, consumers purchasing television sets today expect those sets to be capable of providing reception of both cable and over-the-air television signals.²³ For these reasons, receivers designed for digital cable or satellite-only reception should be clearly labeled to indicate their inability to receive over-the-air reception. With such a labeling regime, consumers will not be misled to believe that new DTV receivers have the same over-the-air reception capabilities as their current analog receivers.

The Commission also seeks information on “pure monitors” that do not include any tuner and asks whether it should require equipment manufacturers to label such equipment to describe their reception limitations. *NPRM* at ¶ 97. Sinclair believes monitors should include a label that explains the reception limitations of the monitor and that instructs the consumer as to what additional equipment must be purchased in order to receive over-the-air, cable, or satellite reception. In November 2002, the General Accounting Office conducted a survey which revealed that forty percent of American households were unaware of the DTV transition.²⁴ If forty percent of American households are unaware of the DTV transition itself, they are certainly not going to appreciate the distinction between DTV “monitors” and “tuners.” Thus, the

²² *Id.*

²³ *Id.*

²⁴ General Accounting Office, *Additional Federal Efforts Could Help Advance Digital Television Transition*, (Nov. 2002).

Commission should require clear labeling of monitors to avoid misleading consumers as to the reception capabilities of monitors.

Sinclair also urges the Commission to require DTV sets that include over-the-air tuners to include a label that states: (i) that over-the-air reception is not possible with a simple indoor antenna; (ii) that instructs the consumer as to what type of antenna must be purchased and installed to have any potential of receiving over-the-air DTV signals; and (iii) provides a contact number at the FCC where consumers can lodge complaints. As Sinclair has explained in other proceedings, the fact is that the consumer electronics industry has proven either incapable or unwilling to produce receivers to date that can provide quality reception of over-the-air DTV signals with a simple indoor antenna.²⁵ Prior to purchasing DTV receivers that claim to provide over-the-air reception of DTV signals, consumers should be made aware of the performance limitations of the receiver and that additional equipment is needed before the receiver can actually receive DTV signals.

To address the problems with the inability of current DTV receivers to provide quality over-the-air DTV reception, Sinclair has urged the Commission to adopt either mandatory performance standards or voluntary performance standards accompanied by a meaningful labeling regime.²⁶ Sinclair believes that such performance standards should address DTV receiver selectivity, sensitivity, dynamic range, and multipath tolerance. While Sinclair believes that mandatory performance standards are preferable, voluntary over-the-air DTV performance standards may be acceptable if they are accompanied by a meaningful labeling regime with

²⁵ See *Sinclair Broadcast Group, Inc., Petition for Partial Reconsideration*, MM Docket No. 00-39 (Nov. 8, 2002); *Reply Comments of Sinclair Broadcast Group, Inc.*, ET Docket No. 02-135 (Feb. 28, 2003); *Comments of Sinclair Broadcast Group, Inc.*, CS Docket No. 97-80, PP Docket No. 00-67 (Mar. 28, 2003).

²⁶ See *id.*

rigorous monitoring by the Commission as to whether manufacturers are meeting these voluntary standards. Under such a labeling regime, a receiver that claims to have over-the-air DTV reception capability would be labeled to indicate whether or not it complies with the Commission's voluntary minimum receiver performance standards. With such a requirement, consumers will be aware prior to purchasing DTV receivers whether the receiver is capable of providing quality over-the-air reception. Sinclair is encouraged by the Commission's recent decision to initiate a *Notice of Inquiry* exploring such a labeling regime.²⁷ If a DTV receiver does not include a label certifying compliance with performance standards, then the receiver should be labeled as described above with: (i) a clear statement that over-the-air reception is not possible with a simple indoor antenna; (ii) instructions to the consumer as to what type of antenna must be purchased and installed to have any potential of receiving over-the-air DTV signals; and (iii) a contact number at the FCC for consumer complaints.

X. DTV PUBLIC INTEREST OBLIGATIONS

As the NPRM notes, the Commission has an ongoing rulemaking proceeding addressing the public interest obligations of DTV broadcasters. *NPRM* at ¶ 109. The NPRM invites additional comments, particularly relating to the application of public interest obligations to broadcasters that choose to multicast and whether the approach should vary depending on the final digital must-carry obligations the Commission adopts. *Id.* at ¶¶ 107-12.

While Sinclair recognizes the congressional intent to require digital television broadcasters to serve the public interest, it believes this mandate was inextricably tied to the continued viability of over-the-air reception of local television stations. If local television

²⁷ See *Interference Immunity Performance Specifications for Radio Receivers, Notice of Inquiry*, ET Docket No. 03-65, MM Docket No. 00-39, FCC 03-54 (Mar. 24, 2003) (“*Receiver Standards NOI*”).

stations cannot be received over-the-air in a robust and ubiquitous manner, they will be no different than cable television channels which do not have any children's programming requirements, commercial limitations in children's programming, content restrictions, or other public interest obligations. Sinclair submits that the survival of public interest obligations depends upon the survival of over-the-air broadcasting. Although Sinclair takes its public interest obligations very seriously, it believes that the Commission should address the issue of whether such obligations can be imposed in an environment that does not provide for over-the-air broadcast television.

Sinclair further submits that any DTV public interest obligations should only be imposed on the primary DTV channel since there is little multicasting going on at the present time and DTV broadcasters should be given time to determine how they will use the spectrum free of additional constraints. It makes little sense to hamper the development of the digital spectrum by imposing numerous duplicative requirements. The Commission can certainly re-visit the issue once the digital transition has progressed.

CONCLUSION

To date, the digital transition has not been successful despite the millions of dollars that broadcasters have invested in constructing new digital facilities. In order to make the transition work, the Commission needs to ensure that the consumer electronics industry manufactures television receivers that will provide the robust, ubiquitous over-the-air digital signal that viewers presently receive from analog facilities. This rule making provides an opportunity for the Commission to address the current failures in the system and adopt pragmatic digital transition policies that do not place unreasonable and unjustifiable burdens on the broadcasters who have been working diligently to construct and operate their digital facilities. As set forth

above, the Commission should adopt reasonable regulations that ensure that over-the-air broadcast television emerges from the transition as a stronger medium and that the public realizes the benefits of digital over-the-air broadcast service.

Respectfully submitted,

/s/

Kathryn R. Schmeltzer
David S. Konczal
Christopher J. Sadowski

Counsel for Sinclair Broadcast Group, Inc.

Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Dated: April 21, 2003