

**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)
Digital Television) RM 9832
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COMMENTS OF ACCESS SPECTRUM, LLC

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I. INTRODUCTION AND SUMMARY

Access Spectrum, LLC (“Access Spectrum”) hereby submits its comments in the above-captioned rulemaking proceeding, the second periodic review by the Federal Communications Commission (“FCC” or “Commission”) of the migration of the nation’s television broadcast system from analog to digital television (“DTV”).¹

When adopting any revisions to its rules and policies concerning the DTV transition, the Commission must remain steadfast in maintaining as its goals the two “essential objectives” of the transition: “to promote and preserve free, universally available, local broadcast television in a digital world” and “to promote spectrum efficiency and rapid recovery of spectrum.”² Decisions that further extend the deadlines designed to foster an expeditious DTV transition and a rapid recovery of valuable spectrum for land mobile services simply fail to further the Commission’s goals and are contrary to the public interest. Further extension of the deadlines would delay the American public’s ability to receive the benefits of both the next generation of broadcast

¹ *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television*, Notice of Proposed Rulemaking, MB Docket No. 03-15, RM 9832 (rel. Jan. 27, 2003) (“*NPRM*”).

² See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶¶ 5-6 (1997) (“*DTV Fifth Report and Order*”).

television and the innovative and important land mobile services that are made possible by an expeditious transition. In short, the Commission must make whatever decisions are necessary to ensure that the transition and attendant recovery of spectrum in the 700 MHz Band proceeds in a manner that allows the American public to realize the benefits of the transition in as short a time as possible.

As set forth more fully below, Access Spectrum therefore submits that the FCC must: (1) refrain from further extending the in-core channel election deadline; (2) provide for broader use of the 700 MHz Band by relaxing the required land mobile and television spacing requirements; (3) establish earlier “use it or lose it” maximization and replication interference protection deadlines for broadcasters currently providing DTV service in the 700 MHz Band, where further delay in spectrum reclamation has a direct impact on the efficient use of this important resource; (4) strictly enforce the deadlines that are established, given the lack of incentive for broadcasters to build out their DTV facilities in the 700 MHz Band; and (5) reconsider its tentative conclusion that DTV full replication facilities in the 700 MHz Band should be protected as “actual” regardless of whether the DTV station is currently operating those facilities.

II. BACKGROUND

As a 700 MHz Guard Band Manager, Access Spectrum has a direct interest in the progress of the DTV transition and spectrum reclamation in 700 MHz Band. To date, Access Spectrum has made great strides towards fulfilling its purpose consistent with the commercial framework of the Commission’s 700 MHz Guard Band management scheme. Access Spectrum acquired twenty-one MEA licenses in the FCC’s Guard Band Manager auctions, providing it with an exclusive — but regional — geographic footprint. Access Spectrum has developed an innovative business plan to realize its band management objectives, developed exhaustive spectrum channelization plans and technical parameters to maximize efficient band usage,

secured extensive third party financing, and has entered into or is negotiating a significant number of spectrum use agreements (“SUAs”)³ with unaffiliated spectrum customers. In an exceedingly short period of time, Access Spectrum has turned the Commission’s band management concept into reality, and is now efficiently and effectively offering new service options to radio users in need of innovative voice and data solutions. Access Spectrum’s success demonstrates that the DTV transition (if allowed to proceed quickly) can bring a myriad of benefits to the American public through the effective and efficient use of spectrum cleared by incumbent broadcasters.

III. DISCUSSION

The reclamation and allocation of the Upper 700 MHz Band is a prime example of an effort by the Congress and the Commission to make new spectrum available to meet the explosive demand for wireless services and also provide public safety and other mission-critical entities with much-needed additional spectrum. As the Commission noted when adopting service rules for the Upper 700 MHz Band, “[r]apidly expanding demand for wireless voice and data services, as well as projections of international demand and the increased spectrum necessary to support wideband applications to be implemented with next generation technologies, confirm that these bands should be structured to enable their efficient and intensive use for wireless services and technologies.”⁴

Given the value to the American public of reclaiming the Upper 700 MHz Band for wireless services, including much-needed additional spectrum for public safety operations, it is imperative

³ Access Spectrum’s written agreements with end users of band manager spectrum have been drafted as “spectrum use agreements,” or “SUAs,” to avoid any confusion with respect to the creation of property rights associated with a “lease.”

⁴ *In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, 15 FCC Rcd 476, ¶ 2 (2000) (“*Upper 700 MHz First Report and Order*”).

that any decisions reached in this docket advance, rather than impede, the rapid clearing of the Upper 700 MHz Band. Accordingly, any new rules or policies adopted by the Commission must ensure that this much-needed spectrum is put to its most beneficial use *as quickly as possible* by ensuring that the DTV transition is not further hampered through continuing inaction and delays on the part of incumbent broadcasters.

A. Early Channel Election Deadlines Must Be Firmly Established and Strictly Enforced.

Establishing a firm deadline by which television licensees with both of their NTSC and DTV stations on in-core channels must decide which of the two channels to use for DTV operations after the transition is complete is essential if the DTV transition is to progress in a timely fashion. The original channel election deadlines provided broadcasters with more than one and a half years after the applicable construction deadlines to make their election, a period of time that the Commission indicated gave broadcasters “ample time to decide” which of their core channels would be most suitable for DTV broadcasting.⁵ The Commission subsequently deferred these original deadlines until the current periodic review in order to give broadcasters an “opportunity to increase power and gain experience at those higher power levels before they can make an educated choice.”⁶

The Commission now proposes a new channel election deadline of May 1, 2005, giving commercial broadcasters three years and non-commercial broadcasters two years after their respective construction deadlines to choose which of their core channels is most suitable for

⁵ See *In the Matter of Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5946, ¶ 14 (2001) (“*First DTV Periodic Review Report and Order*”).

⁶ See *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 20594, ¶ 18 (2001) (“*First DTV Periodic Review MO&O*”).

DTV broadcasting.⁷ As the Commission noted in its first periodic DTV review, ninety-eight percent of television licensees and permittees in all markets had filed DTV construction permits applications by November 15, 2000.⁸ Thus, the new channel election deadlines give the vast majority of broadcasters close to *five years* from the filing DTV permit applications to make an “educated choice” regarding which core channel to utilize for digital broadcasting.

The channel election deadline is the lynch-pin in the successful clearing of the 700 MHz Band, and must be firmly established and strictly enforced if the Commission’s goals are to be realized anytime in the near future. Until in-core broadcasters elect which channel to utilize for their DTV transmission, broadcasters with two out-of-core channels are unable to adequately plan for their own DTV channel conversion before the end of the transition.⁹ Furthermore, until the in-core channel alignments are clearly established, out-of-core broadcasters obviously will be unable to move their digital facilities to the core DTV spectrum and will remain broadcasting in the 700 MHz Band. Thus, the ability to clear the 700 MHz Band of incumbent broadcast licensees and the ability to develop and deploy innovative mobile wireless services and applications in the Band directly hinges on timely in-core channel elections.

Given the vital importance of channel election deadlines to the progress of the DTV transition and the clearing of the 700 MHz Band for new wireless services, the Commission must reject any calls for further extensions of the May 1, 2005 deadline, including proposals to extend the deadline to mirror the proposed in-core replication and maximization deadlines.

⁷ See *NPRM* at ¶ 25.

⁸ See *First DTV Periodic Review MO&O* at ¶ 7.

⁹ See *First DTV Periodic Review Report and Order* at ¶ 14; *First DTV Periodic Review MO&O* at ¶ 14; *NPRM* at ¶ 26.

B. The FCC Must Re-examine the Land Mobile and TV Spacing Provisions of Section 27.60

The *NPRM* raises numerous questions about the level of interference protection afforded to broadcast stations operating on Channels 51-69.¹⁰ Namely, the Commission discusses its current approach for protecting analog broadcast facilities from interference by other services operating in the 700 MHz Band during the DTV transition. The Commission notes that the standard separation values between land mobile stations and co-channel and adjacent channel television broadcast stations¹¹ could “prevent” other services from fully using the 700 MHz spectrum in a number of major metropolitan areas until after the end of the transition.¹² Therefore, the FCC notes that the current rules give public safety licensees and 700 MHz Guard Band licensees additional flexibility by allowing the submission of engineering studies to support the deployment of land mobile stations at locations closer than the standard separation.¹³

Access Spectrum has been operating under these rules for nearly two years now and believes that certain relaxations are possible without any increased interference to broadcast facilities. The 700 MHz Guard Band A-block operates in the first one megahertz of channels 60 and 65; namely, 746-747 and 776-777 MHz. Section 27.60 requires licensees in this block to provide full adjacent channel protection to broadcast stations operating on channels 59, 61, 64 and 66. Access Spectrum believes that, at a minimum, adjacent channel protection to broadcast stations located at least 5 MHz away is excessive and unnecessary. In fact, under the current rules, a 12.5 kHz wide land mobile base station transmitting on the center channel 746.0625

¹⁰ See *NPRM* at ¶ 39 *et seq.*

¹¹ See 47 C.F.R. § 90.54(c) of the Commission’s Rules.

¹² *NPRM* at ¶47.

¹³ See *id.*

MHz would need to be located up to 90 miles away from a nearby broadcast station operating on channel 61. If this land mobile facility were able to locate a mere 12.5 kHz away to the Channel 59 frequency of 745.9375 MHz, there would be no required consideration given to the Channel 61 broadcast station.

Access Spectrum has performed operational tests in the 700 MHz Band and has discovered that its signals place no recordable energy on the upper adjacent television channels when operating within the 700 MHz Guard Band A-Block frequencies. Furthermore, it has not been able to measure signals from Channel 61 or Channel 66 broadcast facilities within the A-Block despite tests from well within the Grade A contour of operational broadcast facilities. Access Spectrum submits that these findings demonstrate that there is no need for adjacent channel protection requirements between the 700 MHz Guard Band A-Block license and broadcast facilities on TV channels 61 and 66.

Access Spectrum recognizes that the rules allow 700 MHz licensees to submit engineering studies to justify deployments at less than the minimum spacing requirements. Indeed, Access Spectrum is currently deliberating with several potential customers whose operations will require such showings. However, such showings will add unnecessary delay to the deployment process that can be obviated with changes to the rules to better recognize frequency displacement for adjacent channel operations. Such changes would strongly benefit public safety users as well by making at least some portion of their 700 MHz allocation usable during the DTV transition in some markets.

C. **The Commission Must Establish Early Maximization and Replication Deadlines For Broadcasters in the 700 MHz Band That Are Strictly Enforced.**

The Commission's goal in establishing specific interference protection deadlines for service maximization and replication of facilities is "to ensure that broadcasters either use their

replication or maximization facilities by that date or risk losing the unused portion of the associated area,” prompting broadcasters to expand their digital service area, speeding the transition, and encouraging efficient spectrum use.¹⁴ With these goals in mind, the Commission proposes to establish July 1, 2005 as the in-core maximization and replication interference protection deadlines for the top-four network affiliates in markets 1-100 and July 1, 2006 for all other DTV licensees.¹⁵ These deadlines provide the largest commercial stations in the largest market with at least three years to expand their service areas, and close to the maximum amount of time now permitted by the current statutory transition timeline for all other DTV licensees.

The Commission also seeks comment in the *NPRM* on whether it should adopt the same or different replication and maximization deadlines for out-of-core stations currently operating on TV channels 52-69 as those stations operating in the core spectrum.¹⁶ The Commission notes that “it may be appropriate to establish earlier replication and/or maximization protection deadline(s) for incumbent broadcasters in this spectrum” to “speed the clearing of the 698-806 MHz band for use by new services and to ensure continued progress in the digital transition.”¹⁷

The Commission has repeatedly declined to impose express replication or maximization requirements on broadcasters and has instead relied upon the assumption that the progress of the DTV transition will be driven forward in large part by the broadcasters’ own incentives to bring digital programming to the American public.¹⁸ One need only consult the most recently released

¹⁴ See *NPRM* at ¶¶ 32, 34; *First DTV Periodic Review Report and Order* at ¶ 22.

¹⁵ See *NPRM* at ¶ 34.

¹⁶ See *id.* at ¶ 39.

¹⁷ *Id.* at ¶ 40.

¹⁸ See *First DTV Periodic Review Report and Order* at ¶ 23 (“[W]e expect that most DTV licensees will replicate their NTSC service areas, and we have decided that an express requirement is unnecessary . . . DTV licensees have incentives to replicate to serve their established viewers.”); *First DTV Periodic Review MO&O* at ¶¶ 26, 30 (noting

figures on how many commercial broadcasters have met their construction deadlines (the *first step* in the DTV transition) to realize that reliance on the broadcasters' own incentives to drive the transition is doomed to failure. Of the approximately 1,196 commercial stations due to commence DTV broadcasts by May 1, 2002, 843 failed to meet the deadline.¹⁹ Of these stations, 602 failed to meet an extended deadline established by the Commission, and close to half of the stations subject to the original deadline were still not broadcasting digital content by March 12, 2003.²⁰ It is clear that without strict maximization and replication deadlines, large swaths of much-needed spectrum will continue to lie fallow for the indefinite future.

As the Commission recognized in the *NPRM*, DTV broadcasters in the 700 MHz Band have even less incentive than in-core broadcasters to fully replicate their analog facilities or maximize their digital coverage area, due to the fact that these out-of-core facilities will only receive interference protection until the stations are required to migrate in-core.²¹ Given this even greater lack of incentive and the recognized importance of clearing the 700 MHz Band in order to meet the overwhelming demand for additional spectrum for land mobile communications, establishing earlier interference deadlines for broadcasters in this band is not only appropriate, but essential. Most broadcasters in the 700 MHz Band, faced with a cost-

that “[w]e expect that most DTV licensees will replicate their NTSC service areas, as they have a marketplace incentive to serve their established viewers” and that once “digital stations [that serve only the broadcasters’ core communities] are on air, we expect that consumer demand for digital sets and signals will increase and that marketplace forces will act to encourage these stations to expand service to their maximized coverage area.”); *NPRM* at ¶ 30 (“Once stations commence at least the minimum level of digital service, we believe that DTV set penetration levels will increase, thereby driving demand . . . and providing broadcasters will an incentive to expand digital service.”).

¹⁹ See *In the Matter of Remedial Steps For Failure to Comply With Digital Television Construction Schedule*, MM Docket 02-113, *Report and Order and Memorandum Opinion and Order on Reconsideration*, FCC 03-77, ¶¶ 5-6 (rel. April 16, 2003) (“*Remedial Steps Report and Order*”).

²⁰ See *id.*

²¹ See *NPRM*, at ¶¶ 52, 53.

benefit analysis that clearly weighs against maximization or replication of facilities on channels with a limited life-span, are likely to retain their current coverage area until the end of the transition period. Thus, large portions of valuable 700 MHz spectrum will most likely remain unused for the indefinite future unless early deadlines are established and strictly enforced. By setting earlier deadlines, the Commission will thus allow commercial wireless operators and public service entities to provide much-needed services on spectrum that may never have been intended to be utilized by broadcasters in the first place.

If out-of-core broadcasters *do* intend to replicate their analog coverage areas, or *have* applied for facilities to maximize their DTV coverage, establishing an earlier deadline will provide much-needed incentives to “use-it-or-lost-it” and act on those intentions. Providing a strong incentive for 700 MHz broadcasters to replicate or maximize as early as possible is clearly in the public interest, given the value of clearing the 700 MHz spectrum as early as possible for the provision of much-needed and sought-after services to the American public.

Given the reality that most 700 MHz broadcasters are extremely unlikely to replicate their NTSC coverage area, establishing a requirement that full replication facilities in the 700 MHz Band 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, makes little sense.²² Requiring wireless operators and other services in the 700 MHz to protect spectrum that will, at least in the vast majority of cases, remain fallow during the DTV transition would clearly fail to further the Commission’s goal of ensuring spectrum efficiency and promoting early recovery of unused spectrum. Accordingly, Access Spectrum urges the Commission to reconsider its

²² See *NPRM* at ¶ 53.

tentative conclusion and require protection of only those replication facilities that DTV stations in the 700 MHz band are actually operating or have filed an application to operate.

IV. CONCLUSION

Access Spectrum again urges the Commission to adopt regulations and policies in this proceeding that ensure that the DTV transition is not further hampered through continuing inaction and delays on the part of incumbent broadcasters and that the much-needed spectrum at 700 MHz is put to its most beneficial use as quickly as possible. With these goals in mind, it is clear that the Commission must: (1) establish firm early channel election deadlines that are strictly enforced; (2) reduce adjacent channel spacing requirements between 700 MHz wireless systems and television systems; (3) establish earlier “use it or lose it” maximization and replication interference protection deadlines for broadcasters in the 700 MHz Band, where further delay in spectrum reclamation has a direct impact on the efficient use of this important resource; (4) strictly enforce the deadlines that are established, given the lack of incentive for broadcasters to build out their DTV facilities in the 700 MHz Band; and, (5) reconsider its tentative conclusion that DTV full replication facilities in the 700 MHz Band should be protected as “actual,” regardless of whether the DTV station is currently operating those facilities.

Respectfully submitted,

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