

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Amendment of Parts 73 and 74 of the)
Commission's Rules to Establish Rules for Digital) MB Docket No. 03-185
Low Power Television, Television Translator, and)
Television Booster Stations and to Amend Rules)
for Digital Class A Television Stations)

To: The Commission

COMMENTS OF CORR WIRELESS COMMUNICATIONS, L.L.C.

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Corr Wireless Communications, L.L.C. (ACorr@) offers these limited comments on the Commission's proposals regarding digital LPTV service. Corr is the winner of C Block licenses in Auctions 44 and 49 for the lower 700 MHz band. It will therefore be initiating service on Channels 54 and 59 in a number of markets in and near the state of Alabama. These comments are directed specifically to the Commission's proposal to permit prospective applicants to apply for new stations on channels 53-55 and 58-60, *i.e.*, the frequencies co-channel and adjacent to those which will be allotted to Corr. At Paragraphs 26-30 of the Notice of Proposed Rulemaking, the Commission proposed to permit stations converting from analog LPTV to digital LPTV operation, as well as new stations, to operate indefinitely on channels 52 to 59 on a secondary basis. It also considered whether interim operation on channels 60-69 until the end of the DTV transition should be permitted. Corr strongly feels that to permit such operations would be a mistake which would not only be a disservice the public but would also be grossly unfair to applicants who bought and paid for the exclusive rights to use these channels at auction.

**A. The Commission Should Be Clearing the 700 MHz Band as Much as Possible B
Not Issuing New Licenses in the Band**

One of the most complex undertakings the Commission has been tasked with in the last decade is the clearing of broadcast stations from the 700 MHz band. After enormous effort, the Commission has made considerable progress toward moving existing licensees out of the band and down toward the core. Much more work needs to be done in that regard, but it appears that the broadcast industry has gotten the message that the clearing process is for real and that they really must relocate to homes elsewhere in the broadcast core. Clearing the band is the most fundamental principle in the long-term plan to reclaim the 700 MHz band from broadcasting and put it to other more socially useful purposes, while at the same time transitioning broadcasting to a more efficient digital model. The proposal to entertain new broadcast applications for channels 53-55 and 58-60 at this stage of the transition is a major step backward in that process.

For one thing, any new stations authorized in this band will almost certainly be highly transient. The 700 MHz service is expected to develop robustly in the next two to three years. It is unlikely that any new LPTV stations could be authorized in this band for at least a year or two since this rulemaking would have to be completed, a new filing window opened, grants made and stations constructed. By that time, advanced 700 MHz services are likely to be coming on the air. This poses two problems even if, as proposed, the new stations are authorized on a strictly secondary basis. First, the public who watch the new stations will potentially lose service over the station almost immediately. The Commission has historically abhorred depriving the public of service once it has been provided, yet the present proposal

almost ensures that such a result will happen everywhere the new stations are licensed. The stations would have to either shut down completely or move to another, non-interfering channel. If a non-interfering channel is indeed available, the applicant should be applying there in the first place rather than on these channels. If no replacement channel is available, not only will the new licensee have invested money and effort which will be wasted, but the public will have come to rely on a station which is truly evanescent. Indeed, it is difficult to understand why anyone would wish to apply for one of these channels given the likelihood that financial losses will ensue. This of course raises the very real specter of plaintive cries by the licensees to the Commission not to evict them from the band because they will suffer severe financial hardship, a hardship which they could accuse the Commission itself of having caused. As a matter of policy, therefore, the Commission should avoid authorizing new licensees in a band which has already been permanently dedicated to other purposes and, indeed, has already been auctioned to new licensees.

B. Interference Claims Will Be Difficult to Resolve

Although the operations to be authorized on channels 53-55 and 58-60 are secondary and would have to be provided on a non-interfering basis, we are concerned that disputes will arise between broadcasters and operators such as Corr who are attempting to put the channels to new and innovative uses. It is unusual for broadcast uses to be co-existing on the same channels as non-broadcast uses such as those envisioned for the new 700 MHz band. Mobile voice and data either in a conventional form or in a 3G configuration are likely to be transmitted over these stations. Predicting or indeed even evaluating what constitutes harmful interference in this context will be difficult and subject to much dispute. A 700

MHz licensee, having expended millions for its license, is likely to find itself arguing with a LPTV broadcaster as to whether or not interference is sufficient to justify shutting the broadcaster down. The FCC will have to resolve such disputes under the pressure of potentially forcing the shut down of existing broadcast services, thus angering consumers. Any resolution which permits the new 700 MHz licensee to begin operations is likely to antagonize broadcast consumers needlessly, while leaving the broadcaster operating will also diminish service quality. The whole situation promises to be a costly, time-consuming lose-lose situation for all concerned.

In this regard, the Commission's proposal here jumps the gun on proposals to establish an interference temperature standard which would permit unlicensed operations in licensed spectrum below the temperature threshold. (*See* ET Docket 03-237.) That concept is a controversial one in terms not only of defining what the temperature threshold should be but also in terms of balancing the rights of the license holders in those bands (particularly ones who have paid for their licenses at auction) against the unlicensed operators. The Commission's proposal here actually goes one step further by essentially allowing licensed operation by the LPTV operator on a channel which has already been exclusively licensed to another company. The Commission should not take such a step until it has thought through the legal and practical implications of such a revolutionary policy in Docket 03-237.

C. Permitting New Broadcast Usage in the Band is Unfair to 700 MHz Licensees

For the FCC to propose issuing new licenses to broadcasters in the 700 MHz bands breaks faith with the companies who bid in good faith for the licenses for this spectrum in 2002 and 2003. While these bidders knew and recognized that there would be some delay in moving

existing users of the band out while the DTV transition was underway. Nothing in the Commission's rules or Public Notices preceding the Auctions 44 and 49 suggested that the same spectrum being auctioned to bidders for their exclusive use would later be given out for free to broadcasters who want to use the channels on any basis, secondary or otherwise. Licensing new people in this band can only lead to complications and interference potential which bidders had no reason to expect at the time of the auction and which they are entitled to be protected from. The Commission is now proposing to give away spectrum which it purported to have already sold at auction. This is a little like selling someone swamp land in Florida in fee simple and then later selling easements over the same property to someone else, the kind of pitch that might well be prosecuted by the FTC as Abait and switch@ if attempted on late night television. To pull the rug out from under auction winners in this way can only be destructive to the Commission's long term credibility in auctioning off spectrum. If bidders come to believe that the Commission may dilute its product after the fact by allowing Asecondary@ licenses and unlicensed operations on the auctioned spectrum, the potential value of all spectrum offered to bidders at auction will suffer.

Apart from these practical negative effects, Corr believes that it is unlawful for the Commission to issue a new license to someone on channels which were auctioned off on an exclusive use basis. The terms of the auctions specified that the bidders would receive the rights to the specified frequencies in the specified geographic areas. That is what was offered and that is what has been bought and paid for. To issue new licenses on this spectrum outside the auction process not only would contravene the stated terms of the auction, but would also contravene Congress's mandate that this spectrum should be auctioned. Moreover, a license

which has been awarded through competitive bidding qualifies as a property right for Fifth Amendment purposes because the FCC has entered into a contractual relationship with the winning bidder. *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996). Any deprivation of the 700 MHz licenses= exclusive right in that property would be subject to the taking provisions of the Fifth Amendment and would therefore require either a rebate of some or all of the auction price or a payment for the lost value.

D. Conclusion

For these reasons, Corr strongly urges the Commission not to authorize new licensees on channels 53-55 and 58-60, even on an interim basis, since any highly temporary benefits would be far outweighed by the long-term negative consequences.

Respectfully submitted,

CORR WIRELESS COMMUNICATIONS, LLC

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