

TABLE OF CONTENTS

I.	ALOHA’S INTEREST IN THIS PROCEEDING.....	2
II.	DISCUSSION	2
A.	THE PUBLIC INTEREST WOULD NOT BE SERVED BY LICENSING MORE LPTV STATIONS AT THIS TIME.....	2
B.	IN THE EVENT THAT THE COMMISSION DETERMINES TO LICENSE ADDITIONAL LPTV STATIONS, IT SHOULD DO SO ONLY IN A CAUTIOUS, REGIMENTED MANNER.....	4
1.	<i>Should Analog LPTV Renewals be Barred After December 31, 2006?</i>	<i>5</i>
2.	<i>Should LPTV Applicants Have to Show Unavailability of Other Channels Prior to Applying for Digital Stations in the Channel 52-59 band?.....</i>	<i>5</i>
3.	<i>Should Eligibility Criteria Vary Depending on Whether the LPTV Applicant is “new” or is Changing From Analog to Digital?.....</i>	<i>5</i>
4.	<i>Should Channels 52-59 and 60-69 be Treated Differently?</i>	<i>6</i>
5.	<i>Should No New Entities be Licensed in Channels 52-59 Given the Transition that is Already in Progress?</i>	<i>6</i>
C.	THE COMMISSION’S PRONOUNCEMENTS REGARDING INTERFERENCE PROTECTION ARE CONSISTENT WITH THE PUBLIC INTEREST.....	6
III.	CONCLUSION.....	7

I. ALOHA'S INTEREST IN THIS PROCEEDING

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 in 2002, 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 the required amount, in full and timely. It is now the licensee of record for each of those stations and is the largest 700 MHz licensee. Moreover, through an affiliate, Aloha was the high bidder for an additional 89 licenses in Auction No. 49, also involving the Lower 700 MHz band, and has paid to the Commission an additional \$5.8 million. Aloha's total 700 MHz coverage of nearly 50% of the U.S. population gives it a significant interest in this proceeding.

II. DISCUSSION

A. The Public Interest Would Not Be Served by Licensing More LPTV Stations at This Time.

Any reasoned analysis of the "balancing" between the needs of LPTV operators and other carriers in the Upper and Lower 700 MHz bands demonstrates that the public interest would not be furthered by increased licensing of LPTV stations at this time.

Initially, the need for more LPTV must be kept in perspective. As recently as 2 years ago, approximately 4,000 new LPTV stations were licensed. Review of the Commission's public records reveals that only approximately 1,000 of those licenses are currently operational. No one knows when, or even if, any of the remaining stations will be built. As a result, there are potentially 3,000 LPTV licensed areas that were licensed, are still unbuilt, and which will

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

become available in the next 12-24 months. That hardly serves to support the proposition that there is an existing, meaningful unmet need for more LPTV stations.

The lack of need for LPTV stations -- which have to date been awarded for free stands in stark contrast with the other licensing actions in the Upper and Lower 700 MHz bands. To date, licensees in those bands have paid to the Commission nearly \$150 million. They have done so because they believe that this spectrum could be used to provide a host of services that will serve the public, particularly in rural areas. If additional LPTV stations were to be licensed in those bands, and constructed, such action would present a host of complications for the “primary” licensees. It is unlikely that an LPTV licensee will willingly give up its license after only 1-2 years of operation and \$50,000 - \$200,000 of startup costs. This is particularly so, in view of certain ambiguities included in rule 47 C.F.R. § 74.7003, which governs interference prohibitions between LPTV and other broadcast stations. Among other things, that rule appears to exempt LPTV stations from the need to cease operating if the other entity does not permit LPTV stations to apply interference remedies that will “demonstrably eliminate” the interference, without providing how that process will be implemented. As a result, the 700 MHz licensee could be forced to either litigate or petition the Commission in order to retain useful access to their spectrum. These proceedings will likely be both time consuming and unnecessary.

Any significant licensing of new LPTV operators would also send precisely the wrong signal, both to full power broadcasters and to future auction participants. It would also be unfair to new LPTV licensees. Insofar as broadcasters are concerned, this would properly be recognized as a re-populating of spectrum by LPTV broadcasters at the very time that other

broadcasters should be exiting the spectrum. As such, any new licensing would convey a contradictory signal to the broadcasters about the Commission's desire to free up spectrum for new uses. All of this would complicate enormously the DTV transition that the Commission has fostered so strongly.

Licensing of LPTV stations would also undermine the integrity of the Commission's auction process at a time when the credibility of the auction process is gaining momentum. When the new 700 MHz licensees participated in the auction, they were told that the bands were being clearing for their use, and they relied on such statements when devising auction strategies. To be clear, the auction participants were on notice of incumbent full power broadcaster rights. LPTV was never identified as a potential use of 700 MHz spectrum. It is possible that some of the 700 MHz licensees may feel that they have contracted for a right to use this spectrum. While Aloha infers that the Commission has thoroughly researched this issue, it could still result in litigation which could jeopardize the auction process. It could also potentially impact future auctions.

Lastly, new LPTV stations would themselves be disadvantaged by the type of licensing here being considered by the Commission. Many would reasonably interpret the FCC's actions as signaling some relaxation regarding their secondary only status. As a result, they may well make investment discussions based on that misunderstanding and then be surprised when that investment becomes worthless due to the need to discontinue service in 1-2 years.

B. In the Event That The Commission Determines To License Additional LPTV Stations, It Should Do So Only In A Cautious, Regimented Manner.

In its Notice, the Commission recognized that, if it were to move forward in the licensing

of additional LPTV stations, there are a number of focal issues that it must address, and invited public comment on several of them. See Notice, at paras 18-30, and para 113. Comment on each of those issues is presented below.

1. Should Analog LPTV Renewals be Barred After December 31, 2006?

The public interest would not be served by permitting any renewals of analog LPTV stations after December 31, 2006. After all, the entire purpose behind the DTV transition was to transition away from analog. Also, analog operations present certain added complications to other uses in the band. Moreover, and as discussed in more detail above, renewal of authorization would send the wrong message to new 700 MHz licensees who properly relied on formal Commission pronouncements as they made auction decisions.

2. Should LPTV Applicants Have to Show Unavailability of Other Channels Prior to Applying for Digital Stations in the Channel 52-59 band?

At a minimum, prior to becoming licensed in a band formally slated for transition, applicants for digital LPTV stations should be required to demonstrate unavailability of other channels. Also, they should be required to evidence an unmet need for programming to be offered over those facilities and a capability to provide such programming.

3. Should Eligibility Criteria Vary Depending on Whether the LPTV Applicant is “new” or is Changing From Analog to Digital?

Different criteria should apply. Even if new stations are to be licensed, they should be available only to entities making an analog to digital transition, and only under the circumstances outlined elsewhere herein. To act any differently would be to effectively permit re-population of the band already set for transition. Also, it would ignore the reality that a transition from analog to digital does benefit the public interest.

4. Should Channels 52-59 and 60-69 be Treated Differently?

They should not be. In both bands, the transition was long-ago announced and has been relied upon by new licensees. Whereas the bands have been, and possibly will continue to be, licensed through separate auctions, and can be used for certain different purposes, the similarities in them far outstrip any differences. Moreover, reviewing courts have been clear in their position that the Commission should not treat similarly situated entities differently solely because of inconsequential differences among them. Indeed, the courts have decreed that the Commission can treat entities differently, based upon differences in underlying factual circumstances, only if those differences are “relevant to the purposes of the Communications Act. *Melody Music, Inc. v. Federal Communications Commission*, 345 F. 2d 730, 732 (D.C. Cir. 1965), Here they most certainly are not. In addition, disparate treatment based solely on minor frequency differences would run counter to the entire FCC regiment established by the Telecommunications Act of 1993, and the Commission’s efforts over the last decade to erase, rather than create, unnecessary differences in treatment of licensees in different bands and services.

5. Should No New Entities be Licensed in Channels 52-59 Given the Transition that is Already in Progress?

Yes. See comments in Section IIA and Subsection IIB. 2 and 3 above.

C. **The Commission’s Pronouncements Regarding Interference Protection Are Consistent with the Public Interest.**

In the Notice, the Commission properly made several pronouncements regarding interference analysis that will further the public interest. In the opening paragraph, the Commission explained that this proceeding is sought to “develop interference protection rules

and methodology that will provide spectrum for new digital stations without undermining established interference protection rights” (Notice, at 1). In the very next paragraph, the Commission expanded upon its initial comment by making it clear that it sought to add “flexibility” to interference analysis. *Id.*, at 2. Later the Commission explained the most basic need for this practical and efficient approach to interference protection: Spectrum availability is becoming even more limited as more DTV operators commence and as new “primary” services begin to operate in the 700 MHz bands. *Id.*, at para 27. It is for this reason that the Commission properly observed that interference protection “must balance facilitating spectrum opportunities” for new entrants with safeguards for incumbents”. *Id.*, at para 36.

In assessing how best to achieve its interference protection goals discussed above, the Commission presented a candid, and somewhat critical, assessment of existing, inflexible interference protection standards. Recognition was voiced that “existing methodology does not fully consider the effects of terrain on signal propagation. *Id.*, at para 36. It was also observed that existing methodology does not account for signals being significantly “attenuated or blocked by terrain obstructions”. *Id.* Existing contour analysis was also noted as providing only predicted interference at the perimeters of the service area of a protected station. *Id.* Lastly, existing contour interference analyses were criticized for not considering interference “masking”, i.e. interference that is already being received from other stations.

III. CONCLUSION

The Commission must be commended for addressing directly the different issues set forth in this notice.

Aloha believes that the potential benefits of issuing new LPTV licenses are few and that

the potential drawbacks are many. Nearly 3,000 of the 2001 LPTV licensing grants are still unconstructed. Additional grants will result in additional speculation and is unlikely to result in many new services.

If LPTV licensees do construct, they are unlikely to relinquish their secondary license willingly because of the costs and time they have incurred. This could result in substantial litigation, time and money for the licensees and the Commission.

Current 700 MHz owners have spent nearly \$150 million for Channels 54, 55, and 59. Some of these licensees may feel that the Commission was unfair to change the rules right after they had purchased their licenses. This view tends to undermine the integrity of the auction.

If the Commission chooses to go forward with additional LPTV licensing process, Aloha recommends that new licenses be limited to established LPTV operators who (1) are transitioning from analog to digital and (2) cannot show that any channels are available in the core.

Respectfully Submitted,
ALOHA PARTNERS, L.P.

/s/ Thomas Gutierrez
Thomas Gutierrez
Its Attorney

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