

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of

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

**COMMENTS OF
PAXSON COMMUNICATIONS CORPORATION**

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Dated: April 21, 2003

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SUMMARY

As the largest station group owner in the United States, PCC has as great a stake in the DTV transition. Because the market did not demand DTV and because consumers have been slow to adopt the technology, the DTV transition has appeared to broadcasters as a series of unfunded government mandates to carry out construction and operational activities that offer no sure return on the tremendous investment required. PCC accepts its role as a servant of the public interest and has dutifully and energetically carried out its responsibilities under these FCC mandates, but it hasn't been easy, and it hasn't been cheap. Now the FCC has instituted this Biennial Review to examine the status of the DTV transition and to determine the wisest course for bringing that transition to a successful conclusion. PCC herein offers its comments on the status of the transition and the FCC mandates that comprise it, but PCC believes that the most important issue still facing the DTV transition is one the FCC chose not to make a part of this Biennial Review: DTV must-carry.

From a bird's eye perspective it ought to be clear by now that FCC mandates that effect broadcasters only will not bring about the conclusion of the transition. The Commission appears to have realized this last year when it instituted its DTV tuner mandate, finally offering the consumer electronics industry an invitation to the DTV dance that they cannot refuse. Accordingly, the only industry that remains free of any government-imposed DTV mandate is the MVPD industry. Indeed, the cable and satellite industries' success at maintaining for themselves a pain-free DTV transition has been spellbinding, given the fact that they are now the primary vehicle for delivering over-the-air broadcast signals to consumer households. By trumpeting its efforts to rebuild its cable plant to offer digital cable, the cable industry has managed to convince

the Commission that it is advancing the DTV transition. This proposition is nonsense because increased cable capacity does precisely nothing to ensure the continuity or robustness of the American over-the-air television system – particularly when cable operators have flat-out refused to carry broadcasters' digital signals. Unlike broadcasters, cable operators get an immediate financial return on their digital build-outs, and their comparison of cable system upgrades to broadcasters' DTV build-out cannot be taken seriously.

It is long past time that cable operators – like broadcasters and consumer electronics manufacturers – be made to play the role that Congress assigned them and be required to carry broadcasters' DTV signals for the duration of the transition. No other regulatory act suggested by the Commission in this Biennial Review could do more to speed the transition. PCC is confident that if cable operators were required to fulfill their duties under the Cable Act, the Commission would be amazed at the speed of the DTV transition. Without DTV must-carry, the Commission can be sure that it will again be asking what can be done to advance the DTV transition through biennial reviews proceeding like this one for a long, long time.

Aside from DTV must-carry, there are several important policy initiatives that the FCC should take this opportunity to consider. First, PCC suggests that the Commission take another look at DTV content issues and recognize the potential importance of multicast programming to television's digital future. Multicasting gives broadcasters the ability to offer significantly more program diversity, as well as providing additional outlets for community oriented and children's programming. Because it would create these significant public benefits while simultaneously increasing the number of revenue streams broadcasters can tap, multicasting also has the potential to be the DTV

transition's Holy Grail – the way to make it pay for broadcasters and viewers alike. If the FCC encourages multicasting to the same extent that it has promoted HDTV – primarily by enacting multicast must-carry – the DTV transition likely will end much sooner than anyone has heretofore hoped. Also on the content side, the Commission should finally address DTV broadcasters' public service obligations. Although PCC always has believed that broadcasters' public service obligations should not change in the digital world, PCC also has made proposals for voluntary industry initiatives that may contribute to reversing the alarming downward spiral of today's television programming. Those proposals are reiterated herein.

There are several technical issues of which the Biennial Review provides an excellent opportunity for the Commission to take stock. Predictably enough, some of the Commission's mandates to broadcasters have been more successful than others. For example, PCC believes that the DTV simulcast requirements must be changed. The simulcast mandate currently requires broadcasters to air their signals to a vanishingly small audience. This requirement makes little sense when the DTV tuner mandate will not come into effect until next year, and it makes even less sense without DTV must-carry. While PCC always has supported placing as many stations on the air as quickly as possible, it is simply asking too much to expect those channels to operate for 50% of the time their paired analog station is broadcasting when so few consumers actually have the equipment necessary to receive DTV. Accordingly, the simulcast requirement must be modified until these other regulatory issues have been settled. On another service-related issue, the Commission also must clarify that the Canada/U.S. Letter of Understanding will not restrict broadcasters' post-transition DTV service area.

The Commission also should begin to resolve the remaining issues delaying the 700 MHz auctions and get that process back on its feet. The Commission often has stated that band-clearing is essential to the DTV transition, and as PCC has made clear repeatedly, the 700 MHz auction is essential to band-clearing. By Congressional directive, the Commission now is free to hold these auctions whenever it sees fit. PCC believes that clearly, the proper time is in the near future. Another band-clearing initiative the Commission should pursue is allowing broadcasters in the 700 MHz band the authority to choose to relinquish their 700 MHz digital spectrum, operate in analog on their analog channel throughout the transition, and flash-cut to DTV on their analog channel at a point of their choosing prior to the close of the DTV transition.

Finally, and perhaps most importantly, the Commission must authoritatively construe Section 309(j)(14)(B)(iii) and thereby establish an end-plan for the transition. Given the labyrinthine quality of the statute, this is no easy task. Nonetheless, the Commission must bear in mind that the statute is designed to protect viewer access to over-the-air broadcast signals. Accordingly, the Commission must read the statute as it was written by Congress to require 85% penetration of over-the-air DTV reception capability. Only this construction will vindicate Congress's intent to protect viewer access to over-the-air DTV signals.

The Commission, together with the broadcast industry, has advanced the DTV transition considerably in the past year. It is time now to adjust some of the mandates effecting broadcasters while the DTV tuner mandate takes effect, and to begin requiring cable operators to live up to their responsibilities to help bring the DTV transition to a successful conclusion.

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COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("PCC") hereby submits these comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.¹ As the nation's largest station group owner, PCC has a wealth of experience navigating the technical and regulatory challenges created by the DTV transition and a tremendous interest in the rapid, ordered resolution of the outstanding obstacles to a successful conclusion of the DTV transition. The technical challenges of the DTV transition have

¹ Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television; Public Interest Obligations of TV Broadcast Licensees; Children's Television Obligations of Digital Television Broadcasters; Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *Notice of Proposed Rulemaking*, MB Docket No. 03-15, RM 9832, MM Docket No. 99-360, MM Docket No. 00-167, MM Docket No. 00-168, FCC 03-8 (rel. Jan. 27, 2003) (the "*NPRM*").

appeared to broadcasters as a series of FCC mandates to carry out specific construction and operational tasks. At this point in the transition, this proceeding is a good vehicle for evaluating the reasonableness of these mandates, particularly in light of the efforts being made by the consumer electronics and cable industries. Predictably enough, some of the Commission's mandates have proved to be more reasonable than others given the overall pace of the transition, and the Commission should not shy away from amending or supplementing these requirements to ensure that each segment of the video delivery industry is carrying its own weight in making the transition a success. PCC offers these comments to aid the Commission in resolving these issues.

I. INTRODUCTION

Directly and through its wholly owned subsidiaries, PCC owns and operates 61 full-power television stations, all of which are affiliated with PAXTV, an emerging network which delivers high-quality, family-oriented television programming to over 88% of U.S. television households. PAXTV prides itself on providing a much needed alternative to the steady stream of sex, violence, and vulgarity offered by many of the other television programmers operating today.

PCC also prides itself on its pioneering spirit, and it has been at the forefront of the DTV transition. To date, PCC has spent millions of dollars constructing and operating full-power DTV facilities for 28 stations, and it expects to launch 10 more DTV stations in the next six months. In addition, the Commission has yet to grant a construction permit for 10 PCC stations and has yet to allot a DTV channel to 9 others, each of which expects to flash-cut to digital operations at the end of the transition. PCC has consistently exhorted broadcasters to provide new services that capitalize on the unique digital features made possible by DTV technology. PCC also has spearheaded

several initiatives aimed at speeding the DTV transition – most notably PCC’s multicast must-carry proposal, which would enable broadcasters to upgrade service to local communities by expanding viewers’ programming choices, thereby creating incentives to consumers to purchase DTV receivers. Multicasting promises to offer viewers a potentially unprecedented breadth of new and diverse program choices, and also promises to offer broadcasters significant opportunities to serve their local communities of license. In addition, PCC has expended considerable resources attempting to accelerate the return of 700 MHz analog spectrum, an endeavor the Commission has stated is integral to the DTV transition.²

Through all these efforts, PCC has stressed the importance of pursuing a rapid DTV roll-out, but one that maintains due regard for the technical needs and financial well-being of broadcasters who continue to provide free, over-the-air service to the viewing public. Contrary to the “spectrum giveaway” rhetoric repeated by the heads of non-broadcast industries, PCC has no desire to operate indefinitely two television stations for every license its affiliates control. Nonetheless, a DTV transition that disrupts over-the-air television service to large numbers of consumers would be no transition at all: it would be an abdication of the public trust with which the Commission is charged. Accordingly, PCC has maintained that the Commission should promote a

² See, e.g., Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules Carriage of the Transmissions of Digital Television Broadcast Stations, Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, *Order on Reconsideration of the Third Report and Order*, 16 FCC Rcd 21633, ¶ 3 (2001) (“700 MHz Reconsideration Order”).

quick transition, but one that maintains or even expands current levels of over-the-air service.

In the past year, the Commission has done much to accelerate achievement of this goal, and the *NPRM* properly recounts the success of Chairman Powell's initiative to encourage increased DTV activity by the key industries involved in the transition, and the remarkable efforts of broadcasters like PCC who have managed to significantly advance a DTV construction effort that still offers them no return on what, for Paxson, has been an investment of tens of millions of dollars.³

Nonetheless, some of the most important questions facing the transition remain unanswered. While important foundation stones for a successful transition now have been put into place – including the DTV tuner mandate and commitments from cable operators to carry increasing amounts of DTV content as it becomes available – even more essential questions – particularly DTV must-carry – remain pending.

As described below, the single greatest weapon remaining in the Commission's transition arsenal is DTV must-carry, and it is appropriate that the Commission impose it now. Cable operators have shown no desire or intention to begin carrying broadcasters' digital signals and, in reality, have done nothing to further the DTV transition. Cable operators' boasts that they have spent many millions of dollars transitioning to digital actually have nothing to do with the DTV transition. These investments have only and always been about increasing cable operators' long-term profitability. There is nothing

³ See *NPRM*, ¶¶ 11, 15.

wrong with cable operators looking after their own bottom line; as American companies that is their right. Nonetheless, Congress has mandated that cable operators make one-third of their channel capacity available for carriage of broadcast signals and they currently use much less than that in most markets. That unused must-carry channel capacity is a vast reservoir from which the Commission can draw more than enough space to provide for digital must-carry now without requiring more of cable operators than Congress already has mandated.

The Commission also must resolve issues related to clearing broadcasters from the 700 MHz broadcast bands that arose last year when the wireless industry convinced Congress that those bands were not yet ripe for auction. In this regard, little has changed since last year, and clearing the 700 MHz spectrum remains an important part of accomplishing the DTV transition. The Commission should inform Congress that it is ready to auction the remaining 700 MHz spectrum and proceed with the auctions with all reasonable speed. As PCC has informed the Commission on numerous occasions, there will be no significant 700 MHz band-clearing until the auctions are held and future stakeholders in the 700 MHz band are established.

Appropriately, the *Second Biennial DTV Review* focuses the Commission's attention on these types of core issues related to completing the transition. In resolving these issues, the Commission must respect Congress's judgment – expressed in Section 309(j)(14)(B)(iii) of the Act -- that viewers' access to over-the-air broadcasting must be protected to the maximum extent possible and that the transition cannot end until at least 85% of viewers in every market have access to DTV signals as they are broadcast over-the-air. Any Commission decision that subverts this principle would be

patently unlawful given the clarity of Congress's command, and would result in the Commission taking broadcasters' rightful expectancy that they will be permitted to continue to broadcast their signals – and realize the accompanying advertising revenue – to at least 85% of their current service population following the transition. This result would be contrary to both Congress's manifest intent and the plain public interest in the continuity of over-the-air broadcasting.

The spirit of this provision should govern not only the Commission's construction of Section 309(j)(14)(B), but also its resolution of the DTV must-carry issue, and the host of outstanding service maximization and replication issues, including issues regarding interference with Canadian allotments addressed herein. In effect, the Commission must ensure that viewers in every DTV market experience little or no reduction in television service through the conversion from analog to digital broadcasting. As the Commission must recognize, the only way to reach this 85% penetration level is through mandatory cable carriage of broadcasters' DTV programming.

Thus, in addition to the important questions raised in the *NPRM*, PCC reminds the Commission that all outstanding DTV proceedings – particularly DTV must-carry -- must be concluded expeditiously to continue the recent progress of the DTV transition.

II. THE COMMISSION SHOULD ENCOURAGE MULTICASTING AS AN INNOVATIVE NEW SERVICE ON PAR WITH HDTV BY ENSURING REGULATORY TREATMENT THAT MAKES MULTICASTING AN ATTRACTIVE BUSINESS PLAN.

A. Multicasting Offers Broadcasters New and Innovative Ways to Serve Their Communities By Offering Expanded Line-Ups of Community-Interest, Children's and Public service Programming.

The Commission has requested comment on the extent to which broadcasters now are using or planning to use their digital channels for multicasting.⁴ PCC currently is broadcasting six free, over-the-air multicast channels on WCPX-DT in Chicago and WWPX-DT in Washington, D.C., and PCC intends to multicast in all its markets. PCC's work in Chicago and Washington has demonstrated the early promise of multicasting, but uncertainty about programming obligations and multicast must-carry has left the prospects for industry-wide multicasting uncertain.

PCC long has been an advocate of multicasting because it promises to solve two important problems facing the broadcasting industry today. First, with several broadcasters offering multicasting in a given community, over-the-air broadcasting could again become a much-needed multi-channel competitor to the cable and satellite delivery platforms. Only multicasting provides the possibility that over-the-air broadcasting could provide a free, over-the-air alternative to cable television. If DTV broadcasting were able to break the cable/satellite duopoly on multi-channel video distribution, many beneficial results would be realized, including a greater diversity of and increased competition for programming among networks and increased downward price pressure on cable rates. Increased competition and lower cable and satellite

⁴ *NPRM*, ¶ 21.

prices plainly are in the public interest, and they are within the reasonable expectations of what a multicast world would look like.

Second, multicasting has the potential to offer viewers an unprecedented number of free, over-the-air program choices that could provide unique access to minority, religious and special interest groups seeking to reach their local communities. In the spirit of the American broadcasting system, these choices would be tailored to the local needs and desires of the many, many communities nationwide that broadcasters remain committed to serve. Because it would be such a boon for the quantity and diversity of local programming, multicasting also would go a long way towards alleviating the Commission's concerns – expressed in the ongoing broadcast ownership biennial review – about those issues. Once broadcasters have some assurance that a sufficient number of viewers will be able to receive these services to make offering them worthwhile, the Commission can expect broadcasters to move quickly to exploit these new opportunities and begin providing services that viewers have yet to imagine that broadcasters could serve.

Third, multicasting offers the possibility of buttressing broadcasters' competitive position by providing them with additional revenue streams, either through additional advertising sales or through the provision of subscription services such as datacasting and video on demand. Improving broadcasters' competitive position is a legitimate core concern for the Commission, which is pledged to ensure the survival of America's over-the-air broadcast system. Multicasting may present a chance for the Commission to enable over-the-air broadcasting to again stand on its own as a competitive entity.

Consequently, multicasting may be the key DTV innovation that will help drive the success of DTV broadcasting during the transition and afterward. The FCC should recognize the transformative potential of multicasting and attempt to foster it by providing regulatory support. In the past, the Commission has remarked upon the flexibility of DTV broadcasting, but thus far, the Commission really has only encouraged the production and dissemination of HDTV. This should change. HDTV offers a unique and enticing choice to consumers for certain premium programming, but, as described, multicasting has the potential to reshape the local television landscape. Moreover, not all broadcasters have access to programming enhanced by HDTV, and if the Commission encourages it to be the key innovation of the DTV transition, the Commission will do no more than ensure that the richest network-affiliated stations get richer while the independent and emerging network stations become a broadcasting backwater. This would be bad for broadcasting and it would be bad for the public.

B. The Commission's Best Alternative for Accelerating the Transition Is To Take Regulatory Steps that Encourage Multicasting.

There are two important regulatory supports that will encourage additional broadcasters to multicast. First, the Commission should ensure that broadcasters will have maximum flexibility in programming their multicast channels. The Commission should not place greater obligations on broadcasters that program multiple channels than it places on stations that broadcast a single, full-time HDTV station.⁵ For example broadcasters who choose to multicast should not be required to air specified amounts of children's and public-interest programming on each multicast channel. Instead, they

⁵ These issues are discussed in greater detail in Section VII, *infra*.

should be permitted to satisfy the entirety of those obligations on individual multicast channels. Thus, a station might air a single channel containing only children's programming and another channel containing only public affairs programming. The best way to encourage multicasting is to allow broadcasters to program their multicast channels in innovative ways that maximize broadcasters' ability to offer new and diverse types of programming.

Second, and most important, the Commission must ensure that broadcasters will have mandatory carriage rights for each individual channel of multicast programming with which it provides free, over-the-air broadcasting services.⁶ Indeed, DTV must-carry remains the largest piece of unfinished business on the Commission's DTV agenda. As Commissioner Martin has pointed out, DTV must-carry is "critical to resolve so broadcasters can make business plans."⁷ Because it promises to provide broadcasters with so many new programming options, it is no exaggeration to say that at this point, multicast must-carry is the regulatory option with the greatest potential to move the transition forward quickly.

⁶ PCC also notes that the Commission must take all necessary steps to ensure that broadcasters' PSIP information, which is transmitted with their DTV signals and is crucial to multicast channel mapping, be included in cable operators' must-carry obligations. If cable operators are permitted to strip broadcasters' PSIP from DTV signals, multicasting likely will become impossible. This issue is raised in the Commission's ongoing plug-and-play cable compatibility proceeding, and PCC will address it in greater length there. See Implementation of Section 304 of the Telecommunications Act of 1996, CS Docket No. 97-80, PP Docket No. 00-67, *Notice of Proposed Rulemaking*, FCC 03-3 (rel. Jan 10, 2003).

⁷ Paige Albiniak, *Rocky Road To Ownership Deadline*, BROADCASTING AND CABLE, available at http://www.broadcastingcable.com/index.asp?layout=story&doc_id=116910&display=breakingNews (last visited April 9, 2003).

Not only is multicast must-carry potentially a potent fuel for the transition, it is entirely consistent with the Commission's responsibilities and cable operators' obligations under the Cable Act. As the Commission is well aware, cable operators are required to dedicate up to one-third of their channel capacity to accommodate local over-the-air broadcast stations entitled to mandatory carriage.⁸ The only relevance that cable operators' digital upgrades of their cable plant have to the DTV transition is that cable operators' vastly expanded channel capacity also has vastly expanded the number of channels available for must-carry stations.

Although the Cable Act also mandates that all stations carried pursuant to the Cable Act must be carried on the cable operators' basic service tier provided to all subscribers, this provides no legal or policy impediments to multicast must-carry. First, this provision was designed to protect broadcasters and consumers, not cable operators who, in Congress's judgment are already amply protected by the one-third channel capacity cap. The concern underlying this provision was that cable operators were placing significant numbers of broadcast stations on cable channels numbered above 12, which at the time, deprived a significant number of viewers owning non-cable-ready televisions of reception of local broadcast signals.⁹ They were then replacing those broadcast channels with cable channels on which they sold advertising – exactly the type of anti-competitive conduct that inspired must-carry in the first place.¹⁰

⁸ See 47 U.S.C. § 614(b)(7).

⁹ See Senate Report No. 102-92 at 44 (1997).

¹⁰ See *id.* at 43-44.

If the Commission allows the channel availability provisions of Section 614(b)(7) of the Cable Act to defeat multicast must-carry, it will subvert the intention of that section – to ensure that all local broadcast offerings available free over-the-air will be available to all cable subscribers. Nonetheless, the Commission may be justly concerned that if all multicast channels are required to be carried on cable operators' basic service tier, cable subscribers who receive only the basic service tier may receive degraded service because they will have fewer non-broadcast programming options on their service plan. The Commission has no mandate under Section 614, however, to protect consumers' cable-channel options. In any case, given the expanded potential for increased local-interest, children's, and community-service programming offered by multicasting, the Commission should not assume that fewer available cable channels will degrade cable customers' service. Moreover, cable operators decide the number of channels to be offered on the basic service tier, and the quality of customer service is primarily cable operators' interest and responsibility. If they believe that too many channels on the basic service tier are being taken up by broadcast channels, they can increase the number of channels available on the basic service tier. Cable operators' business decision regarding the structure of their service should not defeat legitimate must-carry requests from broadcasters and, in the context of Section 614, legitimate requests are those that take up no more than one-third cable operators' channel capacity.

PCC's multicast must-carry plan, which has been detailed in many previous pleadings, would allow cable operators to carry some multicast channels on their digital tier, avoiding the issue of overloading the basic service tier with broadcast

programming. This proposal strikes a middle-ground between broadcasters', cable operators', and cable customers' interests. Broadcasters gain access to the eyeballs necessary to launch new services; cable operators retain the ability to provide a diversity of non-broadcast channels on the basic service tier; and cable customers continue to receive the services they expect and the option of accessing broadcasters' exciting new program offerings. Hence, this option would satisfy any legitimate concerns of cable operators while significantly accelerating the pace of the DTV transition.

Despite Section 614(b)(7), PCC believes that Commission has the legal authority to steer the reasonable course PCC advocates. First, in the DTV tuner proceeding concluded last year, the Commission recognized that it's construction of statutes that predated the DTV transition must be flexible enough to accommodate unforeseen circumstances.¹¹ Accordingly, the Commission could find that Section 614(b)(7) means only that each broadcasters' flagship channel must be placed on the basic service tier, but that the Commission is free to order carriage of broadcasters' multicast offerings on cable operators' digital tier.

Because multicasting promises such great public benefits, it would be ironic indeed if a statute designed to protect broadcasters now would be used to wound the interests both of broadcasters and consumers. The Commission should avoid this bizarre outcome by ordering cable operators to carry broadcasters' multicast offerings

¹¹ See Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Second Report and Order and Second Memorandum Opinion and Order*, 17 FCC Rcd 15978, ¶ 27-30 (2002) ("*DTV Tuner Order*").

up to a third of their channel capacity – either on their basic service tier or on their digital tier.

III. CONGRESS MEANT WHAT IT SAID WHEN IT INSTRUCTED THAT THE DTV TRANSITION WILL NOT END UNTIL NO MORE THAN 15% OF AMERICAN TELEVISION VIEWERS LACK ACCESS TO DTV SIGNALS IN THEIR DIGITAL FORMAT.

The Commission also has requested comment on the meaning of Congress's statutory criteria for the end of the DTV transition as described in Section 309(j)(14)(B) of the Communications Act.¹² At this point, PCC does not believe Sections 309(j)(14)(B)(i) and (ii) provide any great interpretive difficulty, and it will restrict its comments to the meaning of Section 309(j)(14)(B)(iii). PCC believes the Commission has generally read the statute correctly, in the sense that the Commission's proposal appropriately limits which MVPD subscribers can satisfy the 85% threshold. Nonetheless, the PCC believes the Commission's proposed reading of the statute errs in one crucial aspect. The Commission has proposed to read the statute to be satisfied when 85% of viewers have either a DTV receiver or digital-to-analog converter capable of tuning an over-the-air DTV signal or subscribe to an MVPD that carries the DTV signals of every local broadcaster in its market. **PCC believes both the plain meaning of the text and the legislative history of Section 309(j)(14)(B)(iii) mandate that the DTV transition cannot end until a market has achieved both 85% penetration of receivers or digital-to-analog converters capable of receiving DTV signals over-the-air and 85% of television households in the market subscribe to an MVPD that carries the requisite broadcast DTV signals.**

¹² See *NPRM*, ¶¶ 69-94.

A. Section 309(J)(14)(B)(iii) Requires that 85% of Viewers in Each Market Be Capable of Receiving DTV Signals Over-the-Air.

PCC concurs with the Commission's view that Congress' primary goal in enacting the 85% threshold was ensuring that "a significant number of consumers in any given market are not left without broadcast television service as of January 1, 2007."¹³ Congress's concentration on the continuity of broadcast television throughout the transition and beyond cannot be ignored. The Commission therefore must avoid interpretations of the statute that may shorten the transition but also threaten greater loss of broadcast television service to the many households that still rely on over-the-air service.

This clear Congressional intent underlies a statute that has built in several safeguards for recipients of over-the-air signals. One of these safeguards is that to terminate the transition in any market, the Commission must find that both prongs of Section 309(j)(14)(B)(iii) are met, which is to say that an examination of any given market must show both 85% penetration of a combination of DTV receivers and digital-to-analog converters and that 85% percent of television households in a market subscribe to an MVPD that carries every local broadcaster in its market. The language, the logic, and the legislative history of Section 309(j)(14)(B) dictate this result.

The plain language of the statute, supported by the legislative history cited above, shows a clear congressional purpose to require the FCC to apply the 85% threshold to both the measurement of viewers that can receive DTV service through

¹³ See H.R. Conf. Rep. No. 105-2015 (1997) (emphasis added). See also, *NPRM*, ¶ 89.

MVPDs¹⁴ and those that can receive DTV service off-air.¹⁵ Each of these figures must reach 85% before the transition can terminate. Congress expressed its view that both of these conditions must be met by using the conjunctive “and” between subsections (I) and (II), ensuring that the statute would be read to require satisfaction of both conditions before the transition can be complete.

Moreover, as a logical matter, allowing the statute to be satisfied only through a combination of cable subscribers and viewers capable of receiving DTV service off-air could permit the transition to be completed based almost entirely on MVPD penetration. As the Commission has noted recently, MVPD penetration already has reached 85% nationally. Although the number of MVPDs currently carrying the DTV signals of all the local broadcasters in their markets is considerably smaller – perhaps 0% -- it still would be illogical to ascribe to Congress a purpose of allowing the DTV transition to be accomplished by a spike in MVPD subscribership. Indeed, because Congress informed the Commission through Section 309(j)(14)(B)(iii)’s legislative history that its primary concern was with the continuation of over-the-air broadcast service. Increased MVPD penetration would do nothing to further that goal.

B. The 85% Threshold Must Be Construed to Maximize the Number of Viewers Capable of Receiving Over-the-Air DTV Signals.

Regardless of whether the Commission accepts PCC’s construction of the statute, the Commission’s focus clearly must be on maximizing the number of viewers capable of receiving DTV signals over the air with a DTV tuner or DTV to analog

¹⁴ See 47 U.S.C. § 309(j)(14)(b)(iii)(I).

¹⁵ See 47 U.S.C. § 309(j)(14)(b)(iii)(II).

converter.¹⁶ In enacting 309(j)(14)(B)(iii), Congress was primarily concerned with how many viewers could receive over-the-air broadcast signals and that must be the Commission's only concern as well.

1. Ensuring 85% DTV receiver/converter penetration will best serve the American broadcasting system.

Congress's implicit judgment in enacting Section 309(j)(14)(B)(iii) was that to adequately ensure the uninterrupted continuity of the American over-the-air broadcasting system was to make certain that broadcasters retain the ability to reach at least 85% of television households in each market with an over-the-air DTV signal. Congress thus established this threshold as the minimum proportion of broadcasters' current market that the Commission must protect. Given the fundamental alteration of broadcasters' technical operation, assurance that this minimum proportion of broadcasters' market and the accompanying revenues was an eminently wise and reasonable judgment. It goes without saying that the American broadcasting system requires these revenues to sustain itself, and the only way broadcasters can retain their current revenue levels is by delivering an audience of consistent size. Consequently, a Commission construction of the statute that fails to protect 85% of broadcasters' analog market would be both unlawful and contrary to the public interest.

Moreover, failure to protect at least 85% of broadcasters' current over-the-air market would be tantamount to a taking of broadcasters' legitimate expectation that they will continue to be able to reach the vast majority of their current viewers with an over-the-air broadcast signal. Because this expectation has been the linchpin of

¹⁶ See 47 U.S.C. § 309(j)(14)(B)(iii)(II).

broadcasters' transition plans, removing it now would not only be wrong, it would be thoroughly disruptive. If investors had known the Commission would construe Section 309(j)(14)(B) to protect anything less than 85% of their audience, it is unlikely that they would have funded broadcasters' initial DTV build-out, and it is highly unlikely that they will provide additional funds to enable the many stations that have built only temporary, low-power facilities to convert those operations to full-power. In short, without the assurance of a continued over-the-air audience, broadcasters' contribution to the transition is likely to stall.

2. Ensuring 85% DTV receiver/converter penetration will best protect consumers who have been sold non-DTV capable receivers long after it was known that they would be obsolete at the close of the DTV transition.

Failing to ensure 85% DTV receiver and converter penetration also would amount to the Commission abandoning the many consumers who have purchased non-DTV compatible televisions in the past few years. Thankfully, the Commission's DTV tuner mandate will put a stop to the untoward practice of continuing to sell these soon-to-be-obsolete machines in 2004. This, however, is likely to be cold comfort to the millions of consumers that purchased analog-only televisions in the last year.

Having acquiesced for so long in the sale of these analog-only televisions, the Commission cannot in good conscience call an early end to the transition. This is particularly the case because the Commission is fully aware that many of these consumers have been sold analog televisions by unknowledgeable sales people that likely have been selling consumers products without knowing or fully disclosing their

likely longevity.¹⁷ The situation seems largely the same for consumers buying digital sets. Last year the Commission estimated that only 0.2% of U.S. households have over-the-air DTV capability,¹⁸ and if some reports have indicated that of the approximately 4.5 million DTV products sold between 1998 and 2002, only 650,000 were capable of receiving over-the-air DTV. Moreover, the Commission itself has recognized studies showing that 30% of the televisions in use today receive over-the-air analog signals exclusively.¹⁹ These sets function as second and third televisions in most cable households, but Americans have a right to expect that they will work for their normal life span. Abandoning all these viewers who are supposed to be the ultimate beneficiaries of the DTV transition would be the ultimate act of bureaucratic indifference. Conversely, recognizing Congress's 85% DTV receiver/converter threshold would protect these consumers by ensuring that the transition will continue until they are able to upgrade their televisions with a full understanding of the implications of the DTV transition.

C. Regardless of How the Commission Construes Section 309(j)(14)(B)(iii), It Must Narrowly Construe Which MVPD Subscribers Will Count Towards the 85% Threshold.

Regardless of whether the Commission adopts its own flawed construction of Section 309(j)(14)(B)(iii) or that suggested by PCC, given Congress's primary concern with over-the-air broadcasting, the Commission must construe very narrowly the provision allowing subscribers to MVPDs to count towards the 85% threshold.²⁰

¹⁷ See *DTV Tuner Order* (Separate Statement of Chairman Michael Powell).

¹⁸ See *Id.* ¶ 35.

¹⁹ See *Id.* ¶ 34.

²⁰ See 47 U.S.C. § 309(j)(14)(B)(iii)(I).

First, according to the plain language of the statute, a cable operator must carry all the digital signals being offered in its market for its subscribers to be counted towards the 85% threshold. **The Commission must make absolutely plain that for their viewers to satisfy the 85% threshold, MVPDs must carry all required broadcast DTV signals prior to the end of the transition.** The Commission cannot count MVPD subscribers whose system carries the requisite analog broadcasters and has pledged to carry the same DTV stations once the transition is complete. As a practical matter, given current and prospective levels of MVPD carriage of DTV broadcast signals, the 85% threshold as applied to MVPDs will not – indeed, probably cannot – be met unless the Commission orders dual DTV must-carry.

Second, the Commission also has asked whether it should construe “market” to mean a station’s DMA or its Grade B contour. PCC believes the only “market” for consideration is the DMA. This is the FCC’s most common meaning for the term,²¹ and Congress would be presumed to legislate against the backdrop of the existing regulatory regime.²² Moreover, this is the plain meaning of the term “market” in the video delivery industry where cable carriage of broadcasters’ signals is concerned, and Congress should be presumed to have intended the term to have its common

²¹ See, e.g., 47 C.F.R. § 73.3555(b) (meaning of market in television local ownership rules); 76.55(e)(2) (meaning of market in must-carry context).

²² See, e.g., Application of Bellsouth Corporation, Bellsouth Telecommunications, Inc., and Bellsouth Long Distance, Inc., for Provision of in-Region, Interlata Services in Louisiana, *Memorandum Opinion and Order*, 13 FCC Rcd 20599, ¶ 28 & n. 64 (1998) (noting that Congress’s use of a term previously defined by Commission indicates Congressional agreement with the meaning of that term) (citing *Lorillard v. Pons*, 434 US 575, 580 (1978)).

meaning.²³ Accordingly, for subscribers to an MVPD to apply to the 85% threshold, the MVPD must carry all the DTV signals in its DMA, including those for which the cable system may earlier have received a market modification with respect to the stations' analog channel. This approach also is consistent with Congress's disavowal of any linkage between the requirements of 309(j)(14)(B)(iii)(I) and cable operators must-carry obligations.²⁴

The Commission notes that defining "market" in this way would make the 85% threshold very difficult to reach because most cable operators do not carry every analog television station in their DMA.²⁵ While this is true, the Commission must keep in mind that its job in construing the statute is to protect viewers' access to diverse programming that serves local community needs and to ensure that they are receiving these benefits through access to DTV signals, not to speed the close of the DTV transition. It is consistent with this approach to consider MVPD subscribers as part of the 85% threshold only if their service providers carry more DTV signals in a stations' DMA than are strictly required to by law.

Third, the Commission should adopt its proposal to include in the 85% calculation only MVPD subscribers who possess equipment that allows them to view DTV signals,²⁶ but the Commission should go further to require that they are able to receive DTV signals in digital format. Thus, the Commission should not count MVPD subscribers

²³ See, e.g., *Missouri Municipal League v. FCC*, 299 F.3d 949 (2002) (8th Cir.) (citations omitted).

²⁴ See Balanced Budget Act of 1997, 105th Cong., 1st Sess. Conf. Rep. 105-217, 577 (1997).

²⁵ See *NPRM*, ¶ 75.

²⁶ See *NPRM*, ¶ 89.

that view digital signals received from an MVPD by use of a digital-to-analog converter used in conjunction with an analog television receiver. Indeed, if the Commission adopts its proposal to count these viewers, any subscriber to digital cable would arguably count towards the 85% threshold, despite their inability to receive DTV. If the transition ends while significant numbers of such viewers exist, those viewers will not be receiving broadcast DTV service, and Congress plainly expected that only viewers receiving that service would be counted towards the 85% threshold.

Third, the Commission should not count MVPD viewers that receive signals from MVPDs that downconvert digital signals to analog at the cable headend.²⁷ Such viewers will not, in any sense, be receiving DTV service. If significant numbers of cable operators fail to pass digital broadcast service to their customers, then the DTV transition will not have occurred. The idea that broadcasters will have been required to invest the significant resources in DTV only to have their signals degraded by cable operators is contrary to all common sense and could not have been Congress's intention in adopting 309(j)(14)(B).

Finally, the Commission must make clear that to count towards the 85% threshold, MVPD operators must carry stations' DTV signals prior to the end of the transition. Carriage of stations' analog signals with the promise or requirement of post-transition carriage of their DTV signals cannot be enough for the operators' viewers to count towards the 85% threshold.

²⁷ See *NPRM*, ¶ 89.

D. Section 309(j)(14)(B)(iii) Permits the Transition to End Only After the Commission Has Adequately Protected Viewers.

The Commission asks the question whether the purpose of Section 309(j)(14) is “to ensure that viewers do not lose access to broadcast signals, to ensure that the transition to digital actually occurs, or both?”²⁸ To ask this question is to answer it. Congress required through 309(j)(14) a certain type of transition which does not significantly diminish viewers’ traditional ability to receive signals off-air for no more than the affordable price of a television receiver. Accordingly 309(j)(14) must be construed to permit as little disruption of the traditional American broadcasting system as possible. That means ensuring that as many viewers as possible have access to the same options for receiving DTV as they currently have for receiving analog television. Congress set the number of viewers that must have this capability at 85% and directed the Commission to pay special attention to viewers’ ability to access over-the-air DTV. Until this type of transition has been achieved, Section 309(j)(14) requires the Commission to continue the DTV transition.

IV. THE COMMISSION SHOULD CONFIRM THAT THE CANADA-U.S. DTV LETTER OF UNDERSTANDING WILL NOT GOVERN THE POST-TRANSITION SERVICE AREAS OF EXISTING ANALOG BROADCASTERS.

The Commission has requested comment generally on technical issues that are contributing to delay of the DTV transition.²⁹ One such issue concerns the post-transition operation of the Canada – U.S. Letter of Understanding that has governed modifications of the initial DTV table of allotments within 400 km of the U.S./Canadian

²⁸ See *NPRM*, ¶ 90.

²⁹ See *NPRM*, ¶ 18.

border.³⁰ The Commission should clarify that the LOU will not interfere with post-transition DTV replication of stations' current analog service area regardless of whether a station elects to provide permanent DTV service on its analog or digital channel. This clarification is essential to broadcasters' ability to plan their channel election and post-transition business plans.

PCC's need for clarification on this point has arisen from the FCC's treatment of applications for DTV construction permits for PCC stations WPXJ-DT, Batavia, New York,³¹ WPXD-DT, Ann Arbor, Michigan,³² and WVPX-DT, Akron, Ohio,³³ but resolution of this issue has grave implications for all stations operating in the Canadian border zone. In each of PCC's cases, grant of the stations' construction permits has been delayed by predicted interference to Canadian DTV allotments. In each case, to comply with the LOU, the station would be required to significantly reduce its transitional DTV service area to prevent predicted interference.³⁴ Consequently, these stations will not

³⁰ See U.S. and Canada Reach Agreement on Implementing Digital Television Service Along the U.S./Canada Border, *Press Release* (rel. Sept. 29, 2000) ("LOU").

³¹ See FCC File No. BPCDT-19990326KE.

³² See FCC File No. BPCDT-19990812KH.

³³ See FCC File No. BPCDT 19990128KN.

³⁴ In the case of WPXD-DT, the station has submitted that only an acceptable amount of interference is predicted when the interference caused to the Canadian allotment by existing stations – *i.e.* "masking interference" – is taken into account. See File No. BPCDT-19990812KH. Comprehensive Technical Exhibit at 2. PCC understands that the Commission and Canadian authorities have yet to take a final position on whether the LOU permits or requires consideration of masking interference. During the spectrum-congested transition, it is essential that the Commission take account of all available methods of determining whether actual prohibited interference will take place. Accordingly, PCC encourages the Commission to clarify that masking interference should be considered in determining likely interference between U.S. and Canadian stations, and to conclude whatever negotiations are required with Canadian authorities to obtain their concurrence on this matter.

be able to replicate their analog service area with DTV facilities on their currently allotted channels during the DTV transition.

The more serious problem, however, is that a strict reading of the LOU could require the Commission to authorize post-transition DTV service only for these truncated service areas. Requiring stations to operate their post-transition DTV stations with these minimized service areas would be entirely unacceptable. In the case of PCC station WPXJ-DT, this restricted DTV service area could result in a loss of service to as many as 42% of the viewers in the station's analog service area. Such an extensive service reduction directly contradicts the Commission's policy of facilitating stations' full digital replication of their analog service area,³⁵ and is fundamentally at odds with the Commission's traditional commitment to maintaining existing broadcast service.³⁶ Plainly, the Commission could not have intended this type of result when it entered into the LOU.

The Commission's staff has informally represented to PCC that the LOU never was intended to create such service losses to post-transition DTV stations, and will not operate to create this effect. Although PCC appreciates these representations that existing service will be preserved, it remains concerned about potential misapplication of the LOU. Accordingly, PCC respectfully requests that the Commission formally clarify in this proceeding that the LOU will not interfere with DTV stations' post-transition

³⁵ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, *Sixth Report and Order*, 12 FCC Rcd 14588, ¶ 29.

³⁶ See *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules; Carriage of the Transmissions of Digital Television Broadcast Stations; Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 2703, ¶ 16 (2001).

replication of their analog service area regardless of whether they elect to operate on their analog or digital channel.

V. THE COMMISSION SHOULD REPORT TO CONGRESS THAT THE DTV TRANSITION WILL BE FURTHERED BY PROMPTLY RESCHEDULING THE 700 MHz AUCTION.

Another issue that must be resolved in the near future for the Commission to keep the DTV transition moving forward is clearing the 700 MHz spectrum bands and completing the auction of that spectrum. The Auction Reform Act of 2002,³⁷ requires the Commission to report to Congress on issues surrounding reclamation of the 700 MHz spectrum, and the Commission has sought comment on the ways that the progress of the DTV transition impacts the need for and timing of the auction of this spectrum.³⁸ In PCC's view, the Commission's Report to Congress regarding auction of the 700 MHz spectrum should reiterate the Commission's previous position that the relocation of broadcasters currently located on Channels 52-69 is essential to a successful transition to DTV,³⁹ and that the 700 MHz auctions will facilitate this relocation.

By asking how the progress of the DTV transition affects the need for the 700 MHz auctions, the Biennial NPRM appears to distinguish between the progress of the DTV transition and the timetable for future auction of the 700 MHz spectrum.⁴⁰ No such

³⁷ See Auction Reform Act of 2002, Pub. L. No. 107-195 (2002).

³⁸ See *NPRM*, ¶ 23.

³⁹ See, e.g., Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules Carriage of the Transmissions of Digital Television Broadcast Stations, Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Order on Reconsideration of the Third Report and Order*, 16 FCC Rcd 21633, ¶ 3 (2001).

⁴⁰ See *id.* at n.26.

distinction can be made because the two are inextricably linked. The Commission has recognized that “the process of clearing the Upper 700 MHz band has long been an integral part of the DTV transition process.”⁴¹ Indeed, one of the key policy justifications for the transition from analog to the more spectrally efficient digital broadcasting was that it would allow the Commission to pack broadcasters into a smaller swath of spectrum than they currently occupy.⁴² The cleared 700 MHz spectrum will be used by public safety service providers and to provide new wireless services.⁴³ Clearing the 700 MHz spectrum requires relocating the broadcasters, and relocating the broadcasters prior to the end of the DTV transition requires auctioning the spectrum. Accordingly, there can be no successful DTV transition until the spectrum is auctioned and the broadcasters are relocated.

The Auction Reform Act did nothing to change this fact or to undo the pro-band-clearing policies the Commission has developed to accomplish expeditiously the significant public benefits of band-clearing. Following auction of the 700 MHz spectrum, these policies will allow broadcasters to enter into band-clearing agreements with wireless operators to relinquish their right to use their 700 MHz spectrum prior to the

⁴¹ Carriage of the Transmissions of Digital Television Broadcast Stations; Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, *Order on Reconsideration of the Third Report and Order*, 16 FCC Rcd 21633, ¶¶ 12-16 (2001).

⁴² Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, ¶ 1 (2002) (“*Lower 700 MHz Reallocation Order*”).

⁴³ *See id.*

close of the DTV transition.⁴⁴

Prior to passage of the Auction Reform Act, PCC, together with many other 700 MHz broadcasters, tirelessly pursued the fulfillment of these policies and expended significant time and resources developing comprehensive plans for clearing the upper 700 MHz band. The efforts were squandered in June 2002, however, as a result of a massive lobbying effort by the wireless industry to delay the auctions and turn the 700 MHz bands into a huge spectrum warehouse for their future use.

The Auction Reform Act, however, does not require the Commission to postpone the 700 MHz auctions indefinitely. Instead, it leaves to the Commission the discretion to hold the auctions when it believes sound public policy so requires. As shown above, the Commission's DTV transition policies require that the auctions be held in the near future. Accordingly, the Commission should begin the process of rescheduling the 700 MHz auctions now.

In its Report, the Commission should reiterate to Congress that clearing the 700 MHz spectrum is essential to a successful DTV transition. The Commission also

⁴⁴ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Order on Reconsideration of the Third Report and Order*, WT Docket No. 99-168, FCC 01-258 (rel. Sept. 17, 2001); *Upper 700 MHz Third Report and Order*, 16 FCC Rcd 2709; Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845 (2000); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476 (2000); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006 (1999); Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Report and Order*, 12 FCC Rcd 22953 (1998); Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Notice of Proposed Rule Making*, 12 FCC Rcd 14141 (1997).

should explain that it intends to reschedule the auctions as soon as possible to accomplish the many public interest benefits that band-clearing would bring. The Commission already has lost valuable time in this endeavor, but there is no statutory restraint or policy concern that should induce the Commission to delay band-clearing any longer. The case remains much as it was nearly a year ago: the 700 MHz auctions should be delayed no further.

VI. THE COMMISSION SHOULD PERMIT NON-MAJOR-NETWORK-AFFILIATED STATIONS WITH CHANNELS IN THE 700 MHz SPECTRUM TO RETURN THEIR DIGITAL SPECTRUM, OPERATE THEIR CURRENT ANALOG FACILITIES DURING THE TRANSITION, AND FLASH-CUT TO DTV ON THEIR ANALOG CHANNEL AT THEIR DISCRETION.

The Commission also can encourage band-clearing before rescheduling the 700 MHz auction by permitting – though not requiring -- non-major-network-affiliated stations with in-core analog channels and digital allotments in the 700 MHz band to surrender their digital spectrum and provide single-channel analog service on their in-core channel during the transition.⁴⁵ These stations then should be permitted to flash-cut to digital operations at their discretion either during the DTV transition or at a time no later than may be required by the Commission at the end of the transition. The Commission should clarify that such voluntary clearing can be either pursuant to a band-clearing agreement in which the broadcaster is fairly compensated or at the broadcaster's voluntary election. Under no circumstances should the Commission require broadcasters in this position, however, to relinquish their digital spectrum before

⁴⁵ PCC submits that grant of flash-cut authority should be restricted to stations that are not affiliated with the four major television networks. Extending flash-cut authority to Big Four-affiliated stations would interfere with fulfillment of the statutory requirements for the end of the DTV transition contained in Section 309(j)(14)(B)(i).

the broadcaster volunteers it. This course would further the goals of allowing the introduction of new wireless and public safety services in the 700 MHz band and would not delay the DTV transition.

As described above, the Commission has recognized that relocating broadcasters from the 700 MHz band is an integral part of the DTV transition and will accomplish substantial public benefits. By authorizing the early return of 700 MHz digital spectrum, the Commission can begin to realize the benefits of band-clearing immediately. For example, PCC station WVPX(TV), Akron, Ohio, occupies Channel 59. PCC's return of Channel 59 would remove the spectrum encumbrance to Aloha Partners, L.P. ("Aloha Partners"), winning bidder in last fall's Lower 700 MHz Auction of the Block C license that covers WVPX(TV)'s service area. Surrender of the allotment will allow Aloha Partners to introduce new services earlier than otherwise possible and permit a return on their speculative investment. Thus, allowing broadcasters to surrender their 700 MHz digital spectrum, could lead to considerable clearing of these bands – long a source of concern for the Commission.⁴⁶

Allowing voluntary surrender of 700 MHz digital spectrum also would not delay the close of the DTV transition. This is the case regardless of whether these stations continue broadcasting in analog on their in-core allotments until the close of the transition or if they flash-cut to digital at some earlier time. If a station continues to broadcast in analog until the Commission declares the transition complete, then, under Section 309(j)(14)(B)(iii), the station will not be considered in determining whether 85%

⁴⁶ See *Lower 700 MHz Reallocation Order*, ¶ 142.

of the viewers in the market have sufficient access to DTV. Accordingly, the station's continued analog operation will not delay satisfaction of the 85% threshold. If a station that has returned its 700 MHz digital spectrum elects to commence digital operations prior to the close of the transition, then 85% of the viewers in the station's market will need to be capable of receiving the station's signal – but that will be the case if the station is required to construct and operate DTV facilities on its 700 MHz channel as well. Consequently, allowing 700 MHz stations flash-cut authority cannot delay, and may accelerate the DTV transition.

Granting 700 MHz stations flash-cut authority also would be in line with analogous Commission precedent. The Commission has stated that it would consider requests by incumbent broadcasters on channels 52-59 to voluntarily vacate their NTSC channels prior to the end of the DTV transition on a case-by-case basis, considering all relevant public interest factors.⁴⁷ Recently, the Commission carried out this policy, permitting television station WWAC-TV, Atlantic City, New Jersey, to return its 700 MHz analog spectrum and commence single-channel DTV operation.⁴⁸ The Commission noted that allowing WWAC-TV to commence single channel operations was in the public interest because it would aid in clearing the 700 MHz band and enabling earlier introduction of new wireless and public safety services.⁴⁹ The Commission further noted that the request would not result in substantial loss of over-the-air service.⁵⁰

⁴⁷ See *Id.* at 1096 (2002)

⁴⁸ See *WWAC-TV, Letter Decision*, 17 FCC Rcd 19148 (2002).

⁴⁹ See *id.*

⁵⁰ See *id.*

Granting 700 MHz stations authority to surrender their 700 MHz digital spectrum and flash-cut to digital on their analog channel would be consistent with the rationales underlying the Commission's policies as demonstrated by the WWAC-TV case. Allowing stations to surrender 700MHz digital spectrum also would allow earlier introduction of wireless and public safety services. Moreover, because the stations would operate in analog for some portion of the transition, no loss of over-the-air service would be expected to occur. These stations would only be likely to transition to digital if the transition to digital is well under way in the stations' markets or if, like WWAC-TV, they actually could reach more viewers through cable carriage of their single DTV channel than through operation of their analog station. Regardless, permitting stations the requested authority would serve the public interests inherent in clearing the 700 MHz band and would not result in diminution of over-the-air broadcast service or delay of the DTV transition.

VII. THE COMMISSION SHOULD NOT INSTITUTE NEW CONTENT-BASED PUBLIC INTEREST REQUIREMENTS ON DTV BROADCASTERS, BUT INSTEAD SHOULD ENCOURAGE VOLUNTARY PUBLIC COMMITMENTS BY BROADCASTERS TO AIR MATERIAL SUITABLE FOR FAMILIES AND CHILDREN.

PCC long has been a recognized leader in distributing family- and community-friendly programming. Responding to the demands of the marketplace as well as good conscience, PAXTV provides a unique blend of family-friendly programming focused on core American values and free of the explicit sex, senseless violence and foul language found in so many television programs today. PCC programming seeks to create a safe and unthreatening environment in which children and adults alike can interact with their world – a place where parents can bring their children and be proud and unafraid to show them what the adult world can be. PCC is proud to have “proven that money can

be made with family friendly programming,"⁵¹ and believes that, if given the chance, the market increasingly will demand that large media owners live up to the same standard. PCC fully intends to continue to provide family-friendly programming in the DTV world by creating and launching multiple channels of family programming to diversify the video programming delivered to consumers. As described above, multicasting promises to open up broad new horizons of opportunities for local programming that serves the needs of niche audiences. These opportunities promise to increase the quantity of programming available to minorities and special interest groups that otherwise have a difficult time obtaining access to television air time.

Accordingly, PCC fully supports the Commission's examination of broadcasters' public interest obligations in the digital world.⁵² As the Commission's examination of these obligations now is over two years old, it is entirely appropriate that the Commission should seek to refresh the record regarding these matters.⁵³ Nonetheless, the answers to questions regarding DTV broadcasters' public interest obligations remain largely the same as they were two years ago. First, additional FCC mandates are not necessary to ensure that broadcasters satisfy their public interest responsibilities.

⁵¹ Remarks Of Commissioner Michael J. Copps To United States Conference Of Catholic Bishops, Dallas, Texas, April 26, 2002, available at <http://www.fcc.gov/speeches/copps/2002/spmjc204.html>.

⁵² See Comments of Paxson Communications Corporation, MM Docket Nos. 00-167, 00-168, filed December 18, 2000. See also Public Interest Obligations of TV Broadcast Licenses, *Notice of Inquiry*, 14 FCC Rcd 21633 (1999); Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *Notice of Proposed Rulemaking*, 15 FCC Rcd 19816 (2000); Children's Television Obligations of Digital Television Broadcasters, *Notice of Proposed Rulemaking*, 15 FCC Rcd 22946 (2000).

⁵³ See *NPRM*, ¶¶ 107-112.

Second, the Commission should match the increased flexibility offered by digital broadcasting with an increased flexibility in how broadcasters can satisfy their public interest obligations. Broadcasters that choose to multicast should be free to satisfy their public interest obligations in a variety of ways, and the Commission should encourage innovative plans for bringing new and increased amounts of public interest programming to consumers. Third, the Commission should focus on using specific and voluntary public initiatives to encourage broadcasters to discharge their public interest duties with renewed vigor.

A. Additional FCC Mandates Are Not Necessary To Ensure That Broadcasters Meet Their Public Interest Obligations.

PCC respectfully urges the FCC to maintain – but not increase -- the current three-hour children’s core programming guideline for DTV stations and to clarify that the definition of public-interest programming is broad enough to include all programming that is in the public interest, including faith-based educational, informational, and entertainment programming.

As PCC has explained in the past, the market for FCC compliant children’s programming creates problems for local broadcasters that are not affiliated with major networks. Because such programming typically draws relatively low ratings, high quality children’s programming is not produced in large quantities by independent producers. Consequently, any increase in broadcasters’ obligations would strain existing children’s programming resources, increasing operating costs for the independent and small-market broadcasters that can least afford it.

Aside from the practical reasons for maintaining the three-hour programming requirement, however, the Commission should consider several other important factors.

First, the Commission should not assume that only children’s programming that satisfies the Commission’s criteria has any benefit for children. Programming does not have to be designed to appeal exclusively to children to benefit them. Indeed, PCC believes that all its programming is not only suitable, but beneficial for children. While it may be important to “let a kid be a kid,” it is equally important to provide opportunities for children to witness and interact with the adult world in a non-threatening environment. That is precisely what PCC’s family-friendly programming seeks to do. Accordingly, the Commission should focus more on the overall sweep of today’s television programming than on trying to require broadcasters to carry ever-greater quantities of FCC-approved programming.⁵⁴

B. The Commission Should Focus on Voluntary Public Initiatives to Encourage DTV Broadcasters to Commit to Considering Public Morality in Making Program Decisions.

The Commission’s main focus should be to encourage broadcasters to tailor their schedule with healthy doses of both programming that primarily appeals to adults but is suitable for children and programming that primarily appeals to children but is full of the life lessons children need to become decent, law-abiding adults. Of course, the Commission’s efforts in this regard are constrained – and properly so – by The First

⁵⁴ In this regard, PCC vigorously supports the FCC’s new get tough policy on indecency presaged by its recent *Notice of Apparent Liability* issued against Infinity Broadcasting. Such high profile actions cannot help but inform consumers that they do not have to sit through the inappropriate programming on the airwaves with no recourse but to turn off their televisions and radios. Additionally, such actions put errant broadcasters on notice that the public demands more.

Amendment and Section 326 of the Communications Act. Nonetheless there are tools the Commission can use to encourage broadcasters to make responsible programming decisions.

For example, PCC long has favored a voluntary Code of Conduct (the “Code”) that could serve as a guide to broadcasters as they seek to serve their public interest obligations. PCC has publicly advocated such a Code⁵⁵ and wishes to take this opportunity to describe its proposal, which is composed essentially of seven tenets:

- Television stations have been given the responsibility under the Communications Act to serve the public interest, convenience and necessity within their service areas and to use their good faith discretion in determining how to fulfill this obligation.
- Television stations will provide programming that contains information explaining our citizenship, civic responsibilities and political processes. This information will be presented, designed, and structured so that it is accessible, available, understandable and free.
- Television stations will provide programming that reflects and addresses the diverse interests of local viewers and their communities’ culture, heritage, individuality, and demographics. Television stations will provide programming that in the station’s good faith belief addresses all local demographic groups within its coverage area.
- Television stations’ service to their communities will include contributions to political discourse; public service announcements; children’s, faith-based, informational, educational and cultural programming; as well as involvement in local community activities such as sponsorship of charity fundraisers and on-air coverage of important events in the community.
- Television stations will endeavor to establish a daily prime time safe harbor hour free of excessive violence, explicitly sexual and indecent programming and foul language.

⁵⁵ See, e.g., *Ex Parte Letter* from Lowell W. Paxson to Michael K. Powell, CS Docket No. 98-120, MM Docket No. 99-360, MM Docket No. 00-168, dated February 20, 2003.

- Television stations choosing to multicast their DTV signals will consider the appropriate level and scheduling of such public interest programming and determine whether such programming will be aired on one or more channels.

Under PCC's proposal, adherence to the Code of Conduct would be completely voluntary, and, indeed, one of the core concepts underlying the Code is the fact that there are myriad ways for broadcasters to satisfy their public duties. The main substantial benefit to following the Code for broadcasters would be that doing so would entitle them to an expectancy of license renewal on the issue of having satisfied their public service obligations in much the same way that airing three hours per week of children's programming entitles broadcasters to such an expectancy.

The Commission should pay special attention to several of the ways in which this Code of Conduct provides broadcasters with innovative ways to fulfill their duty to the public interest while showing all due respect to broadcasters' First Amendment right to program their stations freely, without government censure or intervention. Even if the Commission decides not to adopt PCC's proposed Code, it should incorporate these concepts into broadcasters' public interest obligations in the DTV world.

1. The Commission Should Define Public Interest Programming Broadly to Include Faith-Based Entertainment, Informational, and Religious Programming.

First, the Code avoids the narrow and parochial view of public interest programming that sees only local news and magazine programs as satisfying licensees' public interest responsibilities. Instead, the Code embraces the idea that many different types of programming serve the public interest, including entertainment and faith-based programming, which can provide substantial benefits to the public that are every bit as meaningful and community-responsive as news programming. The Commission must recognize that broadcasters have a responsibility to serve the spiritual needs of their

communities just as they have the responsibility to inform them of important local events. Moreover, a broad definition of public interest programming ensures a wider variety of programming offered over-the-air. By permitting broadcasters to be flexible in their choices of public interest programming content, the Commission also avoids the First Amendment concerns that accompany content regulation.

2. The Commission Should Allow Broadcasters to Air All of Their Children’s Public Interest Programming on One Multicast Channel.

The Code would allow broadcasters that choose to multicast programming on multiple channels to air all their children’s and public interest programming on a single multicast channel. This innovative idea for unlocking the potentially transforming potential of DTV spectrum to more effectively serve the public interest is fully consistent with the Commission’s invitation to broadcasters to experiment with new uses of broadcast spectrum to serve the public interest.⁵⁶ The benefits of allowing broadcasters to offer all their children’s and public interest programming on one channel are significant. First, the multicast channel airing a station’s public interest programming could serve as a kind of community channel, a place where viewers would know they

⁵⁶ See, e.g., Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fourth Report and Order*, 11 FCC Rcd 17771, ¶¶ 30, 61 (FCC 1996); Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, ¶¶ 4, 7, 21, 29, 49 (FCC 1997) (“Broadcasters will be able to experiment with innovative offerings and different service packages as they continue to provide at least one free program service and meet their public-interest obligations. We choose to impose few restrictions on broadcasters and to allow them to make decisions that will further their ability to respond to the marketplace.” *Id* at ¶ 4) (“*Fifth DTV Report and Order*”); Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, ¶¶ 25, 27 (FCC 1998).

could consistently find community interest programming. Moreover, by combining all of their community-oriented, public service, and children's programming on a single multicast channel, broadcasters would be creating a kind of safe zone where parents and children could feel free to go without fear of finding objectionable or unsuitable programming. These benefits should not be gainsaid in today's everything-goes media environment.

3. The Voluntary Code of Conduct Would Encourage Stations To Take A more Active Community Role Rather Than Merely Seeking to Meet Commission Programming Benchmarks.

Under the Code, broadcasters would be encouraged to take a more active role in community affairs rather than concentrating on meeting minimum hours benchmarks for particular types of programming. For example, broadcasters could satisfy their obligations in part by educating children and airing community issues through participation and sponsorship of community activities such as career days, studio tours, sponsorship of events with local schools, airing of public service announcements for children's activities, community services, and children's organizations. This approach is sure to make for more robust relationships between broadcasters and their communities of license as broadcasters are offered tangible benefits for their community involvement.

C. Decisive Commission Action on Broadcasters' DTV Public Service Obligations is Necessary as Broadcasters Plan Their DTV Future.

PCC cannot stress enough the importance of resolving the issues presented by this consideration of broadcasters' DTV public service obligations. Now is the time when broadcasters are planning their DTV programming strategies. Clearly, knowing their public service obligations are a central part of this process. PCC's proposed Code, and the core concepts it embodies, could help to create a vibrant public space in which

multiple over-the-air channels provide increased amounts of children's and community-oriented programming, but so long as broadcasters are unsure of their obligations, they are unlikely to make such ambitious plans. As with the DTV must-carry proceeding, resolution of these issues is critical to moving the transition forward.

VIII. THE COMMISSION SHOULD DELAY ITS SIMULCAST REQUIREMENTS UNTIL ONE YEAR FOLLOWING A DECISION ON MULTICAST MUST-CARRY.

The Commission has requested comment on its simulcast rule, which recently required non-network-affiliated and smaller-market broadcasters to begin simulcasting on their digital channel 50% of their analog channel programming.⁵⁷ The effect of this requirement is that all non-network affiliated and smaller-market DTV broadcasters now are required to operate their stations during 50% of their analog station's broadcast day.⁵⁸ PCC believes that the simulcasting requirements are premature in light of current market conditions. Accordingly, PCC urges the Commission to continue its practical policy with respect to the simulcast rule and delay these expanded DTV broadcasting requirements at least until one year following resolution of the DTV must-carry proceeding.

⁵⁷ See *NPRM*, ¶ 65-68; 47 C.F.R. § 73.624(f). Under the current rule, the requirement will increase to 75% on April 1, 2004, and 100% on April 1, 2005. Network-affiliated broadcasters in the top 30 markets already are required to operate their digital stations whenever their analog stations are in operation. See Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Memorandum Opinion And Order On Reconsideration*, 16 FCC Rcd 20594, ¶ 17 (2001) ("*Simulcast Order*"). See also 47 C.F.R. § 73.624(b).

⁵⁸ See *Simulcast Order*, ¶ 17.

A. Lack of Consumer Adoption of DTV Justifies Delaying the Phase-in of Increased Simulcast Requirements.

On March 20, 2003, PCC requested a one-year waiver of the April 1, 2003, simulcast requirements based on the ongoing lack of consumer adoption of DTV and the lingering regulatory uncertainty surrounding DTV must-carry and the simulcast requirements themselves.⁵⁹ As explained therein, PCC's situation justifies waiver because it faces a particularly heavy burden as a result of the large size of its station group. Every additional DTV cost – including the considerable increased electricity and maintenance costs that would accompany increased simulcast requirements – is amplified by PCC's many non-revenue-generating DTV stations. The same logic and arguments supporting PCC's waiver request support a general revision of the simulcast rule.

The tremendous progress the DTV transition has seen in the past year has not yet been borne out by increased consumer acceptance of DTV technology. A recent General Accounting Office report of the transition indicates that a vanishingly small number of consumers own digital televisions capable of tuning over-the-air DTV signals and that cable operators are not delivering DTV signals to cable subscribers in any significant numbers.⁶⁰ Most alarmingly, the GAO report found that forty percent of

⁵⁹ See Request for Temporary Waiver of Section 73.624(f) of the Commission's Rules, Paxson Communications Corporation, filed March 20, 2003. Many other broadcasters and broadcast groups also have sought waiver of the simulcast requirements. See Brigitte Greenberg and Dinesh Kumar, *With Digital Deadline Looming, Some Ask for Delay on Simulcast*, COMMUNICATIONS DAILY, Mar. 31, 2003 at 1; Ted Hearn, *Broadcasters Seek DTV Simulcast Waiver*, MULTICHANNEL NEWS, Jan. 6, 2003, at 10.

⁶⁰ Additional Federal Efforts Could Help Advance Digital Transition, General Accounting Office, GAO 03-07, released November 2002 at 3, 20.

consumers are not even aware of the DTV transition.⁶¹ These findings are consistent with those that prompted the Commission to adopt the DTV tuner mandate in the Summer of 2002.⁶² The tuner mandate is likely to speed consumer adoption of DTV technology, but it does not begin to phase-in until July 2004, and does not require that all sets contain DTV tuners until July 2007.⁶³ Meanwhile, consumers continue to be sold substandard DTV products. As recently as last August, the Commission estimated that only 0.2% of U.S. households had over-the-air DTV capability.⁶⁴ The approximately 4.5 million DTV products (including receivers that cannot receive over-the-air DTV) sold since 1998 pale in comparison to the 25 million analog television receivers sold each year.

The net effect of continuing consumer disinterest in DTV technology and continuing to permit the manufacture of sets incapable of receiving DTV is that DTV broadcasters currently are broadcasting to almost no one and are sure to continue doing so for the foreseeable future. As described above, PCC has supported making broadcasters the answer to the chicken and egg question presented by the DTV transition by energetically pursuing the DTV transformation of the largest television station group in the country. Indeed, all broadcasters have made an enormous commitment to build stations that have gone unwatched.

⁶¹ See *id.* at 3.

⁶² Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Second Report And Order And Second Memorandum Opinion And Order*, 17 FCC Rcd 15978, ¶ 34-35 (2002) ("*DTV Tuner Order*").

⁶³ See 47 C.F.R. § 15.117.

⁶⁴ See *DTV Tuner Order*, ¶ 34.

In light of this commitment, it is unreasonable to require non-network and smaller-market broadcasters to increase the amount of programming they simulcast until there is some evidence that significant numbers of households can view DTV signals. This is particularly the case because there is no evidence that the full-time DTV broadcast that has been carried out by top-30 market network affiliates has done anything to spur DTV tuner sales. These are the stations that the Commission always has expected to drive the transition,⁶⁵ so if they have been incapable of attracting the interest of viewers, smaller and non-network affiliated stations are unlikely to do so.

B. Resolution of the DTV Must-Carry Will Provide the Spark Necessary to Make Increased Simulcast Requirements Reasonable.

The simplest way for the Commission to make the increased simulcast requirements reasonable would be to resolve the DTV must-carry proceeding. Granting broadcasters access to cable carriage would provide a potential market for digital services. Given current levels of cable penetration, it is barely an exaggeration to say that cable carriage is necessary to the success of a new video delivery initiative like DTV. In January 2001, however, the Commission tentatively determined that it would not grant mandatory carriage rights to both broadcasters' analog and digital signals, but

⁶⁵ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, ¶ 78 (1997).

it deferred final consideration of the issue pending the development of a more complete record.⁶⁶

As the GAO study indicated, however, Cable operators have resisted carrying broadcasters' DTV signals, arguing that they offer little more than the existing analog channels that they already are required to carry. Even where new services are available, cable operators have shown that they will not carry broadcasters' innovative multicast digital signals.⁶⁷ In light of the public interests that would be furthered, PCC continues to believe that the Commission will correctly conclude that DTV and multi-cast must-carry is the only solution that will both satisfy the Congressional intent in enacting the must-carry requirements and advance the DTV transition.

Regardless of the Commission's choice in the must-carry proceeding, however, broadcasters should be given sufficient time to determine what digital services are viable. If the Commission decides to adopt PCC's multicast must-carry proposal, each station should be given time to choose whether multicasting is an appropriate business plan in its market. Stations also will need time to plan and test their multicast capacity and to work with cable operators to ensure that their DTV signals are being properly

⁶⁶ *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999, Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2958 (2001).

⁶⁷ See, e.g., Letter from Association of Public Television Stations, the Corporation for Public Broadcasting, and the Public Broadcasting System, to Chairman Michael Powell, CS Docket Nos. 98-120, 00-96, 00-2, filed February 27, 2003 (describing recent must-carry proposal from public television stations and describing the pace of adoption of DTV as "glacial").

received and distributed over the cable platform.

If, on the other hand, the Commission rejects multicast must-carry, broadcasters should be given a year to determine the appropriate business plans to take advantage of what little market for over-the-air DTV services exists. This course will not harm viewers, who by and large have no ability at this point to utilize over-the-air DTV broadcast services, but it will significantly aid broadcasters who will save significant operating costs that presently offer no return.

C. Delay would Continue the Commission's Practical Approach to its Simulcast Policy.

The practical approach that PCC counsels would be consistent with the Commission's past approach to the simulcast rule. Initially, non-network affiliated and smaller-market broadcasters were required to operate their DTV stations whenever they were operating in analog. In September 2001, however, the Commission relieved these stations from this requirement,⁶⁸ taking account of the financial and technical obstacles that these less-viewed stations face in transitioning to DTV.⁶⁹ Due to lagging consumer adoption and lingering regulatory uncertainty, the case for increased DTV operation among non-network-affiliated and smaller market stations is no better today than it was two years ago. Accordingly, the Commission should delay the simulcast requirements for a year following resolution of the DTV must-carry issue.

IX. CONCLUSION

PCC applauds the Commission's efforts to advance the DTV transition over the

⁶⁸ See *Simulcast Order*, ¶ 17 (2001).

⁶⁹ See *id.*

past year. Thanks to those efforts and the efforts of broadcasters across the country, the transition is no longer in crisis. PCC firmly believes that the steps outlined herein will ensure that this progress continues, and will contribute to the rich DTV future that every interested party desires, and that the Commission and Congress have promised to the American people. In particular, these steps will help the Commission to fulfill its duty to protect and strengthen the over-the-air television service that despite all rhetoric, still services at least 30% of the television receivers in use today.

Respectfully Submitted,

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