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FCC ADOPTS MEASURES TO FACILITATE VOLUNTARY CLEARING OF 700 MHz BAND AND ACCELERATE DTV TRANSITION

WASHINGTON, DC – The Federal Communications Commission ("FCC" or "Commission") last week adopted a Third Report and Order in WT Docket No. 99-168 to facilitate voluntary clearing of the 700 MHz band to allow for the introduction of new wireless services and to promote the transition of incumbent analog television licensees to digital television ("DTV") service. This action is taken pursuant to Congress's mandate that the 746-806 MHz band (currently used for channels 60-69) be allocated for future use by commercial wireless and public safety licensees. Congress has instructed the Commission to assign commercial licenses for this spectrum by auction, even though incumbent television broadcasters are permitted by statute to continue operations on these frequencies until at least December 31, 2006.

In this Third Report and Order, the FCC adopts rules and policies that allow the private sector to determine the band-clearing mechanisms that will best suit broadcasters' and potential new 700 MHz licensees' needs. Thus, the FCC concludes that it is not necessary or appropriate at this time to adopt cost-sharing rules, cost caps, or cost recovery guidelines to assist in clearing the 700 MHz band, and leaves cost-sharing arrangements to voluntary negotiations among new wireless licensees. In addition, the FCC leaves the implementation of any secondary auction process to private, voluntary efforts that are otherwise consistent with Commission policies and rules and do not interfere with the integrity and operations of the Commission's spectrum auctions.

By this action, the FCC also builds upon the policies adopted in the *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* ("*700 MHz MO&O and FNPRM*") adopted in this proceeding in June 2000, in which it provided guidance regarding the Commission's review of regulatory requests filed in connection with voluntary private agreements that would accelerate the DTV transition and open the 700 MHz band for new uses. Thus, the Commission extends the general rebuttable presumption adopted in the *700 MHz MO&O and FNPRM* in favor of bilateral agreements (between new 700 MHz wireless licensees and incumbent Channel 59-69 broadcasters) to three-way agreements (which would provide for TV incumbents on television Channels 59-69 to relocate to lower band TV channels that, in turn, would be voluntarily cleared by the lower band TV incumbents). The Commission also provides guidance on interference issues that may arise from a proposal to relocate a broadcast operation

to a channel below channel 59. In addition, the FCC adopts various procedural changes in order to streamline the process of reviewing regulatory requests that are necessary to effectuate private band-clearing agreements, and affirms its commitment to process regulatory requests associated with relocation agreements expeditiously.

Action by the Commission by Third Report and Order (FCC 01-25). Chairman Kennard, Commissioners Ness, Furchtgott-Roth, and Powell. Commissioner Tristani approving in part, dissenting in part, and issuing a separate statement.

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WT Docket No. 99-168; CS Docket No. 98-120; MM Docket No. 00-39

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SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI
Dissenting in Part

Re: Service Rules for the 746-764 and 776-794 MHz Bands, and Revision to Part 27 of the Commission's Rules, Third Report and Order, WT Docket No. 99-168

I previously supported – and continue to favor – a case-by-case review of band clearing proposals for channels 59-69.[1] The public interest in both new wireless offerings and existing television services demands it. Earlier in this proceeding, however, I could not join my colleagues in adopting a presumption that the public is better served by loss of its television service than by delay in receiving new services in the 700 MHz band.[2] Nor can I support today's decision extending that presumption to 3-way channel swaps. Although the Commission's action purports to facilitate the DTV transition with only a temporary loss of service for today's viewers of over-the-air television, I fear it will do neither. Moreover, 3-way swaps may result in loss of service not only for viewers of channels 59-69 but in the core spectrum as well. Again, I would have preferred a case-by-case approach.

As I have noted in the past, I am committed to preserving consumer access to free, over-the-air television. A substantial percentage of American households still rely on free, over-the-air broadcasting for their local news and information. This service ensures that all members of the community have access to a range of viewpoints and programming on issues of public concern. At the same time, the 700 MHz spectrum offers unlimited possibilities for advanced wireless services and is a vital source of new spectrum to address public safety needs. Given these competing public interest benefits, I supported applying the Commission's long-standing precedent to determine whether new services warrant loss of existing broadcast service.[3] This case-by-case review, however, prompted uncertainty among potential bidders in the upcoming 700 MHz auction and led to adoption of the presumption in favor of new wireless offerings. At that time, I believed Congress was cognizant that such uncertainty could result when it mandated an early auction while protecting existing broadcast services through 2006 and beyond.[4] I remain unpersuaded that Congress intended the Commission to foster removal of all obstacles to new wireless services in this band – including existing television services.

The majority's contention that today's decision will facilitate the transition to DTV while causing only a temporary loss of service cannot withstand scrutiny. As an initial matter, nothing

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[1] *See* Service Rules for 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476 (2000).

[2] *See* Separate Statement of Commissioner Gloria Tristani, Service Rules for 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, (rel. June 30, 2000).

[3] *See* Triangle Publications, Inc., 37 FCC 307, 313 (1964), *citing* Hall v. FCC, 237 F.2d 567 (D.C. Cir. 1954).

[4] *See* Consolidated Appropriations Act 2000, Pub. L. No. 106-113, 113 Stat. 2502, Appendix E, Sec. 213 (requiring the proceeds from the 700 MHz auction be deposited in the U.S. Treasury no later than Sept. 30, 2000) & 47 U.S.C. §§ 309(j)(14)(B) (allowing existing analog broadcasters to continue operating in the 700 MHz band beyond 2006 upon certain showings), 337(d)(2) (requiring technical restrictions on new licensees to protect existing television service in the 700 MHz band during the transition to digital television).

in today's decision requires a broadcaster engaged in a swap to give up its analog operations in favor of digital-only service. To the contrary, the decision expressly permits a broadcaster to operate in analog format on a digital channel allotment as part of a 3-way agreement. Given the negligible penetration of DTV sets and the lack of advertising to support digital operations, it seems likely that a broadcaster would choose to maintain analog operations – where the audience is – on its only channel and "free ride" on the efforts of other broadcasters to complete the digital transition. To the extent that broadcasters adopt such an approach, the transition to digital television will be hampered, not helped. In the event a broadcaster chooses to engage in digital-only operation, however, it will almost certainly request the local cable operator to carry its signal in an analog format, following the approach outlined in the WHDT Order.[5] In this case, consumers who subscribe to cable services will have one less reason to buy a digital set.

Thus, in the end: (1) the majority will get what they want – the clearing of the 700 MHz band; (2) a few broadcasters will benefit financially (with no requirement that they expedite their conversion to DTV); and (3) the transition to digital television, already proceeding slowly, will not be furthered. In certain circumstances, the trade-off for new wireless services may be in the public interest. As I have said, I would be willing to consider band clearing proposals on a case-by-case basis. But I again object to the majority's complacency about loss of existing service and its vision that these deals will clearly advance the DTV transition.

More broadly, I remain concerned that band clearing will impede a smooth DTV transition. When Congress provided broadcasters with a second 6 MHz channel, the intent was to allow licensees to begin offering digital services while ensuring that existing analog viewers could continue to access today's programming. In contrast, band clearing results in a broadcaster holding one 6 MHz channel rather than two. This inevitably leads to a flash-cut change from analog to digital service, occurring today or, the majority asserts, in May 2002 for most commercial stations. While it's clear that an instant substitution introduces DTV, it does so at the expense of today's viewers of free, over-the-air analog broadcasting services, who will not benefit from the orderly transition envisioned by Congress.

With regard to 3-way swaps in particular, such agreements will inevitably involve complex machinations as broadcasters seek to "shoehorn" existing stations into others' channel allotments. They raise a variety of loss-of-service concerns that involve not only voluntary parties to the agreement but neighboring co-channel and adjacent channel broadcasters as well. An analog provider on channel 61, for example, may seek to move to another broadcaster's digital channel allotment on channel 32 and operate in analog format, raising interference concerns for stations nearby channel 32. Scenarios like this will require close scrutiny. Despite my concerns, I am in part assuaged that the Mass Media Bureau and the Commission will review the loss of service for neighboring television stations on a case-by-case basis as part of the overall regulatory review – not subsequent to grant of the channel swapping agreement. In doing so, we need to look seriously at loss-of-service issues, consistent with our longstanding precedent.

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[5] See News Release, "FCC Grants 'Must Carry' Status to Digital-only TV Station," rel. Jan. 19. 2001 (citing WHDT-DT, Channel 59, Stuart, Florida, Memorandum Opinion and Order, FCC 01-23 (adopted Jan. 19, 2001)).

Finally, I take issue with the majority's treatment of possible "lone holdouts" in the 700 MHz band. Under this scenario, a new wireless licensee could successfully clear its spectrum block of incumbent licensees except for one broadcaster. While the majority expresses no view on mandatory relocation except to assert that the Commission will revisit the matter if necessary, I remain convinced that such action would contravene the statute. Congress set out that incumbent broadcasters in the 700 MHz band could retain their channels until 2006 or beyond when they relocated as part of the orderly repacking process that accompanies the end of the transition.[6] There simply is no statutory authority to support consideration of a mandatory relocation policy, and the majority should have made that clear here. Further, I am disturbed that the majority considers this scenario as a possible "market imperfection" and fails to acknowledge that under the "voluntary" band clearing framework set out herein, a proposal to clear a channel could raise issues that would prevent Commission approval despite the strong presumption or a broadcaster may simply choose to remain on-air in the 700 MHz band.

As I have stated previously, my ultimate concern is that the presumption in favor of band clearing reflects a diminishing regard for the public value of free, over-the-air television services. As we look to the future, I hope that in balancing the ever-growing demand for spectrum this agency will sustain our longstanding commitment to the value that broadcasting services for all Americans.

[6] *See* 47 U.S.C. § 309(j)(14)(B).