

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

In the matter of
Review of the Commission's
Rules and Policies
Affecting the Conversion
To Digital Television
MM Docket No. 00-39

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 8, 2001

Released: November 15, 2001

By the Commission: Commissioner Copps issuing a statement.

TABLE OF CONTENTS

Table with 2 columns: Section Title and Paragraph Number. Includes sections like INTRODUCTION, BACKGROUND AND SUMMARY OF DECISION, ISSUE ANALYSIS, Channel Election, Replication and Maximization, etc.

G.	Translators and Repeaters	67
IV.	CONCLUSION	69
V.	ADMINISTRATIVE MATTERS	70
VI.	ORDERING CLAUSES	73

Appendix A: Rule Modifications

Appendix B: Draft FCC Form 337 and Instructions

Appendix C: List of Parties to Proceeding

Appendix D: Supplemental Final Regulatory Flexibility Analysis

I. INTRODUCTION

1. In January 2001, we released a *Report and Order and Further Notice of Proposed Rule Making* addressing a number of issues related to the conversion of the nation's broadcast television system from analog to digital television (DTV).¹ Among the issues addressed in the *Report and Order* were: when to require election by licensees of their post-transition DTV channel; whether to require replication by DTV licensees of their NTSC Grade B service contours; whether to require DTV licensees to place enhanced service contours over their principal communities; and how we should process mutually exclusive applications. We expressed our belief that resolution of these issues would provide licensees with a measure of certainty that would help them plan facilities, order equipment, and arrange for construction of facilities, all of which will speed the transition to digital service.

2. We have received a number of petitions for reconsideration of the *Report and Order*.² In this *Memorandum Opinion and Order on Reconsideration*, we revise a number of the determinations we made in the *Report and Order*, affirm other decisions, and provide clarification of certain rules and policies. We also modify, on our own motion, the minimum hours of operation of certain DTV stations and establish guidelines for television stations that may seek an extension of our deadlines for construction of DTV facilities. We will resolve several major technical issues raised in the *Report and Order and Further Notice of Proposed Rule Making*, including the issues of receiver performance standards, DTV tuners, revisions to the ATSC transmission standard (including the PSIP standard), and labeling requirements for television receivers, in a separate Report and Order.³

¹ *Report and Order and Further Notice of Proposed Rule Making, In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, FCC 01-24 (rel. January 19, 2001).

² A list of petitioners as well as those filing comments in response to the *Further Notice of Proposed Rule Making* is attached at Appendix C.

³ We will incorporate into that proceeding the petitions for reconsideration and comments filed in this proceeding that address these and related issues.

II. BACKGROUND AND SUMMARY OF DECISION

3. In the Commission's digital television proceeding (MM Docket No. 87-268),⁴ we indicated our intention to hold periodic reviews of the progress of the conversion to digital television and to make any mid-course corrections necessary to ensure the success of that conversion. In the *Fifth Report and Order*, we stated that we would conduct such a review every two years in order to "ensure that the introduction of digital television and the recovery of spectrum at the end of the transition fully serves the public interest."⁵ We commenced this first periodic review with a *Notice of Proposed Rule Making*, adopted March 6, 2000.⁶ In the *Notice*, we invited comment on a number of issues that we considered essential to resolve in order to ensure continued progress on the conversion. We also sought comment generally on various aspects of the transition, such as the pace of DTV receiver sales and the availability of financing for digital facilities.

4. Based on the comments we received in response to the *Notice*, we made a number of determinations in the *Report and Order* that we believed would further progress on the transition. Among other things, we established a December 31, 2003 deadline by which commercial television stations that have both their NTSC and DTV operations on in-core channels must elect which of their two core channels to use for DTV operations after the transition. We gave non-commercial stations that have both their NTSC and DTV operations on in-core channels until the end of 2004 to elect their post-transition DTV channel. We determined that this early channel election would allow us to identify more quickly channels that will be available to accommodate DTV licensees with out-of-core transition channels as well as new entrants. In addition, to provide broadcasters with an incentive to provide full replication of NTSC coverage with DTV service, we determined that, after December 31, 2004, whatever portion of a commercial broadcaster's NTSC Grade B contour is not replicated with its digital television signal will cease to be protected in the DTV Table of Allotments. Noncommercial DTV licensees were given until December 31, 2005 in which to replicate or lose such DTV interference protection. We also imposed a principal community coverage requirement that is stronger than the DTV service contour requirement that we adopted as an initial obligation in the *Fifth Report and Order*. This new city-grade service requirement, which becomes effective December 31, 2004 for commercial stations and December 31, 2005 for noncommercial stations, was intended to improve the availability of service in the community of license and to prevent undue migration of stations from their communities of license.

5. In addition, in our *Report and Order* we adopted DTV application cut-off procedures and determined how we would resolve any mutually exclusive applications. We also made a number of technical decisions, including our determination that there is no persuasive information to indicate that there is any deficiency in the 8-VSB modulation system of the DTV transmission standard that would warrant adding COFDM to the current standard. Finally, we declined to adopt technical performance standards for DTV receivers, although we indicated we would continue to monitor receiver issues throughout the transition and would take appropriate action on receiver standards if necessary.

⁴ *Memorandum Option and Order/Third Report and Order/Third Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 7 FCC Rcd 6924, 6964-66 (1992); *Fourth Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 10 FCC Rcd 10541, 10548-49 (1995); *Fifth Report and Order*, 12 FCC Rcd 12809, 12856 (1997) ("*Fifth Report and Order*"), *on recon.*, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, *on further recon.*, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348 (1998), *recon. dismissed*, DA 99-1361, released July 12, 1999, *recon. dismissed* FCC 00-59, released February 23, 2000.

⁵ *Fifth Report and Order*, 12 FCC Rcd at 12856.

⁶ *Notice of Proposed Rule Making* in MM Docket 00-39, 15 FCC Rcd 5257 (2000) ("*Notice*").

6. Upon further consideration, and after careful review of the petitions for reconsideration, we believe that some of the requirements that we adopted in the *Report and Order* may be having the unintended consequence of hindering, rather than furthering, the DTV transition. In particular, we believe that the Commission's current channel election and replication requirements and deadlines may be imposing substantial burdens on broadcasters without sufficient countervailing public benefits, and may in fact be contributing to difficulties faced by a substantial number of stations in meeting their DTV construction deadlines.

7. The DTV build-out dates have passed for the top-30-market major network affiliate stations. As of September 2001, thirty-seven of the 40 major network affiliate stations in the top 10 television markets are on the air with DTV service, 36 with licensed facilities and one with special temporary authority ("STA").⁷ In addition, 71 of the 79 major network affiliate stations in markets 11-30 are providing digital service, 61 with licensed facilities and 10 with STAs. By May 1, 2002, all remaining commercial television stations are required to complete construction and commence DTV operations. Noncommercial stations have until May 1, 2003 to complete construction.

8. The National Association of Broadcasters ("NAB") recently conducted a survey of all full-power commercial TV stations to determine how many anticipate they will have a digital signal on the air by May 2002.⁸ The results of the survey show that more than two thirds (68.2%) of responding stations reported that they either are operating now in digital format or expect to have a digital signal on the air by May 2002. Stations that anticipate meeting the deadline would provide at least one digital signal by next May in 164 television markets. According to the NAB, these markets include 95.8 % of all television households.

9. While these survey results are encouraging, it nonetheless appears that slightly less than one-third (31.8%) of all stations responding to the NAB survey anticipate that they will not be able to provide a digital signal by the May 2002 deadline. A larger percentage (81.9%) of responding stations in the top 50 markets anticipate that they will meet the deadline, while a smaller percentage (49.1%) of stations in markets 100 and above indicated they will complete construction on time. Three-quarters of those stations that do not anticipate meeting the May 2002 deadline indicated they plan to seek an extension of this deadline from the FCC. Generally, smaller market broadcasters that filed petitions in this proceeding assert that they are unable to obtain financing to construct DTV facilities sufficient to replicate their analog service area. These broadcasters also claim that they will not have sufficient operational experience by December 2004 to determine which core channel is superior for DTV transmission. Broadcasters that are not capable of constructing full replication facilities by the deadline established in the *Report and Order* may be postponing construction altogether. Thus, while the Commission's current replication deadline was intended to provide an incentive to stations to construct DTV facilities capable of reaching their entire service area, this deadline may in fact be causing stations

⁷ Prior to September 11, 2001, 39 of the 40 network affiliate stations in the top 10 television markets were providing DTV service. Two top-four network affiliates in New York City, as well as two other DTV signals, were knocked off the air as a result of the September 11 attack.

⁸ David Gunzerath, Ph.D., Vice President, Research and Planning, National Association of Broadcasters, *Survey of Stations' Plans to Meet Digital Television Deadlines* (Aug. 13, 2001) ("NAB survey"). According to the NAB, the telephone survey was conducted of all U.S. full-power commercial television stations with known telephone numbers (excluding satellites of full-power television stations). The overall response rate was 71.4%, with 785 stations responding out of a total universe of 1,099 stations. According to the NAB, response rates were high among all market types, and especially so among stations in the Top 50 Nielsen markets. NAB Survey at 7. A breakdown of respondents by market rank is shown at p. 8 of the survey, and a summary of survey results by market rank is shown at Appendix 2 of the survey.

to delay construction, thus slowing transition progress.

10. As discussed more fully below, upon reconsideration we have decided to allow stations to construct initial DTV facilities designed to serve at least their communities of license, while still retaining DTV interference protection to provide full replication at a later date. Thus, we will temporarily defer the replication protection and channel election deadlines we established in the *Report and Order*. In our next periodic review of the progress of the DTV transition, we intend to establish a firm date by which broadcasters must either replicate their NTSC service areas or lose DTV service protection of the unreplicated areas, and by which broadcasters with two in-core allotments must elect which channel they will eventually use at the end of the transition. These replication protection and channel election deadlines may be earlier than but will in no event be later than the latest of either the end of 2006 or the date by which 85% of the television households in a licensee's market are capable of receiving the signals of digital broadcast stations. During the next periodic review, we intend to develop a record on the progress of the transition and how such progress relates to such issues as band clearing and the goal of the rapid recovery of spectrum for public safety and other wireless services, as well as other issues related to the successful conclusion of the DTV transition. In order to provide parity to analog UHF stations, we will also allow these stations to construct initial facilities that serve their principal communities while retaining for the time being DTV interference protection to their maximized service areas, subject to the interference protection deadline we intend to establish in the next periodic review. We will not alter, however, our decision to require stations to provide a stronger signal to their communities of license than that adopted as an initial requirement in the *Fifth Report and Order*. As established in the *Report and Order*, this new city-grade service requirement will become effective December 31, 2004 for commercial stations and December 31, 2005 for noncommercial stations.

11. Our intention in making these revisions to the decisions reached in the *Report and Order* is to prioritize those elements that are most important to the DTV transition. At this point, we believe our primary goal should be to maximize the number of DTV stations providing service to at least all consumers in their community of license. Relaxing our channel election and replication requirements will allow stations to go on the air with lower-powered, and therefore less expensive, facilities, while also providing broadcasters additional time to consider their post-transition facilities. The reduced build-out requirements we adopt today will allow broadcasters to save both on construction and operating costs, including lower power expenses. Indeed, the ability to transmit at lower power may permit many of these stations to transmit from existing towers, rather than being forced to build new facilities immediately. In addition, we will allow DTV stations that are not yet required to be on the air with a digital signal -- *i.e.*, those that are subject to the May 1, 2002 or May 1, 2003 deadlines, including stations subject to those deadlines that are currently on the air early -- to operate initially at a reduced schedule by providing, at a minimum, a digital signal during prime time hours, consistent with their simulcast obligations.^{9 10} This is consistent with our recognition that such stations, as an initial matter, may need the flexibility to adopt a more graduated approach to the transition. We believe that this approach may permit more stations to meet the build-out deadlines and help advance the digital transition. This minimum will effectively be increased under the Commission's existing simulcast obligations, which require DTV licensees to simulcast 50% of their analog schedule by April 1, 2003, 75% of their analog schedule by April 2004, and

⁹ See 47 C.F.R. § 73.624(b) (as revised in Appendix A). Commencing April 1, 2003, DTV television licensees and permittees are required to simulcast 50 % of the video programming of the analog channel on the DTV channel. This requirement steps up to a 75% simulcast requirement in April 2004, and a 100% requirement in April 2005. 47 C.F.R. § 73.624(f). To the extent a station's simulcast obligations exceed the minimum digital video programming requirement in Section 73.624 of our rules, the simulcast obligation will govern.

¹⁰ We are making other additional revisions to the wording of Section 73.624(b) of our rules to make it clearer and more consistent with the Commission's decisions in prior orders in the various digital television proceedings.

100% of their analog schedule by April 2005.¹¹ Stations that were subject to the earlier construction deadlines (top four network affiliates in the top thirty markets) will remain subject to the previous rule – *i.e.*, they must operate their DTV station at any time that the analog station is operating. This distinction is consistent with our prior treatment of these stations. In establishing earlier build-out deadlines for these stations in the *Fifth Report and Order*, we noted that “the most viewed stations in the largest television markets can be expected to lead the transition to DTV” and that these stations are “likely to have substantial revenues that may be used to fund the conversion.”¹²

12. In the end, we believe that reconsidering these rules will help further the DTV transition while actually promoting the goals of replication and of maximizing the digital service provided to the public. Getting more stations on the air will help drive DTV set penetration. Increasing the number of DTV sets in production and in the hands of consumers will bring prices down and provide an incentive for content producers and advertisers to invest in DTV. Ultimately, an expanding DTV marketplace will help further the expansion of DTV into unserved areas in the future.

III. ISSUE ANALYSIS

A. Channel Election

13. We decided in the DTV *Sixth MO&O*¹³ that, after the transition, DTV service would be limited to a “core spectrum” consisting of current television channels 2 through 51. Although some stations received transition channels out of the core, and a few have both their NTSC and DTV channels outside the core,¹⁴ we believe that there will be sufficient spectrum so that at the end of the transition all DTV stations will be operating on core channels. However, as we indicated in the *Report and Order*, it now appears that there will be more out of core stations that must be accommodated with a core channel than we initially anticipated because new applicants will be allowed to convert their single NTSC channels to DTV operation and those on NTSC and DTV channels outside the core will be provided a post-transition channel inside the core.¹⁵ Also, the recent establishment of primary Class A television stations may limit availability of core channels in some areas.

14. These factors influenced our decision in the *Report and Order* to mandate early election of DTV channels for that category of licensees with both their NTSC and DTV channels within the core. Specifically, we gave commercial television licensees with both their NTSC and DTV operations on in-core channels until December 31, 2003 to decide which of their two in-core channels to use for DTV operations after the transition. We noted that this is more than one and a half years after the last commercial station construction deadline (*i.e.*, May 1, 2002), and stated our belief that this gave stations time in which to decide which of their two in-core channels would be most suitable for use in digital broadcasting. We stated that setting this channel election deadline would enable us to determine at an early date, on a market-by-market basis, what in-core channels would be available for use by stations

¹¹ *See, supra*, n. 9.

¹² *Fifth Report and Order*, 12 FCC Rcd 12809, at ¶¶ 78, 86.

¹³ *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418 (1998).

¹⁴ There are 17 such stations. *See Report and Order* at ¶ 12.

¹⁵ *Id.* There are a number of such “new applicant” NTSC stations authorized on channels outside the core, and more could be authorized under procedures announced in the filing window Public Notice DA 99-2605, released November 22, 1999. *Id.* at ¶ 12, note 24. *See also Notice of Proposed Rule Making, In the Matter of Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, FCC 01-91 (rel. March 28, 2001).

having two out-of-core channels. We also stated our belief that an early final channel election would help speed the transition by making the final local channel alignments clear. We gave non-commercial stations that have both their NTSC and DTV operations on in-core channels until the end of 2004 to elect their channels, or more than one and a half years after their construction deadline (*i.e.*, May 1, 2003).

15. Many broadcasters that filed petitions for reconsideration of our *Report and Order* argue that December 31, 2003 (December 31, 2004 for noncommercial broadcasters) is too soon for broadcasters to fully analyze which paired in-core channel offers superior prospects for digital service.¹⁶ Among others, the Association of Maximum Service Television, Inc. (“MSTV”), the NAB, and the Association of Local Television Stations, Inc. (“ALTV”),¹⁷ Joint Broadcasters,¹⁸ Block Communications, Inc. (“Block”), Cordillera Communications, Inc. (“Cordillera”), Dispatch Broadcast Group (“Dispatch”), and Idaho Public Television claim that the present deadline will force stations to make an election without adequately exploring the potential interference and coverage issues that must be analyzed before selecting a digital channel. Small market broadcasters argue that the channel election deadline is premature as the DTV transition is likely to take longer in smaller markets and smaller market stations will need additional time to complete construction of digital facilities and implement successful business plans.¹⁹ At least one petitioner also points out that uncertainties still surround the use of television channels 2 through 6 for digital operations.²⁰ A number of petitioners support tying final channel election to an indicator of the progress of the DTV transition, such as digital set penetration.²¹ Some also argue that no channel election deadline should be established for the time being, and the issue should be considered again in the next periodic review.²²

16. As we indicated above, upon reconsideration we have determined to temporarily defer the imposition of a channel election deadline until the next periodic review. We intend to monitor closely the progress of the transition and, based on developments between now and the conclusion of the next review, we will establish a channel election deadline that may be earlier than but in no event will be later

¹⁶ We received no petition or comments filed in response to the *Report and Order and Further Notice of Proposed Rule Making* supporting a channel election deadline.

¹⁷ MSTV, NAB, and ALTV filed a joint Petition for Reconsideration.

¹⁸ LIN Television Corporation, Paxton Media Group, Inc., Post-Newsweek Stations, Inc., Raycom Media Inc., and Vermont Public Television.

¹⁹ *See, e.g.*, Petitions for Reconsideration of Red River Broadcast Co. LLC, Red Rock Radio Corp., and KQDS Acquisition Corp (collectively “Red River”) at 5-6; Block at 8-9; Cordillera at 11.

²⁰ *See, e.g.*, Petition for Reconsideration of Joint Broadcasters at 7-8. Dispatch argues that the FCC has not yet decided certain underlying parameters that must be settled to allow broadcasters to make a fully informed channel election. For example, Dispatch contends that the FCC must determine a DTV station’s authorized power if it selects its NTSC channel as well as the methods to resolve excess interference caused or received if DTV operations are moved to an NTSC channel. Dispatch urges the Commission to delay the channel election date until the Commission has sought comment on and resolved these issues. Petition for Reconsideration of Dispatch at 2.

²¹ *See, e.g.*, Petitions for Reconsideration of MSTV/NAB/ALTV at 15; Idaho Public Television at 2; Joint Broadcasters at 8. For example, Idaho Public Television supports shifting final channel election to a date that corresponds to 85% receiver penetration.

²² *See, e.g.*, Petitions for Reconsideration of MSTV/NAB/ALTV at 15 (FCC should rescind current channel election date and revisit the issue in the next DTV biennial review; channel election should be tied to DTV penetration); Cordillera at 11. Joint Broadcasters argues that the FCC should wait until there is more evidence of when the transition will be completed before requiring channel election. Petition for Reconsideration of Joint Broadcasters at 8.

than the latest of either the end of 2006 or the date by which a market meets the 85% digital penetration target.²³ We believe that this action is consistent with, and necessitated by, our decision today to allow stations to construct initial DTV facilities designed to serve their communities of license, while still preserving DTV interference protection to provide full replication or maximization service at a later date.

17. We expect that a number of stations will choose to meet our May 2002 construction deadline by building less than full facilities initially, or by operating at lower power, and increasing power over time in relation to the demand for digital programming. We are today permitting stations to commence service with facilities that meet the minimum requirements set forth in Section 73.625(a)(1) of our rules. By December 31, 2004, commercial stations must meet the increased city-grade signal strength requirements we imposed in the *Report and Order*. Noncommercial stations have until December 31, 2005 to meet this city-grade service obligation. At the same time, on our own motion, we will allow television stations subject to the May 1, 2002 and May 1, 2003 DTV construction deadlines to operate digitally at a reduced schedule by providing, at a minimum, a digital signal during prime time as specified in Section 79.3(a)(6) of our rules.²⁴ With respect to these stations, this replaces our current rule that requires that DTV licensees and permittees transmit at least one DTV signal at any time the licensee or permittee transmits an analog signal.²⁵ This modified rule does not reduce the simulcast obligations of these licensees, described in Section 73.624(f) of our rules.²⁶ Thus, for example, by April 1, 2003, a DTV station that was required to be on the air by May 1, 2002 must provide a digital signal at least 50 percent of the time it transmits an analog signal, and under the requirements of § 73.624(b)(i), a portion of the simulcasting must occur during prime time.

18. We believe that permitting stations to elect a more graduated approach to providing DTV service will foster the early introduction of DTV service to core service areas, and allow stations to grow into their full DTV facilities as the transition progresses. Because we are permitting stations greater flexibility to increase digital power and hours of service over time, we believe stations must be given an opportunity to increase power and gain experience at those higher power levels before they can make an educated choice about which of their two channels will provide optimal DTV service. We believe that this concern outweighs the benefits we discussed in the *Report and Order* that would result from an early

²³ See, *supra* ¶ 10.

²⁴ Section 79.3(a)(6) was adopted in the *Memorandum Opinion and Order on Reconsideration (Implementation of Video Description of Video Programming)* in MM Docket No. 99-339, 16 FCC Rcd 1251 (2001), *appeal pending*, *Motion Picture Association of America et al. v. FCC*, No. 01-149 (D.C. Cir. Filed Mar. 28, 2001), *National Federation of the Blind v. FCC*, No. 01-1155 (D.C. Cir. filed April 2, 2001) (consolidated). Section 79.3(a)(6) defines prime time as: The period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday. 47 C.F.R. § 79.3(a)(6).

²⁵ See *Fifth Report and Order*, 12 FCC Rcd 12809 at ¶ 28 and 47 C.F.R. § 73.624(b) as adopted in that Order.

²⁶ See n. 9, *supra*. 47 C.F.R. § 73.624(f) states: (f)(i) Commencing on April 1, 2003, DTV television licensees and permittees must simulcast 50 percent of the video programming of the analog channel on the DTV channel. (ii) Commencing on April 1, 2004, DTV licensees and permittees must simulcast 75% of the video programming of the analog channel on the DTV channel. (iii) Commencing April 1, 2005, DTV licensees and permittees must simulcast 100% of the video programming of the analog channel on the DTV channel. (iv) The simulcasting requirements imposed in paragraphs (f)(I)-(iii) of this section will terminate when the analog channel terminates operation and a 6 MHz channel is returned by the DTV licensee or permittee to the Commission.

election date.²⁷ Accordingly, we will temporarily defer the imposition of an election deadline until the next periodic review.

19. Under the Community Broadcasters Protection Act of 1999 (“CBPA”), the Commission is prohibited from granting a Class A license to low power television stations operating on a channel within the core spectrum that includes any of the 175 additional channels that were referenced in paragraph 45 of the Commission’s February 23, 1998 *Memorandum Opinion & Order on Reconsideration of the 6th Report and Order* (MM Docket No. 87-268).²⁸ In that *Order*, the Commission expanded the DTV core spectrum to cover, in total, channels 2-51, and we observed that this expansion would add approximately 175 additional channels to the core. After enactment of the CBPA, we concluded in our *Report and Order* establishing a Class A television service that we are currently in compliance with the requirement of section (f)(6)(B) of the CBPA that we protect the 175 channels, because these channels are now encumbered by existing NTSC or DTV allotments.²⁹ As we noted in our *Report and Order and Further Notice of Proposed Rule Making* in this proceeding, a portion of these channels will become available for other parties once broadcast licensees make their channel elections and begin to discontinue operations on one of their paired channels at the end of the DTV transition.³⁰ We stated that we will have the opportunity closer to that stage to ensure that the CBPA’s channel protection requirement continues to be met.³¹ Our decision today to temporarily defer until the next periodic review the channel election deadline imposed in the *Report and Order* does not alter this conclusion. While we are not now requiring an earlier election, this decision does not affect the protection currently afforded to these 175 channels. We also reiterate that, as the transition comes to a close and channels begin to become available for other use, we will ensure that we continue to comply with the CBPA’s channel protection requirement.

B. Replication and Maximization

1. Replication

20. We established NTSC service replication as a goal in the creation of the initial DTV

²⁷ We recognize that the seventeen broadcasters with both of their channels outside of the core may not be able to plan as early for a post-transition channel given our decision today. However, in view of the relatively small number of such broadcasters, we are confident that they will be accommodated with a channel post-transition.

²⁸ See The Community Broadcasters Protection Act of 1999, Pub Law 106-113, 113 Stat. 1501 (1999) (“CBPA”). Section 5008(f)(6)(B) of the CBPA, Appendix I, states: “The Commission may not grant under this subsection a class A license to a low-power television station operating on a channel within the core spectrum that includes any of the 175 additional channels referenced in paragraph 45 of its February 23, 1998 *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* (MM Docket No. 87-268). Within 18 months after the date of the enactment of the Community Broadcasters Protection Act of 1999, the Commission shall identify by channel, location and applicable technical parameters those 175 channels.” In the *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* we stated, “Our analysis indicates that expanding the core will add approximately 175 additional channels, and that many of these new channels will be in top markets, including at least three new channels each in congested and highly-valuable New York, Los Angeles, San Diego, San Francisco, and Detroit.” *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd at 7436.

²⁹ *Report and Order* in MM Docket No. 00-10, 15 FCC Rcd 6355, 6397 (2000). We also noted that these channels will become available for other parties once full-power stations discontinue operation on one of their paired channels at the end of the DTV transition.

³⁰ *Report and Order* at ¶ 17.

³¹ *Id.*

Table of Allotments.³² Each DTV channel allotment was chosen to best allow its DTV service to match the Grade B service contour of the NTSC station with which it was paired.³³ As we stated in the *Report and Order*, we continue to believe that this approach provides important benefits to both viewers and broadcasters and “will ensure that broadcasters have the ability to reach the audiences that they now serve and that viewers have access to the stations that they can now receive over-the-air.”³⁴

21. In the *Report and Order*, we stated our expectation that DTV broadcasters would eventually choose to replicate their NTSC service areas to serve their viewers. However, we concluded we would not require replication because we wanted to give broadcasters a measure of flexibility as they build their DTV facilities to collocate their antennas at common sites, thus minimizing potential local difficulties locating towers and eliminating the cost of building new towers. We also recognized, among other things, that, in the absence of a Commission-mandated replication requirement and because we provided licensees a certain amount of transmitter location flexibility, some licensees may have already built their initial DTV facilities in locations that are unsuitable for full replication.

22. While we concluded we would not expressly require full replication of NTSC coverage with DTV service, we determined we would provide an incentive to broadcasters to provide such replication in order to assure that viewers do not lose service and to speed the transition. Specifically, we decided to cease to give DTV interference protection to commercial broadcasters’ unreplicated service areas as of December 31, 2004. Thus, under the decision we reached in the *Report and Order*, commercial broadcasters that did not replicate their NTSC Grade B service area as of that date left the unreplicated portions of their DTV service area unprotected in the DTV Table of Allotments against other DTV broadcasters seeking to maximize their own service areas or analog full or low-power broadcasters, including Class A licensees, seeking to expand the service area of their existing stations. We gave noncommercial DTV licensees until December 31, 2005 to replicate or lose interference protection.

23. Numerous petitioners requesting reconsideration of our *Report and Order* argue that it was premature for the FCC to impose what was tantamount to a replication deadline. MSTV, NAB, ALTV, and Joint Broadcasters argue that the deadline would penalize broadcasters for taking a measured approach to the transition based on marketplace realities over which they have little control.³⁵ These petitioners argue that, rather than being the incentive the FCC envisions, the replication deadline could complicate and delay the transition because it deprives broadcasters of flexibility in building their facilities and is contrary to the notion of encouraging broadcasters to develop common sites. Petitioners also claim that the deadline could require some stations to redesign their DTV facilities after having put them into service, or cause broadcasters to delay constructing stations because the cost of full replication facilities exceeds the benefit to broadcasters at this point in time. Other petitioners also stated their belief that, for small market broadcasters in particular, eliminating interference protection at the time established in the *Report and Order* was too soon and could interfere with the ability of those stations to make

³² *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588 (1997) (“*Sixth Report and Order*”), on recon., *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, supra, on further reconsideration, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348 (1998), recon. dismissed, DA 99-1361, released July 12, 1999, recon. dismissed FCC 00-59, released February 23, 2000.

³³ *Sixth Report and Order*, 12 FCC Rcd at 14605.

³⁴ *Id.*

³⁵ Petitions for Reconsideration of MSTV/NAB/ALTV at 5 and Joint Broadcasters at 3-4.

financially sound decisions about the pace at which they construct digital facilities.³⁶

24. As we indicated above, upon reconsideration we have decided to temporarily defer until the next periodic review the replication deadlines established in the *Report and Order*. We agree with those petitioners who believe that, even as an incentive, a fixed date of 2004 (or 2005 for noncommercial stations) may be too soon to reasonably expect all stations to have constructed full replication facilities. However, during the next periodic review of the progress of the DTV transition, we will establish a new interference protection deadline that, as with the channel election deadline discussed above, may be earlier than but will not be later than the end of 2006 or the date by which a market meets the 85% digital penetration target, whichever is later. Our consideration of the issue of the appropriate interference protection deadline during the next periodic review will be informed by the progress that has occurred on issues such as band-clearing and recovering the spectrum for public safety use and other services.³⁷

25. Under the approach we are adopting today, stations will be allowed, without loss of full service area protection, to commence digital operations by constructing and operating facilities that at least provide the required level of digital signal strength to their communities of license.³⁸ This will allow stations to focus their energies initially on providing digital service to their core communities, while permitting them later to expand their coverage area as the DTV transition progresses. We believe that this approach more closely reflects the marketplace realities, such as DTV receiver penetration, upon which the financial decisions of broadcasters and those who offer them financing are based. Because of the large costs of building and operating digital facilities, we recognize that some broadcasters, and particularly those in smaller markets, may need to take a more graduated approach to implementing digital service. The requirement that broadcasters serve their communities of license will ensure that, for most stations, the majority of their analog service populations will receive initial digital service. Once all broadcast stations have commenced at least the minimal level of service to their communities, we believe that DTV set penetration levels will increase and marketplace forces will work to further speed the transition and provide an incentive to broadcasters to expand to provide service to outlying areas. We are hopeful that this approach will prompt broadcasters to build out to their allotted power in response to consumer demand and competition from other stations. Thus, we will continue to protect the replication service areas in the DTV Table of Allotments until the replication protection deadline we establish in our subsequent periodic review.

26. We do not believe that our decision hinders our effort to ensure efficient use of the spectrum. Our goal in deferring the replication protection deadlines temporarily and in permitting stations to commence digital service with smaller, less expensive facilities is to get more digital stations on the air as early as possible. We anticipate that many, if not most, of these stations, will eventually build out to full replication facilities. Thus, we believe that our decision today will help speed the transition, and facilitate the ultimate recovery of spectrum for other uses once the transition is complete.³⁹

³⁶ See, e.g., Petitions for Reconsideration of the Association of America's Public Television Stations and the Public Broadcasting Service ("APTS/PBS") at 6; Block at 8; Idaho Public Television at 1.

³⁷ See 47 U.S.C. §§ 309(j)(14), 337 (requiring the Commission to recover broadcast spectrum for new uses).

³⁸ The minimum facilities required to be constructed by May 1, 2002 are specified in 47 C.F.R. § 73.625(a)(1). Appendix A contains a revised and corrected version of this rule that reflects the decisions made in this *Memorandum Opinion and Order*. The revised rule also reflects the strengthened principal community signal coverage requirement adopted in the *Report and Order*. The increased city-grade signal strength obligation becomes effective December 31, 2004 for commercial stations and December 31, 2005 for noncommercial stations.

³⁹ The Commission has long recognized that the recovery of spectrum for new uses is "a key component of our implementation of DTV service." See *Sixth Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 11 FCC Rcd 10968, 10977 (1996).

We also do not believe that our decision today to temporarily defer our replication incentive will undermine the goals of our simulcasting requirements or lead to a large scale move of DTV stations to larger urban markets, concerns that we expressed in the *Notice* could arise if DTV licensees failed to replicate their NTSC service areas. We expect that most DTV licensees will replicate their NTSC service areas, as they have a marketplace incentive to serve their established viewers. Thus, we do not expect a large migration of stations to larger markets. The goal of our simulcasting requirements was to ensure that viewers could receive in digital format programs that they had become accustomed to receiving on their analog sets, so that the termination of analog service did not disrupt settled viewing patterns. As we believe that DTV broadcasters will ultimately choose to replicate their NTSC service areas, we believe that the goal we seek to accomplish with our simulcasting requirement will eventually be met.

2. Maximization

27. Several petitioners also request that the Commission extend interference protection to the maximized service areas of stations that choose temporarily to operate at lower power and to serve an area smaller than their maximized service area.⁴⁰ These petitioners generally assert that, just as broadcasters need time to increase facilities to full replication, they also need flexibility to effectuate graduated build-out plans for maximized facilities. In addition, Holston Valley Broadcasting (“Holston”) argues that providing additional flexibility to stations seeking to maximize facilities is necessary to rectify the inequitable treatment of UHF stations under the Commission’s current policies.⁴¹ Holston points out that, while most analog VHF stations have been allocated UHF digital facilities with power levels sufficient to permit replication of the station’s analog VHF coverage, analog UHF stations were allocated significantly less power for their UHF digital facilities. These lower powers were selected to permit replication of the analog coverage of the UHF facilities, which is significantly less in most cases than the analog coverage area of VHF facilities. The Commission has allowed analog UHF licensees to apply for maximized digital facilities to permit them to provide greater DTV coverage in their markets. The inequity, according to Holston, arises because UHF licensees who hold construction permits for maximized commercial DTV facilities have been given until May 1, 2002 to construct those facilities. Under the *Report and Order*, however, VHF licensees were provided interference protection to their higher power allotted DTV facilities until December 31, 2004, giving them more time to complete construction. Pursuant to the decision we reach today, we have deferred temporarily this 2004 deadline for interference protection to allotted DTV facilities.

28. We agree with Holston that licensees seeking to construct maximized DTV facilities should be treated the same for purposes of interference protection as licensees seeking to construct allotted DTV facilities. Our goal in permitting DTV stations to apply to maximize was to ensure that they could increase their DTV signal coverage and provide DTV service competitively within their respective markets.⁴² The Commission was particularly concerned that it not artificially limit the size of DTV service areas for UHF analog licensees as an artifact of UHF analog service constraints. In enacting the Community Broadcasters Protection Act of 1999,⁴³ Congress recognized the importance of preserving the right of DTV stations to maximize and established specific measures to ensure the protection of maximized service areas against new Class A stations.⁴⁴

⁴⁰ See Petitions for Reconsideration of MSTV/NAB/ALTV at 7-8; Cordillera at 9-10; Red River at 5.

⁴¹ See Comments on the MSTV/NAB/ALTV Petition for Reconsideration of Holston Valley Broadcasting Corp.

⁴² *Sixth Report and Order*, 12 FCC Rcd 14588 at ¶ 30.

⁴³ See, *supra* n. 28.

⁴⁴ 47 U.S.C. § 336(f)(1)(D), (7)(A)(ii)(IV). Pursuant to the CBPA, to be entitled to protection by low power
(continued...)

29. The construction deadlines for remaining television licensees are May 1, 2002 (commercial) and May 1, 2003 (noncommercial), which are also the respective construction deadlines for outstanding construction permits for maximized facilities granted by the Commission. For the same reasons we temporarily deferred our regulatory replication incentive, we will continue to provide DTV interference protection for the time being to the maximized service area specified in outstanding DTV construction permits for facilities in excess of those specified in the DTV Table of Allotments. We intend in our next periodic review to establish a date by which broadcasters with authorizations for maximized digital facilities must either provide service to the coverage area specified in their maximization authorizations or lose DTV service protection to the uncovered portions of those areas. As with the channel election and replication deadlines for allotted DTV facilities discussed above, this deadline for completion of maximization facilities may be earlier than but will not be later than the latest of either the end of 2006 or the date by which 85% digital penetration is achieved.

30. By the action we take today, we give DTV licensees seeking to maximize facilities the same flexibility to implement graduated construction plans as licensees of facilities specified in the DTV Table of Allotments. Thus, licensees seeking to maximize may choose initially to construct and operate digital facilities that provide service only to their communities of license⁴⁵ while retaining assurance that the maximized coverage area will be available in the future, until the deadline established in the next periodic review. We agree with Holston that this flexibility is especially important for UHF analog licensees that may face greater financial difficulty in constructing digital facilities than their analog VHF counterparts.⁴⁶ We believe that providing flexibility to stations seeking to maximize will help speed the transition by allowing them to implement digital service with less costly facilities initially while still providing service to their core communities. Once these digital stations are on air, we expect that consumer demand for digital sets and signals will increase and that marketplace forces will act to encourage these stations to expand service to their maximized coverage area.

31. We decline Holston's request that we modify the permissible facilities (location, effective radiated power, and antenna height above average terrain) for the initial DTV allotments in Appendix B of the *Second Memorandum Opinion and Order on Reconsideration of the DTV Fifth and Sixth Report and Orders* in the DTV proceeding to reflect maximized facilities granted in DTV construction permits. The DTV facilities reflected in Appendix B are based on the principle of service replication. Requests for facilities beyond those specified in Appendix B have been, and will continue to be, treated only in the context of applications.

32. In response to petitions filed by KM Communications, Inc. ("KM") and Paxson

(...continued from previous page)

television stations applying for primary Class A status, DTV stations were required to have filed an application for maximization or a notice of intent to seek maximization by December 31, 1999, and have filed a bona fide application for maximization by May 1, 2000, and are required to comply with all applicable Commission rules for construction of digital television facilities. Extending the time for protecting maximized facilities generally does not affect the ability of qualified LPTV stations to obtain Class A status. We recognize, however, that this policy could temporarily delay the efforts of Class A-eligible stations operating outside of the core to locate in-core channels, a necessary condition to become a Class A station. We will revisit the issue of maximization in our next periodic review and, based on developments in the interim, will consider at that time whether we should again establish a deadline for the construction of maximized facilities.

⁴⁵ See 47 C.F.R. § 73.625(a)(1) (as revised in Appendix A).

⁴⁶ Holston Comments on the MSTV/NAB/ALTV Petition for Reconsideration at 2-3.

Communications Corp. (“Paxson”),⁴⁷ we clarify that we will continue to protect throughout the course of the transition the analog TV service area of stations that do not have a paired DTV channel, as long as the stations continue to operate in an analog mode. Initially, these stations are the ones that were not eligible for an initial DTV paired license and were, thus, not awarded a second channel to convert to DTV.⁴⁸ We allowed these stations to convert from analog to digital operations on their single channel at any point during the transition period, subject to their meeting the applicable DTV requirements.⁴⁹ As Paxson requests, this analog TV service area protection will be extended to stations that elect voluntarily to relinquish their paired DTV channel and convert to single channel analog operation as part of the 700 MHz band clearing.⁵⁰ Generally, protection of these stations’ analog TV operation within their authorized service areas will allow them to convert to digital operation providing DTV service to the same area.

33. In a recent decision, the Commission found that broadcasters involved in a band-clearing arrangement that are left with a DTV single-channel allotment retain the interference protection associated with that DTV allotment for a period of 31 months after beginning to transmit in digital.⁵¹ We indicated that this period is equal to the period of interference protection for unreplicated areas that the Commission provided to all broadcasters in the *Report and Order* in this proceeding.⁵² In light of our actions today, we will temporarily defer this deadline on the provision of interference protection for broadcasters involved in band-clearing in order to provide them with the same treatment as other broadcasters in terms of our DTV replication policy. In our next periodic review, we will establish a new replication deadline for these broadcasters, which deadline will be within the same timeframe as indicated above for the channel election, replication, and maximization deadlines also to be established in that periodic review.

3. DTV STAs

34. Licensees must construct at least the minimum initial facilities required to serve their community of license by May 1, 2002 (commercial) or May 1, 2003 (noncommercial).⁵³ Licensees with an existing construction permit for a larger facility may elect to commence digital operation with a DTV facility that complies only with these minimum initial build-out requirements and is fully subsumed by the permitted facilities. We will also permit licensees that have not yet been granted a construction permit for allotted or maximized DTV facilities to request an STA to commence digital operation.⁵⁴ Licensees choosing to request an STA should file their request with the Commission as early as possible and, in any event, at least 10 days before they plan to commence operation. The STA request must specify the

⁴⁷ Petitions for Reconsideration of KM at 2; Paxson at 9.

⁴⁸ See *Fifth Report and Order*, 12 FCC Rcd 12809 at ¶¶ 17-18.

⁴⁹ See *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6868 at ¶ 11.

⁵⁰ Petition for Reconsideration of Paxson at 10.

⁵¹ *Order on Reconsideration of the Third Report and Order* in WT Docket No. 99-168, CS Docket No. 98-120, and MM Docket No. 00-39, FCC 01-258 (released Sept. 17, 2001) at ¶ 20.

⁵² *Id.*

⁵³ See 47 C.F.R. § 73.625(a)(1) (as revised in Appendix A).

⁵⁴ This could include licensees that have filed an application for a construction permit that has not yet been acted upon by the Commission, as well as licensees that file an application to maximize in the future. Applicants that file for maximization after May 1, 2000 are required to protect previously filed Class A applications as well as existing Class A stations.

technical facilities requested, including the station's ERP, HAAT, antenna pattern, if any, geographic coordinates, and tower registration number, if any. The STA request must also include a certification that the facilities are in compliance with the FCC's rules and that the coverage in any direction does not exceed that resulting from the allotted parameters in Appendix B⁵⁵ or in an outstanding construction permit. In this regard, we urge licensees to pay special attention to compliance with FAA and FCC tower requirements,⁵⁶ the community of license coverage requirement, and the FCC's environmental rules governing radio frequency ("RF") radiation.⁵⁷

35. Once the Commission has granted a DTV STA request, the licensee or permittee will be authorized to commence digital service as specified in the STA. The Commission will make every effort to act on DTV STA requests within 10 days, absent oppositions or unusual circumstances. STAs will be granted for a period up to six months. The Commission delegates authority to the Mass Media Bureau to continue to extend STAs for additional periods not to exceed six months each until such time as the Commission determines otherwise (for example, by requiring that licensees either construct full replication or maximization facilities or relinquish interference protection). Under our rules, STAs are revocable at will.⁵⁸

36. Commercial and noncommercial stations that are operating pursuant to a DTV STA by their respective construction deadlines (May 1, 2002 or May 1, 2003) will be considered to have met this construction deadline, and their outstanding construction permits will be extended automatically until such time as the Commission determines otherwise (for example, by requiring that licensees either construct full replication or maximization facilities or relinquish interference protection). A copy of the STA issued by the FCC must be maintained in the station's local public inspection file. Periodically, the staff will issue public notices identifying the stations authorized to operate on DTV STAs and the parameters under which they are or will be operating. Stations operating pursuant to a DTV STA must comply with the enhanced community coverage requirement by December 2004 (December 2005 for noncommercial stations).⁵⁹ Until the Commission determines otherwise, we will continue to provide interference protection to the facilities specified in outstanding DTV construction permits issued to permittees operating pursuant to a DTV STA as of their applicable construction deadlines, in addition to protection to the allotted facilities.

C. City Grade Coverage

37. In the *Fifth Report and Order* we allowed DTV licensees to build initial facilities that placed the required DTV service level over their principal community of license. In turn, the required DTV service level was based on the level of service that they would provide at the edge of their authorized service areas (*i.e.*, at the edge of their NTSC Grade B contours) were they operating with full allotted DTV power and antenna height. In the *Report and Order*, we imposed a principal community coverage requirement that is stronger than the DTV service contour requirement that we adopted as an initial obligation in the *Fifth Report and Order*. We explained that the signal strength increase would improve the availability of service in the city of license and help prevent the migration of licensees from

⁵⁵ See DTV Table of Allotments, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, at Appendix B.

⁵⁶ 47 C.F.R. § 17.7.

⁵⁷ 47 C.F.R. § 1.1307.

⁵⁸ 47 C.F.R. § 73.1635(b).

⁵⁹ See 47 C.F.R. § 73.625 (as revised in Appendix A).

their community of license, thus furthering the purposes of Section 307(b) of the Communications Act.⁶⁰ The required level of service must be achieved by December 31, 2004 for commercial stations and December 31, 2005 for noncommercial stations. Operating DTV stations must be providing this level of service over their principal communities at that time.

38. The majority of petitioners that addressed this issue did not object to the Commission's increased city grade signal requirement as long as it was implemented in conjunction with a waiver policy that affords broadcasters flexibility in certain circumstances.⁶¹ MSTV, NAB, ALTV, and Joint Broadcasters point out that broadcasters face many different configurations of terrain and geography, not all of which lend themselves to siting towers that both provide the widest possible service and cast a stronger signal over the principal community.⁶² Petitioners also point out that some broadcasters have already built DTV facilities that may have to be moved or expensively reconfigured to meet the new principal community coverage requirement.⁶³ Finally, APTS/PBS also requests that the Commission grant waivers of the signal strength requirement for: (1) stations whose transmitter is located away from the city of license -- a situation petitioner claims is more typical of noncommercial stations; (2) stations that cannot afford the cost of complying with the requirement; and (3) stations whose DTV assignment is outside the core.⁶⁴

39. We have decided to retain our enhanced principal community signal strength standard. The purpose of our revised requirement is to improve the availability and reliability of DTV service in the community of license and provide an extra measure of protection from interference to DTV service in the community. In addition, by requiring a higher level of service over the community of license, we will limit the extent to which licensees can migrate from their current service contour. These goals are consistent with the fundamental obligation of licensees to serve the needs and interests of their communities of license.

40. The 7dB increment in DTV service contour values that we adopted in the *Report and Order* was less than what we proposed in the *Notice*. We explained that we chose a lower signal strength increase in order to provide broadcasters with flexibility in locating their transmitters while still improving the reliability of service to the community. While we recognized that some stations' currently authorized DTV facilities might not be able to encompass their principal communities with the increased city-grade signal level, we continue to believe that the less burdensome requirement that we adopted will not force many licensees to increase their power or to move their antenna. Even in cases where licensees

⁶⁰ 47 U.S.C. § 307(b).

⁶¹ Paxson argues that the Commission should not adopt the increased city grade coverage requirement but states that, if the requirement is maintained, "at a minimum" the Commission should liberally grant waivers of the rule. Petition for Reconsideration of Paxson Communications Corp. ("Paxson") at 5-6. Cox opposes the enhanced signal strength requirement, arguing that there is no indication at this time that such a requirement is necessary. Cox Broadcasting Inc. Comments on Petitions for Reconsideration at 3-4.

⁶² Petitions for Reconsideration of MSTV/NAB/ALTV at 8-10; Joint Broadcasters at 5. Joint Broadcasters cite as an example a station in Michigan close to Lake Superior. If the licensee sites its tower close to the city of license in order to provide a stronger principal community signal, much of the signal would be broadcast over water. The licensee would prefer to site the tower inland and higher up to attain wider coverage and reach areas with a significant number of viewers, but this siting would not allow the licensee to meet the signal strength requirements for the community of license.

⁶³ See, e.g., Petitions for Reconsideration of MSTV/NAB/ALTV at 9; Joint Broadcasters at 5; APTS/PBS at 8; Delta College at 2-4;

⁶⁴ Petition for Reconsideration of APTS/PBS at 8-9.

have already constructed facilities that do not meet our increased city-grade coverage requirement, we believe that, given the location of most DTV towers, the cost of making the necessary changes to achieve compliance will be minimal in most instances.⁶⁵

D. Construction Deadlines

41. A number of petitioners request that the Commission extend the May 1, 2002 DTV construction deadline for smaller-market stations.⁶⁶ Generally, these petitioners argue that stations in smaller markets need additional time to plan and construct their DTV facilities given the expense involved in conversion and the lower level of profitability of these stations. Petitioners also argue that it is unreasonable to expect small market broadcasters to commence digital service in the midst of the uncertain market conditions created by, among other things, the issues surrounding the DTV transmission standard⁶⁷ and the low rate of DTV receiver penetration. In addition, parties claim that many stations have yet to receive their DTV permits with only a few months left before the construction deadline, which has made it difficult for broadcasters to schedule highly-demanded tower construction crews and to coordinate the purchase of costly equipment. Several petitioners support extending the construction deadline to May 1, 2003 (the same deadline as noncommercial educational stations) for stations in markets 50-100, and to May 1, 2004 for stations in markets above 100.⁶⁸ Others propose tying build-out requirements to a market-defined milestone, such as DTV receiver penetration levels.⁶⁹

42. We decline to issue a blanket extension of the remaining DTV construction deadlines. As noted above, the NAB survey notes that more than two-thirds of responding commercial stations expect to be on the air in digital format by May 2002. Thus, there is substantial evidence that the conversion is progressing and that television stations are working hard to construct digital facilities. In view of the number of stations that have already made a commitment to complying with our deadlines and that have made a substantial investment in conversion, we do not believe that a blanket extension of the remaining deadlines is appropriate. Further, given the reduced build-out requirements we adopt herein, and the clear additional protection we will afford stations meeting these requirements, we believe that a large number of the stations that did not anticipate meeting the deadline will now be able to do so. One leading manufacturer, for instance, states that it can equip a small market station with minimal DTV facilities (500 watts) for less than \$160,000, depending upon the size of the coverage area or other signal propagation characteristics.⁷⁰

⁶⁵ Of course, the Commission may waive any provision of its rules upon a showing of good cause. See 47 C.F.R. § 1.3. Specifically, the FCC may exercise its discretion to waive a rule where “particular facts would make strict compliance inconsistent with the public interest” and where “special circumstances” might warrant a waiver. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (“An applicant for waiver faces a high hurdle even at the starting gate.”).

⁶⁶ See, e.g., Petitions for Reconsideration of Block at 2-6; Cordillera at 2-5; Red River at 5-6; WLTW-TV at 1-2.

⁶⁷ The issues concerning the standard were resolved in ¶¶ 88–92 of the *Report and Order*.

⁶⁸ Petitions for Reconsideration of Cordillera at 1-2; Red River at 5. WLTW-TV supports a construction deadline of May 2004 for stations in markets above 100, and Block supports an extension until May 1, 2003 for DMAs 40-100, and until May 1, 2004 for DMAs 100 and above. Petitions for Reconsideration of WLTW-TV at 1-2; Block at 3.

⁶⁹ *Ex parte* submission of APTS, CPB, and PBS in CS Docket Nos. 98-120, 00-96, and 00-2. A copy of this filing has been placed in the record of this proceeding.

⁷⁰ See *Ex Parte* letter from Lawrence R. Sidman, Esq. on behalf of Harris Corp, dated October 31, 2001. If greater coverage is needed or desired due to either a wide market area or other signal propagation challenges, the Harris letter indicates that stations may need to move to a more extensive system, the cost of which they estimate would be

(continued....)

43. It is possible, however, that a number of stations will not be in a financial position to provide digital service by next May, even with the reduced initial build-out requirements, and will be forced to request an extension of time to construct. In view of the limited financial resources of many of these stations, we believe that it is appropriate at this time to reconsider our standards for granting DTV extension requests.

44. In the *Fifth Report and Order*, we announced our willingness to grant, on a case-by-case basis, an extension of the applicable DTV construction deadline where a broadcaster has been unable to complete construction due to circumstances that are either unforeseeable or beyond the permittee's control, provided the broadcaster has taken all reasonable steps to resolve the problem expeditiously. We indicated that such circumstances include, but are not limited to, the inability to construct and place in operation a facility necessary for transmitting DTV, such as a tower, because of delays in obtaining zoning or FAA approvals, or similar constraints, or the lack of equipment necessary to transmit a DTV signal.⁷¹ We stated explicitly that we did not anticipate that the circumstances of "lack of equipment" would include the cost of such equipment. However, we also stated that we would take into account problems encountered that are unique to DTV conversion and would modify our existing policies regarding extensions accordingly.⁷²

45. As indicated by a number of petitioners and commenters, we recognize that some broadcasters, despite their reasonable good faith efforts, may not be in a financial position to timely complete the construction of their DTV facilities. We also recognize that, particularly for stations in smaller markets, the capital costs of conversion may be very high relative to the station's anticipated revenue. As a result, stations with lower revenues may find it more difficult to cover these costs in time to meet the construction deadline.

46. For many broadcasters, these financial obstacles will be alleviated by the reduced initial build-out requirements we have adopted today. We expect that even smaller market stations generally should be able to afford to finance the minimum DTV facilities required under our rules. Some broadcasters, however, may be unable to complete construction of even these minimum permitted facilities by the applicable deadline. Accordingly, we have determined that we will consider, on a case-by-case basis, in addition to the extension criteria outlined in the *Fifth Report and Order*, whether a broadcaster should be afforded additional time to construct its DTV facilities because the cost of meeting the minimum build-out requirements exceeds the station's financial resources. To qualify under this standard, the applicant must provide an itemized estimate of the cost of meeting the minimum build-out requirements and a detailed statement explaining why its financial condition precludes such an expenditure. We caution broadcasters that a brief downturn in the economy or advertising revenues will not be considered a sufficient showing of financial hardship. Rather, the showing must reflect the particular station's financial status over an economically significant period of time. In addition, the applicant must detail its good faith efforts to meet the deadline, including its good faith efforts to obtain the requisite financing, and explain why those efforts were unsuccessful. To the extent that the applicant's description of its financial condition sets forth information that is proprietary and not

(...continued from previous page)

less than \$625,000. Some initial operating equipment may be able to be used as part of a larger system as broadcasters convert to equipment that provides expanded signal coverage.

⁷¹ *Fifth Report and Order*, 12 FCC Rcd 12809 at ¶ 77. The Chief of the Mass Media Bureau has delegated authority to grant up to two extension requests of six months each beyond the applicable construction deadline if the extension standard is met. Subsequent extension requests must be referred to the Commission. *Id.*

⁷² *Id.*

customarily disclosed to the public, the applicant may request that the Commission treat the information as confidential.⁷³ Applicants must retain underlying documentation fully detailing and supporting their financial representations as well as any steps taken to overcome the circumstances preventing construction. Applicants will also be required to indicate when they reasonably expect to complete construction.⁷⁴

47. Applicants seeking an extension of time to construct a digital television station must file their extension request with the Commission at least sixty days, but no more than ninety days, prior to the applicable construction deadline. The Mass Media Bureau will issue a standard form (FCC Form 337) to be used to apply for an extension of time to construct a DTV station.⁷⁵ As under the current standard, the Commission staff may grant no more than two extensions to any permittee, each for a period not exceeding six months. We direct the Mass Media Bureau to examine closely each extension request under the standards we adopt today, and promptly to notify applicants of any denial of an extension so that the applicant can timely complete construction in order to meet the applicable construction deadline. Subsequent extension requests will be referred to the Commission.

48. EchoStar proposes that the Commission condition the grant of any DTV build-out waiver request by a network affiliated broadcaster on “the broadcaster granting digital distributors like EchoStar a distant network signal waiver for the importation of that station’s digital network feed.”⁷⁶ It asserts that this policy would offer consumers a digital network signal where none would be available and would create an economic incentive for stations to build-out their DTV facilities more quickly.

49. Both NAB and NASA object, asserting that the proposal would force local stations to give up their rights against satellite importation of distant network signals as set out by Congress in the Satellite Home Viewer Improvement Act (“SHVIA”).⁷⁷ NAB notes further that the proposal would be imposed on those stations that cannot comply for reasons beyond their control. In addition, NASA observes that the proposal would not further the DTV transition for several reasons, including the fact that EchoStar equipment will be able to downconvert the distant digital network signals for viewing on analog sets. It also points out that the Commission already has the ultimate incentive to encourage DTV build-out – the license renewal process.

50. Broadcast television stations have rights, through the Copyright Act⁷⁸ and private

⁷³ See 47 C.F.R. § 0.459.

⁷⁴ As with any request for waiver of our rules, a request for an extension of the DTV construction deadline will be granted only upon a showing of good cause and where grant of the extension will serve the public interest. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (“An applicant for waiver faces a high hurdle even at the starting gate.”).

⁷⁵ A draft copy of FCC Form 337 and accompanying instructions are attached hereto at Appendix C. Once the final version of this form has been approved, the Mass Media Bureau will issue a Public Notice announcing the availability of the final form to the public.

⁷⁶ Letter from Charlie Ergen, Chairman and CEO, EchoStar to the Honorable Michael Powell, Chairman, FCC (Sept. 20, 2001) (emphasis omitted).

⁷⁷ Letter from Edward O. Fritts, President & CEO, National Association of Broadcasters to the Honorable Michael K. Powell, Chairman, FCC (Oct. 24, 2001); Letter from Alan Frank, Chairman, Network Affiliated Stations Alliance to the Honorable Michael Powell, Chairman, FCC (Oct. 22, 2001).

⁷⁸ 17 U.S.C. § 119. The SHVIA amended parts of Title 17, as well as parts of the Communications Act.

contracts, to control the distribution of the national and local programming that they transmit.⁷⁹ In 1988, Congress adopted SHVIA in order to protect the broadcasters' interests in their programming while simultaneously enabling satellite carriers to provide broadcast programming to those satellite subscribers who are unable to obtain broadcast network programming over the air.⁸⁰ The SHVIA, adopted in November 1999, maintained this protection, while providing a limited exception to broadcasters' exclusive programming copyrights to allow satellite carriers to offer distant network signals to "unserved households" that cannot receive an acceptable signal over-the-air from a local network affiliate.⁸¹

51. While the Commission is endeavoring to foster the rollout of digital television on a number of fronts, we decline to adopt a policy here that would alter the scope of broadcasters' copyrights established so clearly by Congress. There are other, more targeted, means available to the Commission to facilitate the transition to DTV, including the modified build-out requirements discussed herein. We therefore decline to adopt the EchoStar proposal.

E. Mutually Exclusive Applications

52. In the *Report and Order*, we decided to take a bifurcated approach to cut-off protection for DTV area expansion applications. With respect to all currently pending DTV expansion applications, we established cut-off protection as of the date of the adoption of the *Report and Order* (January 18, 2001). Thus, all DTV expansion applications pending as of the adoption date of the *Report and Order* are cut off and protected against later-filed DTV applications. We explained in the *Report and Order* that this approach would provide a measure of fairness to all applicants that filed DTV expansion applications prior to the adoption of the *Report and Order* by allowing all of them to be considered as part of one cut-off group. As for future DTV expansion applications filed after the adoption date of the *Report and Order*, we determined we would consider such applications cut-off as of the close of business on the day they are filed. We concluded that day-to-day cut-off processing for new DTV expansion applications would help to avoid a larger number of mutually exclusive ("MX") applications and thus expedite processing of these applications and the provision of DTV service to the public. Day-to-day cut-off procedures also encourage potential applicants to file quickly for improved facilities, thereby speeding the introduction of improved DTV service to the public.

53. Paxson and Fox Television Stations, Inc. ("Fox") challenge the Commission decision to establish a single cut-off date for all pending DTV applications instead of considering all such applications as cut-off on the date they were filed (so-called "first-come first-serve" processing).⁸² Fox and Paxson argue that the procedures adopted in the *Report and Order* are "unfair, arbitrary and in

⁷⁹ See *Report, In the Matter of Technical Standard for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act*, ET Docket No. 00-90, FCC 00-416 at para. 3 (rel. Nov. 29, 2000) (*SHVIA Report to Congress*).

⁸⁰ In adopting the Satellite Home Viewer Improvement Act of 1999, Pub.L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999), Congress preserved the distant network signal regime while providing satellite operators the right to transmit local signals into local markets.

⁸¹ 17 U.S.C. § 119(d)(10)(A); see also 47 U.S.C. § 339(c). The Commission has thus far chosen to defer action on setting a distant network signal eligibility standard for DTV. In November 2000 the Commission issued its Report to Congress on the signal intensity standard used to determine subscriber eligibility to receive a distant network signal. *SHVIA Report to Congress*. In it, the Commission concluded that it would be "premature" to construct a DTV distant network signal eligibility standard and deferred action "until such time as more substantial DTV penetration is achieved and more experience is gained with DTV operation." *Id.* at 2.

⁸² See *Report and Order* at ¶¶ 38-42.

conflict with the Commission's customary processing procedures."⁸³ This issue, as well as the arguments raised by Paxson and Fox, were fully considered in the *Report and Order* and we find no reason to reverse our decision in this area.

54. Our justification for adopting a single cut-off date rather than to utilize first-come first-serve processing with respect to the hundreds of pending DTV applications has not changed. In the *Report and Order*, we found that the main advantage of first-come first-serve processing – the elimination of mutually exclusive (MX) applications – would not be achieved in this case, as a large number of pending DTV applications were filed on certain critical DTV filing dates. Therefore, even if we were to have applied first-come first-serve processing, it would not have resulted in the elimination of numerous MX groups of applications that were filed on these dates. While Paxson and Fox both maintain that only a few of their applications were filed on these key dates, this does not change the fact that numerous other parties did file applications on those dates resulting in a large number of MX groups.

55. We reject Paxson and Fox's argument that adopting a single cut-off date was contrary to customary Commission processing procedures. As Barry Telecommunications, Inc. ("Barry") notes, the Commission has adopted a variety of different processing schemes over the years, each time determining that the particular scheme was appropriate for the service and circumstances in question, including single cut-off date lists, filing windows and first-come first-serve processing.⁸⁴ Under the circumstances in this case, our approach to processing pending DTV applications, which balanced the needs of the licensees, the public and our interest in the orderly administration of spectrum, did not diverge from our prior practices.

56. As further justification for our decision, we recognized that there was an extended period of time over the several months leading to the adoption of the *Report and Order* during which we permitted DTV applications to be filed without indication that applicants needed to expedite their filings or lose out on an opportunity to expand their DTV allotments. Therefore, we found that first-come first-serve processing would unfairly prejudice those licensees, particularly smaller market and noncommercial educational licensees, that, as permitted, waited until their later deadlines to file their DTV applications. Contrary to the arguments raised by Paxson and Fox, we continue to find that the equities favor processing of the hundreds of DTV applications, including expansion applications, which were timely filed in reliance on the Commission's processing system.⁸⁵ Barry notes that the Commission's DTV processing system included publication of deadlines for the filing of DTV applications that would be considered on an equal footing with prior filings. Noncommercial educational licensees like Barry have invested substantial resources in their proposals and we agree that Paxson's and Fox's proposals are no more entitled to priority consideration than these later-filed applications. As Barry points out, the Commission never provided any applicant assurance of protection beyond that which was provided in the DTV Table of Allotments. Any applicant that is trying to maximize its allocation was never guaranteed success on that filing and has no claim to favorable action based simply on the timing of its application. Having considered and rejected the arguments of the petitioners, we affirm our application of a single cut-off date to the DTV applications pending on January 18, 2001.

57. KM and the American Legacy Foundation ("ALF"), applicants for new NTSC television stations, allege that the Commission has revised its policy with respect to the protection afforded pending applications for new NTSC stations that were not subject to the television freeze. When the Commission

⁸³ Petition for Reconsideration and Clarification of Paxson at 2-5; Petition for Reconsideration of Fox at 2-7.

⁸⁴ Barry Opposition to Petition for Reconsideration and Clarification at 3.

⁸⁵ *Id.* at 2.

adopted the initial DTV Table of Allotments, protection was afforded to all pending applications for new NTSC stations that were not subject to the television freeze.⁸⁶ The facilities of one pending application for each channel and community were taken into account when designing the DTV Table. KM and ALF argue that the application processing/protection priority procedures announced in the *Report and Order* have unfairly reversed this policy.

58. In the *Report and Order*, we gave priority to pending DTV expansion applications over all NTSC applications except NTSC applications that fell into one of three special categories – post-auction applications, applications proposed for grant in pending settlements, and any singleton applications cut-off from further filings.⁸⁷ These applications must have been accepted for filing in order to be protected from DTV expansion applications. We stated that, in the future, when an applicant files a DTV expansion application, it must determine whether there are NTSC applications on file in any of the three categories and provide interference protection to them. As for pending DTV expansion applications, when one conflicts with an NTSC application in one of these categories, we stated that we would treat the applications as mutually exclusive (“MX”) and follow the procedures adopted in the *Report and Order* for MX applications – that is, we will require that the parties resolve their MX within 90 days or we will subsequently dismiss both applications.

59. We revise the procedures announced in the *Report and Order* in the following respects. First, we note that in the *Broadcast Auctions Report and Order* we found that, by application of Section 309(l) of the Communications Act, pending NTSC application groups on file prior to July 1, 1997, are entitled to compete in an auction that does not include applications filed on or after July 1, 1997.⁸⁸ Therefore, pursuant to that statutory directive, we may not find DTV expansion applications (all of which were filed after June 30, 1997) to be mutually exclusive with NTSC application groups on file prior to July 1, 1997, regardless of whether these groups involve locations inside or outside the freeze areas or whether or not the groups have been settled. This is the case also where there is an NTSC application that was cut-off as part of a group of NTSC applications filed before July 1, 1997, but that is now a singleton because the other applications in the group have been dismissed. NTSC applications in these two categories shall be protected against DTV maximization applications.⁸⁹ We believe these revisions to the procedure address the concerns of KM and ALF. DTV maximization applicants will be permitted to file minor amendments to resolve conflicts with NTSC applications in these categories. In addition, our decision today does not affect the ability of those DTV broadcasters whose maximization applications may interfere with NTSC applications in these categories from applying to maximize at the close of the transition on their analog allotment.

⁸⁶ On July 16, 1987, the Commission imposed a “freeze” on applications for new television stations within the minimum co-channel separation distances from 30 designated television markets. *Advanced Television Systems*, Mimeo No. 4074 (released July 17, 1987). The “freeze” was imposed because the high densities of existing television stations in those markets limited the spectrum available for advanced television service there, and the Commission wanted to preserve its spectrum allocation options for ATV use.

⁸⁷ *Report and Order* at ¶ 52.

⁸⁸ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920, 15945-47 (1998) (*Broadcast Auctions Report and Order*), *aff’d sub. nom. Orion Communications Ltd. v. FCC*, 221 F.3d 196 (D.C. Cir. 2000) (Table).

⁸⁹ We note that this protection does not apply where only one NTSC application was ever filed for a particular allotment.

F. Technical Issues

60. In the DTV *Sixth MO&O*, we adopted a 2 percent *de minimis* interference standard for changes to DTV stations and allotments.⁹⁰ In his petition for reconsideration, Donald G. Everist (“Everist”) seeks clarification regarding the analysis the Commission uses for determining whether the amount of interference caused by a DTV application to another DTV station is *de minimis*. Specifically, Everist is concerned with protection to a DTV station that has been authorized facilities that cover more people than the station’s underlying DTV allotment (the Appendix B population).⁹¹ Everist notes that predicted interference is to be determined to any people in the station’s increased service area but indicates that the current Commission analysis seems to compare that interference population with the smaller Appendix B population to determine if the interference exceeds the 2 % *de minimis* standard.

61. We clarify that the analysis comparison in this situation is to the station’s Appendix B population, as Everist surmised. To the extent he is implying that the analysis should be changed, such a suggestion is beyond the scope of this reconsideration. The analysis was not adopted, altered, or even explained in the *Report and Order*. Furthermore, midstream changes to the analysis process raise issues of fair and consistent treatment of applicants and stations. It may be appropriate to consider a new approach at the time that protection of the Appendix B allotment ends. As decided elsewhere in this document, we are not currently establishing a date to end protection of that “replication” facility.

62. Fox also seeks clarification concerning the DTV interference analysis for determining that other DTV stations are protected. Fox urges the Commission to “only protect the stronger of either the allotted facilities or the currently authorized facilities.” Fox contends that protecting both makes the computation of protection unnecessarily complex by requiring analysis of all possible combinations of station facilities.

63. As Fox requests, we clarify that protection need not be determined for authorized DTV facilities that are smaller than, and encompassed by, the corresponding DTV allotment facilities. Specifically, applicants need not determine that protection is provided to other DTV station applications or authorizations that meet the technical criteria for “checklist” processing. The technical “checklist” criteria are: (1) proposed transmitter site within 5.0 kilometers of underlying DTV allotment reference coordinates, (2) proposed antenna HAAT not exceeding underlying DTV allotment HAAT by more than 10 meters, and (3) proposed ERP in every azimuthal direction not exceeding underlying DTV allotment ERP for that direction, (with a small ERP adjustment if the proposed HAAT differs from the DTV allotment HAAT). In general, a “checklist” application will produce a DTV service area that is contained within the replication service area of the underlying DTV allotment. In addition to “checklist” applications and authorizations, there are applications and resulting DTV authorizations that are considered “checklist-like.” These applications and authorizations do not meet one or more of the technical “checklist” criteria, but produce a DTV service area that is contained within the replication service area of the underlying DTV allotment. As with “checklist” applications and authorizations, “checklist-like” applications and authorization need not be protected by applications from other DTV stations. Protection of the underlying DTV allotment is required.

64. We note that the Fox request also could be interpreted to request a more extensive limitation on the DTV facilities that must be protected, and we do not find such a limitation warranted. For example, a DTV station might have authorized facilities that are neither “checklist” nor “checklist-

⁹⁰ See *DTV Sixth MO&O* at ¶ 80 and Section 73.623(c) of the Commission’s Rules.

⁹¹ See, *supra* n. 55.

like,” where such authorization extends the underlying DTV allotment service contour in some directions and contracts the service contour in other directions. Under such a circumstance, the authorized contour would not be entirely contained within the allotment contour and conversely, the allotment contour would not be entirely contained within the authorized contour. One interpretation of the Fox request would be to only protect the authorized service if it reaches more people or area than the allotment. Similarly, that interpretation would only protect the allotment service if it reaches more people or area than the authorized facility. For two reasons, we are not accepting this more limited protection calculation. First, it is inconsistent with our decision in the replication section of this *Order*. There we decide to continue to protect DTV allotment service. The Fox proposal would only continue that allotment protection if that service area or population is larger than the authorized (or applied for) service. Second, where a DTV authorization allows a service area to be shifted from the DTV allotment service area, we do not believe it is fair or appropriate to deny protection to that authorized service area if it reaches fewer people or less overall area than the allotment facility would reach.

65. In the *DTV Sixth Report and Order*, we established tables and formulas for determining maximum effective radiated power (ERP) limits for various antenna heights, channels and zones.⁹² In the *Report and Order*, we clarified our process for applying an alternative determination of a DTV station’s maximum ERP based on matching the coverage area of the largest station in the market.⁹³ We indicated that the provision is triggered only where a station in a market is covering a larger area than could be covered with standard maximum power and antenna height. KM seeks additional clarification regarding the reference to standard maximum power and antenna height, asking if it refers to the largest station in the market or to the DTV station proposing to maximize. KM also asks if the standard refers to the DTV Table of Allotment parameters, or some other parameters that may be permitted under the Commission’s rules.

66. We clarify that the standard maximum facilities are the power and antenna height limits specified in Section 73.622(f)(6)-(8) of our Rules. For example, for UHF DTV stations, the standard maximum ERP is 1000 kilowatts (kW) if the antenna HAAT is 365 meters (m) or less (365 m is approximately 1200 feet). For antennas located at higher HAATs, the standard maximum ERP is reduced, with the standard maximum UHF DTV ERP being 750 kW at an HAAT of 425 m and 316 kW at 610 m. We also clarify that the largest station provision is applied when a DTV application requests an ERP greater than the rule allows for its requested HAAT on its channel. Thus it is the standard maximum ERP of the DTV station proposing to maximize that triggers applicability of the “largest station” provision.

G. DTV Translators and Repeaters

67. APTS and PBS request that the Commission adopt rules as soon as possible that allow digital stations to extend coverage through the use of low power repeater stations.⁹⁴ These petitioners argue that the use of on-channel low power DTV repeaters is an economical way for stations to replicate their service areas. Red River also supports permitting the use of translators to fill in gaps in DTV

⁹² See *DTV Sixth Report and Order*, 12 FCC Rcd 14588, ¶ 213 (1997). The power limits depend on the antenna height above average terrain (HAAT), the channel band (low VHF channels 2-6, high VHF channels 7-13 or UHF channels 14-69), and zone or area of the country within which the station is located (as defined in Section 73.609 of the Commission’s rules).

⁹³ See *Report and Order* at ¶¶ 73-74 and Section 73.622(f)(5) of the Commission’s Rules.

⁹⁴ Petition for Reconsideration and Clarification of APTS and PBS at 6, n.16.

service.⁹⁵

68. As we stated in the *Report and Order*, while we recognize the desire to initiate DTV operations on translator and booster facilities, we believe there are fundamental issues surrounding their authorization and protection that must be addressed in a more comprehensive manner than can be accomplished based on the limited record on this issue in this proceeding. Accordingly, we will defer consideration of these issues to a separate rulemaking proceeding on digital LPTV, translator and booster stations. We hope to initiate this proceeding in the near future.

IV. CONCLUSION

69. In this *Memorandum Opinion and Order on Reconsideration*, we revise a number of the determinations we made in the *Report and Order* to ensure continued progress in the transition to digital broadcasting. By temporarily deferring the channel election and replication deadlines established in the *Report and Order*, and by extending interference protection to maximized service areas, our intention is to prioritize those elements that are most important to the DTV transition. Our primary goal is to maximize the number of DTV stations on the air and provide service to most, if not all, consumers. We believe that our actions today will help further the transition and promote the goal of replication by increasing the number of DTV stations on the air and the number of DTV receivers in the hands of consumers. Once set penetration rates increase, we believe that marketplace forces will provide further incentives that will result in the expansion of DTV service in the future.

V. ADMINISTRATIVE MATTERS

70. *Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, as amended,⁹⁶ the Commission's Supplemental Final Regulatory Flexibility Analysis has been completed and attached as Appendix D.

71. *Paperwork Reduction Act Analysis.* The actions taken in this *Memorandum Opinion and Order on Reconsideration* have been analyzed with respect to the Paperwork Reduction Act of 1995 ("Act") and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the Act.

72. *Comments.* As part of our continuing effort to reduce paperwork burdens, we invite the general public to take this opportunity to comment on the information collections contained in this *Memorandum Opinion and Order on Reconsideration*, as required by the Paperwork Reduction Act of 1996. Public and agency comments are due thirty days after publication of the *Memorandum Opinion and Order on Reconsideration* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) ways to enhance the quality, utility, and clarity of the information collected; and (c) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 Twelfth Street, S.W., Room C-1804, Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 17th

⁹⁵ Petition for Reconsideration of Red River at 5.

⁹⁶ See 5 U.S.C. § 601 et. seq.

Street, N.W., Washington, D.C. 20503 or via the Internet to edward.springer@omb.eop.gov.

VI. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED that, pursuant to authority contained in sections 1, 4(i), 303, and 336(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303, and 336(f), Part 73 of the Commission's rules, 47 C.F.R. Part 73, ARE AMENDED as set forth in Appendix A below.

74. IT IS FURTHER ORDERED that the amendments set forth in Appendix A SHALL BE EFFECTIVE 60 days after publication in the Federal Register.

75. IT IS FURTHER ORDERED that the petitions for reconsideration or clarification listed in Appendix B ARE GRANTED to the extent provided herein and otherwise ARE DENIED.

76. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order on Reconsideration*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

77. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**Rule Modifications**

1. Section 73.623 is revised as follows:

§ 73.623 DTV applications and changes to DTV allotments

* * * * *

(h) *DTV Application Processing.*

(1) DTV applications for a construction permit or a modified construction permit pending as of January 18, 2001:

(i) shall be afforded the interference protection set forth in paragraph (c) or (d) of this section, as applicable:

(A) by all NTSC minor change applications,

(B) by NTSC new station applications, except those covered by paragraph (h)(1)(ii)(G) and (h)(1)(iii)(D) of this section,

(C) by all rulemaking petitions to amend the NTSC TV table of allotments,

(D) by DTV applications filed after January 18, 2001, and

(E) by rulemaking petitions to amend the DTV table of allotments filed after January 18, 2001;

(ii) must demonstrate the requisite interference protection set forth in paragraph (c) or (d) of this section, as applicable, to:

(A) DTV licensed stations,

(B) DTV construction permits,

(C) existing DTV allotments,

(D) rulemaking petitions to amend the DTV table of allotments for which a Notice of Proposed Rule Making has been released and the comment deadline specified therein has passed prior to the filing date of the DTV application,

(E) NTSC stations with licenses covering construction permits that were granted before the DTV application was filed,

(F) NTSC construction permits that were granted before the DTV application was filed;

(G) applications for new NTSC television stations that were in groups of mutually exclusive applications on file prior to July 1, 1997, regardless of whether they are the only applications that remain pending from their group.

(iii) that do not provide the requisite interference protection set forth in paragraph (c) or (d) of this section, as applicable, to the following applications and petitions will be deemed mutually exclusive with those applications and petitions:

(A) other DTV applications pending as of January 18, 2001,

(B) rulemaking petitions to amend the DTV table of allotments filed on or before January 18, 2001 for which a Notice of Proposed Rule Making had been released and the comment deadline specified therein had not passed prior to the filing date of the DTV application,

(C) rulemaking petitions to amend the DTV table of allotments filed on or before January 18, 2001 for which a Notice of Proposed Rule Making had not been released, and

(D) applications for new NTSC stations that are not covered by paragraph (h)(1)(ii)(G) of this section and were filed and accepted for filing on or before January 18, 2001 that:

(1) were filed by post-auction winners pursuant to Section 73.5005 of the Rules,

(2) are part of a settlement agreement on-file with the Commission that would result in the grant of the NTSC application, or

(3) are cut-off singletons.

(2) DTV applications for a construction permit or a modified construction permit filed after January 18, 2001:

(i) shall be afforded the interference protection set forth in paragraph (c) or (d) of this section, as applicable:

(A) by all NTSC minor change applications,

(B) by NTSC new station applications, except those covered by paragraph (h)(2)(ii)(H) and (I) of this section,

(C) by all rulemaking petitions to amend the NTSC TV table of allotments except those filed by NTSC applicants in those groups defined in (h)(2)(ii)(I) of this subsection for which a Notice of Proposed Rule Making has been released and the comment deadline specified therein has passed prior to the filing date of the DTV application,

(D) by later-filed DTV applications, and

(E) by later-filed rulemaking petitions to amend the DTV table of allotments;

(ii) must demonstrate the requisite interference protection set forth in paragraph (c) or (d) of this section, as applicable, to:

- (A) DTV licensed stations,
- (B) DTV construction permits,
- (C) earlier-filed DTV applications,
- (D) existing DTV allotments,

(E) rulemaking petitions to amend the DTV table of allotments for which a Notice of Proposed Rule Making has been released and the comment deadline specified therein has passed prior to the filing date of the DTV application,

(F) NTSC stations with licenses covering construction permits that were granted before the DTV application was filed,

(G) NTSC construction permits that were granted before the DTV application was filed, and

(H) earlier-filed and accepted for filing applications for new NTSC stations that are not covered by paragraph (h)(2)(ii)(I) of this section, and that:

(1) were filed by post-auction winners pursuant to Section 73.5005 of the Rules,

(2) are part of a settlement agreement on-file with the Commission that would result in the grant of the NTSC application, or

(3) are cut-off singletons;

(I) applications for new NTSC television stations that were in groups of mutually exclusive applications on file prior to July 1, 1997, regardless of whether they are the only applications that remain pending from their group;

(J) rulemaking petitions to amend the NTSC table of allotments filed by applicants defined in (h)(2)(ii)(I) of this subsection for which a Notice of Proposed Rule Making has been released and the comment deadline specified therein has passed prior to the filing of the DTV application.

(iii) that do not provide the requisite interference protection set forth in paragraph (c) or (d) of this section, as applicable, to the following applications and petitions will be deemed mutually exclusive with those applications and petitions:

(A) other DTV applications filed the same day,

(B) rulemaking petitions to amend the DTV table of allotments for which a Notice of Proposed Rule Making had been released and the comment deadline specified therein had not passed prior to the filing date of the DTV application, and

(C) earlier-filed rulemaking petitions to amend the DTV table of allotments for which a Notice of Proposed Rule Making had not been released.

(3) DTV applicants, DTV applicants and NTSC applicants, or DTV applicants and DTV

rulemaking petitioners that are mutually exclusive pursuant to this section will be notified by Public Notice and provided with a 90-day period of time to resolve their mutual exclusivity via engineering amendment or settlement. Those applications and petitions that remain mutually exclusive upon conclusion of the 90-day settlement period will be dismissed.

2. Section 73.624(b) and (d) are amended by revising them to read as follows:

§ 73.624 Digital television broadcast stations.

- (b) DTV broadcast station permittees or licensees must transmit at least one over-the-air video program signal at no direct charge to viewers on the DTV channel. Until such time as a DTV station permittee or licensee ceases analog transmissions and returns that spectrum to the Commission, and except as provided in subsection (i) below, at any time that a DTV broadcast station permittee or licensee transmits a video program signal on its analog television channel, it must also transmit at least one over-the-air video program signal on the DTV channel. In addition, the DTV broadcast station permittee or licensee is subject to the simulcasting requirements in paragraph (f) of this section. The DTV service that is provided pursuant to this paragraph must be at least comparable in resolution to the analog television station programming transmitted to viewers on the analog channel.
- (i) DTV broadcast station permittees or licensees required to construct and operate a DTV station by May 1, 2002 or May 1, 2003 pursuant to paragraph (d) of this section must, at a minimum, beginning on the date on which the DTV station is required to be constructed, provide a digital video program signal, of the quality described in paragraph (b) above, during prime time hours as defined in section 79.3(a)(6). These licensees and permittees must also comply with the simulcasting requirements in paragraph (f) of this section.
- (ii) DTV licensees or permittees that choose to commence digital operation before the construction deadline set forth in paragraph (d) of this section are not subject to any minimum schedule for operation on the DTV channel.

(d)(3) Authority delegated.

- (ii) Such circumstances shall include, but shall not be limited to: (a) inability to construct and place in operation a facility necessary for transmitting digital television, such as a tower, because of delays in obtaining zoning or FAA approvals, or similar constraints; (b) the lack of equipment necessary to obtain a digital television signal; or (c) where the cost of meeting the minimum build-out requirements exceeds the station's financial resources.
- (iii) ***

- (iv) Applications for extension of time shall be filed no earlier than 90 and no later than 60 days prior to the relevant construction deadline, absent a showing of sufficient reasons for filing within less than 60 days of the relevant construction deadline.

3. Section 73.625(a)(1) is amended by revising it to read as follows:

§ 73.625 DTV coverage of principal community and antenna system.

(a) Transmitter location.

- (1) The DTV transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, the following minimum F(50,90) field strength in dB above one uV/m will be provided over the entire principal community to be served:

Channels 2-6.....35 dBu
 Channels 7-13.....43 dBu
 Channels 14-69..... 48 dBu

Note: These requirements above do not become effective until December 31, 2004 for commercial television licensees and December 31, 2005 for noncommercial television licensees. Prior to those dates, the following minimum F(50,90) field strength in dB above one uV/m must be provided over the entire principal community to be served:

Channels 2-628 dBu
 Channels 7-1336 dBu
 Channels 14-6941 dBu

APPENDIX B

Draft FCC Form 337 and Instructions

APPENDIX C**LIST OF PARTIES TO THE PROCEEDING****Petitions for Reconsideration**

American Legacy Foundation
Association of America's Public Television Stations
Barry Telecommunications, Inc.*
Block Communications, Inc.
Consumer Electronics Association
Cordillera Communications, Inc.
Covington & Burling*
Delta College
Dispatch Broadcast Group
EchoStar Communications Corp.*
Everist, Donald G.
Fox Broadcasting Company
Harris Corp.*
Idaho Public Television
Joint Broadcasters
KM Communications, Inc. et al.
MST/NAB/ALTV
National Association of Broadcasters*
Network Affiliated Stations Alliance*
Paxson Communications Corporation
Raycom Media, Inc.*
Red River Broadcast Company, LLC
Thomas Multimedia, Inc.
Veridian Corp.*
WLTW-TV

Oppositions to or Comments on Petitions for Reconsideration

Aries Telecommunications Corp.*
Barry Telecommunications, Inc.
Consumer Electronics Association
Cox Broadcasting, Inc.
Holston Valley Broadcasting Corporation
National Cable Television Association
Paxson Communications Corp.
Pegasus Communications Corp.*

Comments on Further Notice of Proposed Rule Making

Advanced Television Systems Committee
Consumer Electronics Association
MSTV/NAB/ALTV

Motorola, Inc.
Paxson Communications Corporation
Thomson Multimedia, Inc.

* *Ex Parte* filings

APPENDIX D

Supplemental Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (“RFA”),⁹⁷ an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rule Making* (“Notice”)⁹⁸ and a Final Regulatory Flexibility Analysis (“FRFA”) was incorporated in the *Report and Order and Further Notice of Proposed Rule Making*.⁹⁹ The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. No comments were received in response to the IRFA or the FRFA. The present Supplemental Final Regulatory Flexibility Analysis (“Supplemental FRFA”) conforms to the RFA.¹⁰⁰

A. Need for, and Objectives of, the *Memorandum Opinion and Order on Reconsideration*

In January 2001, we released a *Report and Order and Further Notice of Proposed Rule Making* addressing a number of issues related to the conversion of the nation’s broadcast television system from analog to digital television (DTV).¹⁰¹ Among the issues addressed in the *Report and Order* were: when to require election by licensees of their post-transition DTV channel; whether to require replication by DTV licensees of their NTSC Grade B service contours (thereby providing coverage to those who receive the station’s analog signal); whether to require DTV licensees to place enhanced service contours over their principal communities (thereby serving these communities with a stronger signal); and how we should process mutually exclusive applications. We expressed our belief that resolution of these issues would provide licensees with a measure of certainty that would help them plan facilities, order equipment, and arrange for construction of facilities, all of which will speed the transition to digital service.

We received a number of petitions for reconsideration of the *Report and Order*. In this *Memorandum Opinion and Order on Reconsideration*, we revise a number of the determinations we made in the *Report and Order*, affirm other decisions, and provide clarification of certain rules and policies. We also modify, on our own motion, the minimum hours of operation of certain DTV stations and establish guidelines for television stations that may seek an extension of our May 1, 2002 and May 1, 2003 deadlines for construction of DTV facilities. We will resolve several major technical issues raised in the *Report and Order and Further Notice of Proposed Rule Making*, including the issues of receiver performance standards, DTV tuners, revisions to certain components of the DTV transmission standard, and labeling requirements for television receivers, in a separate Report and Order.¹⁰²

⁹⁷ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (“CWAAA”). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).

⁹⁸ *Notice of Proposed Rule Making* in MM Docket No. 00-39, 15 FCC Rcd 5257 (2000).

⁹⁹ *Report and Order and Further Notice of Proposed Rule Making* in MM Docket No. 00-39, FCC 01-24 (rel. January 19, 2001).

¹⁰⁰ *See* 5 U.S.C. § 604.

¹⁰¹ *Report and Order and Further Notice of Proposed Rule Making, In the Matter of Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, FCC 01-24 (rel. January 19, 2001).

¹⁰² We will incorporate into that proceeding the petitions for reconsideration and comments filed in this proceeding that address these and related issues.

B. Summary of Significant Issues Raised by Public Comments

No comments were received in response to the IRFA, and no petitions or comments were received in response to the FRFA contained in the *Report and Order*. However, a number of parties that filed petitions for reconsideration or comments in response to the *Report and Order and Further Notice of Proposed Rule Making* raised concerns about the impact of the channel election and replication protection deadlines on broadcasters, and particularly broadcasters in smaller television markets. Generally, smaller market broadcasters assert that they will not be able to obtain the financing to construct DTV facilities sufficient to replicate their analog service area,¹⁰³ and that they will not have sufficient operational experience by December 2004 (the channel election deadline for commercial stations) to determine which core channel is superior for DTV transmission.¹⁰⁴

In this *Memorandum Opinion and Order*, we respond to these concerns by allowing stations to construct more minimal initial DTV facilities designed to serve their communities of license while still retaining, for the time being, DTV interference protection to the full replication facility. We also temporarily defer the deadline by which broadcasters with two in-core allotments (television channels 2-52) must elect which channel they will eventually use for DTV at the end of the transition. In our next periodic review of the progress of the DTV transition, the Commission intends to establish a firm date by which broadcasters must either replicate their NTSC service areas or lose DTV service protection of the unreplicated areas, and by which broadcasters with two in-core allotments must elect which channel they will use post-transition. These replication protection and channel election deadlines may be earlier than but will in no event be later than the latest of either the end of 2006 or the date by which 85% of the television households in a licensee's market are capable of receiving the signals of digital broadcast stations. In addition, we also allow DTV stations required to complete construction of DTV facilities by May 1, 2002 or May 1, 2003 to operate initially at a reduced schedule by providing, at a minimum, a digital signal during prime time hours, consistent with their simulcast obligations. In order to provide parity to analog UHF stations, we will also allow stations to construct initial DTV facilities that serve their principal communities while retaining DTV interference protection to their maximized service areas for the time being, subject to the interference protection deadline we intend to establish in the next periodic review.

We do not alter, however, our decision to require stations to provide a stronger DTV signal to their communities of license than that adopted as an initial requirement in the *Fifth Report and Order*. As established in the *Report and Order*, this new city-grade service requirement will become effective December 31, 2004 for commercial stations and December 31, 2005 for noncommercial stations. The majority of petitioners that addressed this issue did not object to the Commission's increased city grade signal requirement as long as it was implemented in conjunction with a waiver policy that affords broadcasters flexibility in certain circumstances. Some commenters pointed out that broadcasters face many different configurations of terrain and geography, not all of which lend themselves to siting towers that both provide the widest possible service and cast a stronger signal over the principal community. Other commenters noted that some broadcasters have already built DTV facilities that may have to be moved or expensively reconfigured to meet the new principal community coverage requirement.¹⁰⁵

The purpose of the stronger city-grade signal strength requirement is to improve the availability and reliability of DTV service in the community of license and provide an extra measure of protection from

¹⁰³ See, *supra*, ¶¶ 9, 23.

¹⁰⁴ See, *supra*, ¶¶ 9, 15.

¹⁰⁵ See, *supra*, ¶ 38.

interference to DTV service in the community. In addition, by requiring a higher level of service over the community of license, we will limit the extent to which licensees can migrate from their current service contour. These goals are consistent with the fundamental obligation of licensees to serve the needs and interests of their communities of license. The 7dB increment in DTV service contour values that we adopted in the *Report and Order* was less than what we proposed in the *Notice*. We explained that we chose a lower signal strength increase in order to provide broadcasters with flexibility in locating their transmitters while still improving the reliability of service to the community. While we recognized that some stations' currently authorized DTV facilities might not be able to encompass their principal communities with the increased city-grade signal level, we continue to believe that the less burdensome requirement that we adopted will not force many licensees to increase their power or to move their antenna. Even in cases where licensees have already constructed facilities that do not meet our increased city-grade coverage requirement, we believe that, given the location of most DTV towers, the cost of making the necessary changes to achieve compliance will be minimal in most instances.¹⁰⁶

We also received comments and petitions requesting an extension of the remaining deadlines (May 1, 2002 commercial and May 1, 2003 noncommercial) to complete construction of DTV facilities. Generally, these parties argue that stations in smaller markets need additional time to plan and construct their DTV facilities given the expense involved in conversion and the lower level of profitability of these stations. Petitioners also argue that it is unreasonable to expect small market broadcasters to commence digital service in the midst of the uncertain market conditions created by, among other things, the issues surrounding the DTV transmission standard and the low rate of DTV receiver penetration. In addition, parties claim that many stations have yet to receive their DTV permits with only a few months left before the construction deadline, which has made it difficult for broadcasters to schedule highly-demanded tower construction crews and to coordinate the purchase of costly equipment. Several petitioners support extending the construction deadline to May 1, 2003 (the same deadline as noncommercial educational stations) for stations in markets 50-100, and to May 1, 2004 for stations in markets above 100. Others propose tying build-out requirements to a market-defined milepost, such as DTV receiver penetration levels.¹⁰⁷

In response to these views, we modify in the *Memorandum Opinion and Order* our guidelines for television stations that may seek an extension of our May 1, 2002 and May 1, 2003 deadlines for construction of DTV facilities, making extensions available to broadcasters that can demonstrate that the cost of meeting the minimum build-out requirements exceeds the station's financial resources.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules.¹⁰⁸ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁰⁹ In addition, the term "small business" has the same meaning as the term "small business

¹⁰⁶ Of course, the Commission may waive any provision of its rules upon a showing of good cause. See 47 C.F.R. § 1.3. Specifically, the FCC may exercise its discretion to waive a rule where "particular facts would make strict compliance inconsistent with the public interest" and where "special circumstances" might warrant a waiver. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) ("An applicant for waiver faces a high hurdle even at the starting gate.").

¹⁰⁷ See, supra, ¶ 41.

¹⁰⁸ 5 U.S.C. § 603(b)(3).

¹⁰⁹ 5 U.S.C. § 601(6).

concern” under the Small Business Act.¹¹⁰ A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

Small TV Broadcast Stations. The SBA defines small television broadcasting stations as television broadcasting stations with \$10.5 million or less in annual receipts.¹¹¹

The digital television rules we address in the *Memorandum Opinion and Order* apply to commercial and noncommercial television stations. There are approximately 1,304 existing commercial television stations and 374 existing noncommercial television stations of all sizes that may be affected by the digital television rules addressed in the *Memorandum Opinion and Order*.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *Memorandum Opinion and Order* directs the FCC’s Mass Media Bureau to issue a standard form (FCC Form 337) to be used to apply for an extension of time to construct a DTV station. We estimate that it will take applicants 1 hour and 30 minutes to complete the form

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹¹²

We made a number of determinations in the *Report and Order* that we believed would further progress on the transition from analog to digital television. Among other things, we established a deadline of December 31, 2003 by which commercial television stations that have both their NTSC and DTV operations on in-core channels must elect which of their two core channels to use for DTV operations after the transition. We gave non-commercial stations that have both their NTSC and DTV operations on in-core channels until the end of 2004 to elect their post-transition DTV channel. We determined that this early channel election would allow us to identify more quickly channels that will be available to accommodate DTV licensees with out-of-core transition channels as well as new entrants. In addition, to provide broadcasters with an incentive to provide full replication of NTSC coverage with DTV service, we determined that, after December 31, 2004, whatever portion of a commercial broadcaster’s NTSC Grade B contour is not replicated with its digital television signal will cease to be protected in the DTV Table of Allotments. Noncommercial DTV licensees were given until December 31, 2005 in which to replicate or lose such DTV interference protection.

¹¹⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

¹¹¹ 13 C.F.R. § 121.201 (SIC Code 4833).

¹¹² 5 U.S.C. § 603(c)(1)-(4).

Upon further consideration, we determine in the *Memorandum Opinion and Order* that the channel election and replication requirements may be imposing substantial burdens on broadcasters, and especially on smaller stations, without sufficient countervailing public benefits, and may in fact be contributing to difficulties faced by a substantial number of stations, particularly smaller stations, in meeting their DTV construction deadlines. A survey conducted by NAB indicates that slightly less than one-third of all stations responding to the NAB survey anticipate that they will not be able to provide a digital signal by the May 2002 deadline. A larger percentage (81.9%) of responding stations in the top 50 markets (larger market stations) anticipate that they will meet the deadline, while a smaller percentage (49.1%) of stations in markets 100 and above (smaller-market stations) indicated they will complete construction on time. Three-quarters of those stations that do not anticipate meeting the May 2002 deadline indicated they plan to seek an extension of this deadline from the FCC. Generally, smaller market broadcasters that filed petitions in this proceeding assert that they are unable to obtain financing to construct DTV facilities sufficient to replicate their analog service area. These broadcasters also claim that they will not have sufficient operational experience by December 2004 to determine which core channel is superior for DTV transmission. Broadcasters that are not capable of constructing full replication facilities by the deadline established in the *Report and Order* may be postponing construction altogether.

Upon reconsideration, we decide in the *Memorandum Opinion and Order* to allow stations to construct initial DTV facilities designed to serve at least their communities of license, while still retaining DTV interference protection to provide full replication until such deadline as the Commission shall establish in its next periodic review of the progress of the DTV transition. Thus, we temporarily defer both the replication protection and channel election deadlines we established in the *Report and Order*. In our next periodic review of the progress of the DTV transition, the Commission intends to establish a firm date by which broadcasters must either replicate their NTSC service areas or lose DTV service protection of the unreplicated areas, and by which broadcasters with two in-core allotments must elect which channel they will use post-transition. These replication protection and channel election deadlines may be earlier than but will in no event be later than the latest of either the end of 2006 or the date by which 85% of the television households in a licensee's market are capable of receiving the signals of digital broadcast stations. In order to provide parity to analog UHF stations, many of which are smaller stations, we will also allow stations to construct initial facilities that serve their principal communities while retaining DTV interference protection to their maximized service areas until the maximization deadline to be established by the Commission in its next periodic review. This alternative significantly reduces the costs associated with constructing and operating initial DTV facilities as compared to the requirements adopted in the *Report and Order*.

In contrast, the Commission could have retained its channel election and replication protection deadlines established in the *Report and Order*. However, we have determined that those deadlines may be too burdensome, and that the Commission should reexamine what deadlines are appropriate in its next periodic review in light of the record developed in the interim regarding the progress of the DTV transition. The alternative selected herein works to benefit smaller stations by facilitating their compliance with the May 1, 2002 (commercial) and May 1, 2003 (noncommercial) construction deadlines.

The *Memorandum Opinion and Order* also allows stations required to construct and operate DTV facilities by May 1, 2002 or May 1, 2003 to operate initially in digital format at a reduced schedule by providing, at a minimum, a digital signal during prime time hours, consistent with their simulcast

obligations.¹¹³ This alternative also significantly reduces the costs associated with initial operation of DTV facilities for these smaller stations. In contrast, the Commission could have retained the requirement for these stations that they operate in digital format whenever they transmit in analog format, greatly increasing their costs. Although the Commission considered reducing the minimum operating hours for all digital stations, we believe that the prime time obligation adopted in the *Memorandum Opinion and Order* for smaller stations appropriately balances our concern to reduce the burden on these broadcasters where possible with our goal of furthering progress in the transition to digital broadcasting.

In addition, in the *Memorandum Opinion and Order* we modify our guidelines for television stations that may seek an extension of the DTV construction deadlines. In the *Fifth Report and Order*, we announced our willingness to grant, on a case-by-case basis, an extension of the applicable DTV construction deadline where a broadcaster has been unable to complete construction due to circumstances that are either unforeseeable or beyond the permittee's control, provided the broadcaster has taken all reasonable steps to resolve the problem expeditiously. We indicated that such circumstances include, but are not limited to, the inability to construct and place in operation a facility necessary for transmitting DTV, such as a tower, because of delays in obtaining zoning or FAA approvals, or similar constraints, or the lack of equipment necessary to transmit a DTV signal.¹¹⁴ We stated explicitly that we did not anticipate that the circumstances of "lack of equipment" would include the cost of such equipment.

As indicated by a number of petitioners and commenters, we recognize that some broadcasters, despite their reasonable good faith efforts, may not be in a financial position to timely complete the construction of their DTV facilities. Many stations are finding it difficult to obtain the substantial sums required to construct digital television facilities. Many stations are also experiencing decreasing revenues in part as a result of the slowdown in the overall economy, which has slowed even further in the wake of the events of September 11, 2001. We also recognize that, particularly for stations in smaller markets, the capital costs of conversion may be very high relative to the station's anticipated revenue. As a result, stations with lower revenues may find it more difficult to cover these costs in time to meet the construction deadline.

For some broadcasters, these financial obstacles may be alleviated by the reduced initial build-out requirements adopted in the *Memorandum Opinion and Order*. Other broadcasters, however, may be unable, for purely financial reasons, to complete construction of even these minimum permitted facilities by the May 1, 2002 deadline. Accordingly, in the *Memorandum Opinion and Order* we determine that we will consider, on a case-by-case basis, in addition to the extension criteria outlined in the *Fifth Report and Order*, whether a broadcaster should be afforded additional time to construct its DTV facilities because the cost of meeting the minimum build-out requirements exceeds the station's financial resources. This new waiver standard should be particularly beneficial to smaller market broadcasters and those with fewer resources.

This relaxation of our extension standard will benefit small entities by giving additional leeway to stations in smaller markets that need more time to construct because of their lower revenues. By permitting these

¹¹³ See 47 C.F.R. § 73.624(b) (as revised in Appendix A). Commencing April 1, 2003, DTV television licensees and permittees are required to simulcast 50 percent of the video programming of the analog channel on the DTV channel. This requirement steps up to a 75% simulcast requirement in April 2004, and a 100% requirement in April 2005. 47 C.F.R. § 73.624(f). To the extent a station's simulcast obligations exceed the minimum digital video programming requirement in Section 73.624 of our rules, the simulcast obligation will govern.

¹¹⁴ *Fifth Report and Order*, 12 FCC Rcd 12809 at ¶ 77. The Chief of the Mass Media Bureau has delegated authority to grant up to two extension requests of six months each beyond the applicable construction deadline if the extension standard is met. Subsequent extension requests must be referred to the Commission. *Id.*

stations to delay the transition for a brief period of time, they will be able to spread the large investments needed to convert over more years. By delaying the transition for a short period for those stations that face the greatest financial challenges, these stations may also benefit from further progress overall in the transition, including greater consumer demand for digital television signals and greater advertising revenue.

We considered but declined in the *Memorandum Opinion and Order* to issue a blanket extension of the remaining DTV construction deadlines. It appears that more than two-thirds of commercial stations will be on the air in digital format by May 2002. Thus, there is substantial evidence that the conversion is progressing and that television stations are working hard to construct digital facilities. In view of the number of stations that have already made a commitment to complying with our deadlines and that have made a substantial investment in conversion, we do not believe that a blanket extension of the remaining deadlines is appropriate. Further, given the reduced build-out requirements we adopt herein, and the clear additional protection we will afford stations, including smaller stations, meeting these requirements, we believe that many of the stations that did not anticipate meeting the deadline will now be able and willing to do so.

Report to Congress

The Commission will send a copy of the *Memorandum Opinion and Order*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.¹¹⁵ In addition, the Commission will send a copy of the *Memorandum Opinion and Order*, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Memorandum Opinion and Order* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.¹¹⁶

¹¹⁵ See 5 U.S.C. § 801(a)(1)(A).

¹¹⁶ See 5 U.S.C. § 604(b).

**SEPARATE STATEMENT
OF COMMISSIONER MICHAEL J. COPPS**

*In the Matter of: Review of the Commission's Rules and Policies
Affecting the Conversion to Digital Television*

The Commission's decision today strikes a balance between moving the digital transition along on schedule and providing a measure of flexibility to stations as they build and upgrade their digital facilities within that time frame.

Pursuant to a Congressional directive, the FCC several years ago implemented an ambitious schedule for the transition to digital television. Many of the nation's television broadcasters have done a commendable job of getting their DTV stations up and running in accordance with that schedule. The NAB has reported that as many as two thirds of the nation's commercial television stations will be on the air with a digital signal by May of 2002.

Nevertheless, it appears that certain stations – particularly stations in smaller television markets – are facing costs that make it difficult if not impossible for them to meet the May deadline. Some of those costs may be related to the need for maximization of their digital signals and replication of their analog signal areas by upcoming deadlines. In order to minimize the immediate impact of those costs, we will defer the maximization and replication deadlines, and will set new deadlines that in no case will be later than the deadline for digital conversion prescribed by Congress. I am pleased that this Order so strongly reaffirms this deadline.

For those stations facing unexpected financial obstacles, not relieved by the deferral of the maximization and replication deadlines, and despite their good faith attempts to meet the May 2002 construction deadline, we will consider waiver applications. We will permit individual stations to apply on a case-by-case basis for six-month waivers of the May deadline due to lack of financial resources. I do not expect that stations will apply for these waivers absent genuine hardship, nor that the Bureau will grant them without such showing.

Finally, I am pleased that the Commission did not travel down the path of issuing a general waiver. That would have been unfair to those who are moving toward full performance and it would have been too lenient on those less far along.