

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

In the Matter of)
)
Implementation of the DTV Delay Act) MB Docket No. 09-17
)

REPORT AND ORDER AND *SUA SPONTE* ORDER ON RECONSIDERATION

Adopted: February 13, 2009

Released: February 13, 2009

By the Commission:

I. INTRODUCTION

1. In this Report and Order, the first in response to the Congressional extension of the digital television (DTV) transition period, we extend the analog license terms and adjust the construction permits for the full power television stations subject to the DTV Delay Act that was enacted into law on February 11, 2009.¹ In the DTV Delay Act, Congress extended the date for the completion of the nationwide DTV transition from February 17, 2009 to June 12, 2009. As a result, after June 12, 2009, full-power television broadcast stations must transmit only digital signals, and may no longer transmit analog signals except for limited analog “nightlight” service.² Congress extended the transition date in order to permit analog service to continue until consumers have had additional time to prepare.³ The DTV Delay Act directs the Commission to take any actions “necessary or appropriate to implement the provisions, and carry out the purposes” of the DTV Delay Act, and to do so within 30 days.⁴ This Report

¹ See DTV Delay Act, Pub. L. No.111-4, 123 Stat. 112 (2009). On February 11, 2009, the DTV Delay Act was signed by the President and enacted into law. The DTV Delay Act was passed by the United States Senate on January 29, 2009 and passed by the United States House of Representatives on February 4, 2009. The Commission also has issued a number of public notices to facilitate Congress’s postponement of the DTV transition deadline. See Public Notice, “FCC Requires Public Interest Conditions for Certain Analog TV Terminations on February 17, 2009,” FCC 09-7 (rel. Feb. 11, 2009) (*February 11 Public Notice*); Public Notice, “FCC Announces Procedures Regarding Termination of Analog Television Service On or After February 17, 2009,” FCC 09-6 (rel. Feb. 5, 2009) (*February 5 Public Notice*).

² The DTV Delay Act (to be *codified at* 47 U.S.C. §§ 309(j)(14) and 337(e)), amends Section 309(j)(14) of the Communications Act to establish June 12, 2009 as the new nationwide deadline for the end of analog transmissions by full-power stations. 47 U.S.C. § 309(j)(14)(A) (“A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond June 12, 2009.”). See also 47 U.S.C. § 337(e)(1) (“Any full-power television station licensee that holds a television broadcast license to operate between 698 and 806 megahertz may not operate at that frequency after June 12, 2009.”). See also the Short-term Analog Flash and Emergency Readiness Act, Pub. L. No.110-459, 122 Stat. 5121 (2008) (“*Analog Nightlight Act*”).

³ See, e.g., Cong. Rec. H895 (daily ed. February 4, 2009).

⁴ DTV Delay Act § 4(c). In addition, the DTV Delay Act amends the Digital Television and Public Safety Act of 2005 (“DTV Act”), Pub. L. No. 109-171, 120 Stat. 4 (2006), to direct the Commission to “take such actions as are necessary (1) to terminate all licenses for full-power television stations in the analog television service, and to (continued....)

and Order also delegates authority to the Media Bureau to rule on stations' filings regarding termination of analog service on February 17, 2009. We intend to follow up quickly with additional rulemakings as needed. Finally, we adopt a *Sua Sponte Order on Reconsideration* to make a minor adjustment to the Public Notice released on February 5, 2009, and to the conditions adopted in the Public Notice released on February 11, 2009.

II. DISCUSSION

2. Initially, we conclude that the actions herein are not subject to the rule making requirements of the Administrative Procedure Act⁵ or any other provision of law that otherwise might apply but would impede implementation of the DTV Delay Act. The Act directs the Commission to postpone the DTV transition date from February 17 to June 12, 2009, and provides that, “[n]otwithstanding any other provision of law,” the FCC must “adopt or revise its rules, regulations, or orders or take such other actions as may be necessary or appropriate to implement the provisions, and carry out the purposes, of this Act and the amendments made by this Act” within 30 days of the date of its enactment.⁶ The “notwithstanding” clause plainly excuses compliance with otherwise applicable legal requirements that would impede implementation of the DTV Delay Act by the statutory deadline.⁷ Even if the clause were ambiguous, we would interpret it to exempt the Commission from APA and other requirements that cannot be reconciled with the statutory deadline.⁸ The actions herein are necessary and appropriate to implement the DTV Delay Act and carry out its purposes, and must be accomplished before February 17, 2009, so that the effective deadline for our actions here is less than three business days. Because compliance with the APA and other requirements would frustrate our ability to meet that deadline, we conclude that our actions herein are exempt from such requirements. Moreover, we find that there is good cause for departure from the APA requirements of notice and comment and a 30-day delay before rules become effective.⁹ Again, with regard to the actions here, the effective deadline for

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require the cessation of broadcasting by full-power stations in the analog television service, by June 13, 2009; and (2) to require by June 13, 2009, ... all broadcasting by full-power stations in the digital television service, occur only on channels between channels 2 and 36, inclusive, or 38 and 51, inclusive (between frequencies 54 and 698 megahertz, inclusive).” 47 U.S.C.A. § 309 Note.

⁵ 5 U.S.C. §§ 551, *et seq.* (APA).

⁶ DTV Delay Act § 4(c).

⁷ In other contexts, the D.C. Circuit has interpreted similar “notwithstanding” language “to supersede all other laws, stating that ‘a clearer statement is difficult to imagine.’” *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (internal cites omitted).

⁸ *See, e.g., Verizon Comm’ns, Inc. v. FCC*, 535 U.S. 467, 539 (2002) (under *Chevron* doctrine, courts generally defer to an agency’s reasonable interpretation of an ambiguous provision in its enabling statute). *Cf. Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) (“when Congress sets forth specific procedures that ‘express its clear intent that APA notice and comment procedures need not be followed, an agency may lawfully depart from the normally obligatory procedures of the APA’”), *quoting Methodist Hospital of Sacramento v. Shalala*, 38 F.3d 1225, 1235 (1994). The D.C. Circuit upheld agency findings that the APA did not apply in the absence of express exemptions in *Asiana* and *Methodist*, despite an APA provision that modifications must be express, because the statutes specified procedures that could not be harmonized with the APA.

⁹ *See* 5 U.S.C. §§ 553(b)(3)(B) (notice and comment not required “when the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”), 553(d)(1) (exception to 30-day waiting period for a rule’s effectiveness where agency finds good cause and publishes finding with the rule). *See also* 5 U.S.C. § 608 (agency “may waive or delay the completion of some or all of the [initial regulatory flexibility analysis] requirements ... by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding ... that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance ... impracticable.”).

Commission action is less than three business days.¹⁰ Our actions are of an interim nature, in that they will no longer be in force after June 13, 2009,¹¹ and are largely ministerial, because they simply extend deadlines tied to the original DTV transition date of February 17, 2009 to the new statutory date.¹² Accordingly, even if our actions are subject to the APA, we find that there is good cause for departure from APA requirements.

A. Licenses and Construction Permits Extended Until New Transition Date

3. By this Order, and pursuant to the authority set forth in the DTV Delay Act,¹³ we hereby revise and extend the following dates related to full-power broadcast television stations' licenses and construction permits: (1) the date of termination for a station's analog license is extended from February 17, 2009 to June 12, 2009 (11:59:59 pm local time);¹⁴ (2) the construction permit deadline to construct a station's full-authorized post-transition (DTV) facility is extended from February 17, 2009 to June 12, 2009 (11:59:59 pm local time);¹⁵ and (3) the date on which a station can commence operation of a facility authorized for post transition service without further Commission authorization is extended from 12:00 am February 18, 2009 to 12:00 am June 13, 2009 (local time). Absent the extensions granted in this Report and Order, existing authorizations to provide analog broadcast service and to construct replacement digital facilities will expire on the former transition date and a gap in service would occur beginning on February 18th. This would directly contravene the purpose of the DTV Delay to afford viewers more time in which to prepare for the digital transition.

4. We remind stations that they may complete construction of their post-transition digital facilities before June 12 at 11:59:59 pm, but may not operate such facilities before 12:00 am June 13, 2009 (local time) without express Commission approval because operation of a facility that has been authorized for post-transition but not pre-transition service could cause impermissible interference to pre-transition broadcasting. Therefore, stations that wish to operate a post-transition facility before 12:00 am June 13, 2009 (local time) must request special temporary authority (STA) from the Commission via the "DTV engineering STA," including the appropriate engineering analysis.¹⁶

¹⁰ The D.C. Circuit has held that "the extremely limited time given by Congress" to an agency for adoption of regulations "is a crucial factor in establishing 'good cause'" under the APA. *Id.* at 1200-01 (upholding agency finding of good cause to adopt interim rule without notice and comment where statute directed agency to promulgate implementing regulations "[n]ot later than 60 days after the date of enactment").

¹¹ See *American Federation of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (good cause existed to issue new rates effective immediately without notice and comment but not to make them permanent).

¹² See *Metzenbaum v. FERC*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (agency orders that were nondiscretionary ministerial actions issued in conformity with statute were properly issued without notice and comment).

¹³ See DTV Delay Act § 2 and 4(c).

¹⁴ A number of stations are operating with reduced analog facilities pursuant to special temporary authority, based upon a showing that the service reduction was directly related to the construction and operation of their post-transition facilities. We also extend the date of termination for these STAs from February 17, 2009 to June 12, 2009 (11:59:59 pm local time). Similarly, we extend the date of termination for stations operating pre-transition digital facilities pursuant to STAs which currently terminate on February 17th to June 12, 2009 (11:59:59 pm local time).

¹⁵ We note that the *Third DTV Periodic Report and Order* established certain construction deadlines, rules and procedures for requesting and obtaining extensions for build-out of digital facilities. See *Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07-91, Report and Order, 23 FCC Rcd 2994, 3014-42, ¶¶ 37-97 (Section V.B.) (2007) ("*Third DTV Periodic Report and Order*"). We will address these deadlines, rules, and procedures if and as necessary in subsequent proceedings.

¹⁶ See *id.*

B. February 11 Public Notice**1. Delegated Authority to Consider Waiver Reinstatement**

5. We hereby delegate authority to the Media Bureau to determine whether showings submitted in response to the Commission's February 11, 2009 Public Notice justify reinstatement of the conditional waiver necessary to terminate analog service on February 17, 2009.¹⁷ The *February 11 Public Notice* reconsidered the partial waiver granted in an earlier Public Notice with regard to a number of stations intending to terminate analog service on February 17, 2009, based on the conclusion that termination by such stations poses a significant risk of substantial public harm.¹⁸ The stations in question, which are listed in the Appendix to the *February 11 Public Notice*, may not terminate analog service on February 17 unless they obtain reinstatement of the waiver of the procedures set forth in the *Third DTV Periodic Report and Order* by (1) making certain certifications by February 13 or (2) by showing "that extraordinary, exigent circumstances, such as the unavoidable loss of their analog site or extreme economic hardship, require that they terminate their analog service on February 17th."¹⁹ A station electing to submit such a showing (as opposed to a station making a self-effectuating certification) "must await a determination by the Commission that its showing is sufficient before terminating analog service." The Commission stated in the *February 11 Public Notice* that we would try to make such determinations before February 17th.²⁰ Accordingly, and to expedite such determinations, we delegate authority to the Media Bureau to make the required determinations and notify stations of the results.

2. Sua Sponte Reconsideration**a. February 5 Public Notice**

6. By this Order we reconsider the limitation adopted in the *February 5 Public Notice* that stated: "We expect that stations indicating their intent to terminate their analog service on February 17 will do so. Therefore, as a condition of the waiver granted herein, the Commission will not permit stations to withdraw or modify these notifications except in the event of emergency or disaster necessitating the continued operation of analog service. The analog operations of stations submitting notification of intent to terminate analog service on February 17, 2009 pursuant to this Public Notice will no longer be protected from interference after February 17, 2009."²¹ Some stations that were not on the Appendix to the *February 11 Public Notice* have expressed interest in withdrawing their notifications for good reasons associated with circumstances in their markets, but not rising to the level of an "emergency or disaster." We find that it is in the public interest to allow stations to withdraw their notifications of intent to terminate analog service on February 17, 2009.

7. Due to the limited period of time remaining before February 17th, stations that wish to withdraw their notifications must notify us no later than 6:00 pm EST on Sunday, February 15, 2009. Stations should send an email to: Barbara.Kreisman@fcc.gov and place "Withdrawal of Termination Notification" in the subject line.²² Stations should also revise their "Viewer Notifications" to reflect their change in plans as soon as possible.

¹⁷ *February 11 Public Notice*.

¹⁸ *Id.* at 2. See also *February 5 Public Notice*.

¹⁹ *Id.* at 5.

²⁰ *Id.*

²¹ *February 5 Public Notice*, at 8-9.

²² Stations listed in the Appendix to the *February 11 Public Notice* that have chosen not to terminate their analog service will so indicate by 6:00 pm EST on Friday, February 13, 2009 on the form described in footnote 10 to the *February 11 Public Notice*; they should not and need not send notifications to this e-mail address.

b. February 11 Public Notice

8. By this Order, we also reconsider and make a minor adjustment to one of the conditions set forth in the *February 11 Public Notice*.²³ The third condition stated, in relevant part: “Ensure that enhanced nightlight service concerning the DTV transition or emergency information will be provided in Spanish and English and accessible to the disability community . . .” Some stations have maintained that they do not have the capability of translating emergency information into Spanish. We also note that neither our rules nor the Analog Nightlight Act require emergency information in Spanish;²⁴ rather the Analog Nightlight Act requires only that information concerning the DTV transition be provided in both English and Spanish.²⁵

9. We recognize the value and importance of ensuring that emergency information is available in Spanish for many viewers. However, we do not wish to prevent stations that can otherwise comply fully with the eight public interest conditions set forth in the *February 11 Public Notice* from doing so and proceeding with their analog termination, as provided in the *February 11 Public Notice*. Therefore, we will not require stations to provide emergency information in Spanish if the station does not otherwise provide Spanish language programming. We certainly encourage stations to broadcast emergency information in Spanish or other languages as needed by their viewers. The requirement for DTV transition information in Spanish remains in place.

C. Additional Information

10. For additional information, contact Evan Baranoff, Evan.Baranoff@fcc.gov, of the Media Bureau, Policy Division, at (202) 418-7142.

III. ORDERING CLAUSES

11. IT IS ORDERED that, pursuant to the authority contained in Sections 4, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, and Sections 2 and 4(c) of the DTV Delay Act, DTV Delay Act §§ 2, 4(c), this Report and Order IS ADOPTED.

12. IT IS ALSO ORDERED, pursuant to the authority contained in Section 4(c) of the DTV Delay Act, DTV Delay Act § 4(c), the actions herein are effective upon release of this Report and Order. As discussed above, the actions herein must be effective no later than February 17, 2009 at 11:59:59 p.m. to avoid a gap in analog broadcast service that would harm viewers and directly contravene the purposes of the DTV Delay. The Commission is releasing this Report and Order on Friday, February 13, 2009, only two days after the DTV Delay Act’s enactment on February 11, 2009, and the last business day before February 17, 2009 (Monday, February 16 is a federal holiday). As a result, we find that there is good cause to make the actions herein effective today upon release of this Report and Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²³ See *February 11 Public Notice*, at 4.

²⁴ See Section 2(b) of the *Analog Nightlight Act*, *supra* note 2; see also *Implementation of Short-term Analog Flash and Emergency Readiness Act; Establishment of DTV Transition “Analog Nightlight” Program*, MB Docket No. 08-255, Report and Order, FCC 09-2 at ¶¶ 28-29 and 36 (rel. Jan. 15, 2009) (“*Analog Nightlight Order*”).

²⁵ *Id.* We also urge stations to provide DTV transition information in other languages as appropriate for their viewers. *Id.* at ¶ 29.