

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

In the Matter of )
)
Amendment of Parts 73 and 74 of the ) MB Docket No. 03-185
Commission's Rules to Establish Rules for Digital )
Low Power Television, Television Translator, and )
Television Booster Stations and to Amend Rules )
for Digital Class A Television Stations )

SECOND MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2013

Released: September 27, 2013

By the Commission:

I. INTRODUCTION

1. In its Second Report and Order, the Commission adopted final rules to ensure a timely and successful completion of the low power television digital transition. Eight parties filed petitions for reconsideration of the Second Report and Order. In this Second Memorandum Opinion and Order, we grant Hammett and Edison, Inc.'s and National Public Radio's petitions to the extent that they each seek clarification of our policy with respect to protection of noncommercial educational FM radio stations by low power television stations, and otherwise deny those filings and dismiss or deny, as appropriate, the remaining six petitions for reconsideration.

II. DISCUSSION

A. September 1, 2015 Transition Date

2. In the Second Report and Order, the Commission adopted a September 1, 2015 deadline for low power television stations to complete their transition to digital. The Commission concluded that adoption of a September 1, 2015 date for the termination of all analog low power television service will ensure a successful completion of the digital transition. Signal, the licensee of two low power television

1 Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, Second Report and Order, 26 FCC Rcd 10732 (2011)(Second Report and Order).

2 In this item, Class A TV stations, low power television stations (referred to separately as "LPTV"), and TV translators, are referred to collectively as "low power television stations."

3 A full list of all pleadings filed in this proceeding and short-hand abbreviations for all parties are included in the Appendix. We note that the law firm of Cohn and Marks filed its August 5, 2011 Petition for Reconsideration and Clarification, as well as a January 7, 2013 Request for Commission Action on Petition for Reconsideration and March 21, 2013 Supplement to Request for Commission Action on Petition for Reconsideration, on behalf of Channel 51 of San Diego, Inc., and filed its December 8, 2011 Reply and December 13, 2011 Supplement in the name of the firm, on behalf of its clients that are LPTV permittees. In the interest of simplicity, we will refer to Cohn and Marks as the proponent of all of these filings.

4 Second Report and Order, 26 FCC Rcd at 10736.

5 Id.

stations operating on channel 6 that are essentially used like radio stations,<sup>6</sup> revisits its prior arguments from its comments in this proceeding. Specifically, it argues that no hard DTV conversion deadline is necessary “or that at the very least any deadline should be fixed to the later of September 1, 201[5] or twelve months after final adoption of a Broadband Plan.”<sup>7</sup> Signal asserts that “[i]mposing an arbitrary DTV deadline for analog LPTV stations will penalize the efficient and innovative use of spectrum the Commission is committed to fostering, and it will gratuitously and seriously erode existing public broadcasting services, especially to underserved communities, with no compelling need or countervailing justification.”<sup>8</sup> Signal argues further that work on the Broadband Plan may not be complete by the September 1, 2015 transition date and that low power operators may be required “to build out digital facilities twice or build a digital facility only to find it cannot be operated at all.”<sup>9</sup>

3. The Commission considered and rejected Signal’s arguments in the *Second Report and Order*.<sup>10</sup> In doing so, it cited several reasons to justify adoption of September 1, 2015 as the firm deadline by which the LPTV transition should be completed, “regardless of [the] status of the *Broadband Innovation* proceeding in 2015.”<sup>11</sup> First, the Commission concluded that “[w]ith the full power transition now complete, and a vast majority of viewers thus able to receive digital broadcasts, we believe it is appropriate to require low power television stations to complete their transition to digital.”<sup>12</sup> Second, the Commission found that “[e]ven if the reallocation is not concluded before the conversion deadline, a 2015 deadline [would] permit low power operators to take specific proposals into account when finalizing their transition plans.”<sup>13</sup> Third, the Commission reasoned that the September 1, 2015 transition date would “also be further removed from the prolonged economic downturn that began in late 2007, and [would] provide . . . time for operators to secure the necessary funding.”<sup>14</sup> Fourth, the Commission decided that a “hard transition date [would] ensure that the benefits of digital technology are realized without further delay.”<sup>15</sup> Finally, the Commission concluded that “a transition date of September 1, 2015 [would] allow low power television stations to have better understanding of the overall spectrum landscape when determining their final transition plan while ensuring a date by which analog spectrum must be put to a more efficient digital use.”<sup>16</sup> Given that Signal offers no new arguments to support its request for a “soft” transition<sup>17</sup> other than the ones the Commission considered—and rejected—in the *Second Report and*

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<sup>6</sup> Signal Petition at 4 (explaining that Signal’s analog television broadcast on Channel 6 can be received by radios tuned to 87.7 FM).

<sup>7</sup> Signal Petition at 1 and Erratum at 1. Signal does not explain what exactly “final adoption of a Broadband Plan” means, but as explained below, we do not believe that any extension of the transition deadline is warranted.

<sup>8</sup> Signal Petition at 1-2.

<sup>9</sup> *Id.*

<sup>10</sup> *Second Report and Order*, 26 FCC Rcd at 10738, n. 22 (citing Signal Comments at 5).

<sup>11</sup> *Id.* at 10737-38. The Commission subsequently began a proceeding to consider rules for the incentive auction and the repacking of television channels including those used by low power television stations. See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Notice of Proposed Rulemaking, Docket No. 12-268, 27 FCC Rcd 12357 (2012) (*Incentive Auction NPRM*).

<sup>12</sup> *Id.* at 10736.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 10739.

<sup>17</sup> NPR notes this deficiency in Signal’s Petition and argues that the Commission should dismiss its Petition pursuant to Section 1.429(l) as procedurally defective given that the Petition relies “on arguments that have been fully considered and rejected by the Commission within the same proceeding.” NPR Opposition at 5-6, citing 47 C.F.R. § 1.429(l).

*Order*, we dismiss its petition for reconsideration.<sup>18</sup> Additionally, we find that Signal's interest in continuing to use its analog television stations to broadcast radio signals does not justify postponing the entire low power television transition.

4. We base our decision on the record compiled in this proceeding. We note that, since the release of the *Second Report and Order*, Congress authorized the Commission to conduct an incentive auction and to reclaim broadcast television spectrum,<sup>19</sup> and the Commission has initiated a proceeding to implement that authority.<sup>20</sup> Our decision today is made without prejudice to the Commission's ability to consider making adjustments to the timing of the low power television transition in that proceeding as the Commission develops the schedule for holding the incentive auction and implementation of the subsequent repacking.

#### **B. December 31, 2011 "Out-of-Core" Transition Date**

5. In the *Second Report and Order*, the Commission established December 31, 2011, as the date by which all low power television stations must cease all operations (both analog and digital) on channels 52-69 (the "out-of-core" channels).<sup>21</sup> In support of this date, the Commission cited the fact that stations with out-of-core channel facilities were given fourteen years of advance notice that they would have to clear the band.<sup>22</sup> In addition to abundant notice, the Commission found that "out-of-core operators wanting and able to move to an in-core channel have had sufficient time to begin the process."<sup>23</sup> Finally, the Commission found that "continued use of 700 MHz channels by low power television stations beyond the end of [2011 would] interfere with the prompt initiation of new wireless service on these channels by commercial wireless and public safety entities."<sup>24</sup>

6. In addition, the Commission required all low power television stations with out-of-core facilities that had not already done so to submit a digital displacement application proposing an in-core channel no later than September 1, 2011.<sup>25</sup> The Commission made clear that a station that failed to submit the required displacement application by the September 1, 2011 deadline would be required to cease operation of its out-of-core facility by December 31, 2011 and would lose its authorization.<sup>26</sup> The Commission provided that stations could seek a waiver of the September 1, 2011 application filing deadline; however, all out-of-core operations were required to cease by December 31, 2011.<sup>27</sup>

7. As it did in its comments filed in the underlying rulemaking proceeding, NTA, a trade association that represents TV translator stations, argues in its petition for reconsideration that the December 31, 2011, final date for operation of an analog out-of-core LPTV or TV translator station is "unworkable" and "enforcement of this deadline will have a serious adverse impact on the public."<sup>28</sup>

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<sup>18</sup> See 47 C.F.R. §1.429(l)(3).

<sup>19</sup> See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012).

<sup>20</sup> See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Notice of Proposed Rulemaking*, 27 FCC Rcd 12357 (2012).

<sup>21</sup> *Second Report and Order*, 26 FCC Rcd at 10744.

<sup>22</sup> *Id.* at 10743.

<sup>23</sup> *Id.* at 10744.

<sup>24</sup> *Id.* at 10745. See also CTIA Opposition at 5 ("numerous commercial and public safety wireless operators have emphasized the harm they would suffer if LPTV stations are not required to vacate the 700 MHz spectrum").

<sup>25</sup> *Id.* at 10749.

<sup>26</sup> *Id.* at 10750.

<sup>27</sup> *Id.* at n. 101.

<sup>28</sup> NTA Petition at 2. See also NTA Comments filed in MB Docket No. 03-185 at 3-4.

NTA maintains that “a very workable procedure has been in effect for several years – [w]hen a wireless operator who has purchased currently-occupied 700 MHz spectrum is ready to construct, all it needs to do is give 120 days’ notice to the incumbent. Either the translator changes channel or it goes off the air.”<sup>29</sup> Lake of Woods and Voyaguers, licensees of low power television stations with out-of-core analog facilities, filed petitions for reconsideration in August 2011 expressing concern about their ability to complete construction of their in-core facilities before the December 31, 2011 deadline.<sup>30</sup> C Spire and CTIA argued that the process of resolving interference to and from LPTV operations under the 120-day process would increase the cost and complexity of wireless service buildout and anticipated that any extension of the deadlines would impair commercial and public safety wireless licensees’ ability to meet their June 13, 2013 initial performance deadline.<sup>31</sup>

8. NTA filed a request for stay of both the September and December deadlines applicable to out-of-core low power operators.<sup>32</sup> In its August 2011 denial of this request,<sup>33</sup> the Media Bureau considered NTA’s arguments and concluded that NTA had failed to demonstrate the necessity of staying either of the deadlines.<sup>34</sup> We similarly find that NTA has failed to demonstrate that adoption of the December 31, 2011 deadline should be reconsidered.<sup>35</sup> The deadline was reasonable given the abundant notice given to out-of-core licensees of the need to vacate the 700 MHz band.<sup>36</sup> As the Commission noted in the *Second Report and Order*,<sup>37</sup> fourteen years ago, the *DTV Sixth Report and Order* identified the core DTV spectrum as consisting of those TV channels below Channel 52 and noted plans to recover channels above 52 for other uses.<sup>38</sup> Shortly thereafter, the Commission notified low power licensees operating on channels 60-69 that they would have to terminate operation on these channels because they were being reallocated for use by commercial wireless and public safety entities.<sup>39</sup> Likewise, in 2002 the

<sup>29</sup> NTA Petition at 4. *See also* 47 C.F.R. § 74.703(g).

<sup>30</sup> Lake of Woods Petition at 1 and Voyaguers Petition at 1.

<sup>31</sup> C-Spire Opposition at 7-8; CTIA Opposition at 6-10. C Spire also questions NTA’s assertions that many translator licensees would be unable to meet the deadlines because of difficulties obtaining up-front financing, equipment, or access to qualified engineers, given that licensees have had more than ten years to complete this process, and they assert that there is no guarantee that any financing difficulties could be overcome by extending the deadlines. C-Spire Opposition at 5-6.

<sup>32</sup> In its Petition, NTA indicates that, while it would also prefer a postponement of the September 1 deadline for filing applications for an out-of-core channel, it “can accept” that deadline, combined with the Commission’s consideration of requests to waive it. NTA Petition at 2.

<sup>33</sup> *See* Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, *Order*, FCC 26 Rcd 11227 (MB 2011)(*Stay Order*).

<sup>34</sup> To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>35</sup> *See* NPR Opposition at 4 (NTA’s petition relies “exclusively on arguments that were fully considered and expressly rejected by the Commission . . . and . . . summary Bureau dismissal of the Petitions is warranted”). *See also* CTIA Opposition at 11 (“NTA’s Petition merely recites arguments addressed and rejected by the Commission in the Second R&O, and offers no new facts in support of its position, the Commission should promptly deny it”).

<sup>36</sup> *See also* CSI Opposition at 3 (“LPTV and TV translators have had more than a decade to move to in-core channels”).

<sup>37</sup> *Second Report and Order*, 26 FCC Rcd at 10743-44.

<sup>38</sup> *DTV Sixth Report and Order*, 12 FCC Rcd 14588, 14608-09 (1997).

<sup>39</sup> *See* Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Report and Order*, 12 FCC Rcd 22953 (1997).

Commission notified low power operators of the Commission's intent to recover channels 52-59.<sup>40</sup> In January 2010, after the June 12, 2009 full power digital conversion date, the Video Division began sending letters to licensees of out-of-core channel stations advising them of the need to move to an in-core channel.<sup>41</sup> Then, in September 2010, the Commission released a *Further Notice* in this proceeding to propose an out-of-core transition date of December 31, 2011, –and proposed June 30, 2011 as the deadline for applications, which is earlier than the deadline that the Commission eventually adopted.<sup>42</sup> Thus, for many years out-of-core channel low power television broadcasters have known that their use of the 700 MHz band was authorized only on an interim basis, that their out-of-core facilities would ultimately be displaced by new wireless licensees, and that shortly after the completion of the full power digital conversion they would be forced to vacate these channels and find a permanent in-core channel.<sup>43</sup>

9. In addition to abundant notice, out-of-core operators wanting and able to move to an in-core channel have had sufficient time to begin the process. They had nearly two years since completion of the full power digital transition to find an in-core channel among spectrum surrendered by full power stations, at least a year since receiving a letter from the FCC warning of the need to move to an in-core channel, and at least nine months from the release of the *Further Notice* indicating the need to move imminently. Furthermore, the Commission afforded out-of-core stations special relief to assist in the last-minute construction of their in-core facilities. For example, the Commission gave out-of-core stations priority processing for their displacement applications filed by September 1, 2011, and permitted these stations to obtain an emergency STA to begin operating on their proposed in-core channel while they awaited processing of their displacement application. Additionally, the Commission permitted those that could not file their applications before September 1, 2011, to seek a waiver of that deadline.<sup>44</sup> Contrary to NTA's claim, our actions did not force hundreds of translator stations off the air.<sup>45</sup> For example, Lake of Woods and Voyaguers received a quick grant of their in-core channel applications, which enabled both to complete construction and begin operating their new facilities prior to the December 31, 2011 transition date. Indeed, the staff worked hand-in-hand with out-of-core stations to ensure that all stations that

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<sup>40</sup> See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

<sup>41</sup> The letter warned stations that “the Commission will be taking steps this year to begin the process of clearing low power television (LPTV) and TV translator stations off of the 700 MHz band (television channels 52-69).” The letter continued that this “is an effort by the Commission to facilitate the deployment of new commercial wireless and public safety facilities on these channels. Although no deadline has been set for low power television stations to discontinue the use of 700 MHz channels, we urge you to begin the process of identifying an in-core channel (channels 2-51 excluding channel 37) and filing a displacement application as soon as possible. We appreciate your efforts to help clear the way for new uses on the 700 MHz band including the deployment of additional wireless broadband facilities.”

<sup>42</sup> See Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, *Further Notice*, 25 FCC Rcd 13833, 13841 (2010)(*Further Notice*).

<sup>43</sup> Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, *Report and Order*, 19 FCC Rcd 19331, 19354-60 (2004)(*Digital LPTV Report and Order*). See also CEA Comments at 10; AT&T Comments at 5; Elizabeth Trinkle Comments at 9.

<sup>44</sup> See CSI Opposition at 4 (“to the extent there are truly exception situations where public service would indeed suffer, C Spire agrees that the staff should be able to consider waivers”). See also NTA Reply at 2 (“NTA does, however, ask for extension of the deadline – if only on a limited, case-by-case waiver basis – in order to protect television service to the public”).

<sup>45</sup> Although approximately 275 station authorizations were cancelled following the December 31, 2011 deadline, it is not known which of these stations were forced to discontinue operations and which voluntarily chose not to transition to digital. In fact, approximately 150 of the 275 stations had in core digital authorizations and therefore appeared to have chosen not to transition.

wanted to transition were able to do so. Approximately 100 out-of-core channel stations never sought an in-core channel and the Commission consequently cancelled these stations' authorizations effective January 1, 2012. The problems with the out-of-core transition forecasted by NTA, Lake of Woods and Voyaguers did not come to fruition. Indeed, Lake of Woods and Voyaguers met both of the challenged deadlines after seeking reconsideration on the grounds that they would be unable to do so. Accordingly, we deny their petitions.

10. Further, the Commission's decision to set the December 31, 2011 deadline appropriately balanced the respective interests of LPTV and TV translator licensees, who had many years to find an out-of-core channel, with the Commission's interest in clearing the 700 MHz band for use by wireless licensees seeking to expedite the rollout of new services to consumers.<sup>46</sup> NTA has repeated arguments the Commission considered and rejected when it established the deadline.<sup>47</sup> Therefore, we dismiss NTA's petition for reconsideration.

### C. Construction Deadline for New Digital Low Power Television Stations

11. In addition to adopting September 1, 2015 as the deadline for all existing low power television stations to complete their transition to digital, the Commission in the *Second Report and Order* extended the expiration dates of all outstanding flash-cut and digital companion channel digital construction permits to coincide with the September 1, 2015 transition date.<sup>48</sup> Construction permits for new digital low power television stations, however, were not affected by this change and retained their original expiration date, which is set by rule to be three years from their issuance.<sup>49</sup>

12. The law firm of Cohn and Marks requests that the Commission reconsider its decision and extend the expiration date for all construction permits for new digital low power television stations to September 1, 2015.<sup>50</sup> Cohn and Marks contends that the same factors warranting an extension of the expiration date for outstanding digital construction permits tied to the digital transition justify extending the deadline for construction permits for new digital low power television facilities.<sup>51</sup> One Ministries requests that new digital low power television stations be granted three additional years to complete their facilities for a total six-year construction period.<sup>52</sup>

13. In its 2004 *Report and Order* establishing the rules for digital low power television, the Commission concluded that all digital low power television construction permits (including permits for new stations as well as transition-related permits for flash cut and digital companion channels) would be granted with a three-year construction period.<sup>53</sup> Subsequently, in the *Second Report and Order* in this proceeding, the Commission established a separate September 1, 2015 transition deadline for low power television stations transitioning from analog to digital and extended the expiration dates of outstanding

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<sup>46</sup> See *Second Report and Order*, 26 FCC Rcd at 10746-10748; see also C-Spire Opposition at 7-8.

<sup>47</sup> Moreover, its claim that the December 31, 2011 deadline would force hundreds of translator stations off the air did not in fact occur. See footnote 47.

<sup>48</sup> *Second Report and Order*, 26 FCC Rcd at 10740.

<sup>49</sup> *Id.* at 10740, n. 37 ("this change in expiration date applies only to digital construction permits for existing stations' flash-cut or digital companion channel facilities. Construction permits for new, digital-only facilities shall continue to be granted for a three-year term . . .").

<sup>50</sup> Cohn and Marks Petition at 1.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> One Ministries Petition at 1. One Ministries also requests that "digital LPTV operators on channel 6 be able to additionally provide an audio service on 87.7 MHz." *Id.* That issue was not previously raised, is outside of the scope of this proceeding and will not be considered.

<sup>53</sup> See *Digital LPTV Report and Order*, 19 FCC Rcd at 19388-19389. The Commission also established procedures and criteria by which stations could seek additional time within which to complete their construction. *Id.*

transition-related construction permits for flash cut and digital companion channels.<sup>54</sup> The Commission did not contemplate in this proceeding, nor did it seek comment on, whether to change the existing three-year construction period for new digital low power television stations. Rather, the Commission considered only whether to establish a separate transition deadline for stations converting to digital.<sup>55</sup> Therefore, permittees for new digital stations that do not have to transition from analog remain subject to the three-year construction period rule and must complete construction by their individual expiration dates.<sup>56</sup> As NPR notes, this should come as no surprise to permittees of new digital low power television stations as it has been the rule since 2004.<sup>57</sup> Cohn and Marks asks us to reconsider the applicability of the September 1, 2015 transition deadline to new LPTV permittees, a matter that was not proposed in the *Further Notice* and is therefore outside the scope of this proceeding. Cohn and Marks asks also that we clarify the types of circumstances that permittees for new digital low power television stations may rely upon when seeking an extension of their construction permits.<sup>58</sup> Cohn and Marks cites to the example of the Commission's incentive auction proceeding and the impact that repacking may have upon permits for new digital LPTV facilities.<sup>59</sup> Decisions on whether to grant an extension of a digital low power television construction permit are made on an individual basis, taking into account the permittees' particular facts and circumstances. Permittees desiring to rely on the Commission's ongoing incentive auction proceeding as a basis for the grant of an extension should make a showing based upon the criteria set forth in the rules and demonstrate in their extension application (i) how such circumstance has delayed their construction, (ii) how it was unforeseeable or beyond their control and (iii) how, despite this delay, they have taken all reasonable steps to resolve the problem expeditiously.<sup>60</sup> Because each extension application is evaluated on the facts specific to the case, we cannot say categorically, as Cohn and Marks requests, that extensions "based solely on the delay of the repacking finalization will suffice to satisfy the unforeseeable/beyond control standard."<sup>61</sup> We note, however, that the Media Bureau has granted extensions based, at least in part, on repacking considerations.<sup>62</sup> For the foregoing reasons, we deny the Cohn and Marks petition.

14. During the comment stage in this proceeding, One Ministries did not propose to change the Commission's rules to extend the construction period for new digital low power television stations from three to six years, which it belatedly urges in its Petition. Because One Ministries relies on facts and arguments not previously presented to the Commission, we dismiss its Petition.<sup>63</sup>

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<sup>54</sup> See *Second Report and Order*, 26 FCC Rcd at 10740.

<sup>55</sup> In the *Further Notice* in this proceeding, the Commission clearly stated that it was seeking comment on whether to establish a transition date for "the digital *conversion* of the remaining stations in the low power television service . . ." as well as how to address "hardship" cases for those stations that are "unable to make a timely *conversion*." *Further Notice*, 25 FCC Rcd at 13839-13840 (emphasis added).

<sup>56</sup> We note, however, that under our rules applicants for new digital low power television stations may seek an extension of the three-year construction deadline, upon making the proper showing, if they need additional time to construct. See 47 C.F.R. § 74.788. Many permittees for new digital stations have sought and been granted such relief.

<sup>57</sup> See NPR Opposition at 6 ("the 3-year period for constructing a new, digital-only facility is exactly what the permittee expected when it applied to construct the facility").

<sup>58</sup> Cohn and Marks Petition at 5.

<sup>59</sup> See *Incentive Auction NPRM*, *supra* n. 13.

<sup>60</sup> See 47 C.F.R. § 74.788.

<sup>61</sup> Cohn and Marks Petition at 5.

<sup>62</sup> See, e.g., File Nos. BEP-20130912AAF and BEP-20130912AAU-AAW.

<sup>63</sup> 47 C.F.R. § 1.429(l)(2).

**D. Protection of Noncommercial Educational FM Radio Stations**

15. In the *Second Report and Order*, the Commission modified its rules to permit digital low power stations “operating on VHF channels 2-13 to operate with up to 3 kilowatts of power, which is the maximum power such stations are permitted to operate with in analog.”<sup>64</sup> In its comments, NPR opposed this increase in power arguing that it “would increase the likelihood of additional interference to adjacent noncommercial educational (NCE) radio stations.”<sup>65</sup> The Commission disagreed with this concern, finding that because digital low power television stations are authorized on a secondary basis<sup>66</sup> “regardless of their power level, low power television stations are required to protect the first adjacent NCE radio stations if there is actual interference to these stations.”<sup>67</sup>

16. None of the parties filing pleadings in this proceeding challenged the decision to increase the maximum power for VHF low power television stations. Rather, NPR, a non-profit membership corporation that produces and distributes noncommercial educational programming through more than 900 public radio stations nationwide, and engineering firm Hammett & Edison sought clarification of the Commission’s policy with respect to interference protection between low power television stations and NCE FM radio stations. NPR argues that “we are aware of no Commission precedent supporting a distinction between first adjacent and other stations in a primary service, and the *Second Report and Order* offered no justification for adopting such a distinction in this case.”<sup>68</sup> Hammett & Edison agrees with NPR’s position, but it notes that the Part 74 rules do not outline the interference protection that low power television stations must provide to noncommercial FM radio stations.<sup>69</sup> Likewise, Hammett & Edison argues, “there is currently no obligation for NCE FM stations to protect DTV Channel 6 stations, either.”<sup>70</sup> As Hammett & Edison points out, “Section 73.525 of the FCC rules, which relates to protection by DTV stations of other facilities, applies only to NCE FM stations protecting *analog* TV Channel 6 stations, not *digital* TV Channel 6 stations.”<sup>71</sup> Hammett & Edison notes that it raised this issue in its petition for reconsideration of the outstanding DTV periodic review proceeding considering remaining issues related to the DTV transition.<sup>72</sup>

17. We confirm that, as Hammett & Edison and NPR observe, our current rules do not distinguish between primary NCE FM stations on different adjacent channels in terms of the protection that secondary low power television stations must provide to NCE FM stations.<sup>73</sup> We affirm our decision

<sup>64</sup> *Second Report and Order*, 26 FCC Rcd at 10751.

<sup>65</sup> *Id.* citing NPR Comments at 8-9.

<sup>66</sup> *Id.* at 10752.

<sup>67</sup> *Id.*

<sup>68</sup> NPR Petition at 3.

<sup>69</sup> Hammett & Edison Petition at 1; Hammett & Edison Comments on NPR Petition at 1.

<sup>70</sup> Hammett & Edison Petition at 2.

<sup>71</sup> *Id.* (emphasis in original).

<sup>72</sup> See Hammett & Edison Petition for Reconsideration filed March 25, 2008 of the *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order on Reconsideration*, 23 FCC Rcd 4220 (2008).

<sup>73</sup> Hammett & Edison’s comments urging the Commission to modify its interference rules are before the Commission in a separate proceeding. *Id.* As it would more appropriate to address them in that proceeding or through a separate notice of proposed rulemaking, we do not address them here. Similarly, NPR’s request that the Commission modify its rules to incorporate an interference protection standard is outside of the scope of this proceeding and, therefore, we do not address them here. NPR Petition at 5 (“NPR urges the Commission to reconsider and revise its Second Report and Order to . . . clarify that LPTV stations are obligated to protect all NCE FM radio stations from interference and . . . include such obligation in the Commission Rules governing the LPTV (continued....)”) (continued....)



to increase the maximum power for VHF low power television stations. Because of their secondary status, digital low power television stations historically have not been permitted to cause interference to, and must accept interference from, full-service television stations, certain land mobile radio operations and other primary services.<sup>74</sup> Therefore, we grant Hammett & Edison's and NPR's Petitions to the extent that we clarify that, regardless of their power level, low power television stations may not cause interference to a primary service such as NCE FM stations. Furthermore, given the lower power of their operations, interference between low power television stations and NCE FM stations would not likely occur. Moreover, we take this opportunity to caution digital low power television stations, as secondary licensees, to endeavor to design their digital facilities to avoid interference to primary NCE FM radio stations. We otherwise deny the Hammett & Edison and NPR petitions.

### III. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), and 5(c), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(c), and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the petitions for reconsideration of Cohn and Marks, Lake of the Woods County and Voyaguers Contronics Corporation **ARE DENIED**.

19. IT IS FURTHER ORDERED that, the petitions for reconsideration of Hammett & Edison, Inc., and National Public Radio **ARE GRANTED IN PART AND OTHERWISE DENIED**.

20. IT IS FURTHER ORDERED, that, the petitions for reconsideration of National Translator Association, One Ministries, Inc., and Signal Above, LLC **ARE DISMISSED**.

#### FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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*service*" emphasis added). NPR also notes that developing technical standards to predict likely LPTV-NCE FM interference would be difficult. See NPR Reply at 2-3.

<sup>74</sup> See, e.g., Inquiry into the Future Role of Low-Power Television Broadcasting and TV Translators, BC Docket No. 78-253, *Notice of Proposed Rulemaking*, 82 FCC 2d 47, ¶22 (1980) ("low power television broadcast stations, like television translators, should enjoy only a secondary status"); *Low Power Television Service*, 51 RR 2d 476, 488 (1982) ("an existing low power station that would cause interference in connection with ... a proposed new full service station is responsible for eliminating the interference, or the low power station must cease operation"); *Low Power Television and Television Translator Service, Notice of Proposed Rulemaking*, 104 FCC 2d 1368 (1986) ("television translators have always been considered secondary to full service television stations in spectrum priority"); Advanced Television Systems, *Memorandum Opinion and Order on Reconsideration of Sixth Report and Order*, 13 FCC Rcd 7418, 7461 (1998) ("as secondary operations, low power stations must give way to new operations by primary users of the spectrum, including in this case new full service DTV stations operated by existing broadcasters under our DTV implementation plan"); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Notice of Proposed Rulemaking*, 16 FCC Rcd 7278 (2001) ("LPTV and TV translator stations not be permitted to cause harmful interference to stations of primary services, including new licensees in Channels 52-59, and cannot claim protection from harmful interference from stations of primary services, including new licensees in Channels 52-59"); Digital Low Power Television, Television Translator, and Television Booster Stations and Digital Class A Television Stations, *Report and Order*, 19 FCC Rcd 19331 (2004) ("stations in the low power television service are authorized with "secondary" frequency use status. These stations may not cause interference to, and must accept interference from, full-service television stations, certain land mobile radio operations and other primary services" citing 47 C.F.R. §§ 74.703, 74.709, 90.303).

**APPENDIX**

**List of Pleadings**

**Petitions for Reconsideration (8)**

Cohn and Marks, LLP (Cohn and Marks)  
Hammett & Edison, Inc. (Hammett & Edison)  
Lake of the Woods County (Lake of the Woods)  
National Public Radio, Inc. (NPR)  
National Translator Association (NTA)  
One Ministries, Inc. (One Ministries)  
Signal Above, LLC (Signal)  
Voyagers Contronics Corporation (Voyagers)

**Oppositions (4)**

Cellular South, Inc. (CSI)  
CTIA – the Wireless Association (CTIA)  
Hammett & Edison  
NPR

**Replies (4)**

Cohn and Marks  
Hammett and Edison  
NPR  
NTA