

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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In the Matter of)	
)	
)	
Amendment of Parts 73 and 74 of the)	
Commission's Rules to Establish Rules for Digital)	MB Docket No. 03-185
Low Power Television and Television)	
Translator Stations)	
)	
)	
Expanding the Economic and Innovation)	
Opportunities of Spectrum Through Incentive)	GN Docket No. 12-268
Auctions)	
)	
Amendment of Part 15 of the Commission's Rules)	
to Eliminate the Analog Tuner Requirement)	ET Docket No. 14-175
_____)	

To: The Commission

**Comments of
National Religious Broadcasters to Third Notice of Proposed Rulemaking**

National Religious Broadcasters (“NRB”), through undersigned counsel, hereby files its Comments in response to the Commission’s above entitled October 10, 2014 *Notice of Proposed Rulemaking* (“NRPM”) in the above-captioned matter.¹

Background

National Religious Broadcasters is a non-profit association that exists to keep the doors of electronic media open and accessible for religious broadcasters. NRB’s many members include a significant number of full power, Class A, and low power television (LPTV) broadcasters that produce and/or telecast religious programming. The public service provided by these broadcasters is uniquely local, often showcasing programming

¹ *Third Notice of Proposed Rulemaking*, FCC 14-151, rel. October 10, 2014 (hereinafter “NPRM”).

with local churches or non-profits, and providing wholesome, family-oriented viewing choices.

In connection with the incentive auction and spectrum repacking, NRB urges the Commission to adopt procedures that preserve a robust, free over-the-air television service so that all Americans continue to have access to the specialized religious and family programming offered by its members. Because LPTV broadcasters, and in particular religious LPTV stations, fill a unique niche and meet the local content and information needs of communities in a way not provided by secular stations, we urge that the Commission adopt the recommendations contained in these Comments.

Summary of these Comments

The Commission should, in an effective way, protect low power television stations. Given the unique public service provided by LPTV stations in meeting local community needs, that goal should be commensurate with the overriding goal of accumulating sufficient spectrum in the spectrum auction to meet the rising demands of digital communications.

The Commission itself has admitted that there is a risk to LPTV stations ceasing to exist as a result of the spectrum auction and repacking. This is inconsistent with the “no-alter” mandate in the Spectrum Act, which requires that the rights of LPTV stations not be altered by the auction process. In order to ameliorate this result, NRB suggests several avenues of action.

First, we agree with the Commission that it should postpone the September 1, 2015 deadline for digital conversion of LPTV stations, especially given the fact that the Commission notes that a "significant" number of LPTV stations have not, at present,

been converted to digital. We commend the Commission for proposing this postponement.

Second, we urge the Commission to grant auction and spectrum protection rights to any low-power station – similar to granting it Class-A license status – where that station can demonstrate that it has essentially and substantially met the qualifications to apply for Class-A status. We believe that this would be consistent with the Commission’s authority under the Spectrum Act.

Third, NRB proposes that LPTV stations displaced by the auction and repacking should be automatically granted *mandatory cable carriage* status at their new location/channel upon constructing their new facilities. Such status should not be restricted by the standard criteria to be a “qualified low power television station” under Section 76 of the Commission’s rules. Displaced LPTV stations would elect carriage upon completion of post-displacement construction. We also propose other ways to incentivize full power stations to enter into programming arrangements with LPTV stations that are displaced.

In addition, we recommend that the Commission exercise the highest degree of transparency regarding the assumptions and criteria upon which its “repacking and optimization” software program will match stations with channels, and which, in effect, will be tantamount to choosing winners and losers among LPTV stations that are impacted by the spectrum auction.

We also propose in the auction/repacking process that the Commission proceed with its historical standard analysis, considering loss of service on a case-by-case basis.

Consistent with precedent, this process should not be a “mere comparison of numbers”² but a careful examination of the extent of the loss, whether any “white” or “gray” areas will be created, whether the loss area is “underserved”, and whether the loss involves specialized programming. The Commission should also not minimize the importance of over-the-air television viewers by discounting them based upon cable/DBS penetration when considering a loss of service in a market. From auction design to repacking procedures, the Commission should protect the public interest by preventing the loss of any over-the-air television service – even if doing so increases the complexity of the auction and repacking or limits the efficiency of the outcome.

Further, in light of the request by Representative Joe Barton and Representative Anna Eshoo for the Government Accountability Office (GAO) to study critical aspects of the negative impact of the spectrum auction on LPTV stations and Translators, both quantitatively regarding the number of LPTV stations that will be taken off the air as an example, and qualitatively regarding the impact on viewers and communities, including minority segments of the viewing public, the Commission should wait until the GAO issues its report and finding before it takes any action flowing from the auction that will compromise the operational status of LPTV stations or Translators, or that will impact their channel designation, or that will cause those stations to go off the air.

Each recommendation is detailed in the sections below.

² See *West Michigan Telecasters, Inc.* 22 FCC 2d 943, *recon denied*, 26 FCC 2d 668 (1970), *aff'd*, 460 F.2d 883 (D.C. Cir. 1972).

A. The Commission Should Effectively Protect Low Power Television

Stations

The Commission has proposed measures that it says are intended to "alleviate" the negative "consequences" to LPTV stations and LP translators as a result of the spectrum auction and the channel repacking. NPRM ¶ 3. The Commission recognizes the devastating nature of those consequences: it states that a "significant number [of LPTV stations] may be displaced as a result of the auction or repacking process and required to find a new channel from the smaller number of channels that will remain in the reorganized spectrum or discontinue operations." NPRM ¶ 2.

According to data from Knowledge Networks' 2011 Ownership Survey and Trend Report, a part of *The Home Technology Monitor*, the number of Americans relying exclusively on over-the-air (OTA) broadcasts in their home had increased to 45.6 million as of that time, up from 42 million the prior year.³ The following year, in 2012, that number continued to rise to almost 54 million. The research by GfK Media showed that "broadcast-only households skew towards younger adults, minorities and lower-income families" according to media reports.⁴

The number of low power television stations that may be potentially impacted by the spectrum auction and repacking could be staggering, and the impact on the information needs of the public, if those stations are sacrificed, will be detrimental.

In the May 7, 2014 letter to the Commission from National Association of Broadcasters, National Religious Broadcasters, and the Advanced Television Broadcasting Alliance, ("letter of NAB, NRB, ATBA") it was pointed out that in the state

³ "Over-the-air TV homes increase 10% to 46 million," Rapid TV News.com, August 6, 2011.

⁴ <http://rbr.com/u-s-over-the-air-tv-viewership-at-54-million/>

of Colorado, in the Denver DMA northward, alone, there are some 450 low power television stations and TV translators that serve approximately a half of a million residents.⁵

The 2010 National Broadband Plan has led, over several years, to complex proposals for incentive auctions of spectrum to help meet the Nation's spectrum needs. Whatever the outcome of the auction, we believe that the auction process *should not* do so at the expense of an important existing segment of America's television viewing public who are being served in their local communities by the unique broadcast content of LPTV stations.

B. The Threat to Religious Low-Power Television and the Viewing Public

An important number of NRB member television stations are low-power, and provide valuable religious content to their communities. When the Working Group on Information Needs of Communities, commissioned by FCC Chairman Genachowski and led by Steven Waldman, issued its report in June 2011 it noted the importance of religious broadcasters: "Although discussion of public broadcasting rarely focuses on religious programming, religious broadcasters have a significant and valuable presence on the airwaves."⁶

The specter of LPTV stations disappearing as a result of the Commission's approach in this NPRM, runs directly counter to the long-standing commitment that it has

⁵ Letter of NAB, NRB and Advanced Television Broadcasting Alliance, May 7, 2014, page 1, n. 1 (citing *Ex Parte* letter from Richard Zaragoza for Colorado Broadcasters Association, et al. in GN Docket No. 12-268, filed March 7, 2013).

⁶ Steven Waldman and the Working Group on Information Needs of Communities, The Information Needs of Communities – The Changing Media Landscape in a Broadband Age, June 2011, page 186.

articulated over the years to encouraging and protecting true “localism” in broadcasting. As the FCC’s Working Group on Information Needs of Communities noted: “[I]ow power TV stations can be used to provide locally oriented service to small communities.”

⁷ To the extent that many low-power stations are religious ones, this auction process will fall heavy, particularly against the continuation of religious broadcasting content.⁸

The congressional language in the Spectrum Act expressly provides that the rights of low-power television should not be altered in the auction process: “Nothing in this subsection shall be construed to *alter* the spectrum usage rights of low-power television stations.”⁹ (Emphasis added). Obviously, any process that engineers a diminishing of low-power spectrum rights would constitute a move to “alter” those rights. A question arises, therefore, as to both the scope and mechanism for enforcement of that provision protecting low-power stations from having their spectrum usage rights altered. The “no-alter” language is set forth clearly in the Spectrum Act, although the approach in this NPRM has failed to address that fact.¹⁰

By ignoring the “no-alter” mandate in the Spectrum Act, the Commission’s approach in this proceeding improperly makes low-power television *persona non-grata*

⁷ Id. at page 326.

⁸ Ordinary rights of a licensee to protest a license modification under 47 U.S.C. § 316 have been rendered inapplicable to a “modification” that is made by the Commission pursuant to the Spectrum Act, as stated under § 6403 (h) of that Act. Presumably, but not definitely, this would also negatively impact the rights of a license loser to demand a hearing under *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945) and its progeny on the grounds that the situation created constitutes the equivalent of “mutually exclusive” applications for a license. See also: *Bachow Communications, Inc. v. F.C.C.*, 237 F.3d 683 (DC Cir. 2001).

⁹ See: Spectrum Act, § 6403 (b) (2).

¹⁰ If LPTV stations are given *no protection* in the channel reshuffling, then the enforcement of the rights of low-power stations under the Spectrum Act not to have their rights “altered,” would superficially seem to conflict with the other provision in the Act that suspends the ordinary right of a licensee to protest a modification of its license accomplished pursuant to the spectrum reallocation that will result from the reverse and forward auctions. See: n. 7 above. However, all of these sections of the Act can be harmonized logically, by concluding, as we do here, that although LPTV licensees cannot participate in the auction, they must necessarily be given protection in the repacking. For this reason, the approach in previous NPRMs to give no deference to low-power licensees is, and must necessarily be, incorrect. The Commission is to be commended for its effort in this proceeding to seek remedies for the LPTV problem.

during the auction process, thus dropping them into the category of easy prey for extinction while making no counterbalancing provision for their continued survival. Admittedly, low-power stations are ineligible to participate in the auction process. We see that as a mandate *only* that low-power stations not be able to *benefit* from the revenue gained from a sale of their spectrum, reserving that benefit to Class A and full power stations. There is equity and logic behind our interpretation of congressional intent; Class A and full power stations are likely to have invested more in their start-ups, facilities and equipment and therefore should be in the best position to profit from a sale of their spectrum as a fair return on investment. However, we do not see the Spectrum Act language as a mandate for sweeping aside low-power stations in the repacking process nor as an authorization to doom them to extinction. To the contrary, the “no-alter” mandate from Congress in the Spectrum Act would counsel just the opposite result.

In order for the Commission to adequately fulfill its commitment to minimize disruption to broadcast television stations and their viewers, and responding to the invitation in this proceeding for other ideas for remedies (see: NPRM ¶ 4 and ¶ 59), we suggest below approaches that can minimize the damage to low-power television and to their audiences. See: sections C. through F. below.

C. Protecting Low Power and Potential Class-A Television Stations

1. The Digital Conversion Deadline Should be Postponed

In this NPRM, the Commission proposes to postpone the September 1, 2015 deadline for digital conversion of LPTV stations, noting that a "significant" number of LP television stations have not been converted to digital. NPRM ¶ 5 and ¶ 6. We concur

with this proposal, and have in fact urged this result since 2013. See: Comment of National Religious Broadcasters, January 25, 2013, page 9, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Docket No. 12-268.

But there are still problems that must be resolved, particularly regarding low power stations that are caught in a "twilight zone" of uncertainty, either because they are uncertain whether their station will be taken off the air completely, or where they could qualify in fact for Class A status, but have not yet been granted that status and have been trying to decide whether to apply for a Class-A license. What assurance has the Commission given that they will be treated equitably regarding the auction repacking? And what criteria will the Commission apply in making that decision? These questions appear to be unanswered.

The problem of LPTV stations being caught in the low-power-into-Class A transition dilemma described above is heightened by the Commission's express recognition in this NPRM that " ... this proceeding concerns matters related only to LPTV and TV translator stations and not Class A television stations," NPRM ¶ 2 at page 3, n. 6 (noting that Class A stations are already protected by the mandate that the FCC make "reasonable efforts" to preserve their coverage areas and by being qualified to be reimbursed for channel relocation costs, but not addressing the status of LPTV stations that essentially meet the conditions of a Class A station but have not been granted that status).

Responding to the Commission's suggestion for other ideas to mitigate or elevate harm to LPTV stations and TV translators (NPRM ¶ 4 and ¶ 59), NRB suggests remedies for these areas of uncertainty in the following sections below.

2. NRB Proposal for Transitional Low-Power-into-Class A Stations

The dilemma created by the Commission's proposal is illustrated by KDOV, "The DoveTV," a low-power station in Medford, Oregon. The station was awarded NRB's "Low Power TV Station of the Year" at our national 2012 convention, and is scheduled to be similarly honored again in February at the NRB 2015 International Christian Media Convention. USB USA, Inc. is the licensee of the station. The DoveTV has made substantial investments in the station, and had stated publicly to members of Congress that it is faced with "uncertainty about our future, yet the FCC says we must convert to digital by September 2015 ... we have immediate plans to expand our facilities. How can we do that if we are uncertain of even having a station?"¹¹

We urge the Commission to grant auction and spectrum protection rights to any low-power station – similar to granting it Class-A license status – where that station can demonstrate that it has essentially and substantially met the qualifications to apply for Class-A status. We believe that this would be consistent with the Commission's authority under § 6001 (6) (B) of the Spectrum Act, where in that section a "Broadcast Television Licensee" is deemed to include any "low-power television station that has been accorded primary status as a Class A television licensee under section 73.6001 (a) of title 47, Code of Federal Regulations." Low power stations that can demonstrate that they are Class A

¹¹ Letter of Perry Atkinson, President, UCB USA, Inc., to Hon. Greg Walden, U.S. House of Representatives, December 20, 2012.

in fact, though lacking that status, should be afforded the Class A protections mentioned in this proceeding at NPRM ¶ 2, page 3, n. 6.

3. NRB Proposal for Displaced Low-Power Stations

NRB also strongly supports the adoption of creative, alternative methods to ensure that the important programming provided by LPTV stations continues to reach viewers. Because LPTV stations have little or no bargaining power, these solutions must provide direct relief to displaced LPTV stations or at a minimum, incentivize other stakeholders to enter into arrangements with LPTV stations that can enable continued distribution of their programming.

NRB specifically proposes that displaced LPTV stations be automatically granted mandatory cable carriage status at their new location/channel upon constructing their new facilities. Such status should not be restricted by the standard criteria to be a “qualified low power television station” under Section 76 of the Commission’s rules. Displaced LPTV stations would elect carriage upon completion of post-displacement construction.

Further, to incentivize full power stations to enter into programming arrangements with LPTV stations, NRB proposes that:

(a) full power noncommercial television stations be allowed to carry the programming content, including commercial content, of a displaced LPTV station on one of their free, over-the-air digital multicast channels, so long as the main NCE TV channel continues to provide a primarily noncommercial television service;

(b) in order to mitigate the already substantial burden on low power stations as a result of the spectrum auction and repacking, any full power commercial or

noncommercial television station carrying a displaced LPTV station on one of their free, over-the-air digital multicast channels be exempt on that channel from any closed captioning requirements and from the requirement to add an additional three (3) hours of children's core television programming to their quarterly requirement; and

(c) any full power commercial or noncommercial television station that is being repacked as a result of the incentive auction outcome, but that agrees to carry a displaced LPTV station on one of their free, over-the-air digital multicast channels, be entitled to a set amount of additional cash remuneration from the TV Broadcaster Relocation Fund over and above the amount of its relocation reimbursement costs.

D. Transparency is needed in the Software Proposal

The Commission has suggested the use of a "repacking and optimization software" system to aid displaced LPTV stations in finding "new channel homes." NPRM ¶¶ 44 - 46.

Transparency should be a paramount value in the use of such a software program, given the interests at stake which, in some cases, will consist of the very survival or demise of various incumbent television stations. This is true, even though the Commission has indicated that the use of this system by displaced low power stations would be purely "voluntary." *Id.* at ¶ 46. While a voluntary approach is preferable, a voluntary and *informed* approach is essential, and being *informed* presupposes that the Commission will be transparent regarding the assumptions and criteria upon which that software program will match stations with channels, and, in effect, choosing winners and

losers among LPTV stations that are rocked by the sizable wake from the spectrum auction.

We join with those members of Congress who have called on the Commission to exercise the highest degree of transparency in the entire auction-engineering process.¹² Low power stations are not the only ones affected. One Representative predicts that as many as fourteen full-power stations in the state of Washington might be forced to cut power after the repacking process, and in the Seattle market, as many as ten out of seventeen full power stations could literally have no place to go within the channel reassignment.¹³

While the Commission has consistently proposed an approach geared to achieving “optimization” by balancing the clearing of the minimum amount of necessary spectrum with the relocation costs of stations, it is abundantly clear that the results from the proposed software programmatic method will only *approximate* a suitable result; what LPTV stations are entitled to know, among other things, are the acceptable tolerances – or margins of error – that will be deemed acceptable in such “repacking and optimization” software. Also, stations relying on this program need to know in advance whether that program, and the algorithms within it, have been inputted with assumptions that value (or which have the effect of valuing) certain types of LPTV stations or stations with certain kinds of programming formats more than others, or that prioritize certain broadcast markets over other markets.

¹² “Border State Democrats Call for Transparency From FCC on Channel Repacking,” TVTechnology.com, January 2, 2013.

¹³ *Id.*

E. The Commission Should Insure that no Commercial or Noncommercial Television Service Loss Areas are Created During Repacking so that Programming Choices, Including Religious Programming, are Preserved.

In ¶ 4 of the NPRM, the Commission states that it seeks to "help preserve the important services LPTV and TV translator stations provide." The Commission has stood firm against such losses in the past, and we strongly urge the adoption of auction design and repacking procedures that will prevent *any* loss of television service.

Historically, the Commission has viewed *any* loss of television service as *prima facie* inconsistent with the public interest.¹⁴ Nothing should change that view in the auction and repacking context – if anything, the approach should be more stringent given the multiple, simultaneous changes to television service that will occur. The reason for a stringent approach is clear – there is a significant risk of disenfranchising an ever-growing over-the-air television viewing population by allowing the auction/repacking to create “white” or “gray” areas¹⁵ where the population receives little or no over-the-air television service.

Especially in the auction/repacking context, the Commission should proceed with its historical standard analysis of considering loss of service on a case-by-case basis. Consistent with precedent, this process should not be a “mere comparison of numbers”¹⁶ but a careful examination of (i) the extent of the loss,¹⁷ (ii) whether any “white” or “gray” areas will be created,¹⁸ (iii) whether the loss area is “underserved”,¹⁹ and (iv) whether the

¹⁴ See *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); see also *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16507, ¶26 (2010).

¹⁵ The Commission defines “white area” as an area that receives no over-the-air television service, and “gray area” as an area that receives only one over-the-air television service.

¹⁶ See *West Michigan Telecasters, Inc.* 22 FCC 2d 943, *recon denied*, 26 FCC 2d 668 (1970), *aff’d*, 460 F.2d 883 (D.C. Cir. 1972).

¹⁷ See *John McCutcheon d/b/a Communications*, 4 FCC rcd 2079, 2083 n.3 (1989).

¹⁸ *Id.*

loss involves specialized programming.²⁰ We are gravely concerned that the specialized programming offered by independent and religious stations is threatened by spectrum repurposing and the repacking process. Only stringent application of these factors will ensure that the public interest, including access to religious programming, will be preserved.

The Commission should certainly not minimize the importance of over-the-air television viewers by discounting them based upon cable/DBS penetration when considering a loss of service in a market. Doing so would dilute the public interest solely based on the fact that television programming *might* be received in other ways, and place the Commission in the position of deciding that millions of Americans cannot have access to free over-the-air television programming. Instead, from auction design to repacking procedures, the Commission must take steps to protect the public interest by preventing the loss of any over-the-air television service – even if doing so increases the complexity of the auction and repacking or limits the efficiency of the outcome.

There should be no debate on whether or how to preserve television broadcasting during spectrum repurposing, and no room for compromise or dilution of the public interest. Instead, the public interest must be as paramount as it has always been, with the preservation of television broadcasting trumping all other competing interests in this auction process, whenever an irreconcilable conflict occurs.

¹⁹ See *Cambridge and St. Michaels, Maryland*, 19 FCC Rcd 2592 (AD 2004)

²⁰ See *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16507, ¶26 (2010).

F. The Commission Should Await the GAO Study

In an October 1, 2014 letter to the Government Accountability Office (GAO), Rep. Joe Barton and Rep. Anna Eshoo requested that the GAO conduct an evaluation regarding the “impact” of the incentive auction on LPTV stations.²¹ In that letter, they requested that the GAO determine the number of LPTV stations that currently provide original programming, as well as news and information that serves, in particular, racial and ethnic minorities. The relevance of that inquiry is borne out by the November 21, 2014 letter of Rep. Adam Schiff to FCC Chairman Tom Wheeler stressing the importance of LPTV broadcast content serving an ethnic minority segment in his California district.²² This information should be a critical component in the Commission’s decisions regarding the future of LPTV stations in general in light of the public service that they currently perform, and in deciding the fate of individual stations in particular.

The Barton/Eshoo letter also requested that the GAO determine such things as: the projected number of LPTV stations and translators that are likely to lose their channels as a result of the auction and repacking, without the availability of replacement channels; the number of viewers who will lose broadcast access to an LPTV station; and the projected costs of relocation for LPTV stations that are fortunate enough to receive a replacement channel. We believe that this is information that the Commission should have before making potentially irrevocable decisions about the fate of LPTV stations and

²¹ Letter of Rep. Joe Barton and Rep. Anna Eshoo to Hon. Gene L. Dodaro, Comptroller General of the United States, October 1, 2014.

²² Letter of Rep. Adam Schiff to Hon. Tom Wheeler, November 21, 2014. Rep. Schiff pointed out that the Barton/Eshoo letter request to the GAO “raises important questions” about the impact of the auction process of LPTV stations, and further noted that within Schiff’s district, which includes a portion of Los Angeles, that a “large Armenian speaking population is served by LPTV stations ...”

translators. ²³ Therefore, no decision should be made that negatively impacts LPTV stations or Translators in their operations, channel designations, or broadcasting status until the GAO study is released.

Conclusion

For the above reasons, NRB respectfully submits that the Commission should adopt incentive auction and repacking procedures that prioritize and preserve the continued existence and viability of free over-the-air television broadcasting so that the American public's viewing choices, including the choice of religious programming, are not diluted, and so that incumbent licensees, especially low power stations and TV translators are preserved, and that the Commission should adopt the recommendations contained herein.

Dated this 12th day of January, 2015

Respectfully submitted:

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²³ By "irrevocable," we mean that once the decision is made by the Commission that results in a given LPTV station actually going off the air, it is hard to envision, as a practical concern, how that station, or indeed how the public interest in that viewing area for that matter, could ever be made whole.

