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

In the Matter of	)	
	)	
Petition for Rule Making by	)	WT Docket No. 99-168
Spectrum Exchange Group, LLC	)	
Concerning Rules To Facilitate	)	
Clearing of the 746-806 MHz Band	)	

To: The Commission

PETITION FOR RULE MAKING

Spectrum Exchange Group, LLC ("Spectrum Exchange") hereby submits a petition seeking institution of further rule making proceedings in the above-captioned docket. Such proceedings would look toward the adoption of a rule that would require a television broadcast station currently licensed on channels 59-69 to switch its operations to a lower channel under certain limited circumstances. As demonstrated below, adoption of a "lone holdout" relocation rule is necessary in order to achieve important public interest goals associated with the initiation of new wireless services in the 746-806 MHz band (the "700 MHz band") and the Commission's upcoming auctions of licenses in this band.[1]

[1] An auction of commercial licenses to operate on 30 MHz in the 700 MHz band is scheduled to begin on June 7, 2000 (Auction #31), and an auction of licenses to "guard band managers" in 6 MHz of this band is scheduled to begin on June 14, 2000.

I. BACKGROUND

As the record in this proceeding clearly demonstrates, the potential of the 700 MHz band to produce benefits for consumers is enormous. Because of its location in the electromagnetic spectrum and its excellent propagation characteristics, this band is ideally suited for next generation (3G) mobile or high-speed broadband services. Once deployed, these services will intensify competition for all communication services and yield tremendous benefit to the public. This potential can only be realized in the foreseeable future, however, if the band can be cleared of television broadcast stations that now operate on channels 59-69 in most of the major markets but are slated to move to lower channels in the transition to digital television broadcasting (DTV).[2] The value inherent in licenses for clear spectrum in the 700 MHz band licenses is illustrated by the auction of third generation wireless licenses now taking place in the United Kingdom, where the bid for a 30 MHz license stands at £5,964,000,000 (approximately US$9.42 billion) as of April 20, 2000.[3]

Section 309(j)(14) of the Communications Act generally provides that analog television broadcast operations will not be authorized after December 31, 2006, except that extensions of that deadline shall be granted under certain circumstances.[4] It is generally believed that, at the

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[2] Because of adjacent channel interference protections, Channel 59 also must be cleared. Most of the broadcast operations on channels 59-69 are analog stations. The Commission also has made several interim DTV television allotments in the 700 MHz band that must be cleared to enable new wireless licensees to provide service in this band.

[3] Observe that the United Kingdom's population (59 million) is much smaller than the United States' population. Though it is impossible to predict the actual value of 30 MHz of clear 700 MHz spectrum across the United States, it is evident that this value far exceeds the sum of the aggregate value of the incumbent broadcast stations now occupying the band, particularly inasmuch as the majority of viewers receive these broadcast signals via cable television or other alternative delivery means. This demonstrates that the 700 MHz band is not currently being put to its best and most efficient use.

[4] The Commission must extend the DTV transition period upon request if:

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

end of 2006, stations will be able to obtain extensions of the transition period under the statutory standards.[5] Therefore, absent some arrangement wherein the incumbent broadcasters in the 700 MHz band agree to clear the band or relocate to other spectrum, new wireless services in this band will be forestalled indefinitely.

Recognizing the need for, and the importance of, band-clearing, the Commission indicated in its *First Report and Order* in this proceeding that it will "consider specific regulatory requests needed to implement voluntary agreements reached between incumbent licensees and new licensees in these bands."[6] Spectrum Exchange is organizing a voluntary

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(ii) digital-to-analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market--

(I) do not subscribe to a multichannel video programming distributor (as defined in Section 602) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either--

(a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

Pub. L. 105-33, 111 Stat 251, §§ 3002, 3003 (1997) (codified at 47 U.S.C. § 309(j)(14)(B)).

[5] *See* Congressional Budget Office, *Completing the Transition to Digital Television* (Sept. 1999), at 31-41; *CBO Says 2006 DTV Transition is Unlikely Without Must-Carry*, Communications Daily (Sept. 7, 1999) (stating that CBO's conclusions are "[a]s most in industry have at least privately acknowledged . . . .").

[6] *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, *First Report and Order*, FCC 00-5 (released Jan. 7, 2000), 65 Fed. Reg. 3139 (Jan. 20, 2000), at ¶ 145. The Commission also set forth in general terms the considerations that would inform its determination regarding whether the public interest would be served by allowing an early DTV transition:

> "In considering whether the public interest would be served by approving specific requests, we would, for example, consider the benefits to consumers of the provision of new wireless services, such as next generation mobile services or Internet fixed access services. We would also consider whether such agreements would help clear spectrum for public safety use in these bands and could result in the provision of new wireless service in rural and other relatively underserved communities. On the other hand, we would also consider loss of service to the broadcast community of the licensee. For example, we would consider the availability of the licensee's former analog programming within the service area, through simulcast of that programming on the licensee's DTV channel or distribution of the programming on cable or

private market process (referred to herein as the "private band-clearing auction") that is designed to facilitate efficient clearing of the 700 MHz band while minimizing the reduction in over-the-air reception of broadcast signals during the transition to DTV.[7] In order for the private band-clearing auction to be successful (and for the concomitant public interest benefits explained below to be realized), however, the Commission must provide greater regulatory certainty to both the incumbent broadcast licensees and the prospective new licensees.

II. THE PROBLEM OF ENCUMBRANCE REQUIRES ACTION

The Commission's rules afford broadcast stations protection against interference from other co-channel and adjacent channel operations. The rules thus would prevent a 700 MHz C block licensee from providing service on the lower portion of the block (747-752 MHz) in any market in which a television station operates on channel 59, 60 or 61, and on the upper portion (777-782 MHz) in any market in which a station operates on channels 64, 65 or 66. Similarly, a 700 MHz D block licensee would be either unable to provide service on, or restricted in the use of, the lower portion of that block (752-762 MHz) in any market in which a television station operates on channel 60, 61, 62 or 63, and on the upper portion (777-782 MHz) in any market in which a station operates on channels 65, 66, 67 or 68. Prospective new licensees intending to operate a paired service obviously would be more severely affected by incumbent broadcast

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> DBS, or the availability of similar broadcast services within the service area, (*e.g.*, whether the lost service is the only network service, the only source for local service, or the only source for otherwise unique broadcast service)."

Id.

[7] The details regarding Spectrum Exchange's proposed private band-clearing auction have been outlined in filings on the record in this proceeding. *See* "Opposition of Spectrum Exchange Group to Petitions for Reconsideration," in WT Docket No. 99-168, filed March 10, 2000; *see also* Letters dated December 17 and December 29, 1999 from Kathleen Q. Abernathy and letters dated April 3, April 7 and April 11, 2000 in WT Docket No. 99-168 from Jonathan V. Cohen, counsel to Spectrum Exchange, to Magalie Roman Salas, FCC Secretary, regarding *ex parte* presentations made by Spectrum Exchange.

operations because they would require clear spectrum in both the upper and lower bands. The large number of incumbent broadcast operations on channels 59-69 in most of the major cities in the United States not only places these broadcasters in a position to block initiation of new wireless service in their areas but also creates a serious coordination problem among the broadcasters themselves in planning for spectrum clearing.[8]

The above-quoted language in paragraph 145 of the *First Report and Order* suggests that if the winners of the 700 MHz auction and the incumbent broadcasters negotiate band-clearing agreements, the Commission would consider regulatory requests necessary to effectuate these agreements. Such an approach might yield some amount of band-clearing, which of course would be preferable to continued encumbrance.

This approach is insufficient, however, primarily because of the well-known "holdout" problem. Even if most incumbent broadcasters could reach agreement with the new licensees about terms of relocation, a single holdout in each broadcast market could undermine the agreement. Thus, in order to implement a private solution to spectrum clearing, the holdout problem must be solved, and the efficient clearing and relocation of over-the-air broadcasts must be facilitated.

The overall solution thus involves two elements. One part is a relocation rule, as proposed below, that helps the incumbent broadcasters in channels 59-69 to achieve a coordinated solution among themselves. The second part is an auction with purely voluntary

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[8] The Commission has published a list of 138 broadcast licensees that encumber channels 59-68. *See* Public Notice, *Auction of Licenses in the 747-762 and 777-792 MHz Bands Auction Notice and Filing Requirements for 12 Licenses in the 700 MHz Bands Auction Scheduled for May 10, 2000*, DA 00-292, at Attachment J (rel. Feb. 18, 2000), *modified*, Public Notice, DA 99-785 (rel. Apr. 12, 2000). Licensees on channel 69 are not in a position to block any of the commercial services to be offered on the C or D blocks, but they do block public safety operations in the upper portion of the 24 MHz band reserved for use by public safety agencies. Spectrum Exchange proposes to include channel 69 stations in the private band-clearing auction so that public safety agencies will fully realize the benefits of band-clearing.

participation by interested broadcasters to encourage and facilitate clearing and relocation in the most efficient manner possible. Both parts are explained in some detail below.

1. Clearing a single station

The new entrant has a privately-known value, called "v", for clear spectrum. The incumbent has a privately-known clearing cost, called "c." With a single incumbent, the new entrant and incumbent are bargaining over the split of the net value (v – c) that is created by clearing. It is a well-known and well-established theorem in the bargaining literature[9] that there is a significant chance of disagreement or delayed agreement. The incumbent generally can be expected to demand a payment of much more than c from the entrant and, indeed, tries to obtain as much of v as possible. But since the value, v, is unknown to the incumbent, the bargaining is likely to stall. Disagreement and delay are well documented in the bargaining literature from both a theoretical and empirical perspective.

By introducing a comparable station into the negotiation, the situation changes dramatically. Now the two comparable stations with clearing costs of c_1 and c_2, respectively, compete to be cleared. Rather than bargaining over the net value created by clearing, a clearing auction can be held. Even if the clearing costs are private information, it is possible to attain efficient clearing through a descending-clock auction that would determine the station that clears and the payment that it receives. The auction starts at a high price at which both would prefer to clear. The price drops until only one of the bidders is willing to clear. At this point, the auction ends. The station willing to clear at least cost has been identified. It clears and receives a payment equal to the price at which the other dropped out. The best strategy in such an auction is for each station to remain in until its clearing cost is reached. For example, with $c_1=50$ and $c_2=30$, station 1 drops out when the clearing payment reaches 50. Hence, station 2 is cleared and

[9] Myerson, Roger B. and Mark A. Satterthwaite (1983), "Efficient Mechanisms for Bilateral Trading," *Journal of Economic Theory,* 28, 265-281.

receives the clearing payment of 50, provided that v is at least 50. Unlike the bilateral negotiation that takes place without a comparable station, the auction process never yields disagreement or delayed agreement when the value of clearing is positive. A big advantage of this auction is that it achieves efficient clearing at the lowest cost, without requiring any knowledge of clearing costs, provided the value of clear spectrum exceeds the marginal clearing cost.

Comparable stations can only be introduced into this process, however, if provision is made to relocate the incumbent station to the comparable station's channel location.

2. Clearing many stations

When many stations need to be cleared, the bargaining problem faced by the entrant is much more severe. The entrant must get agreement from all of the incumbent blocking stations. Each incumbent knows this and has an incentive to hold out to be the last to agree, at which point the last remaining incumbent can try to demand as much of v as possible. Because each incumbent has the incentive to be in the position of the last to agree, the bargaining takes much longer (and has much less chance of success) than in the case of clearing a single station. In contrast, with a relocation rule, the descending-clock procedure works so long as there is at least one comparable station not in channels 59-69 that is willing to clear. Then a single blocking station cannot unilaterally prevent a new entrant from providing service. The incentive to hold out vanishes, and efficient clearing is achieved at the lowest cost. Moreover, as the field of comparable stations is increased, there are greater opportunities for identifying a station with a lower clearing cost, and so the situation further improves.

III. A PRIVATE AUCTION CAN PROMOTE EFFICIENT BAND-CLEARING AND RELOCATION

The private band-clearing auction, as proposed by Spectrum Exchange, provides a voluntary mechanism by which prospective bidders in the FCC's 700 MHz auction and broadcasters in channels 59-69 and lower bands can arrange efficient clearing. Broadcasters now operating on channels 59-69 will be able to choose either to undergo an early transition to DTV-only broadcasts or to relocate with compensation to a lower channel.

Spectrum Exchange's private band-clearing auction would work as follows:

- In each market where one or more stations in channels 59-69 encumber the 700 MHz licenses, a set of comparable UHF stations is determined. These stations would be eligible to bid in the clearing auction for that market. For example, in the Chicago area, there are four stations in channels 59-69 (including one interim DTV allotment), but there is a field of nine comparable analog stations (including the three analog stations in channels 59-69).[10]

- Spectrum Exchange will seek to contract with both the stations and the applicants in the Commission's 700 MHz auction. The auction applicants would agree to pay for band-clearing at the price determined by the private auction. The broadcasters would agree to participate in the private auction and be contractually bound by their bids. Each broadcaster now occupying a channel in the range of 59-69 would receive an extra incentive payment in return for its commitment either to transition early to DTV-only broadcasts (if it "wins" the clearing auction) or to relocate to a lower analog allotment (if it does not).

- Using a descending clock approach, the auction would identify (using the Chicago example) the four stations among the nine that are willing to clear (*i.e.*, transition to DTV-only broadcasts) at least cost. Those stations would receive the clearing price. If an incumbent broadcaster now on a channel in the range of 59-69 wins, it would receive both the incentive payment and the price determined by the auction.

[10] The nine comparable stations in Chicago are 20 WYCC, 26 WCIU, 32 WFLD, 38 WCPX, 44 WSNS, 50 WPWR, 60 WEHS, 62 WJYS, and 66 WGBO. There is an interim DTV allotment to Chicago on channel 59.

- The stations that win in the band-clearing auction would be cleared at some fixed time (*e.g.*, one or two years after the 700 MHz licenses are awarded), provided that the stations satisfy the Commission's criteria for clearing (as outlined at para. 145 of the *First Report and Order*).

Participation in the private band-clearing auction is voluntary. Every station that agrees to clear does so because it prefers the clearing payment to continuing analog over-the-air transmissions. Significantly, stations in channels 59-69 would not be required to make an early transition to DTV-only transmissions. Indeed, these stations will receive an incentive payment for participating in the process, regardless of whether they "win" in the private auction. Observe that the stations that are willing to clear at the least cost would likely be those with the fewest over-the-air viewers, perhaps because their programming is already seen primarily over cable and DBS, thus minimizing the loss of viewership.

IV. A PRIVATE VOLUNTARY MECHANISM THAT PROMOTES EFFICIENT BAND-CLEARING WILL SERVE THE PUBLIC INTEREST

The private band-clearing auction proposed by Spectrum Exchange offers a coordinated mechanism within which clearing of the 700 MHz band can be accomplished to the benefit of the bidders, the Treasury, the broadcasters, and the public. If the contractual terms of the private auction are determined before the Commission's 700 MHz auction, it will enable prospective bidders in the Commission's 700 MHz auction to bid with confidence that they will be able to clear incumbent broadcasters from the band in a reasonable time frame. It also provides a way for bidders to know with certainty the costs to clear the spectrum of its incumbent users, so that they can factor these costs into their bids. Because this certainty enhances the value of the spectrum, the Treasury will enjoy increased auction revenues. Broadcasters will have an opportunity to derive new revenues that will help them to make the costly transition to DTV

broadcasting, and they will be able to avert the possibility of holdouts that could jeopardize this opportunity.

Most importantly, however, the efficient clearing of the 700 MHz spectrum would achieve the following significant public interest benefits:

- Efficient clearing will allow the spectrum to be put to its most efficient use sooner that would otherwise be the case.

- Efficient clearing will enable new spectrum users to introduce competitive new broadband services to the public earlier that if they were forced to await the end of the DTV transition period.

- Efficient clearing will assist many television stations with the costs of DTV transition. Many of these stations are those least able to afford these costs. Early transition will increase the amount of DTV programming and accelerate the transition of broadcasting to DTV transmissions, thereby helping to stimulate demand for digital receivers.

- Unless an efficient clearing mechanism is in place before the Commission's 700 MHz auction, the 700 MHz licenses are less likely to be awarded to the parties that value them most highly. Instead, that auction will be skewed in favor of technologies, services and/or bidders that are better able to deal with the incumbent broadcasters, are less in need of clear spectrum, or are most optimistic about the costs of clearing.

- The private band-clearing auction proposed by Spectrum Exchange would facilitate clearing of the entire 700 MHz band, including channel 69, where broadcast operations could preclude public safety agencies' use of the band. In the private auction now contemplated, these agencies would realize the benefits of band-clearing without bearing any of the costs.

- Through the private band-clearing auction, bidders in the Commission's 700 MHz auction will be able to bid with confidence that they will be able to provide service on unencumbered spectrum within a reasonable time frame. The Commission's auction thus will generate a greater return to taxpayers on the public spectrum resource.

It is important to reemphasize that participation in the private band-clearing auction — both by the broadcasters and by the applicants in the Commission's 700 MHz auction — is

voluntary. Therefore, the clearing auction will occur only if the parties perceive it to be advantageous to them.

Relocation of channel 59-69 stations to lower channels makes the private band-clearing auction possible. By putting all comparable UHF channels on the same footing, the stations can compete for the clearing payment. In this way, the lowest-cost clearing solution is found, rapid deployment of 3G mobile and high-speed data services is made possible, and loss of broadcast service is minimized. Spectrum Exchange has found significant interest in the broadcasting community for its voluntary private auction mechanism.

The broadcasters willing to participate in the private band-clearing auction, however, face a coordination problem to the extent that there are any stations in their broadcast markets that may attempt to hold out. Thus, to achieve the described public interest benefits, a limited relocation rule (as described below) is needed so that a "lone holdout" cannot jeopardize the entire band-clearing process.

V. THE COMMISSION SHOULD PROPOSE A "LONE HOLDOUT" RULE FOR RELOCATION IN ORDER TO INCREASE THE LIKELIHOOD THAT A PRIVATE VOLUNTARY SOLUTION TO THE BAND-CLEARING PROBLEM WILL BE FOUND

As noted above, each incumbent channel 59-69 broadcaster who voluntarily participates in a private band-clearing auction will either transition early to DTV-only transmissions or relocate to a lower channel, depending on the results of the private band-clearing auction. The relocation mechanism makes it possible to include comparable stations in the private auction. Complete clearing, however, can be achieved only if all of the incumbent channel 59-69 broadcasters either transition to DTV-only transmission or relocate to lower channels.

As explained above, the orderly and efficient clearing of the 700 MHz band — with its concomitant public interest benefits — would be jeopardized if "holdout" broadcast stations

attempt to extract from a new spectrum user a significant fraction of the total value of the clear spectrum in their markets. Some relocation rule is necessary in order to obtain efficient clearing. The proposed limited relocation rule, which takes effect only when there is a "lone holdout," would enable the broadcasters to protect their legitimate interests while still promoting effective private negotiations between the broadcasters and the new licensees.

Even a "lone holdout" can introduce sufficient uncertainty into the clearing process as to effectively prevent a private band-clearing auction from taking place. If a holdout strategy — refusing to participate in a private band-clearing auction in the belief that a larger clearing payment can be obtained — is perceived to be without substantial risk, the entire band-clearing process is endangered.

The Commission should therefore propose adoption of a limited rule that would increase the risk of adopting a holdout position. Such a rule would apply in situations in which there is a single holdout station among all of the stations needed to clear from the channel 59-69 spectrum in a given DMA. Under such a rule, when all but one of the television broadcasters in a market voluntarily agree to clear from the channel 59-69 spectrum, the "lone holdout" would risk being required to relocate (with compensation limited to actual, documented costs) to a channel being vacated by a comparable television station that agrees to clear in its place.

A draft of Spectrum Exchange's proposed rule is attached as an Appendix to the instant petition. The rule would be effective: (1) where all television stations authorized to broadcast in channels 59-69 in a given Designated Market Area (DMA) are offered substantially similar economic terms in exchange for agreement to early transition to DTV-only transmissions, to relocate to comparable lower channels, or to otherwise cease over-the-air transmission in channels 59-69; and (2) where all but one station accept those terms. The single remaining analog or DTV station is offered compensation for relocation to a comparable lower channel pursuant a certification submitted to the Commission by the new 700 MHz licensee. Six months

after the certification, the single remaining station must relocate to the offered channel or otherwise cease over-the-air transmission on channels 59-69. The television station licensee would receive compensation for its actual, documented costs of relocation, based on an independent third party estimate paid for by the 700 MHz licensee. A lower channel shall be deemed comparable if it lies in the same DMA and has a substantially overlapping Grade B contour. Adoption of this proposed rule will facilitate clearing of the 700 MHz band by reducing the opportunity that a single broadcaster will gain a windfall by refusing to participate in a coordinated band-clearing process.

VI. STATUTORY AUTHORITY AND COMMISSION PRECEDENT SUPPORT ADOPTION OF THE PROPOSED RULE

The Communications Act of 1934, as amended, provides ample authority for the Commission to require a station to change its channel of operation if the public interest so requires. Section 303(c) of the Act empowers the Commission to "assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate", while Section 303(g) directs the Commission to "encourage the larger and more effective use of radio in the public interest."[11] More directly on point in the present context, Section 303(f) of the Act instructs the Commission to:

> [m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee *unless the Commission shall determine that such changes will*

[11] 47 U.S.C. §§ 303(c), (g).

> *promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with . . . .*[12]

Thus, the Communications Act clearly empowers the Commission to make a public interest finding to support a rule or order under which a television broadcast station can be ordered to change its channel of operation. Indeed, such findings are relatively common in proceedings concerning the FM Table of Allotments.

The Commission routinely requires incumbent FM licensees to relocate operations to different frequencies. This situation normally arises when an aspiring licensee asks the Commission to amend its FM Table of Allotments to substitute a channel and/or modify an incumbent station's license so as to accommodate a new broadcast service. In support of such a request, the petitioner is required to show that the public interest will be served by such a channel substitution or modification. In these cases, the Commission often receives competing proposals, and in considering the comparative merits of the conflicting proposals, solutions often depend upon the availability of an alternative, accommodating channel for the incumbent. If such a modification is in the public interest and the incumbent cannot show why its authorization should not be modified, the Commission forces the incumbent station to relocate to a different channel, with reasonable costs of relocation reimbursed by the petitioning party.[13] The cases following this pattern are numerous.[14]

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[12] 47 U.S.C. § 303(f) (emphasis added). Additional authority is found in Sections 4(i) and 303(r) of the Communications Act, which generally empower the Commission to promulgate regulations necessary to fulfill its obligations under, or to carry out the provisions of, the Communications Act. *See* 47 U.S.C. §§ 4(i), 303(r).

[13] *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967).

[14] *See, e.g.*, Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Walla Walla and Pullman, Washington, and Hermiston, Oregon), *Report and Order*, 13 FCC Rcd 13342 (1998); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Ironton, Malden and Salem, Missouri), *Report and Order*, 13 FCC Rcd 6584 (1998); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Spring Valley, Minnesota and Osage, Iowa), *Report and Order*, 12 FCC Rcd 15237 (1997); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Parris Island and Hampton, South Carolina), *Report and Order*, 12 FCC Rcd 17331 (1997).

The Commission's rules also mandate that incumbent private operational fixed microwave licensees relocate from the 2 GHz band to alternative spectrum in order to accommodate the entry of emerging technology services, including broadband PCS and 2 GHz mobile satellite services.[15] Noting the "immediate need for additional spectrum to sustain the growth of services made possible through new technologies," "that the uncertain current and future availability of spectrum is a major obstacle to the development of emerging technologies and implementation services using these technologies", that access to such spectrum "will promote the ability of American industry to maintain their competitive leadership position in global telecommunications markets," and that the relevant spectrum had particularly favorable propagation characteristics, the Commission determined that relocation of the incumbent licensees is consistent with its public interest mandate.[16]

The rules provide that, after a specified negotiation period, the incumbent licensee is required to relocate, provide that the new licensee guarantee payment of enumerated costs and undertake activities to relocate the incumbent to comparable facilities in alternate spectrum.[17] The Commission's authority to adopt most of these rules has not been challenged and, when incumbent licensees operating public safety systems challenged the Commission's decision to require such licensees to relocate to alternative spectrum, the U.S. Court of Appeals for the D.C. Circuit *upheld* the Commission's rules.[18] Indeed, the court underscored the deference entitled to the Commission in situations where, as here, the Commission's predictive judgment regarding

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[15] *See* 47 C.F.R. §§ 101.69 et seq.

[16] *See Redevelopment of Spectrum to Encourage Innovation in the use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd. 6886, 6888 ¶¶ 14-15 (1992).

[17] *See id.* 47 C.F.R. §§ 101.75(a)-(c).

[18] *Association of Public-Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996).

technical matters is involved.[19] As discussed above, Spectrum Exchange submits that many of the same public interest considerations are present here, and that the Commission is well within its authority to adopt the rule proposed herein.

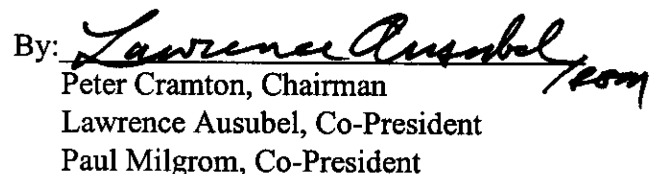
VII. CONCLUSION

As demonstrated above, unless the Commission acts to facilitate the clearing of the 700 MHz band, new spectrum users likely will not be able to initiate new competitive broadband services before the end of the DTV transition period, which in all likelihood will extend beyond the December 31, 2006 target date. Furthermore, the uncertainty surrounding the encumbrance issue will impair the Commission's upcoming 700 MHz auction and prevent it from achieving the Commission's basic goal in its auction program: ensuring that licenses are awarded to the parties who value them most highly. Adoption of the limited relocation rule proposed herein will advance important public interest objectives and will result in forced relocation only in a limited circumstance. Considering the high stakes involved, the public interest clearly favors adoption of the proposed rule.

WHEREFORE, Spectrum Exchange respectfully requests that the Commission expeditiously adopt a Further Notice of Proposed Rule Making along the lines suggested herein.

Respectfully submitted,

SPECTRUM EXCHANGE GROUP, LLC

By: 

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[19] *See id.* at 398-400.

APPENDIX

Add the following definitions to Section 27.4

"Actual costs" of relocating a TV/DTV Station shall include, but are not limited to, such items as: Transmission equipment (transmitting antennae, transmission lines, modems, etc.); costs incident to relocating such equipment to other towers (if required), including modifications to such equipment or towers; back-up power equipment; monitoring or control equipment; engineering design costs; installation; systems testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; testing of any new equipment; spare equipment; project management; site lease renegotiation; power plant upgrade (if required); electrical grounding systems; Heating Ventilation and Air Conditioning (HVAC) (if required); alternate transport equipment; and leased facilities; independent third party appraisal of its compensable relocation costs and incumbent transaction expenses that are directly attributable to the relocation, subject to a cap of two percent of the "hard" costs involved.

"Comparable Channel" means a channel below channel 59 for the same television market and with a substantial overlap of the Grade B service contour.

"Television market" is defined as the Designated Market Area or DMA as defined by Nielsen Media Research as of April 3, 1997.

Add New Section 27.503

Section 27.503 Relocation of TV/DTV Stations by Licensee

(a) A TV/DTV station licensed to an entity in channels 59-69 (the "TV/DTV Licensee") must relocate to a comparable channel or otherwise cease over the air transmission on channels 59-69 under the following circumstances:

(1) an entity has been awarded a license which would cause interference to public reception of the TV/DTV Licensee station absent compliance with the requirements of paragraphs (a) and (b) of section 27.60;

(2) a comparable channel below channel 59 is or will be vacant due to the TV/DTV Station having voluntarily agreed to cease over-the-air transmission over such comparable channel;

(3) the TV/DTV Licensee is the only TV/DTV Station in the applicable television market which has not entered into a voluntary agreement to cease over-the-air transmission on channels 59-69 and has been offered substantially similar economic terms as the other stations in channels 59-69 in such television market;

(4) the entity described in subparagraph (a)(1) has certified to the Commission

that it will reimburse the TV/DTV Licensee for the actual costs of relocating the TV/DTV Station to a comparable channel; and

(5) 6 months has elapsed after the TV/DTV Licensee has received notice of the certification described in subparagraph (a)(4).

(b) The TV/DTV Licensee must provide an independent third party estimate of actual costs, at the new licensee's expense, not later than 30 days after receiving notice of the certification. If the parties are unable to complete relocation within the 6-month period due to a dispute, parties are encouraged to use expedited ADR procedures, such as binding arbitration, mediation, or other ADR techniques.