substances or mixtures listed in § 716.120. * * *

* * * * *

6. By revising § 716.35(a), introductory text, to read as follows:

§ 716.35 Submission of lists of studies.

(a) Except as provided in §§ 716.5, 716.20, and 716.50, persons subject to this rule must send lists of studies to EPA for each of the listed substances or listed mixtures (including as a known byproduct) in § 716.120 which they are manufacturing, importing, or processing, or which they propose to manufacture (including import) or process.

* * * * *

7. By revising § 716.45(c)(3) to read as follows:

§ 716.45 How to report on substances and mixtures.

* * * * *

(c) * * *

(3) The substance of the grade/purity specified in each rule promulgated under 15 U.S.C. 2607(d).

8. By revising § 716.60(a) to read as follows:

§ 716.60 Reporting schedule.

(a) *General requirements*. Except as provided in § 716.5 and paragraphs (b) and (c) of this section, submissions under §§ 716.30 and 716.35 must be postmarked on or before 60 days after the effective date of the listing of a substance or mixture in § 716.120 or within 60 days of proposing to manufacture (including import) or process a listed substance or listed mixture (including as a known byproduct) if first done after the effective date of the substance or mixture being listed in § 716.120.

* * * * *

9. By revising the § 716.65 to read as follows:

§ 716.65 Reporting period.

Unless otherwise required in a rule promulgated under 15 U.S.C. 2607(d) relating to a listed chemical substance or listed mixture [hereinafter ''rule''], the reporting period for a listed chemical substance or listed mixture will terminate 60 days after the effective date on which the listed chemical substance or listed mixture is added to 40 CFR 716.120. EPA may require reporting for a listed chemical substance or listed mixture beyond the 60 day period in a rule promulgated under 15 U.S.C. 2607(d), however EPA will not extend any reporting period later than 2 years after the effective date on which a listed chemical substance or listed mixture is added to 40 CFR 716.120. After the applicable reporting period terminates, any person subject to the rule under 40 CFR 716.5 (a)(2) or (a)(3) and who has submitted to EPA lists of ongoing or initiated studies under 40 CFR 716.35 (a)(1) or (a)(2) must submit a copy of any such study within 30 days after its completion, regardless of the study's completion date.

§ 716.120 [Amended]

10. The tables in § 716.120 (a), (c), and (d) are amended by revising the dates in the ''Sunset date'' column that have not yet occurred as of April 1, 1998, to read ''June 30, 1998''.

[FR Doc. 98–8425 Filed 3–31–98; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 87–268; FCC 98–23]

Advanced Television Systems

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order* (''MO&O'') reaffirms & clarifies the Commission's rules to implement digital television. The intended effect of this action is to provide a host of new and beneficial services to the American public, while preserving and improving free universal television service that serves the public.

EFFECTIVE DATE: May 1, 1998.

FOR FURTHER INFORMATION CONTACT: Mania Baghdadi, Mass Media Bureau, Policy & Rules Division, 202–418–2130.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *MO&O*, MM Docket No. 87–268, FCC 98–23, adopted February 17, 1998 and released February 23, 1998. The full text of this *MO&O* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C., 20036, (202) 857–3800.

I. Introduction

1. In the *Fifth Report and Order*, 62 FR 26996 (May 16, 1997), in the digital television (''DTV'') proceeding, we adopted rules to permit the nation's broadcasters to implement the conversion to digital television in accordance with the Telecommunications Act of 1996 (''1996 Act''). Our goals were to preserve and promote free, universally available, local broadcast television in a digital world, as well as to advance spectrum efficiency and the rapid recovery of spectrum by fostering the swift development of DTV. Accordingly, we sought to maximize broadcasters' flexibility to provide a digital service to serve the needs and desires of the viewers, while adopting rules to ensure a smooth transition to digital television.

2. We established an aggressive but reasonable construction schedule, a requirement that broadcasters continue to provide free, over-the-air television service, a target date of 2006 for the completion of the transition, and a simulcasting requirement phased in at the end of the transition period. We also recognized that digital broadcasters remain public trustees of the nation's airwaves and have a responsibility to serve the public interest. In order to permit an opportunity to reassess the decisions we made in the *Fifth Report and Order*, we also noted our intention to conduct a review of the progress of the transition to DTV every two years. In response to petitions for reconsideration from various parties, we take this opportunity to reaffirm, revise, or clarify certain of our actions. Issues raised in the petitions for reconsideration that are not addressed here will be resolved in separate proceedings or future orders as noted.

II. Issue Analysis

A. Eligibility

3. *Background*. The 1996 Act expressly limited initial eligibility for DTV licenses to persons that, as of the date of the issuance of the licenses, hold either a construction permit or license (or both) for a television broadcast station. In the *Fifth Report and Order*, the Commission issued initial DTV licenses simultaneously to all eligible full-power permittees and licensees. We concluded that it more effectively effectuates the Congressional scheme to implement the statute through a streamlined three-phased licensing process, with the first phase consisting of the initial DTV license, rather than through the conventional two-phased licensing process. Use of the two-step process without the initial licensing phase would have prevented the establishment of a date certain at which to determine initial eligibility because, given the statutory directive that eligibility be limited to permittees and licensees as of the date of issuance of the DTV licenses, it could potentially

have left eligibility open until the last DTV operating license was granted, a period that could possibly take years. This was also necessary to allow us to establish the DTV Table of Allotments.

i. Alleged Exclusion of Eligible Permittees

4. *Petitions/Comments.* Coast TV (''Coast'') and Three Feathers Communications, Inc. (''Three Feathers'') assert that they held television construction permits as of the date of issuance of the DTV licenses but were erroneously excluded from the list of eligible broadcasters.

5. *Discussion.* Commission records indicate that Three Feathers held a construction permit for channel 36, Hutchinson, KS, as of the date of issuance of the DTV licenses. Similarly, Coast's application for a construction permit for channel 38, Santa Barbara, CA, had also been granted before that date, thereby making it eligible for a DTV license. Their exclusion was inadvertent. Accordingly, the foregoing facilities of Three Feathers and Coast are eligible for initial DTV licenses pursuant to the *Fifth Report and Order,* and we shall amend the DTV Table of Allotments to reflect their eligibility.

ii. Eligibility of Parties with Pending NTSC Applications

A. General Matters

6. *Petitions/Comments.* Several petitioners argue that parties whose new NTSC construction permit applications were still pending as of the date of issuance of the initial DTV licenses should be able to participate in the transition to DTV, at least under certain circumstances. Many of these petitioners filed applications within the past three years that are mutually exclusive with other applications and which, as a result, have not been grantable by the Commission. Some petitioners claim that the newly granted NTSC construction permits would be worth very little if they could not be used for DTV, but instead had to be surrendered to the Commission at the end of the transition period. Similarly, other petitioners assert that pending applicants cannot realistically make the substantial investments required to proceed with their applications and construct facilities absent assurances that their NTSC channels can be converted to DTV.

7. *Discussion.* The 1996 Act stated that, if the Commission determines to issue additional DTV licenses, the Commission ''should limit the initial eligibility for such (DTV) licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both) * * * In the *Fifth Report and Order,* we fully implemented this provision. We made no decision at that time regarding the assignment of DTV channels to new permittees and licensees whose pending NTSC applications had not yet been granted and who were, as a result, not awarded initial DTV licenses.

8. We shall afford new NTSC permittees, whose applications were not granted on or before April 3, 1997 and who were therefore not eligible for an initial DTV paired license, the choice to immediately construct either an analog or a digital station on the channel they were granted. They will not be awarded a second channel to convert to DTV but may convert on their single 6 MHz channel. If they choose the analog option, they will be subject to the traditional two-year construction period applied to NTSC stations, and they may, upon application to the Commission, convert their analog facility to DTV at any point during the transition period, up to the end of that period.

9. All NTSC service must cease at the end of the transition period. Because NTSC is a technology of the past that will cease to exist, authorizing new analog stations that cannot evolve to digital operation would have significant public interest costs. It could limit the ability of the analog broadcaster to serve its viewers as well as it otherwise might; it could put the licensee at a competitive disadvantage vis-a-vis its emerging digital competitors; and viewers would lose altogether a channel of free, over-the-air video programming at the end of the transition period. In contrast, allowing the transition to DTV would allow broadcasters to better serve their viewers on a local scale, and it could help facilitate the overall conversion from analog to digital broadcasting across the country.

10. Before the NTSC permittee or licensee can build a DTV station, either initially or after first building an analog station, it must file a DTV application. We will treat these DTV applications as minor modifications. The proposed DTV facility must protect all DTV and NTSC stations by complying with all applicable DTV technical rules. In addition, such a new permittee or licensee's DTV facility must generally comply with analog operating rules, such as minimum operating hours, except where the analog rule is inconsistent with the digital rules or inapplicable to digital technology. It must also provide one, free over the air video program service, as with other DTV licensees. These stations will also be afforded the flexibility to provide digital ancillary or supplementary services authorized by § 73.624(c) of the Commission's rules, consistent with the DTV standard.

11. To prevent warehousing of spectrum, we will require these permittees to build a station, analog or digital, within the initial two-year construction period granted, rather than applying the DTV construction timetable adopted in the *Fifth Report and Order.* We will not extend the time for construction based on sale of the permit or based on a decision to convert to DTV in the initial two-year period before the analog station is built. Those stations that first construct and operate an analog station (within the initial two-year period) and then choose later to construct a DTV station must convert by the 2006 deadline and, upon grant of a DTV permit, will have (subject to the 2006 deadline) until the construction deadline for that category of station or a period of two years, whichever is longer, within which to build the DTV station.

12. DTV stations operating on a core NTSC channel will continue to do so after the end of the transition period. However, stations operating outside the core will be doing so on an interim basis only. At the end of the transition period, to fully implement the policies adopted in the *Sixth Report and Order,* 63 FR 460 (January 6, 1998), and the recently concluded *Channels 60–69 Reallocation,* 63 FR 6669 (February 10, 1998), proceeding, the Commission will reassign all out-of-core DTV broadcasters, including the currently pending applicants, to channels in the core. Because the out-of-core allotment is intended to be temporary, the subsequent move to a core channel will be considered a minor change in facilities, intended solely to effectuate the policies set forth in the above-mentioned documents.

B. Denied NTSC Applications

13. *Petitions/Comments.* SL Communications (''SL'') requests reconsideration of an allotment decision in the *Sixth Report and Order* that we consider here because it implicates eligibility. SL requests that we allot a DTV channel for a vacant analog UHF channel in Texas, for which an initial construction permit application was filed by another party. In 1995, that applicant and SL filed a petition to substitute SL for the applicant. The petition was denied on February 27, 1997, the proceeding was terminated, and a petition for reconsideration is pending. Because there was no

permittee or licensee for the channel in question, there was no corresponding DTV allotment made in the *Sixth Report and Order* and no additional license awarded in the *Fifth Report and Order*. SL argues that a DTV allotment should have been made because an application was on file before October 24, 1991.

14. *Discussion.* We decline to reconsider this allotment eligibility decision. Under the eligibility criteria established by section 336(a)(1) of the Communications Act and adopted in the *Fifth Report and Order*, SL was not eligible for the award of an initial DTV license, as it was not a permittee or licensee as of the date of issuance of the DTV licenses. Indeed, the original applicant for which SL sought to substitute did not have a permit at that time, and the application had been denied. Thus, regardless of the outcome of the proceeding to reconsider whether the NTSC application was properly denied, we were not required to take the vacant analog allotment into consideration when we crafted the DTV Table of Allotments. It would be premature to give such consideration in the instant case because no permit or license has been granted. However, in its recent order denying the petition for reconsideration, *Dorothy O. Schulze and Deborah Brigham*, FCC 98–21 (adopted February 12, 1998), the Commission held that the NTSC channel is exempt from the general provisions of the *Sixth Report and Order* deleting vacant NTSC allotments and that the Mass Media Bureau should take appropriate steps to permit the filing of applications for this channel. If such an application for an NTSC construction permit is subsequently granted, the permittee will have the same rights and obligations as other parties with pending NTSC applications, as discussed above.

B. Definition of Service—Spectrum Use

15. *Background.* In the *Fifth Report and Order*, we recognized the benefit of affording broadcasters the opportunity to develop additional revenue streams from innovative digital services. Therefore, we allowed broadcasters the flexibility to respond to the demands of their audiences by providing ancillary or supplementary services that do not derogate the mandated free, over-the-air program service. We did not require that such services be broadcast-related, and we noted that such ancillary or supplementary services could include, but are not limited to, subscription television programming, computer software distribution, data transmissions, teletext, interactive services, audio signals, and any other services that do not interfere with the required free service.

16. As noted in the *Fifth Report and Order*, our decision to allow broadcasters flexibility to provide ancillary or supplementary services is supported by section 336. This section specifically gives the Commission discretion to determine, in the public interest, whether to permit broadcasters to offer such services. Section 336(a)(2) of the Act provides that if the Commission issues additional licenses for advanced television services, it ''shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.''

i. Ancillary or Supplementary Services

17. *Petitions/Comments.* The Personal Communications Industry Association (''PCIA'') argues that the *Fifth Report and Order* did not adequately define ''ancillary or supplementary'' services. PCIA claims that the provision of land mobile service by DTV licensees would not serve the public interest, as it would create an uneven playing field between DTV licensees and mobile service providers. PCIA further claims that consideration of the effect of the Order on mobile licensees is missing from the *Fifth Report and Order's* Final Regulatory Flexibility Analysis, as it identifies small businesses that may be impacted by the decisions in the *Fifth Report and Order*, but analyzes the impact only on other broadcast licensees.

18. PCIA also argues that the Commission's decision is contrary to the 1993 Budget Act, which authorized the Commission to auction spectrum used for commercial mobile radio purposes. PCIA claims that DTV licensees, which were not required to participate in an auction, will ultimately have license rights different from those of other mobile service providers. They argue that these licensees do not appear from the *Fifth Report and Order* to have the same regulatory responsibilities as current mobile providers and are permitted to provide video broadcast and subscription services.

19. PCIA acknowledges that § 73.624(c)(1), adopted in the *Fifth Report and Order*, states that DTV licensees offering such services must comply with the Commission's regulations regarding each specific service. However, it argues that the Commission has failed to define these regulatory requirements in sufficient detail. For example, PCIA questions whether DTV licensees offering land mobile services will be required to provide emergency 911 access, telephone number portability, and mandatory resale.

20. AAPTS and PBS (''AAPTS/PBS'') oppose PCIA's petition and argue that DTV licensees should be allowed to provide land mobile and other ancillary or supplementary services that do not relate to broadcast service. AAPTS/PBS states that the *Fifth Report and Order's* blanket authorization of supplementary services is consistent with the mandate of section 336(a)(2), which allows ancillary service offerings that are consistent with the public interest. AAPTS/PBS also observes that allowing public television stations the flexibility to provide a variety of services is crucial, as these services could generate needed revenue for DTV construction and operation.

21. *Discussion.* We are unpersuaded by PCIA's arguments that we should specifically exclude the provision of mobile services from the definition of DTV ancillary or supplementary services. As we stated in the *Fifth Report and Order*, we believe that the approach we have taken with respect to permitting ancillary or supplementary services will best serve the public interest by fostering the growth of innovative services to the public and by permitting the full possibilities of DTV to be realized. Granting broadcasters the flexibility to offer whatever ancillary or supplementary services they choose may also help them attract consumers to the service, which will, in turn, speed the transition to digital. Such flexibility should encourage entrepreneurship and innovation, will contribute to efficient spectrum use, and will expand and enhance use of existing spectrum. Permitting broadcasters to assemble a wide array of services that consumers desire will also help promote the success of the free television service.

22. Section 336(b) outlines our authority to permit the provision of ancillary or supplementary services by DTV licensees. Under this section, we are required to limit ancillary or supplementary services to avoid derogation of any advanced television services that we may require. We are also required to apply any regulations relevant to analogous services. Our decision is fully consistent with the statutory requirements. The services we have authorized will not derogate advanced television service, nor will they create inequities for other regulated services.

23. The *Fifth Report and Order* addressed the issue of parity in the treatment of various service providers. We stated that, consistent with section

336(b)(3), all non-broadcast services provided by digital licensees will be regulated in a manner consistent with analogous services provided by other persons or entities. We also noted that we currently follow such an approach for ancillary or supplementary services provided by NTSC licensees, for example, on the vertical blanking interval (VBI) and the video portion of the analog signal. Further, in the *Fifth Report and Order*, we noted that we would review our flexible approach to permit ancillary or supplementary services during our periodic DTV reviews and to make adjustments to our rules as needed. These reviews will allow us to address any specific concerns raised by the mobile service industry regarding the provision of certain ancillary or supplementary services by DTV licensees on a case-by-case basis if warranted.

24. Contrary to the claims of PCIA, our decision regarding ancillary or supplementary services will fulfill our Congressional mandate to establish a fee program that prevents unjust enrichment of DTV licensees. In enacting section 336, Congress specifically recognized the possibility that DTV licensees might offer services competing with those subscription-based services operating on spectrum purchased in the auction process. Congress therefore required that the Commission establish a fee program for ancillary or supplementary services provided by digital licensees if subscription fees are required in order to receive such services.

25. In considering the assessment of fees for the ancillary or supplementary use of the DTV spectrum, Congress mandated that to the extent feasible, the fee imposed should recover an amount that equals but does not exceed the amount that would have been realized in an auction of the spectrum under section 309(j). Congress stated that the fee should be designed to prevent the unjust enrichment of DTV licensees using the DTV spectrum for services analogous to services provided on spectrum assigned at auction. We recently issued a Notice of Proposed Rule Making to consider proposals as to how this statutory provision should be implemented and these fees assessed.

26. Finally, there is no basis to PCIA's claim that we were required to consider the impact of our DTV decision on land mobile licensees in the Final Regulatory Flexibility Analysis (FRFA) appended to the *Fifth Report and Order*. The FRFA, required of agencies in rulemaking proceedings by the Regulatory Flexibility Act, is designed to protect small entities that are directly subject to administrative rules rather than all entities that are indirectly affected by the results that any rules will produce.

ii. Minimum Programming Hours

27. *Petition*. Chronicle Publishing Co. (''Chronicle'') observes that the *Fifth Report and Order* requires broadcasters to provide a free digital video programming service, the resolution of which is comparable to or better than that of today's service, aired during the same time periods that their analog channel is broadcasting. Chronicle argues that there may be unexpected difficulties for stations operating on channels adjacent to nearby stations, for which the interference issues are not yet fully understood. To accommodate such difficulties, Chronicle requests that the Commission modify the foregoing requirement to exempt broadcasters from providing a free digital video signal between the hours of midnight and 6:00 a.m. (even though the analog station is broadcasting) in order to allow licensees to conduct maintenance or resolve any technical or other unanticipated problems arising from the use of new digital technology, especially in the UHF band. Chronicle maintains that such ''down time'' is essential for the ultimate success of DTV.

28. *Discussion*. We decline to grant Chronicle's requested modification to our requirement that broadcasters provide a free digital video programming service when the analog station is broadcasting. This requirement was designed to assure that broadcasters provide on their digital channel the free over-the-air television service on which the public has come to rely. We believe that it is a minimal requirement that should not be unduly burdensome, particularly in light of the flexibility we have otherwise provided to broadcasters to provide a variety of digital services. While we recognize that broadcasters may have technical problems to resolve as they make the transition to DTV, we believe that the remedy requested is overbroad. In the event, however, that stations experience unexpected technical difficulties with the required transition to DTV such as those outlined by Chronicle, they may request special temporary authority to operate at variance from our required minimum digital television service on a case-by-case basis so that such technical difficulties can be resolved. If it later appears that a more general change in our requirements may be necessary, we can consider that modification during our periodic reviews.

C. Public Interest Obligations

29. *Background*. In the *Fifth Report and Order*, we noted that the 1996 Act provided that broadcasters have public interest obligations with respect to the program services they offer, regardless of whether they are offered using analog or digital technology. Noting the differences in views as to the nature and extent of digital broadcasters' public interest obligations, we stated that we would issue a Notice to collect and consider all views on broadcasters' public interest obligations in the digital world. However, we also put broadcast licensees and the public on notice that existing public interest requirements continue to apply to all broadcast licensees, that the Commission may adopt new public interest rules for digital television, and that the *Fifth Report and Order* ''forecloses nothing from our consideration.''

30. *Petitions*. Media Access Project, et al. (''MAP''),[1] contends that the Commission should not delay its analysis of what modified (and increased) public interest obligations it should impose on DTV licensees. According to MAP, the Commission's failure to impose new public interest obligations violates section 201 of the 1996 Act, 47 U.S.C. 336(d), 336 (a)(1), and 47 U.S.C. 336(b)(5). MAP adds that new public interest obligations are also warranted because broadcasters will have full use of 12 MHz (double their available spectrum) for at least 9 years, and also will be able to provide a number of commercial services that were previously impossible. MAP urges the Commission to clarify that all new and existing public interest obligations will apply to both free and subscription program services in both analog and digital modes. MAP contends that such a conclusion appears implicit in the *Fifth Report and Order* and is supported by 47 U.S.C. 336(d).

31. *Decision*. We will not reconsider the approach we took in the *Fifth Report and Order* with respect to the issue of the nature and extent of broadcasters' public interest obligations in the digital world. MAP has not presented sufficient reasons why we must make an immediate decision on these questions instead of issuing a Notice so that we may collect and consider all views on these important issues.

[1] Media Access Project filed jointly with the Center for Media Education, the Consumer Federation of America, the Minority Media and Telecommunications Council, and the National Federation of Community Broadcasters.

D. Transition

i. Simulcast

32. *Background.* In the *Fifth Report and Order,* the Commission declined to adopt a simulcast requirement for the early years of the transition, but it adopted a phased-in simulcasting requirement as follows: by the sixth year from the date of adoption of the *Fifth Report and Order,* there is a 50 percent simulcasting requirement; by the seventh year, a 75 percent simulcasting requirement; and, by the eighth year, a 100 percent simulcasting requirement, which will continue until the analog channel is terminated and the analog spectrum returned.

33. *Petitions: Include Simulcasting Target Dates in Periodic Reviews.* MSTV contends that although the simulcasting phase-in is based on the transition end date of 2006, the Commission may change this date. Therefore, MSTV urges the Commission to expressly include simulcasting target date requirements in its biennial review of the DTV transition. MSTV contends that this will ensure that simulcasting requirements remain tied to consumer acceptance of DTV, and broadcasters have the flexibility to program their DTV channels to best attract the public to DTV during the early stages of the transition.

34. *Limited Simulcasting Exemption for Public TV Stations.* AAPTS/PBS contends that public stations may be adversely affected by the partial-to-full simulcasting requirement, as well as by the requirement that the digital channel operate during the same hours as the licensee's NTSC station. According to AAPTS/PBS, these requirements effectively impose a minimum operating requirement on the DTV station. It therefore advocates that the Commission not require public stations to simulcast their NTSC programming on their DTV stations, because that will effectively require that the licensee operate the DTV station whenever the NTSC station is operating. AAPTS/PBS instead urges that the Commission apply the simulcast requirement only during the hours when a licensee operates the DTV station. AAPTS/PBS notes that for many public stations, the power requirements for operating a DTV station whenever their NTSC station is operating (which is often 18 hours a day) will exceed their financial resources and may chill their ability or willingness to build a DTV station in the first place. Since there are no minimum operating requirements for noncommercial TV stations, according to AAPTS/PBS, these two DTV operation requirements ''could have the perverse result of providing an incentive for public television stations to reduce their NTSC operating hours in order to comply with these (two *Fifth Report and Order*) requirements.''

35. Accordingly, AAPTS/PBS urges that the Commission afford public stations the discretion to determine how many hours a day to operate their DTV stations. AAPTS/PBS contends that public stations will still offer DTV services during a reasonable portion of the day because they incurred the DTV construction costs, and PBS will be delivering HDTV programming at least during prime time. In addition, because public stations rely on audience contributions for their operating costs, they will have an incentive to operate their DTV stations the maximum number of hours they can afford. AAPTS/PBS therefore contends that this proposal will not adversely affect the transition to DTV. If a public station operates its DTV station fewer than the number of hours required to meet the simulcast percentage, the licensee should be required to simulcast for the entire time the DTV station is operating.

36. *Discussion: Periodic Review.* We agree with MSTV that we should expressly include simulcasting requirements in our periodic review. As discussed below, Congress now requires us to reclaim the analog spectrum by December 31, 2006 and to grant extensions of that date to stations under circumstances specified in the statute. We will conduct a periodic review of the progress of DTV every two years until the cessation of analog service. In these reviews, we will address any new issues raised by technological developments, necessary alterations in our rules, or other changes necessitated by unforeseen circumstances.

37. *Noncommercial Stations.* We do not believe that it is necessary at this time to grant AAPTS/PBS's request to afford public stations discretion to determine how many hours a day to operate their DTV stations. We note that, in the *Fifth Report and Order,* we adopted a six-year period for public stations to construct their DTV facilities, the longest construction period for any category of DTV applicant. We reiterate our beliefs, stated in that Order, that special relief measures may eventually be warranted to assist public television stations to make the transition, that it would be premature at this time to determine what those measures might be, and that the specific nature of any special relief for public stations is best considered during our periodic reviews.

ii. Licensing of DTV and NTSC Stations

38. *Background.* In the *Fifth Report and Order,* we concluded that the NTSC and DTV facilities should be licensed under a single, paired license. We stated that this will help both the Commission and broadcasters by keeping administrative burdens down, and that it would allow us to treat the DTV license and the NTSC license together for the purposes of revoking or not renewing a license. Therefore, we stated that once broadcasters have satisfied construction and transmission requirements, they will receive a single, paired license for the DTV and NTSC facilities.

39. *Petitions/Comments.* The Department of Special Districts, San Bernardino County, California (''San Bernardino'') notes that the 1996 Act requires the Commission to condition the DTV license on the ''require[ment] that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation.'' San Bernardino argues that this condition should appear on the face of the instrument for all license renewals granted after the start of 1998, consistent with the eight-year license term and the 2006 reversion date adopted in the *Fifth Report and Order.*

40. *Discussion.* We note that the 2006 reversion date is now statutory. After the adoption of the *Fifth Report and Order* and the filing of the petitions for reconsideration, Congress enacted the Balanced Budget Act of 1997, which provides that ''(a) broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006'' unless the Commission grants an extension based on specific criteria enumerated in the statute. We believe that this statutory language addresses any concerns San Bernardino may have regarding the reversion of one of the licenses of each station. Nevertheless, to ensure that all broadcasters are aware of their obligation to surrender either the original license or the additional license pursuant to Commission regulation, we will place on all broadcast television licenses granted after December 31, 1998, an express condition requiring return of one of the two 6 MHz channels at the end of the transition period. We will impose such a condition on all renewals granted until the transition period has ended.

E. Application/Construction Period

41. *Background.* In the *Fifth Report and Order,* we announced that we would apply a streamlined three-stage application process to the group of initially eligible analog permittees and licensees allotted a paired channel in the DTV Table of Allotments. In the *Fifth Report and Order* itself, the Commission completed Stage 1, the initial modification of the license for DTV, by issuing DTV licenses to all parties initially eligible to receive them. Before initial DTV licensees can commence construction, however, we required that they file an application for a construction permit. We stated that we would treat the construction application, the second stage, as a minor change application, which does not require a showing of financial qualifications. We observed that the DTV construction permit application would not constitute a change in frequency, but merely the implementation of the initial DTV license on a channel assigned in the *Sixth Report and Order.* In the third stage, upon completion of construction, the permittee may commence program tests upon notification to the Commission, provided that an application for a license to cover the construction permit for the DTV facility is timely filed.

i. Financial Qualifications

42. *Petitions/Comments.* MAP argues that the Commission should have required broadcasters to demonstrate their financial qualifications as a condition of awarding an initial DTV permit or license. MAP notes that the Commission's classification of an application for DTV construction permit as a minor change means that the applicant is not required to demonstrate its financial qualifications. MAP asserts that this decision threatens to delay the institution of DTV service because financially unqualified applicants may warehouse awarded spectrum or simply be unable to construct DTV facilities.

43. MAP also argues that the conversion to DTV is not a change in facilities, but instead involves issuing a new construction permit and license to each existing broadcaster making the transition. Because the license is new, according to MAP, the Commission is statutorily required to determine whether the broadcaster is qualified to receive it. In this regard, MAP cites section 308(b) of the Communications Act of 1934, as amended, which states that ''(a)ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission may by regulation prescribe as to the * * * financial * * * qualifications of the applicant to operate the station.'' In the alternative, MAP asserts that even if the DTV applications are categorized as a change, the Commission's classification of them as minor is inconsistent with § 73.3572(a)(1) of the Commission's rules. That provision of the rules defines a major change as one involving a change in frequency or community of license. MAP disputes the Commission's assertion in the *Fifth Report and Order* that ''the change involved in constructing and operating a DTV facility does not constitute a change in frequency, merely the implementation of the initial DTV License on a channel assigned in the *Sixth Report and Order.*'' MAP states that, regardless of whether broadcasters use their new frequency for the current analog or future digital transmissions, they will change their frequencies and be subject to § 73.3572(a)(1).

44. *Discussion.* We decline to reconsider the streamlined licensing process, under which we do not require a showing of financial qualifications. We continue to believe that the DTV construction permit applications related to these allotments should be treated as minor change applications. They do not involve new stations or changes in frequency as these terms have traditionally been used for the purposes of § 73.3572(a)(1) of the Commission's rules to define a major change. This is not an instance where an individual broadcaster has devised its own plan to change its channel or community of license and is requesting Commission authorization of that specific change. To the contrary, in order to implement the transition to DTV that we have found will serve the public interest, each application is to implement a specific DTV channel allotment expressly set forth by the Commission in the *Sixth Report and Order* for use by the applicant, the incumbent analog broadcast licensee, as contemplated by Congress.

45. We also conclude that treating DTV applications like applications for minor changes is consistent with Section 308(b) of the Communications Act. Section 308(b) authorizes the Commission to exercise its discretion when determining whether a financial qualifications showing requirement for certain classes of applications would serve the public interest. As noted above, Section 308(b) requires that ''(a)ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts *as the Commission may by regulation prescribe* as to the * * * financial * * * qualifications of the applicant to operate the station.'' 47 U.S.C. 308(b) (emphasis supplied). Consistent with this statutory language, the Commission long ago made a public interest determination that applicants for minor changes in broadcast facilities (*i.e.,* analog television and radio) do not need to provide information regarding their financial qualifications. MAP does not assert that this Commission policy is inconsistent with section 308(b). Further, MAP does not state why the Commission's public interest determinations regarding analog television application forms and DTV license application forms should be considered differently for the purposes of section 308(b). Accordingly, we find MAP's section 308(b) argument unpersuasive.

46. As we emphasized in the *Fifth Report and Order,* one of our primary goals is to achieve a rapid and efficient transition from analog to digital broadcast television. We continue to believe that the approach we have taken will foster swift and widespread construction and operation of digital television stations with minimal risk of spectrum warehousing or disuse. A number of factors will encourage broadcasters to construct their DTV stations quickly. These factors include stations' need to compete with other video program providers, who are also delivering or preparing to deliver digital video programming; the planned cessation of NTSC broadcasting in 2006; and the opportunity to offer a variety of ancillary services in addition to the one mandatory, over-the-air video programming service.

47. In addition, as we discussed in the *Fifth Report and Order,* we will grant requests for extensions of time within which to construct DTV facilities only if they meet specific, delineated criteria. We will grant an extension of the applicable deadline where a broadcaster has been unable to complete construction due to circumstances that are either unforeseeable or beyond the licensee's control, and only if the licensee has taken all reasonable steps to resolve the problem expeditiously. As we stated in the *Fifth Report and Order,* ''such circumstances include, but are not limited to, the inability to construct and place in operation a facility necessary for transmitting DTV, such as a tower, because of delays in obtaining zoning or FAA approvals, or similar constraints, or the lack of equipment necessary to transmit a DTV signal.'' As a further guarantee that valuable DTV spectrum would not be warehoused, the *Fifth Report and Order* noted that we do not anticipate that the circumstance of

''lack of equipment'' would include the cost of such equipment.

ii. Construction Schedule

48. *Background.* The *Fifth Report and Order* adopted a construction schedule for DTV facilities. Affiliates of the top four networks (ABC, CBS, Fox and NBC) must build digital facilities in the ten largest television markets by May 1, 1999. Affiliates of those networks in the top 30 television markets, not included above, must construct DTV facilities by November 1, 1999. All other commercial stations must construct DTV facilities by May 1, 2002. All noncommercial stations must construct their DTV facilities by May 1, 2003. We delineated specific criteria pursuant to which we would grant requests for extensions of time within which to construct.

General Issues

49. *Petitions/Comments.* Several petitioners request reconsideration of the construction schedule. For example, Cordillera Communications (''Cordillera''), which intends to construct nine DTV stations, requests an extension of the deadlines or, in the alternative, relaxation of the standards for granting extensions. According to Cordillera, the full implementation of DTV will take longer than the ten-year period the Commission has established. Cordillera cites the time needed to acquire a tower site, construct a tower in compliance with local and federal regulations, acquire equipment to provide maximum service, and evaluate the impact of DTV on its viewers who receive its NTSC signals via translator. It adds that modifying the construction schedule will prevent the Commission from needlessly expending resources on processing extension applications.

50. *Discussion.* We do not believe that it would serve the public interest to extend the construction timetable established in the *Fifth Report and Order*. If a broadcaster does not complete construction within the time period contemplated by the current timetable, it may request an extension of time within which to construct, as noted above. The criteria we use to determine whether grant of an extension would serve the public interest adequately address the concerns raised by Cordillera. In addition, arguments related to zoning are more relevant to our ongoing proceeding considering the alleged impact of delays to DTV station construction caused by local zoning regulations.

Effect on Radio Stations

51. *Petitions/Comments.* National Public Radio (''NPR'') requests that we extend the construction schedule. It claims that the current timetable, combined with the allotment, in the *Sixth Report and Order,* of DTV channels on the basis of current transmitter sites and replication of existing NTSC service areas, threatens to create a shortage of available tower capacity for DTV antennas. As a result, NPR claims, a substantial number of public radio stations will be forced to relocate their transmitting antennas at a significant financial cost and possible loss of signal coverage areas. It adds that several FM stations have already been informed that they will have to relinquish their tower space to make way for a DTV antenna.

52. *Discussion.* We decline to alter the construction schedule as requested by NPR. First, NPR's claim that a significant number of educational FM stations will have to relinquish their tower space and pay for a costly relocation of their transmitting antennas is, at this time, speculative. NPR provides no documentary evidence to support its claim that several FM stations have already been informed that they will have to relinquish their tower space in order for the tower owner to make room for DTV equipment. It also provides insufficient information regarding the cost or time period of such circumstances. Thus, NPR has not demonstrated at this time that the construction schedule will have any undue negative impact on a significant number of public radio stations. We can revisit this issue, if warranted, during the periodic DTV reviews.

Issues Relating to Noncommercial Television Stations

53. *Petitions/Comments.* AAPTS/PBS states that public television stations with both NTSC and DTV channels outside the core channels should be permitted to defer DTV construction until they have a permanent DTV channel (*i.e.*, the end of the transition period, when they have a core channel). According to AAPTS/PBS, 13 public television stations have both their analog and their digital channels outside channels 2–46, and 13 have channels outside channels 7–51. It adds that ''over half of those stations in each case have operating budgets of less than $5 million. Under the current rules, they not only will have to build two DTV stations, but will have to migrate their viewers to a new channel at the end of the transition.'' AAPTS/PBS states that since the Commission has not yet determined what the core channels will be, these public TV stations do not know what that new channel will be at the end of the transition period or when they will learn of the assignment. AAPTS/PBS asserts that this uncertainty makes planning and finding funding for the transition difficult.

54. AAPTS/PBS's proposal is supported by Motorola as a way for noncommercial educational stations to alleviate conversion costs. According to Motorola, the proposal ''recognize(s) the difficult economics involved with a two step migration to digital service. More importantly, (it) could accelerate the recovery of UHF channels 60–69 for public safety or other wireless use.''

55. *Discussion.* We decline to adopt the modifications to the construction schedule proposed by AAPTS/PBS. We do not believe that such modifications are necessary. Because we recognized the financial difficulties often faced by noncommercial broadcasters, the construction timetable we adopted in the *Fifth Report and Order* provided noncommercial stations a six-year period within which to construct their DTV facilities, the longest construction period allotted to any category of DTV applicant. In the *Fifth Report and Order,* we also stated that special relief measures may eventually be warranted to assist public television stations to make the transition, but we concluded that it was premature to determine what those specific measures should be. We stated then, and we continue to believe, that determining the specific nature of whatever special relief may be needed for noncommercial educational broadcasters is best considered during our periodic reviews. AAPTS/PBS has not demonstrated that its concerns regarding public television stations with both NTSC and DTV channels outside the core channels cannot adequately be addressed in that context. Nonetheless, as discussed in the *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order,* we will consider, on a case-by-case basis, requests to defer construction and/or to make an immediate transition to digital when filed by those stations that have both analog and digital channels outside the core.

Satellite Stations

56. *Petitions/Comments.* Hubbard Broadcasting, Inc. (''Hubbard'') seeks clarification as to the application of the construction schedule to satellite stations. Hubbard asks how the construction schedule applies to satellite stations such as its own that transmit the same network programming as their parent, not by virtue of a network affiliation agreement, but by rebroadcast consent granted by the network.

57. *Discussion.* We clarify that the construction exception for same-market affiliates applies to satellite stations. Thus, with regard to Hubbard's particular example, the two satellite stations are located within the same market as their parent and, according to Hubbard, broadcast the programming of the same network. Under our rules, if a network has more than one affiliate in a top 30 market, the station with the smaller audience share is not subject to the expedited schedule for networks affiliates. Therefore, regardless of the stations' satellite status or type of network contract being used, Hubbard's two satellites are not subject to an accelerated construction schedule. Instead, they are subject to the five-year construction deadline.

iii. Processing Procedures

58. *Background.* In the *Sixth Report and Order,* the Commission allowed flexibility for DTV facilities to be built at locations within five kilometers of the reference allotment sites without consideration of additional interference to analog or DTV service, provided the DTV facilities do not exceed the allotment reference HAAT and ERP values. In the *Fifth Report and Order,* we noted that we would expedite processing of construction permit applications that could correctly certify as to a series of checklist questions, which include whether the proposed facility conforms to the DTV Table of Allotments by specifying an antenna site within five kilometers of the reference allotment site. We noted our intent to grant a construction permit to such broadcasters within a matter of days and noted that other applicants would be required to furnish additional technical information.

59. *Petitions/Comments.* Costa de Oro TV (''Costa de Oro'') asks the Commission to establish expedited processing procedures for stations that need to relocate their transmitters due to the inability to use their current sites. It also asks several questions as to how certain types of applications will be processed.

60. *Discussion.* The October 16, 1997 Public Notice setting forth how DTV construction applications will be processed generally addresses issues such as those raised by the petitioners. As we noted in the *Fifth Report and Order,* we intend to give processing priority to routine DTV applications, which are those in which the applicant can certify compliance with several key processing requirements. We also are expediting the processing of DTV applications in any of the television markets where broadcasters are subject to an accelerated construction timetable (*i.e.,* the top 30 markets). With regard to showings that a requested change is in compliance with the Commission's interference standards, all non-routine DTV applications will be processed pursuant to the criteria adopted in the *Sixth Report and Order* and its reconsideration order, and as set forth in OET Bulletin No. 69.

iv. Selection of Permanent DTV Channel

61. *Petitions/Comments.* AAPTS/PBS petitions the Commission to require stations with both their NTSC and their DTV channel within the core to select their permanent channel several years before the end of the transition period, such as at the end of the construction period or, at the latest, a year after they commence operation.

62. *Discussion.* The issue of whether we should require stations with both channels within the core to select their permanent channel early in the transition will be dealt with in the *Memorandum Opinion and Order* on reconsideration of the *Sixth Report and Order.* We take this opportunity to clarify that non-core licensees will not be subject to competing applications when they apply for their permanent DTV channels.

v. Immediate Transition

63. *Petitions/Comments.* In the *Fifth Report and Order,* we contemplated that each broadcaster would operate its analog station while constructing its digital facilities, and then operate both facilities upon the completion of construction for the duration of the transition. However, several parties request that the Commission allow stations, at least under certain circumstances, to make an immediate and complete transition to DTV upon construction, so that they would not have to operate both digital and analog facilities. For example, Meyer Broadcasting Company (''Meyer''), Reiten Television, Inc. (''Reiten'') and NDBA argue that, because of the transition's high cost to small market stations, the Commission should allow such stations to make an immediate transition from analog to digital, eliminating the need for them to build additional facilities.

64. AAPTS/PBS makes a similar argument for noncommercial, educational television stations, as a way to compensate for their unique funding difficulties. It asserts that, in order to give needed flexibility to smaller public TV stations, the Commission should allow public TV stations with both an NTSC and a DTV channel within the core to convert to DTV on their in-core NTSC channel, rather than having to spend the money to build a separate DTV station. In the alternative, AAPTS/PBS asks that the Commission consider individual requests by stations to employ the immediate transition option where the licensee has been unable to raise the funds to construct the DTV station or lacks the resources to operate two stations simultaneously. In support, Motorola claims that adoption of the proposal could accelerate the recovery of UHF channels 60–69 for public safety or other wireless use.

65. *Discussion.* We recognize both the economic challenges facing small market broadcasters and the unique funding difficulties often experienced by noncommercial television stations. Indeed, we explicitly considered these concerns in the *Fifth Report and Order* when we set the construction schedule and adopted the service rules. It is exactly because of the matters raised by the petitioners that commercial small market broadcasters and all noncommercial broadcasters have a greater period of time within which to construct their facilities. As the network affiliates in the top 30 markets construct and begin to operate their DTV stations, we expect the market to drive construction costs down to a level that all commercial stations will be able to finance construction of their own facilities. This cost decrease should also assist noncommercial broadcasters.

66. However, adoption of these proposals could undermine the simulcasting policy set forth in the *Fifth Report and Order,* a policy that is premised on the idea that each licensee will be operating an NTSC and a DTV station until the end of the transition period. The simulcasting requirement is intended to ensure that broadcasters provide substantially the same programming to all their viewers, regardless of whether those viewers have acquired digital receiver equipment yet. Further, adoption of the proposals could disenfranchise some viewers who watch noncommercial television by removing their option to continue to watch NTSC television until the end of the transition period. Accordingly, we do not at this time believe that adopting the above proposals of Reiten, NDBA, or AAPTS/PBS would serve the public interest. However, we note that we can revisit this conclusion during any of our biennial DTV reviews, should a change in circumstances warrant.

F. Recovery Date

67. *Background.* In the *Fifth Report and Order,* the Commission established a target date of 2006 for the cessation of

analog service. It stated that one of its overarching goals in this proceeding is the rapid establishment of successful digital broadcast services that will attract viewers from analog to DTV technology, so that the analog spectrum can be recovered. Accomplishment of this goal requires that the NTSC service be shut down at the end of the transition period and that spectrum be surrendered to the Commission.

68. Subsequent to the release of the *Fifth Report and Order,* in the Balanced Budget Act of 1997, Congress directed the Commission to reclaim the analog spectrum by December 31, 2006. Congress also required the Commission to grant an extension of that date to a station under a number of specific circumstances cited in that statute.[2]

69. *Petitions.* County of Los Angeles, CA (''Los Angeles'') contends that the 2006 recovery deadline should be shortened for NTSC and DTV stations between channels 60–69 located in southern California, which it argues is necessary to alleviate the severe spectrum shortages facing Los Angeles area public safety agencies. According to Los Angeles, this will be particularly important if the Commission is unable to eliminate any of the allotments between channels 60–69 that affect public safety frequencies. Los Angeles advocates that, at a minimum, the Commission should adopt a very firm deadline so that public safety agencies can plan accordingly.

70. San Bernardino objects to the 2006 recovery date, maintaining that too early a reversion date may hurt viewers in rural areas dependent on traditional translator services. According to San Bernardino, the Commission's computer channel selection process for DTV treated existing built-out TV translator systems such as San Bernardino's as though they did not exist. San Bernardino argues that these rural locations, which are at or near full channel capacity, might lose one or two channels as the result of DTV allotments transmitting in distant markets, and would find the additional loss of channels 60–69 to be devastating. San Bernardino argues that it is obvious, even if the technology were affordable and available, that such community TV operators will not be able to double their systems and simulcast NTSC and DTV at any time during the transition. San Bernardino also argues that if many rural areas are unable to receive a DTV signal throughout the transition, the residents (perhaps 2–4 million people) will not tolerate a ''lights out'' by a date certain for NTSC television. Val Pereda (''Pereda'') also objects to the 2006 date, contending it will make existing NTSC television sets obsolete and require consumers to buy expensive DTV converters and sets.

71. *Decision.* As discussed above, the Balanced Budget Act requires us to reclaim the analog spectrum by December 31, 2006, and has established specific circumstances under which we are to grant stations an extension of that date. Although we have discretion to set an earlier deadline, we decline to grant in this proceeding the request of Los Angeles for an earlier recovery deadline for NTSC and DTV stations between channels 60–69. On reconsideration of the *Sixth Report and Order,* we are making adjustments to the DTV allotments, as suggested by MSTV, that will make some spectrum available for public safety in the southern California area. We have issued a Notice in another proceeding to seek comment on the service rules for this spectrum that Congress designated for public safety services. We also decline to grant the remaining petitioners' requests for reconsideration of the recovery date. Upon receipt of an appropriate petition, as specified in the Balanced Budget Act, we will examine the circumstances of individual licensees and grant extensions to any that qualify.

G. Must-Carry and Retransmission Consent

72. *Background.* In the *Fifth Report and Order,* the Commission decided to defer consideration of the application of must-carry and retransmission consent requirements to DTV to a future proceeding, in order to obtain a full and updated record on these issues. We noted that, on March 31, 1997, the Supreme Court upheld the constitutionality of the must-carry provisions contained in the Cable Television Consumer Protection and Competition Act of 1992, in *Turner II.* The *Turner II* case, however, did not expressly address the issue of must-carry of digital television signals.

73. *Petition.* Malrite Communications Group (''Malrite'') urges the Commission to modify the ''must carry'' rules to require cable system operators to adopt ''appropriate'' digital technologies, *i.e.,* technologies compatible with broadcast DTV standards. Malrite acknowledges, however, that there is a separate proceeding that will allow the Commission to consider cable compatibility.

74. *Decision.* We find that this reconsideration proceeding is not the proper forum in which to determine the applicability of the must-carry and retransmission consent provisions in the digital context. As discussed above, we intend to issue a Notice in a separate proceeding to seek additional comments regarding these issues. We believe that opening the record for further comments in that proceeding will allow us to reach a well-reasoned decision that will take into account the implications of the *Turner II* decision and the most current information with respect to must-carry and retransmission of DTV signals.

H. Sunshine Act

75. *Background.* The Commission adopted both the *Fifth Report and Order and the Sixth Report and Order* in the DTV proceeding at an open Commission meeting on April 3, 1997, and issued a Sunshine Agenda notice announcing the addition of these two items that morning. The Notice stated that, under § 0.605(e) of the Commission's rules, ''[t]he prompt and orderly conduct of the Commission's Business requires this change and no earlier announcement was possible.''

76. *Petitions/Comments.* The Community Broadcasters Association (''CBA'') argues that the Sunshine Act requires seven days public notice for matters to be discussed at an open meeting. CBA notes that the Sunshine Agenda notice went out on March 27 and did not mention the DTV docket, and that the notice adding the DTV items was not issued until the very day of the meeting. As a result, CBA argues, there was effectively no advance notice that the DTV items would be discussed at the April 3, 1997 meeting as required by the Sunshine Act. Asserting that this violated the Sunshine Act, CBA claims

[2] The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that: (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; (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.

Balanced Budget Act of 1997, adding new paragraph 47 U.S.C. 309 (j)(14)(B).

that adoption of the DTV rules at the April 3, 1997 meeting was invalid.

77. MSTV argues in opposition that the Sunshine Act was not violated as claimed by CBA. MSTV notes that the Commission complied with the statutory exception in the Sunshine Act, which allows a meeting without seven days prior notice if such late notice is necessary to conduct the agency's business. MSTV also observes that according to the legislative history of the Sunshine Act, when noncompliance is unintentional and does not harm the interests of any party, the underlying matter need not be reconsidered.

78. *Discussion.* We find CBA's claim that we violated the Sunshine Act to be unwarranted. The Sunshine Act states that:

> [t]he subject matter of a meeting * * * may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

Consistent with these statutory requirements, the April 3, 1997 Sunshine Agenda Notice made such a determination by recorded vote.

79. In addition, § 0.605(e) of the Commission's rules, 47 CFR 0.605(e), makes clear that ''[i]f the prompt and orderly conduct of agency business requires that a meeting be held less than one week after the announcement of the meeting, or before that announcement, the agency will issue the announcement at the earliest practicable time.'' We made such a finding in our April 3, 1997 Sunshine Agenda Notice. Further, CBA has not made a showing of how its or any other party's interests were harmed by the short notice. Accordingly, we believe that there is no basis for a finding that the adoption of the DTV rules at the April 3, 1997 meeting was in violation of the Sunshine Act or otherwise invalid.

I. Other Issues

i. Channels 60–69

80. *Petitions/Comments.* As noted above, the Commission has recently concluded a rule making proceeding reallocating the spectrum from channels 60–69 to a variety of services, including broadcast television. Motorola argues that all licensees should be able to decline to construct DTV facilities on channels 60–69, provided they so inform the Commission, so the spectrum can be used for public safety and other wireless purposes. Motorola seeks to have as few DTV channels as possible allotted to channels 60–69, to allow broadcasters that do have such allotments to change them, and to prevent the Commission from allotting future channels within that spectrum to DTV broadcasters. In this regard, Motorola states that each additional DTV allotment between channels 60 and 69 would preclude the use of at least 6 MHz of spectrum by new wireless users for nearly 8000 square miles, potentially denying new wireless service to millions of customers.

81. *Discussion.* We do not believe that allowing broadcasters to decline to construct DTV facilities on channels 60 through 69 would necessarily serve the public interest. In the *Sixth Report and Order*, we allotted spectrum between channels 60 and 69 to the fewest number of broadcasters possible, in light of our then-pending proceeding examining whether that spectrum should be reallocated. As we noted in the *Channels 60–69 Reallocation Report and Order*, ''the operation of some TV and DTV stations in this spectrum is clearly required to facilitate the DTV transition: and the Budget Act provides for this, stating '[a]ny person who holds a television broadcast license to operate between 746 and 806 megahertz may not operate at that frequency *after the date on which the digital television service transition period terminates* as determined by the Commission.''' Had other channels been available, they would have been allotted to these broadcasters.

ii. Line-of-Sight to City of License

82. *Petitions/Comments.* Hammett and Edison observes that § 73.625(a)(2) of the rules adopted in the *Fifth Report and Order* requires DTV transmitter sites to be free of a major obstruction in the path over the principal community to be served, but does not require that line-of-sight coverage of the principal community be achieved. Petitioner indicates that the analog TV rule regarding selection of transmitter site (§ 73.685) includes such a corollary requirement and suggests that this apparently inadvertent oversight in the wording of § 73.625(a)(2) be corrected by including the analog TV line-of-sight text. Hammett and Edison states that while engineers may reasonably differ in their opinions whether an obstruction is major, there is no ambiguity in the line-of-sight requirement.

83. *Discussion.* We do not believe the requested change is warranted. In the *Fifth Report and Order*, we attempted to minimize the DTV rules we created to the extent possible. In so doing, we did not include provisions that are admonitory, describing a recommended practice instead of a mandatory requirement. The analog TV line-of-sight rule indicates that the transmitter location ''should be so chosen that line-of-sight can be obtained * * *'' This is not mandatory language.[3] For either NTSC or DTV, there are situations where line-of-sight coverage over the entire community is not possible. In such situations, licensees should avoid obstruction to the extent possible. This should be clear from the ''major obstruction'' rule we adopted, and we believe that it would not be reinforced by the requested additional admonitory language. The decision to exclude it from the new DTV rule was not inadvertent, and Hammett and Edison has not presented any justification for including it upon reconsideration.

III. Conclusion

84. Our decisions in the *Fifth Report and Order* were designed to foster technological innovation and competition, while minimizing government regulation. We continue to believe that our decisions modified herein will ensure that we will soon see a digital television service that provides a host of new and beneficial services to the American public, while preserving free universal television service that serves the ''public interest, convenience, and necessity.''

IV. Administrative Matters

85. *Paperwork Reduction Act of 1995 Analysis.* The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to contain no new or modified form, information collection and/or recordkeeping, labelling, disclosure or record retention requirements on the public. This decision would not increase or decrease burden hours imposed on the public.

86. *Supplemental Final Regulatory Flexibility Analysis.* In the *Fifth Report and Order*, we conducted a Final Regulatory Flexibility Analysis (''FRFA'') as required by the Regulatory Flexibility Act, 5 U.S.C. 603. No petitions to reconsider the FRFA were

[3] Section 73.685(b) of the rules reads as follows:

> Location of the antenna at a point of high elevation is necessary to reduce to a minimum the shadow effect on propagation due to hills and buildings which may reduce materially the strength of the station's signals. In general, the transmitting antenna of a station should be located at the most central point at the highest elevation available. To provide the best degree of service to an area, it is usually preferable to use a high antenna rather than a low antenna with increased transmitter power. The location should be so chosen that line-of-sight can be obtained from the antenna over the principal community to be served; in no event should there be a major obstruction in this path * * *

filed. However, in its petition for reconsideration of the *Fifth Report and Order*, the Personal Communications Industry Association (''PCIA'') asserted that the FRFA's discussion of small businesses that would be affected by the DTV rules and policies should have included mobile licensees, not just other broadcast licensees. Rejecting PCIA's argument, the Commission notes that the FRFA's scope is limited to small entities directly subject to administrative rules, rather than all entities that are indirectly affected by the results that any rules will produce.

87. Also, the Commission on its own motion has made three minor technical changes to the rules adopted in the *Fifth Report and Order* and one minor substantive change, which are explained above. They do not affect the previous FRFA. These minor rule changes do not alter in any significant way the FRFA or the potential effect of the rules on any small entities that may be subject to them. The Commission shall send a copy of this Supplemental Final Regulatory Flexibility Analysis, along with this *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (a)(1)(A).

Ordering Clauses

88. Accordingly, it is ordered that, pursuant to sections 4(i) & (j), 303(r), 307, 309, and 336 of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), (j) 303(r), 307, 309, and 336, this Memorandum Opinion and Order is adopted.

89. It is further ordered that the Petitions for Reconsideration in this proceeding are granted to the extent described above, and are otherwise denied.

90. It is further ordered that the rule changes set forth in this document shall become effective May 1, 1998.

91. It is further ordered that, upon release of this Memorandum Opinion and Order, this proceeding is hereby terminated.

List of Subject in 47 CFR Part 73

Television broadcasting.

Federal Communications Commission,

Magalie Roman Salas,

Secretary.

Rule Changes

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

2. Section 73.624 is amended by revising paragraph (c) to read as folows:

§ 73.624 Digital Television Broadcast Stations.

* * * * *

(c) Provided that DTV broadcast stations comply with paragraph (b) of this section, DTV broadcast stations are permitted to offer services of any nature, consistent with the public interest, convenience, and necessity, on an ancillary or supplementary basis. The kinds of services that may be provided include, but are not limited to computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, subscription video, and any other services that do not derogate DTV broadcast stations' obligations under paragraph (b) of this section. Such services may be provided on a broadcast, point-to-point or point-to-multipoint basis, provided, however, that any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary.

(1) DTV licensees that provide ancillary or supplementary services that are analogous to other services subject to regulation by the Commission must comply with the Commission regulations that apply to those services, provided, however, that no ancillary or supplementary service shall have any rights to carriage under §§ 614 or 615 of the Communications Act of 1934, as amended, or be deemed a multichannel video programming distributor for purposes of section 628 of the Communications Act of 1934, as amended.

(2) In all arrangements entered into with outside parties affecting service operation, the DTV licensee or permittee must retain control over all material transmitted in a broadcast mode via the station's facilities, with the right to reject any material in the sole judgment of the permittee or licensee. The licensee or permittee is also responsible for all aspects of technical operation involving such services.

(3) In any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, a licensee shall establish that all of its program services on the analog and the DTV spectrum are in the public interest. Any violation of the Commission's rules applicable to ancillary or supplementary services will reflect on the licensee's qualifications for renewal of its license.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 970930235–8028–02; I.D. 032598E]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Closure

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS closes the commercial fishery for Atlantic migratory group king mackerel in the exclusive economic zone (EEZ) of the Atlantic. This closure is necessary to protect the Atlantic group king mackerel resource.

DATES: The closure is effective 12:01 a.m., March 29, 1998, through March 31, 1998.

FOR FURTHER INFORMATION CONTACT: Mark Godcharles, 813–570–5305.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, cero, cobia, little tunny, dolphin, and, in the Gulf of Mexico only, bluefish) is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act by regulations at 50 CFR part 622.

Based on the Councils' recommended total allowable catch and the allocation ratios in the FMP, NMFS implemented a commercial quota for the Atlantic migratory group of king mackerel of 2.52 million lb (1.14 million kg).

In accordance with 50 CFR 622.43(a)(3), NMFS is required to close any segment of the king mackerel commercial fishery when its allocation or quota is reached or is projected to be reached by publishing a notification in