

For additional information, see the direct final rule which is located in the Rules Section of this **Federal Register**.

Dated: January 27, 2009.

**Ira W. Leighton,**

*Acting Regional Administrator, EPA New England.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[MB Docket No. 09-17; FCC 09-11]

#### Implementation of the DTV Delay Act

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document seeks comment on issues relating to further implementation of the DTV Delay Act. The Commission proposes and seeks comment on a procedure for early termination of analog broadcasting by full-power television broadcasters, and asks whether stations should be allowed to terminate service at different times of day. It also asks whether the DTV Consumer Education Initiative rules should be revised, particularly to require stations to provide viewers with detailed information about service loss due to the move from analog to digital broadcasting.

**DATES:** Comments for this proceeding are due on or before March 4, 2009.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. You may submit comments, identified by MB Docket No. 09-17, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Federal Communications Commission's Web Site: <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the

**SUPPLEMENTARY INFORMATION** section of this document. In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection

requirements contained herein should be submitted to the Federal Communications Commission via e-mail to [PRA@fcc.gov](mailto:PRA@fcc.gov) and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to [Nicholas\\_A\\_Fraser@omb.eop.gov](mailto:Nicholas_A_Fraser@omb.eop.gov) or via fax at 202-395-5167.

**FOR FURTHER INFORMATION CONTACT:** For more information, please contact Nazifa Sawez, [Nazifa.Sawez@fcc.gov](mailto:Nazifa.Sawez@fcc.gov), at 202-418-7059 or Shaun Maher, [Shaun.Maher@fcc.gov](mailto:Shaun.Maher@fcc.gov), at 202-418-2324, of the Video Division, Media Bureau; or Evan Baranoff, [Evan.Baranoff@fcc.gov](mailto:Evan.Baranoff@fcc.gov), at 202-418-7142; Lyle Elder, [Lyle.Elder@fcc.gov](mailto:Lyle.Elder@fcc.gov), at 202-418-2120; or Kim Matthews, [Kim.Matthews@fcc.gov](mailto:Kim.Matthews@fcc.gov), at 202-418-2154, of the Policy Division, Media Bureau; or Eloise Gore, [Eloise.Gore@fcc.gov](mailto:Eloise.Gore@fcc.gov), at 202-418-7200, of the Media Bureau. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams on (202) 418-2918, or via the Internet at [PRA@fcc.gov](mailto:PRA@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rulemaking ("NPRM") in MB Docket No. 09-17, FCC 09-11, adopted and released February 20, 2009. (The companion Second Report and Order to this document is published elsewhere in this issue of the **Federal Register**.) The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC 20554. These documents will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

#### Initial Paperwork Reduction Act of 1995 Analysis

This Notice of Proposed Rulemaking (NPRM) was analyzed with respect to the Paperwork Reduction Act of 1995, Public Law 104-13 (PRA) and contains modified information collection

requirements. Specifically, this NPRM proposes to modify existing DTV transition-related information collection requirements to (1) expand viewer notification and other public interest obligations for early terminators of analog service; and (2) amend consumer education requirements to provide more detailed and accurate information to television viewers. The Commission is seeking OMB approval for these changes under OMB's emergency processing rules.

The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the PRA. Public and agency comments are due March 4, 2009. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

*Summary of the Notice of Proposed Rulemaking:*

#### I. Notice of Proposed Rulemaking

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on possible additional amendments to our rules that may be necessary or appropriate to carry out the purposes of the DTV Delay Act. In particular, we seek comment on revisions to the early analog termination procedures for stations that prefer to complete their transition before the new deadline of June 12, 2009. We also seek comment on whether to revise our consumer education rules, particularly by requiring broadcasters to provide service loss notices to viewers. We ask whether broadcasters should provide information on rescanning with digital equipment, and, where applicable, information regarding the need for different equipment due to changes from UHF to VHF service, or vice versa.

We also seek comment on amendments to the "100-Day Countdown" that is required in Option Two and the 30 minute informational video that is required in both Option Two and Option Three. Finally, we ask whether stations that participate in or support the post-transition analog nightlight program should be exempt from post-transition consumer education requirements.

#### *A. Analog Service Terminations Prior to June 12, 2009*

2. As discussed above, we find that revising the analog (and pre-transition digital) service termination procedures established in the *Third DTV Periodic Report and Order*, 72 FR 37310 (July 9, 2007), is necessary to implement and carry out the purposes of the DTV Delay Act. We seek to develop revised service termination procedures that will best enable us to evaluate and adjust deployment of our resources and to coordinate with other entities in order to prepare for stations' analog service terminations and protect the public interest. The Commission must make, adjust and prioritize arrangements for consumer outreach, call center staffing, converter installation assistance and coordinate with contractors, partners, volunteers, and organizations throughout the country to address areas where stations will terminate their analog signals throughout the transition period. We therefore propose to allow stations to proceed with their planned terminations, as described in their March 17 notification to the Commission, without the need for action by the Commission; provided, however, that if a major network (ABC/CBS/FOX/NBC) affiliate intends to terminate service early, it must certify that: (1) At least 90% of its analog viewers will receive some analog service (full service or enhanced nightlight) until June 12, 2009; and (2) it will comply with the other public interest conditions described below on or before the day it terminates analog service and through June 12, 2009. Any major network affiliate that does not certify to both requirements must continue providing full analog service until June 12, 2009 (except in the case of equipment failure, natural disaster, or other unforeseeable emergency).

3. In the companion Order published elsewhere in this issue of the **Federal Register**, we require all full-power television stations that have not terminated their analog service as of February 17, 2009, to decide on a firm date by which they intend to terminate their regular analog television service and to notify us of that date no later

than Tuesday, March 17, 2009. We tentatively conclude that stations may terminate no earlier than April 16, 2009, to give all parties at least 30 days from the notification date to prepare and educate consumers. Our proposals here are influenced by our experience planning for the partial transition by one-third of the full power stations on or just before February 17, 2009. We have found that advance planning and station commitment to nightlight service and public interest outreach contribute to a smoother transition.

4. For the same reason, we also tentatively conclude that stations will not be permitted to change their date for analog service termination without a strong justification and express Commission approval. We propose that, except in the case of equipment failure, natural disaster, or other unforeseeable emergency, stations would only be permitted to terminate analog service on the date they elect. In addition, we propose that the timing and advance notice for analog terminations to be adopted in this proceeding will supersede the provisions of Section 73.1615. Stations would be able to rely on the flexibility of Section 73.1615 for brief terminations or reductions of service for technical reasons, as originally contemplated by that section. They would not, however, be permitted to rely on this provision to terminate analog service altogether, even in the days immediately prior to June 12, 2009. A station's analog service termination would only be permissible on the date permitted for it by the Commission. We seek comment on our tentative conclusion and proposals.

5. The *Third DTV Periodic Report and Order* required stations to notify their viewers about a planned analog service termination at least 30 days prior to the termination. These "viewer notifications" are required to describe how viewers can continue to receive service from the station, and continue to apply to any station terminating prior to June 12. They are not limited to major network affiliates. We do not propose to modify the 30-day on-air viewer notification requirement for early service terminations, although we do encourage early transitioning stations to start viewer notifications as soon as their plans are set. We seek comment on whether to require a longer viewer notification period for early transitioning stations, up to 60 days when possible, or if we should require that notifications commence uniformly on a date certain or, instead, as soon as the station's intended termination date is finalized. Under no circumstances will a station be permitted to air

notifications for fewer than 30 days. Each station's on-air viewer notifications must include the specifics of the station's firm termination date. We also seek comment on whether to require all stations that are terminating prior to June 12, 2009, to air a crawl for the seven days prior to their termination, as was required for stations terminating on February 17, 2009.

6. The *Third DTV Periodic Report and Order* required stations to make a showing with their notification "is necessary for purposes of the transition."

Consistent with this requirement, we propose to require stations to provide us with sufficient information to enable us to determine whether an early analog termination is necessary and in the public interest. As described in the companion Order published elsewhere in this issue of the **Federal Register**, no service termination notifications may be filed prior to the release of the new procedures and form to be adopted in response to this NPRM. We propose to allow stations that notify us by March 17, 2009 to proceed with their planned terminations without specific individual approval, with limited exceptions. Under this proposal, we would review the termination notifications of major network affiliates. We propose that, in order to terminate analog service on their proposed early date, these stations will be required to certify both that there will be continuing analog service to a substantial portion of their analog audience until June 12, and that they will comply with the other public interest conditions proposed below.

7. We propose that these stations must certify that at least 90 percent of the population within their Grade B analog contour will continue to receive analog service through June 12, 2009. Analog service, for this purpose, may be full service analog programming from a major network affiliate or enhanced analog nightlight service, because either of these will include local news, public affairs and emergency information, as well as DTV educational information. Any major network affiliate that is certifying in order to terminate analog service early must include with its filing a list of the stations that will continue to provide such analog service to at least 90 percent of its analog viewers through June 12, 2009. Stations may cooperate to share responsibility for providing this analog service, but each station is individually responsible for its own analog viewers.

8. We further propose that these stations must also certify that they will comply with the other public interest conditions detailed below. The "On-Air

Crawl Prior to Termination” requirement goes into effect, by its own terms, prior to the termination of the station’s analog service. The “DTV Educational Information” and “Market Outreach” obligations must be undertaken so that they are in place no later than the day on which the station terminates full service analog programming. The “Market Outreach” requirements contemplate collective effort, in a market where more than one broadcaster has certified compliance with these conditions, but we remind major network affiliates who terminate early of their joint and several responsibility for compliance with these requirements. Due to different analog termination dates, each broadcaster in an area may become subject to these conditions at different times. Therefore, we will hold a broadcaster responsible for compliance with these requirements only during the period after the termination of its analog service. We emphasize that broadcasters that continue providing analog service through June 12, 2009, are not responsible for compliance with any of the requirements associated with early termination, or for any shared efforts or expenses incurred by early termination stations as a result of these requirements.

9. We propose to require certification to the following conditions, which generally track the conditions that we applied to the network affiliates that sought to terminate on February 17, 2009:

#### Enhanced Analog Nightlight

- Ensure that at least one station that is currently providing analog service to an area within the DMA that will no longer receive analog service after the early termination date will continue broadcasting an analog signal providing, at a minimum, DTV transition and emergency information, as well as local news and public affairs programming (“enhanced nightlight” service) for 60 days following the early termination date, but not beyond June 12, 2009; for the purposes of these early terminations, therefore, the enhanced nightlight must begin as soon as there is no network affiliate serving the area, and be provided only through June 12, 2009. The local news, public affairs, or other programming may include commercial advertising.

- Ensure that enhanced nightlight service concerning the DTV transition will be provided in Spanish and English and that both DTV transition and emergency information is accessible to the disability community (e.g., silent scrolls or slates do not provide

information to the visually impaired, and therefore, broadcast notices must have an aural component, as well as being closed or open captioned).

#### Other Public Interest Conditions

##### *DTV Educational Information*

- Ensure that on-air educational information (prior to the early termination date and thereafter as part of “enhanced nightlight” service) will include demonstrations of converter box installations, antenna setups, and other helpful information, including the location of walk-in centers in the market and the phone number for the local or toll-free telephone assistance provided to the market, discussed in this section. The Commission will continue to publicize the location of local walk-in centers via our Web site at <https://dtvsupport.fcc.gov/dtvtools>.

- Ensure that the DTV educational information, both on-air and through other means, will provide information describing areas that may be losing over-the-air signal coverage temporarily or permanently as the station transitions to digital-only broadcasting. Such information may include detailed maps, listings of affected communities, and instructions on how to assess what type of antenna may be necessary to retain or regain the station’s digital signal, as well as identifying specific locations that will not be able to receive a digital signal regardless of antenna. If educational information is prepared jointly, it must still specify the signal loss or change as relevant to each station.

##### *Market Outreach*

- Each station individually or collectively in the market commits to assisting viewers by providing local or toll-free telephone assistance, including engineering support. Such assistance may be provided jointly with other stations, organizations, and businesses in the area, but the certification must specify which station or stations are responsible. If no station is specified, the station making the certification is presumed responsible.

- Each station alone or together with other stations or local businesses and organizations in the market will provide a location and staff for a consumer “walk-in” center to assist consumers with applying for coupons and obtaining converter boxes, to demonstrate how to install converter boxes, to provide maps and lists of communities that may be affected by coverage issues, and to serve as a redistribution point for consumers who are willing to donate coupons, converter

boxes, televisions and for those in need of these items. The certification must specify which station or stations are responsible for operating the walk-in center. If no station is specified, the station making the certification is presumed responsible.

- Each station will consider and is encouraged to coordinate with and use community resources to provide consumer outreach and support, including in-home assistance.

##### *On-Air Crawl Prior to Termination*

- Each station, individually, will broadcast a crawl on their analog channel regarding the station’s termination of analog service, for the seven day period just prior to the date of early termination. For the first five days, the crawl must be aired for 5 minutes of every hour of the station’s analog broadcast day, including during primetime. For the final two days, the crawl must be aired for 10 minutes of every hour of the station’s analog broadcast day, including during primetime. Each station will include in the crawl the FCC toll-free number (1-888-CALLFCC, 1-888-225-5322). Stations that cannot broadcast a crawl because it is technically unfeasible may provide substitute information on an hourly basis, which should be indicated in their certification.

10. We recognize that major network affiliates subject to the certification requirement may not be able to certify that they and the other stations in their market will provide continuing analog service and compliance with the other necessary public interest obligations discussed above. In such cases, these licensees may make an alternative showing to the Commission that extraordinary, exigent circumstances, such as the unavoidable loss of their analog site or extreme economic hardship, require that they terminate their analog service on their proposed date. This showing must also include information regarding analog service that will be available for the station’s viewers. For example, a network affiliate might partner with another station serving the same area to ensure that its viewers may view local news, public affairs and emergency information. Some network affiliates transitioning on February 17 partnered with local PBS stations to provide local news programs, which the PBS station aired without commercials. The showing should not exceed five (5) pages, not including attachments. Stations attempting to make this showing bear a heavy burden of proof. Any station electing to make this showing must await a determination by

the Commission that its showing is sufficient before terminating analog service. The Commission will endeavor to resolve all of these cases prior to the stations' proposed termination date.

11. Under our proposed approach, we would also retain the right to prevent any station from going forward with early termination if we find it in the public interest to do so. As the Commission did in the case of stations seeking to terminate on February 17, we would expeditiously provide notice to stations via public notice if major network affiliates subject to the certification requirement decline to certify, or if any other station will not be permitted to transition on its proposed date. After broadcasters have had an opportunity to review the Commission's decisions regarding the early termination of stations in their market and surrounding markets, they would have an opportunity to revoke their early termination decision and continue to broadcast analog service through June 12. Notice of this decision would have to be provided to the Commission and viewers, however, not later than 5 days prior to the station's scheduled termination date.

12. We believe that our proposals are consistent with the DTV Delay Act. They retain stations' flexibility to choose a transition date prior to June 12 that works for them, while also taking into consideration the needs and readiness of viewers in their markets. These proposals afford flexibility for stations consistent with consumer readiness and assistance. We require that stations decide and select a final transition date that will enable other interested parties to make their plans and preparations for the station's transition. We expect that network affiliates and other stations serving the same viewing area will closely coordinate if they intend to terminate analog service before June 12, 2009. We seek comment specifically on the benefits and hazards of allowing all or virtually all stations in a market to transition prior to June 12. We are concerned that doing so would deprive unprepared consumers of access to vital local news, public affairs and emergency information. We also seek comment from affected industry groups and, particularly, from consumers on the relative benefits and harms of our proposal.

13. We also seek comment on whether stations should be allowed to terminate analog service at any time on June 12, 2009, or be required to continue broadcasting an analog signal until 11:59:59 p.m. local time. As noted in the *First Report and Order*, 74 FR 7654 (Feb.

19, 2009), implementing the DTV Delay Act, full power stations' analog licenses expire at 11:59:59 p.m. on June 12, 2009. As explained above, stations may continue analog broadcasting after 11:59:59 p.m. only to the extent that they are participating in the Analog Nightlight program. However, the DTV Delay Act and the other relevant statutory provisions are silent as to the time of day on June 12, 2009 on which analog termination may occur. We do not believe it is necessary to treat analog termination on June 12 but prior to 11:59:59 p.m. as an "early" termination and propose to leave it to stations to determine what time of day is most appropriate for their viewers. However, we propose to require that stations inform the Commission of the time of day they plan to terminate when they file the required notification on March 17, 2009 and notify viewers through their required PSAs, crawls and other consumer education broadcasts if they are planning to end analog service before 11:59:59 p.m.

#### *B. Consumer Education Initiative Rules*

##### 1. 100 Day Countdown

14. We also seek comment on whether we should revise the "100 day countdown" requirement that applies to Option Two broadcasters. As originally conceived, and as revised in this 2nd Report and Order, each Option Two broadcaster must air a daily reminder of the number of days until the conclusion of the DTV transition, beginning 100 days prior to the transition. A simultaneous nationwide countdown was appropriate when we expected that the vast majority of stations were planning to continue analog programming until the conclusion of the transition. Now that the transition has been delayed, however, many of the roughly 64% of stations that did not transition on or before February 17 may transition prior to or on June 12. Under the circumstances, we recognize that requiring an identical and simultaneous countdown to June 12 by all Option Two stations, including those that have already transitioned, may create more confusion than it would alleviate. We therefore seek comment on whether and how to revise this requirement.

15. Should a station that will be transitioning before June 12 be required to count down to the date on which that station will terminate analog service? Should it provide a second countdown (simultaneous with the first?) that demonstrates the distinction between the station's and the nation's transitions? Should the requirement vary depending on whether a station's

entire market is transitioning? If so, how should we define "entire market" for the purposes of these rules? Once a station has transitioned early, should it be required to run a countdown of any kind? We note that the educational obligation placed on pre-transition television stations arose not merely from their position as television stations watched by analog-only viewers, but also from their important position as an authoritative source of information for the affected community. Even when one station has completed its move to digital, it can still provide valuable information and education to its viewers regarding the transition by other stations.

##### 2. 30 Minute Informational Videos

16. Under the rules as revised in the companion Report and Order, Option Two and Three broadcasters must, on at least one day prior to June 12, 2009, air "an informational program on the digital television transition." Many, if not most, of the affected broadcasters complied with this requirement when the transition was to take place on February 17, and their informational programs necessarily reflected that date. For stations that have already transitioned, we find that such a program would have met the needs of their viewers. We seek comment, however, concerning whether such a pre-DTV Delay Act program should be considered sufficiently accurate and helpful to viewers of stations that have not yet transitioned, or if these stations should be required to air an up-to-date 30 minute informational program before they cease analog programming.

17. We also seek comment on what specific information would need to be included in such a program for it to serve the consumer educational purposes of the DTV Delay Act. Specifically, we seek comment on whether this up-to-date 30-minute informational video should explain: (1) The change in the transition date; (2) when that particular station is transitioning; (3) when other stations in the market are transitioning; and/or (4) any change in the coverage area of the station.

##### 3. Service Loss Notices

18. The Commission's experience with stations that have already terminated analog service, particularly in those areas where an entire market has transitioned, is that loss of a station due to a change in the digital coverage area creates the greatest consumer confusion and distress. This will be true for stations that transition at any time, up to and including June 12. Indeed, it

is true even before stations terminate their analog service as more and more viewers come to rely on digital service. Therefore, we seek comment on whether every station should be required to provide specific notice to analog viewers who are likely to lose over-the-air service from the station due to changes in the stations' coverage area.

19. Broadcasters electing Option One are already required to provide information to their viewers, at least once per week, about any "[c]hanges in the geographic area or population served by the station during or after the transition." They must do so via their regularly-aired PSAs. We propose to require broadcasters who have elected Options Two or Three to provide similar information to their viewers via PSAs, if 2 percent or more of their analog viewers are predicted to lose service as a result of a change in their geographic coverage area (even if the station gains viewers elsewhere). The Commission has created a tentative list of stations anticipated to lose 2 percent or more of their analog viewers, which can be found on the FCC Web site at <http://www.fcc.gov/dtv/markets/report2.html>. For purposes of the notice requirement, we would not include those stations where the losses are due solely to propagation effects such as a change from a VHF to UHF channel. Stations would be required to provide geographically specific information detailing areas that are covered by the Grade B analog contour but are not predicted to receive digital service. We would also require stations to provide educational information describing areas where analog signal strength is generally sufficient for viewers to rely on an indoor antenna but where it is likely that they will need an outdoor antenna to receive the digital signal.

20. We seek comment on how the information should be presented in a manner that is both accurate and understandable to viewers. Should we permit stations to convey the geographic specificity in different ways? For example, would PSAs referencing particular communities, ZIP codes, or neighborhoods be sufficient, or should stations be required to show maps demonstrating their changed service area? Should service area information be provided to viewers more frequently than once per week? Alternatively, should broadcasters be required or permitted to provide information directly to populations expected to lose service, via, for instance: direct mail to addresses in the affected area? We note that radio broadcasts and local newspapers are another means of targeting viewers who are likely to

experience loss. Stations may also point out to their viewers any areas in which their over-the-air service will improve or expand. There may well be viewers who currently rely on subscription service who may be able to rely, instead, on free over-the-air broadcasting and thus realize one of the benefits of the DTV transition, particularly where the station offers multicast channels.

21. We also propose to require all stations to provide information to consumers about the need to periodically "rescan" when using over-the-air digital reception equipment, particularly through the end of the transition. We propose to further require stations that are changing their broadcast frequency from VHF to UHF (or vice versa) to include as part of their required consumer education activities notice about the need for additional or different equipment to avoid loss of service. The implementation of Major Channel Numbers as part of the Program System Information Protocol (PSIP) makes it more difficult for consumers to determine this information on their own, because a station's "channel" no longer necessarily reflects its over the air frequency.

#### 4. Waiver of Post-Transition Consumer Education Requirements

22. We propose to waive the post-transition consumer education requirements for stations that participate in the statutory nightlight program. The broadcasters in Wilmington, North Carolina, who volunteered to transition their market on September 8, 2008, ceased analog broadcasting on that date but voluntarily participated in a "nightlight"-type program for roughly one month afterward, displaying a "slate" describing the transition and explaining how people could obtain additional information about it. In consideration of the fact that the entire market was transitioning at once, and upon the request of the broadcasters, the Commission found that the nightlight fulfilled the Wilmington stations' consumer education obligations, and waived the remainder of those obligations for both the analog and digital signals.

23. As discussed above, after the conclusion of the nationwide transition many stations will have the option to participate in the statutory nightlight program created by Congress and implemented in our *Analog Nightlight Order*. Should we, as we did in Wilmington, consider participation in this program, or support of another station's participation, sufficient to meet a station's consumer education

obligations, to the extent that they apply after June 12, 2009? We seek comment on this proposal.

#### C. Other Issues

24. Finally, we welcome comment on any actions "necessary or appropriate to implement the provisions, and carry out the purposes" of the DTV Delay Act that have not been resolved by or addressed above.

## II. Procedural Matters

### A. Statutory Authority and Good Cause Findings

25. For the reasons below, pursuant to section 4(c) of the DTV Delay Act, we conclude that the rule changes and other actions herein are not subject to the rulemaking requirements of the Administrative Procedure Act, Congressional Review Act, Regulatory Flexibility Act, or any other provision of law that otherwise would apply and would impede implementation of the statutory directives. In any event, we also conclude that there is good cause for departure from such requirements here. Nevertheless, we are providing notice and an abbreviated opportunity for public comment regarding the issues addressed in Section IV above to allow interested parties to contribute to our consideration of these issues to the extent possible in the limited time that Congress has provided.

26. Section 4 of the DTV Delay Act provides that, "[n]otwithstanding any other provision of law," the Commission must "adopt or revise its rules, regulations, or orders or take such other actions as may be necessary or appropriate to implement the provisions, and carry out the purposes, of this Act and the amendments made by this Act" within 30 days of the date of its enactment. The "notwithstanding" clause plainly excuses compliance with otherwise applicable legal requirements that would impede FCC actions to implement the DTV Delay Act by the statutory deadline. In other contexts, the DC Circuit has interpreted similar "notwithstanding" language "to supersede all other laws, stating that 'a clearer statement is difficult to imagine.'" The plain meaning of the DTV Delay Act's language is reinforced by the circumstances surrounding its passage. Congress extended the imminent DTV transition deadline to enhance national preparedness for the DTV transition, and examination of the legislative history reflects its recognition that accomplishing this goal would require extraordinary and immediate action by the Commission and others. Thus, the Act requires the FCC to act

not later than 30 days after the date of enactment, and grants it broad discretion within that brief period to take such actions "as may be necessary or appropriate" to accomplish the Act's goals. For the reasons explained elsewhere in this Order, we find that the rule making and other actions herein are necessary and appropriate to implement the DTV Delay Act and carry out its purposes. As discussed below, compliance with the APA and other procedural administrative law requirements would frustrate or impede the FCC's ability to meet the statutory deadline. Therefore, section 4(c) of the Act supersedes such legal requirements.

27. Even if the statutory language were ambiguous, we would interpret it to exempt the Commission from APA and other procedural administrative law requirements that cannot be reconciled with the statutory mandate. As stated above, the Act requires the FCC to implement its provisions and purposes within 30 days. The fact that many Commission rules, regulations and orders are tied to the original statutory deadline of February 17, 2009, combined with the Act's enactment only a few business days before February 17, reduced the time frame for many of the necessary actions from one month to a matter of days. Moreover, given the number and complexity of rule making and other actions required to implement the DTV Delay Act and accomplish its purposes, combined with the fact that the Act itself postpones the nationwide DTV transition for a limited period, the FCC cannot fulfill the statutory mandate and comply with otherwise applicable rule making and other legal requirements. There is insufficient time to publish a Notice of Proposed Rulemaking in the **Federal Register**, allow time for meaningful comment and consider those comments before taking all of the necessary legal actions. The APA also requires **Federal Register** publication at least 30 days before a rule's effective date. Here, a standard comment period after **Federal Register** publication and a 30-day waiting period before rules become effective would exceed the 30-day period after enactment during which agency implementation is required. Other legal requirements cited above likewise require more time than circumstances allow. Therefore, even if the statute were ambiguous, we would interpret it to supersede requirements that cannot be harmonized with the statutory mandate, including the APA, CRA, and RFA.

28. We also find that there is good cause for departure from the APA requirements of notice and comment,

the requirements of the CRA, and a 30-day delay before rules become effective under the circumstances here. As discussed above, the extraordinary circumstances surrounding the DTV Delay Act create an urgent need for rapid action. The statutory deadline for Commission action is no more than 30 days from enactment. The DC Circuit has held that "the extremely limited time given by Congress" to an agency for adoption of regulations "is a crucial factor in establishing 'good cause'" under the APA. We note that many of our actions are of an interim nature, in that they will no longer be in force after June 13, 2009. Moreover, some of our actions, such as extending the terms of the licenses for the recovered spectrum (including the license period and construction requirements associated with those licenses) for 116-day period, are non-discretionary or ministerial in nature. Accordingly, even if our actions were subject to the APA (and, as explained above, they are not), we find that there is good cause for departure from APA requirements because the circumstances make compliance impracticable or unnecessary. Nevertheless, as indicated above, we are providing notice and an abbreviated opportunity for public comment regarding the issues addressed in Section IV above to allow interested parties to contribute to our consideration of these issues to the extent possible in the limited time that we have. We find that the five-day comment period provided herein is the maximum possible opportunity for public comment that we can provide and still fulfill our statutory mandate to take such actions as are necessary or appropriate to implement the DTV Delay Act and accomplish its purposes within 30 days of the Act's enactment, or no later than March 13, 2009.

#### *B. Initial Paperwork Reduction Act of 1995 Analysis*

29. This NPRM was analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and contains modified information collection requirements. Specifically, this NPRM proposes to modify existing DTV transition-related information collection requirements to (1) expand viewer notification and other public interest obligations for early terminators of analog service; and (2) amend consumer education requirements to provide more detailed and accurate information to television viewers. The Commission is seeking OMB approval for these changes under OMB's emergency processing rules.

30. Written comments by the public on the new and/or modified information

collections are due on or before 5 days after the date of publication in the **Federal Register**. In addition to filing comments with the Office of the Secretary, a copy of any comments on the proposed information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 12th St., SW., Room 1-C823, Washington, DC 20554, or via the Internet to [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

31. *Further Information.* For additional information concerning the PRA proposed information collection requirements contained in this NPRM, contact Cathy Williams at 202-418-2918, or via the Internet to [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

#### *C. Filing Requirements*

32. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

33. *Comments.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before the date indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998). To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY). We find that the five-day comment period provided herein is the maximum possible opportunity for public comment that we can provide and still fulfill our statutory mandate to take such actions as are necessary or appropriate to implement the DTV

Delay Act and accomplish its purposes within 30 days of the Act's enactment; therefore, we find good cause to waive the requirement for Reply Comments established in our rules.

34. Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

35. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service (although we continue to experience delays in receiving U.S.

Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail, should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary: Office of the Secretary, Federal Communications Commission.

36. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC 20554. Persons with disabilities who need assistance in

the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or [bill.cline@fcc.gov](mailto:bill.cline@fcc.gov). These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com); or via their Web site at <http://www.bcpiweb.com>. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

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