

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09-440; MB Docket No. 05-67; RM-11116, RM-11342]

Radio Broadcasting Services; Clinton, Fishers, Indianapolis, and Lawrence, IN

AGENCY: Federal Communications Commission.

ACTION: Final rule, denial of petition for reconsideration.

SUMMARY: This document denies a Petition for Reconsideration filed by Word Power, Inc., directed to the *Report and Order* in this proceeding, which had denied Word Power's counterproposal and had granted a mutually exclusive rulemaking petition. See **SUPPLEMENTARY INFORMATION, infra.**

FOR FURTHER INFORMATION CONTACT: Andrew Rhodes, Media Bureau (202) 418-2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Memorandum Opinion and Order* in MB Docket No. 05-67, adopted February 25, 2009, and released February 27, 2009. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>.

The *Report and Order* granted a rulemaking petition, *inter alia*, to substitute Channel 230B1 for Channel 230A at Fishers, Indiana, to reallocate Channel 230B1 to Lawrence, Indiana, and to modify the license for Station WRWM to specify Lawrence as the community of license. To accommodate this reallocation, Word Power's Station WPFR-FM, Clinton, Indiana, was ordered to change its frequency from Channel 230A to Channel 229A. The *Report and Order* also denied Word Power's counterproposal to upgrade its Station WPFR-FM from Channel 230A to Channel 230B1. See 72 FR 53687, September 20, 2007.

The *Memorandum Opinion and Order* found that the *Report and Order* did not err by (1) not discussing the applicability of the *Tuck* factors regarding whether Lawrence is sufficiently independent of Indianapolis to warrant consideration as a first local

service; and (2) not specifically requiring the reimbursement to Word Power for the costs of changing channels. The document reasoned that a *Tuck* analysis is not required in this situation where a station is moving from one community to another inside an urbanized area. Likewise, a reimbursement condition is not necessary given the repeated assertions by the initial rulemaking petitioners that they will reimburse Word Power for the reasonable expenses related to the Station WPFR-FM facility modification. Finally, the *Memorandum Opinion and Order* rejected Word Power's argument that the staff had inadequately inquired into the possible premature construction of the upgraded WRWM facilities at Lawrence.

The Commission will not send a copy of this *Memorandum Opinion and Order* to GAO pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A), because the Petition for Reconsideration was denied.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.
Federal Communications Commission.
John A. Karousos,
Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E9-5399 Filed 3-11-09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

47 CFR Part 301

[Docket Number: 090212171-9172-01]

RIN 0660-AA19

Amendments to the Digital-to-Analog Converter Box Program to Implement the DTV Delay Act

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Final rule.

SUMMARY: On February 11, 2009, President Obama signed into law the DTV Delay Act, which extended the deadline for the digital conversion and the coupon application period for the Digital-to-Analog Converter Box Program (Coupon Program) by four months.¹ The DTV Delay Act also authorized the National Telecommunications and Information

¹ See DTV Delay Act, Pub. L. 111-4, 123 Stat. 112 (Feb. 11, 2009).

Administration (NTIA) to issue replacement coupons to households whose coupons have otherwise expired unredeemed. These changes to the Coupon Program were conditioned upon enactment of new budget authority for the Coupon Program, which was recently provided by the American Recovery and Reinvestment Act of 2009.²

DATES: This final rule becomes effective March 12, 2009.

FOR FURTHER INFORMATION CONTACT: Milton Brown, NTIA (202) 482-1816 or mbrown@ntia.doc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Digital Television Transition and Public Safety Act of 2005 (the Act), among other things, directed the Federal Communications Commission (FCC) to require full-power television stations to cease analog broadcasting and to broadcast solely digital transmissions after February 17, 2009.³ Recognizing that consumers may wish to continue receiving broadcast programming over the air using analog-only televisions not connected to cable or satellite service, section 3005 of the Act also authorized NTIA to establish and implement the Coupon Program.⁴ Accordingly, NTIA issued final regulations to implement the Coupon Program on March 15, 2007.⁵

On February 11, 2009, President Obama signed into law the DTV Delay Act. The DTV Delay Act, among other things, extended the date by which the Federal Communications Commission must terminate all licenses for full-power television stations in the analog television services from February 18, 2009 until June 13, 2009.⁶ Specific to the Coupon Program, subsection 3(a) of the DTV Delay Act amended paragraph (1) of subsection 3005(c) of the Act to

² The American Recovery and Reinvestment Act, Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009).

³ See Section 3002 of Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 21 (Feb. 8, 2006) (the Act). Section 3002(a) of the Act previously amended Section 309(j)(14)(A) of the Communications Act of 1934 so that analog full-power television licenses will terminate on February 17, 2009. Section 3002(b) of the Act directed the FCC to terminate analog television licenses for full-power stations by February 18, 2009.

⁴ Digital Television Transition and Public Safety Act § 3005, 120 Stat. at 23, 24.

⁵ 47 C.F.R. Part 301. The regulations were subsequently amended to waive the "eligible household" application requirement for individuals living in nursing homes, intermediate care facilities and assisted living facilities, and to permit households that utilize post office boxes for residential mail delivery to apply for and receive coupons. 73 Fed. Reg. 54,325 (Sep. 19, 2008).

⁶ See DTV Delay Act at Subsection 2(a).

extend the date by which households may apply for coupons for digital-to-analog converter boxes from March 31, 2009 until July 31, 2009.

Subsection 3(b) of the DTV Delay Act amended paragraph (1) of subsection 3005(c) of the Act to add a new subparagraph (D) that authorizes the NTIA Assistant Secretary to issue one replacement coupon per requesting household for each coupon previously issued to such household that expired without being redeemed. Subsection 3(c) of the DTV Delay Act amended paragraph (1) of subsection 3005(c) of the Act to clarify that the Assistant Secretary's obligation to ensure the two-coupon per household maximum was based on the number of coupons the household redeems rather than the number it receives via the United States Postal Service.

Subsection 3(d) of the bill provided that the amendments made by Section 3 of the DTV Delay Act would not take effect until additional budget authority for the Coupon Program was subsequently enacted. On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009, which provided that subsequent budget authority.⁷

II. Discussion

Because of the amendments to the Coupon Program necessitated by the DTV Delay Act, NTIA hereby revises and amends its regulations. Accordingly, 47 C.F.R. Part 301 is amended as discussed below.

Application Deadline

The DTV Delay Act revised Section 3005(c)(1)(A) of the Digital Television Transition and Public Safety Act of 2005 to change the last day that households can request coupons for digital-to-analog converter boxes from March 31, 2009, to July 31, 2009. Accordingly, NTIA amends its regulations at 47 C.F.R. § 301.3(c), to reflect this change and to permit households to apply for coupons until July 31, 2009. The change in date will not ensure that funds will be available to fill all coupon requests at that time.

Reissuance of Coupons

The DTV Delay Act authorized NTIA to issue replacement coupons to households if those households were

previously issued coupons that had expired without being redeemed.⁸ Because the issue of replacement coupons has not previously been addressed in the Coupon Program regulations, NTIA now adds a new section to provide that a household may request one replacement coupon for each coupon that was issued to such household and that expired without being redeemed. NTIA also requires that a request for a replacement coupon otherwise be made in accordance with the Coupon Program regulations. Thus, the application process for replacement coupons remains the same as that for households requesting coupons for the first time.

United States Postal Service

The DTV Delay Act also amended Section 3005(c)(1)(A) of the Digital Television Transition and Public Safety Act of 2005 to strike the words "receives, via the United States Postal Service," and inserts the word "redeems" to conform to the new authority for reissuance. Accordingly, NTIA amends 47 C.F.R. § 301.4(d) to add at the end thereof "or by other means as determined by the Agency." This change has the effect of providing NTIA with additional flexibility with respect to the manner with which it distributes coupons to U.S. households. Moreover, because the regulations linked the coupon issuance date to the date that the coupon was placed with the United States Postal Service, NTIA must revise its regulations to reflect the change made by the DTV Delay Act. Accordingly, 47 C.F.R. § 301.4(e) is amended to add at the end of the second sentence of that provision "or the date upon which the Agency otherwise forwards the coupon to the requesting household." The effect of this change is that the coupon issuance date, for purpose of the 90-day expiration, commences on the date that NTIA places the coupon with the United States Postal service or otherwise forwards it to a requesting household.

Prioritizing Coupon Distribution

NTIA has found it necessary in the past to place applicants from eligible households on a waiting list until funds from expired coupons become available to distribute more coupons.⁹ The

additional funding provided by the American Recovery and Reinvestment Act of 2009 will enable NTIA to liquidate the current waiting list of approximately 4.2 million coupons in two to three weeks after the Coupon Program is able to access such funds. However, if the Coupon Program experiences a high demand, it may be necessary for NTIA to once again place applicants on a waiting list. Thus, NTIA reserves the right to prioritize the distribution of coupons to over-the-air only households in the event that a waiting list becomes necessary, or if any other circumstances arise in which NTIA deems such prioritization appropriate. This decision is based on NTIA's goal of maximizing the benefits of the Coupon Program in the transition to digital television broadcasts.¹⁰ Accordingly, NTIA adds a new section to its regulations that permits NTIA to prioritize the distribution of coupons to over-the-air only households if NTIA deems it appropriate.

Administrative Procedure Act

As permitted by the good cause exception to the Administrative Procedures Act (APA), 5 U.S.C. § 553(b)(B), NTIA finds that it is impracticable and contrary to the public interest to provide notice and a public procedure on this final rule. Under the APA, notice and comment is impracticable when the agency cannot both follow section 553 and execute its statutory duties. The limited duration of the statutory extension of the application period provided in the DTV Delay Act requires swift action on the part of NTIA to amend its rules and implement program changes prior to the new application period's expiration.¹¹

Converter Box Coupons (Jan. 5, 2009) available at http://www.ntia.doc.gov/press/2009/DTV_WaitList_090105.pdf.

¹⁰ See *Rules to Implement and Administer a Coupon Program for Digital to Analog Converter Boxes*, 72 Fed. Reg. 12,097, 12,098 (March 15, 2007).

¹¹ See also DTV Delay Act, § 4(c). The DTV Delay Act required the Federal Communications Commission and the NTIA to expeditiously implement the provisions and amendments made by the DTV Delay Act. Specifically, it provided that such actions should be taken within 30 days of enactment of the DTV Delay Act. Although the DTV Delay Act also provided that the amendments to the authority related to the Coupon Program "shall not take effect until the enactment of additional budget authority after the enactment of this Act," it is nevertheless clear that Congress' intent was rapid implementation of the changes to the Coupon Program upon subsequent enactment of the new budget authority for the program. See DTV Delay Act § 3(d). Courts have found that where Congress has given an agency an extremely short period of time to promulgate a rule, a determination that waiving notice and comment as impracticable is reasonable and not arbitrary. *Philadelphia Citizens*

⁷ The American Recovery and Reinvestment Act of 2009 (providing in pertinent part, "For an amount for 'Digital-to-Analog Converter Box Program', \$650,000,000, for additional coupons and related activities under the program implemented under section 3005 of the Digital Television Transition and Public Safety Act of 2005 . . .").

⁸ The specific language of Section 3(b) of the DTV Delay Act provided that "[t]he Assistant Secretary may issue to a household, upon request by the household, one replacement coupon for each coupon that was issued to such household and that expired without being redeemed."

⁹ See Press Release, *Commerce's NTIA Announces New Coupon Applicants Will be Placed on Waiting List Due to High Demand for TV*

To the extent that NTIA provided a public procedure on this final rule, it would not be able to execute the statutory duties required by the DTV Delay Act. The current regulations prohibit households from applying for coupons after March 31, 2009. A normal rulemaking process involving notice and comment to extend the application deadline to July 31, 2009, in conformance with the DTV Delay Act, could extend well beyond March 31, 2009. Likewise, NTIA must amend its existing regulations to issue replacement coupons to households that previously received coupons that expired without being redeemed. To ensure that these households receive coupons prior to the end of analog transmission, regulations must be promulgated expeditiously.

Moreover, for the reasons above, NTIA finds good cause to waive the 30-day delay in effectiveness required by 5 U.S.C. § 553(d) because it is impracticable and contrary to the public interest. The limited duration of the statutory extension of the application period provided in the DTV Delay Act requires swift action on the part of NTIA to amend its rules and implement program changes prior to the new application period's expiration. To the extent that NTIA provided a 30-day delay in effectiveness for this final rule, it would not be able to execute the statutory duties required by the DTV Delay Act. To ensure that these households receive coupons prior to the end of analog transmission, NTIA waives the 30-day delay in effectiveness.

Executive Order 12866

This regulation has been determined to be economically significant for purposes of Executive Order 12866; and therefore has been reviewed by the Office of Management and Budget (OMB). In accordance with Executive Order 12866, an Economic Analysis was completed, outlining the costs and benefits of implementing this rule change. The complete analysis is available from NTIA upon request.

in Action v. Schweiker, 669 F.2d 877 (3rd Cir. 1982).

Congressional Review Act

It has been determined that this final rule is major under 5 U.S.C. § 801 *et seq.* NTIA finds good cause under 5 U.S.C. § 808(2) that prior notice and public comment are impracticable and contrary to the public interest. To the extent that NTIA provided a 60-day delay in effectiveness pursuant to the Congressional Review Act, it would not be able to execute the statutory duties required by the DTV Delay Act in a timely manner prior to the expiration of its extended authority. Accordingly, this final rule shall take effect upon publication in the **Federal Register**.

Regulatory Flexibility Act

Because NTIA finds good cause under 5 U.S.C. 553 § (b)(B) to waive prior notice and opportunity, the Regulatory Flexibility Act does not apply and therefore does not necessitate the preparation of a regulatory flexibility analysis.

Executive Order 13132

This rule does not contain policies having federalism implications requiring preparation of a Federalism Summary Impact.

Paperwork Reduction Act

This document does not contain new collection-of-information requirements subject to the Paperwork Reduction Act (PRA). Households are subject to the same information collection requirements that were approved by OMB Control Numbers 0660-0024, 0660-0026, and 0660-0027.

List of Subjects in 47 CFR Part 301

Antennas, Broadcasting, Cable television, Communications, Communications equipment, Electronic products, Telecommunications, Television.

■ For the reasons stated in the preamble, the National Telecommunications and Information Administration amends 47 CFR Part 301 as follows:

PART 301—DIGITAL-TO-ANALOG CONVERTER BOX COUPON PROGRAM

■ 1. The authority citation is revised to read as follows:

Authority: Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 21 (Feb. 8, 2005) (47 U.S.C. § 309 note); DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (Feb. 11, 2009); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

■ 2. Amend § 301.3 by revising paragraphs (c) and (e), and adding paragraphs (f) and (g), to read as follows:

§ 301.3 Household eligibility and application process.

* * * * *

(c) Requests for coupons must be submitted to the Agency no later than July 31, 2009.

* * * * *

(e) A household may request one replacement coupon for each coupon that was issued to such household and that expired without being redeemed. A request for a replacement coupon must otherwise be made in accordance with this section.

(f) If the Agency deems it appropriate, NTIA may prioritize the distribution of coupons to households that have certified that they do not receive cable, satellite or other pay television service.

(g) If an applicant does not meet the above eligibility requirements, the request will be denied.

■ 3. Amend § 301.4 by revising paragraphs (d) and (e) to read as follows:

§ 301.4 Coupons.

* * * * *

(d) Coupons will be sent to Eligible Households via the United States Postal Service or by other means as determined by the Agency.

(e) Coupons expire 90 days after the issuance date. Issuance date means the date upon which the coupon is placed with the United States Postal Service or the date upon which the Agency otherwise forwards the coupon to the requesting household.

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Dated: March 6, 2009.

Anna M. Gomez,

Acting Assistant Secretary for Communications and Information.

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