



September 2008

DTV Update: T-Day Minus Four Months and Counting

Harry F. Cole
cole@fhhlaw.com
703-812-0483

We're rounding the final turn and heading into the homestretch of the DTV derby. At this point the momentum has for the most part shifted so that the FCC and the TV industry as a whole are gliding . . . or perhaps careening . . . or perhaps stumbling toward the digital finish line. Here we chronicle various scenes from the evolving apocalyptic panorama.

Jumping the gun?

While the firm, fixed and final Transition Date has long been set at February 17, 2009 (unless, of course, a bill thrown into the Congressional hopper in mid-September gets any traction, in which case a couple more weeks – and who knows, maybe even more than that – might get added), a number of licensees are champing at the bit to terminate their analog operations before then. Early analog withdrawal is not necessarily a bad idea. After all, at a minimum the licensee eliminates power bills for a redundant operation. And if the licensee is reasonably confident that the significant majority of its audience already receives the digital signal – either through cable, or satellite, or maybe real DTV receivers – then the risk of ratings collapse is minimized.

The Commission has established a drill for those who want to pull the analog plug before February, and for those who are willing to hold off until November 17 to do so, the drill is largely trouble-free.

The FCC has adopted a streamlined approach for transitioning stations, an approach which kicks in November 17, 90 days prior to the Real Transition Date (*i.e.*, next February 17). Most stations will be able to permanently terminate their analog operations as of November 17 ***without prior Commission approval AS LONG AS*** they have provided at least 30 days' worth of over-the-air notices, on their analogs, alerting the audience to the anticipated termination date and "inform[ing] them about how they can continue to receive the station". (See the sidebar on page 11 for details on just what information those announcements should include.) Stations choosing this option will have to notify the Commission of their plans at least 30 days in advance. While that

notification is supposed to contain a showing that “the service reduction or termination is necessary for purposes of the transition”, it’s not clear what the purpose of that showing is, since the Commission has unequivocally stated that prior agency approval will not be required.

The bottom line for most full-service TV stations, then, is that if you want to turn off your analog operation as early as possible without first having to get FCC approval, you should plan to do so on November 17, which will require notice to the FCC (through CDBS) no later than October 18, and over-the-air notices of the planned termination also starting no later than October 18.

The one subset of licensees who will have to jump through additional hoops are those who have flash-cut construction permits which specify that operation on the DTV channel cannot commence until February 17, 2009. That condition was imposed on those permits out of concern about possible interference to pre-transition facilities – the theory is that such interference could occur up to the final Transition Date. However, licensees holding a DTV permit weighed down with such a condition can request an STA to get around it (assuming, of course, that their DTV operation will not cause interference).

All quiet on the Wilmington front?

The Commission is still presumably evaluating its experience in the Wilmington, North Carolina, market, which (with the FCC’s blessing) went almost-all-digital as a test in September, five months before the Real Transition. But its preliminary assessment is upbeat: “the vast majority of the 400,000 television viewers impacted by the change . . . seemed to be prepared for it.”

That is good news, although the Commission’s rah-rah reaction downplays (or disregards) aspects of the test that might otherwise give it pause.

For example, the fact that *anyone* in the Wilmington area might not have been aware of and prepared for the transition is hard to believe. After all, agency and industry officials (all continually beating loudly on the ominous The-Transition-Is-Coming drum) reportedly blanketed the place for weeks leading up to the test – so much so that you couldn’t swing a dead cat without hitting a couple anywhere you went. If that kind of hyper-saturation exposure did not achieve universal familiarity with the transition, it’s a pretty good bet that in other markets not blessed with this type of attention, the lack of familiarity with the transition is likely to be considerable higher.

And let’s look at the numbers. According to the FCC, Wilmington features an estimated 180,000 households, of which 14,000 rely on over-the-air (*i.e.*, non-cable, non-satellite)

signal delivery. On Day One of the Wilmington test, about 800 residents called into the FCC helpline looking for help. The Commission looks at those numbers and, with italicized excitement, concludes that “*less than one-half of one percent of area homes*” called in. And it’s true that 800 is less than one-half of one percent of 180,000.

But that’s not really a valid measure.

The primary transition fear, after all, is that folks who receive their TV signals over-the-air won’t know what to make of it on February 18, when they wake up and all they are seeing on their sets is snow. Cable- and satellite-connected viewers should not have that problem, so they are not the people the test was focusing on. Rather, the test was (or at least should have been) intended to gauge the effect of the transition on the 14,000 households who use over-the-air receivers.

If we use 14,000 as the relevant denominator, we find that *almost six percent* (i.e., 800 divided by 14,000) of the affected population had some kind of problem. That’s a boatload worse than the less-than-one-half-of-one-percent touted by the Commission.

And again, let’s stress that this occurred in a market which had been overwhelmingly blanketed with information.

So while the Wilmington experiment apparently went well, it may not have gone as well as the FCC would like us to believe and, more importantly, it may not be an accurate harbinger of what we might all expect next February.

“Hi, I’m [fill in the blank], from the FCC . . .”

Lest anyone claim that the FCC Commissioners themselves have somehow been looking the other way on this whole transition thing, check out http://www.dtv.gov/video_audio.html. There you will find 17 video PSAs and 15 audio PSAs, most of which star none other than Los Comisionados in person, each earnestly spreading the Transition word in English and Spanish. (Actually, it looks like only Comisionados Adelstein and McDowell chipped in Spanish versions, and Commissioner Tate appears only in the audio PSAs, not the videos.) You can download one, some or all of these bad boys in a variety of electronic formats. Be the first one on your block to collect ’em all – who knows what historical value they may have come next year?

Converter boxes redux

One of the aspects of the Transition that tends to go unmentioned is the issue of converter boxes. Those devices are set-top units which serve as digital tuners, converting an old-

fashioned analog receiver into a new-fangled digital receiver with the mere connection of a couple of cables. The government has allocated millions of dollars to putting these boxes into consumers' hands through a coupon program which has already suffered considerable criticism. (The implementation of that program is the responsibility of the NTIA, so the FCC dodges that bullet.)

But others have criticized the fact that the converters that are generally available in the marketplace are lacking. Perhaps most importantly, the vast majority of the converters that can be purchased lack a "pass-through" capacity that will allow the old-fashioned receiver to continue to function as an old-fashioned receiver while the converter box is plugged in. This is a serious drawback when it comes to receiving low power and Class A TV stations, most of which are not scheduled to move to digital for the foreseeable future.

This problem has been brought to the FCC's attention time and again (including in a mandamus petition filed by FHH member Peter Tannenwald). The Commission's reaction has been less than encouraging.

Hold on, though. This month he wrote a letter to the Consumer Electronics Retailers Coalition (CERC), noting that "recently" a converter box featuring "the important analog pass-through feature" had been introduced to the market. But, according to Martin, the unit is available only "from a few very small retail outlets" and by means (*i.e.*, over the Internet or by phone) that add considerable shipping charges. Martin asked whether it might be possible for the CERC maybe to get some of its members – like Best Buy, Circuit City, Wal-Mart, etc. – to, like, you know, possibly stock these converters, along with the non-pass-through-friendly ones they have been selling for months.

Keeping his Junior Consumer Advocate hat on, Martin wrote another letter, this one to the CERC and the Consumer Electronics Association, pointing out that there just don't seem to be many battery packs for converter boxes and battery-powered DTV receivers out there in the market. Martin the Governmental Official chided that the availability of such items "is vitally important as a matter of public safety". Martin the Entrepreneurial Consultant helpfully observed that "there appears to be a significant unmet market demand" for such items. Martin the Design Engineer noted that many converter boxes "operate from an external power supply and it appears they could operate with battery packs". As of this writing it is not clear whether either letter has drawn any response.

Not to be outdone, Meredith Attwell Baker, the acting head of the NTIA – the agency responsible for the converter box coupon program – suggested that, rather than let the government do all the heavy lifting here, broadcasters should consider (1) stocking up on converter boxes and then (b) handing them out free-of-charge to viewers. In an

admirable demonstration of “spin”, Baker pointed out that the boxes could be gussied up with station logos, “which would allow [the broadcasters] to build brand awareness while they were helping out.”

The Cost of Premature Analog Withdrawal: Getting the word out to the viewers

Licenses looking to pull the plug on their analog operations prior to February 17, 2009, are required to so notify the public in over-the air messages containing the following information:

- the station’s call sign and community of license;
- the fact that the station is planning to reduce or terminate its analog operations before the transition date;
- the date of the planned reduction or termination;
- what viewers can do to continue to receive the station, *i.e.*, how and when the station’s digital signal can be received. (Alternatively, the notification could describe how to get service from another station affiliated with the same network and serving the same loss area.);
- information about the availability of digital- to-analog converter boxes in their service area; and
- the street address, email address (if available), and phone number of the station where viewers may register comments or request information.

Stations turning off their analog on or after November 17 must air **four** such announcements **daily** (at least one in prime time) for the **30 days prior to turn-off**. These are, by the way, separate and distinct from the DTV educational PSAs that stations are supposed to be running as part of the run-up to the Transition.