

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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| <b>In the Matter of</b>  | ) |                 |
|  | ) |                 |
| <b>Realignment of the 896-901 / 935-940 MHz<br/>Band to Create a Private Enterprise<br/>Broadband Allocation</b> | ) | <b>RM-11738</b> |
|  | ) |                 |

To: The Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau  
Via: Electronic Comment Filing System

**COMMENTS OF JVCKENWOOD USA CORPORATION**

JVCKenwood USA Corporation (“JVCKenwood”), a major manufacturer and developer of communications equipment for, among other purposes, public safety and industrial/business land mobile communications systems, hereby respectfully submits its comments in response to the *Public Notice* (the “Notice”), DA 14-1723, released November 26, 2014 in the above captioned proceeding. The Notice seeks comment on the “*Petition for Rulemaking of the Enterprise Wireless Alliance and Pacific DataVision, Inc.*”<sup>1</sup> requesting that the Commission commence a rulemaking proceeding, proposing (1) to realign the 896-901/935-940 MHz (900 MHz) band to create therein a “private enterprise broadband allocation” (PEBB); (2) to assign licenses in the newly allocated, six megahertz<sup>2</sup> PEBB allocation (898-901 and 937-940 MHz) on the basis of one, “240-channel” (sic) license per Major Trading Area (MTA) “to the entity already holding at least fifteen (15) of the twenty (20) geographic licenses in that MTA;” and (3)

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<sup>1</sup> See the *Petition for Rule Making* (the Petition) filed November 17, 2014 by Enterprise Wireless Alliance (EWA) and Pacific DataVision, Inc. (PDV), which are collectively referred to herein as “Petitioners”.

<sup>2</sup> The proposal is to allocate two paired, three megahertz blocks of spectrum for broadband operation.

that the Commission “be prepared to” reinstitute a freeze on the licensing of 900 MHz Band Business, Industrial, and Land Transportation (B/ILT) frequencies if applicants for new licenses exhibit “questionable” eligibility.<sup>3</sup> The PEBB licensee in each market would be obligated to pay for the relocation of incumbent B/ILT and SMR MTA licensees in the PEBB band to equivalent narrowband channels in the remaining four megahertz of spectrum (896-898 and 935-937 MHz). For its comments in opposition to the Petition, JVCKenwood states as follows:

## **I. Introduction.**

1. Petitioners ask the Commission to completely disrupt the narrowband licensing process in the 900 MHz Band, just a year and a half after the Commission finally, and only partially, lifted a *ten-year* freeze on all licensing in this Band. The Petition would necessitate a complete reconfiguration process with a level of complexity akin to the 800 MHz Nextel rebanding effort (which has taken many years and is as yet far from complete). The EWA/PDV proposal is made in furtherance of a rather transparent plan to feather the nest of one of the Petitioners, PDV, to the exclusion of all others. The PEBB licensee would be, as Petitioners put it, “in most cases, Pacific DataVision, Inc., which holds most SMR MTA licenses in virtually every MTA in the country.”<sup>4</sup> For EWA’s part, the proposal includes an exclusive award to EWA of the authority to develop and manage “the initial frequency recommendation process” for those licensees to be relocated from the PEBB allocation. Lest there be any doubt that the plan of the Petitioners is to preclude any opportunity for mutually exclusive applicants for the proposed, six megahertz PEBB allocation, the Petition strongly suggests that there be reinstated *yet another freeze on applications* for this band, so that no other entities (including “applicants with

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<sup>3</sup> What constitutes “questionable” eligibility is not defined in the Petition and that portion of the Petition is difficult to understand. Eligibility for licensing is binary at 900 MHz; it exists or it doesn’t, and the rules are straightforward. See, 47 C.F.R. § 90.603 (a), (b) and (c).

<sup>4</sup> See the Petition, at iii.

‘questionable’ eligibility”) could apply for or obtain licenses that would allow them to obtain PEBB licenses in individual markets or to compete with PDV. In summary, this is a self-serving Petition that, for the numerous reasons explained below, fails to establish that the relief requested is in the public interest and plainly does not warrant consideration by the Commission. It should therefore be dismissed without further action. 47 C.F.R. § 1.401(e).

## **II. The Petition is Procedurally Defective**

2. Section 1.401(c) of the Commission’s rules requires that a petition for rulemaking shall set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected. The instant Petition fails to meet these requirements in several respects. Most notably, there is no appendix and no indication of the Part 2 and/or Part 90 rule changes that are required in order to implement the Petition. It is readily apparent that there would, under the conceptual proposal of the Petitioners, be substantial changes in both Subpart S and Subpart U of Part 90 of the Commission’s rules, as well as the establishment of some new rules governing the assignment of licenses to PEBB licensees.<sup>5</sup> There are also potential changes to the Table of Allocations, Section 2.106 of the Commission’s Rules. Yet, the only exhibit to the Petition is a graph depicting the revised domestic allocation plan for the 900 MHz Band which is merely illustrative, but not descriptive of the proposal. There has been provided no appendix and no listing of proposed new rule text, no amended rule text, and no listing of rules proposed to be repealed.

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<sup>5</sup> For example, at page 19 of the Petition, the Petitioners suggest that the revised 900 MHz rules should specify a start date for initiation of a one-year voluntary negotiation period for affected licensees that should begin sixty days after the adoption of the new rules. But what those new rules should say, and what terms for the negotiation period should be included in them, are not specified in the four corners of the Petition. The public is called upon to speculate what Petitioners have in mind. This is precisely the kind of situation that Section 1.401(c) was intended to preclude.

3. Far worse than the absence of proposed rules in the Petition is the absence of any preclusion study in the Petition. There is no indication in the Petition of the effect (in any market) of reallocating three- fifths of the spectrum that is now available for narrowband licensing on the present *and future growth*<sup>6</sup> of 900 MHz B/ILT operations in the remaining two-fifths of the band, once the PEBB-displaced incumbent licensees are moved there to accommodate a single PEBB licensee. The Petition is purely qualitative, discussing the alleged, highly speculative benefits of creating a new private broadband system providing commercial broadband service to customers. It makes no qualitative reference to the cost of displacement of incumbent licensees; it provides no data as to the number of narrowband licensees that would have to be relocated in each MTA; there is no disclosure of the ability of PDV or any other potential PEBB licensee to bear the cost of creating the broadband network and relocating incumbents or the procedure that would be utilized and whether it could be done without disruption of incumbent's operations; and therefore there is no indication of the magnitude of the project or the extent of disruption of licensee operations during the proposed rebanding process. It proposes no transition administrator, such as was established in the 800 MHz transition to protect the displaced licensees from arbitrary action by PDV or EWA, but proposes instead that a single, interested FAC handle the entire relocation process according, apparently, to whatever procedures it chooses to implement. In short, Petitioners have failed to justify their proposal within the four corners of the Petition and therefore it is defective pursuant to Section 1.401 of the Commission's Rules and should be dismissed.

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<sup>6</sup> Indeed, as is discussed below, this Petition is untimely because it is filed a scant year and a half after the (partial) lifting of a ten-year freeze on narrowband application filing. The demand for narrowband facilities at 900 MHz cannot be determined accurately because business plans have only recently developed for 900 MHz facilities after the partial lifting of the freeze in late June of 2013. Therefore, the preclusion effect of this Petition cannot be accurately determined now.

4. Finally on this subject, it is suggested by Petitioners that there may have to be a guard band between the narrowband segment and the broadband segment. It is unspecified how much of a guard band would be necessary; what it would be used for, if anything, and how it is to be administered. Nor is there a compatibility study incorporated in the Petition relative to the proposed division between broadband and narrowband operations in the Band. The Petition is skeletal; it provides a vague concept only; and it therefore constitutes an incomplete platform to permit meaningful comment on the proposal or its individual components. It is therefore subject to dismissal.

### **III. The Commission Would be Obligated to Assign PEBB Licenses Via Competitive Bidding, and Therefore the Petition Cannot be Effectuated as Proposed**

5. Petitioners suggest that, upon reallocating the 900 MHz band and making available the six megahertz broadband allocation, the entirety of that PEBB broadband segment should be simply assigned to the holder of “a majority” (but not all) of the individual geographic area licenses in an MTA, which “in most cases” is stated to be PDV.<sup>7</sup> In other markets where there is no dominant licensee, Petitioners propose<sup>8</sup> a unique, and apparently mandatory negotiation process among all geographic license holders in that MTA that is somehow supposed to result in a consensus plan with a single nominee emerging as a PEBB licensee.<sup>9</sup> The Petitioners, therefore, propose that the Commission award a single, exclusive license to a broadband service

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<sup>7</sup> The Petition, at page 17, states that “It is expected that PDV will be the PEBB licensee in most MTAs because of the extensive MTA holdings Sprint purchased from the FCC at auction and through subsequent secondary market transactions, which spectrum rights have been purchased by PDV and assigned to it from Sprint following FCC consent to the assignment. There are seven (7) MTAs in which neither PDV nor any other MTA licensee holds at least fifteen (15) of the twenty (20) geographic licenses. There, the Petitioners recommend that all MTA licensees be obligated to negotiate to select the PEBB licensee. This could be accomplished in a number of ways, including by creating a new entity in which all the parties participate, subject, of course, to FCC approval. Because these parties will hold varying numbers of MTA blocks within the market, the process should be designed to motivate all to negotiate in good faith.”

<sup>8</sup> *Id.*, at 17.

<sup>9</sup> Doubtless, the expectation of the Petitioners is that PDV will be the “consensus” broadband licensee in those markets as well.

provider through a mechanism that avoids any auction and precludes any opportunity for the filing of a mutually exclusive application to become a PEBB licensee in a given market. In fact, so as to ensure that there is no chance of a mutually exclusive PEBB license applicant to challenge PDV in any market, the Petitioners have suggested a freeze on applications across the board for 900 MHz licenses. If that is done, no entity desirous of competing with PDV for a PEBB license in any market could do so by becoming a licensee in that band.

6. Pursuant to Section 309(j) of the Communications Act of 1934, as amended,<sup>10</sup> Congress directed the Commission to use competitive bidding to resolve mutually exclusive license applications for those radio services that do not fall within one of Section 309(j)(2)'s auction exemptions. The Commission has concluded that in non-exempt services, the Commission's authority under the Balanced Budget Act continues to permit it to adopt licensing processes that result in the filing of mutually exclusive applications where the Commission determines that such an approach would serve the public interest.<sup>11</sup> The Commission has determined that applications are "mutually exclusive" if the grant of one application would effectively preclude the grant of one or more of the other applications.<sup>12</sup> Where the Commission receives only one application that is acceptable for filing for a particular license that is otherwise auctionable, there is no mutual exclusivity, and thus no auction. Therefore, mutual exclusivity is established when competing applications for a license are filed. In addition, Section 309(j)(2) sets forth conditions beyond mutual exclusivity that have to be satisfied in order for spectrum to be auctionable.<sup>13</sup> Generally speaking, these conditions subject to auction those services in which

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<sup>10</sup> See 47 U.S.C. § 309(j) (1999).

<sup>11</sup> *Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended; Report and Order and Further Notice of Proposed Rule Making* 15 FCC Rcd 22709 (2000).

<sup>12</sup> *Implementation of Section 309(j) of the Communications Act -Competitive Bidding (Second Report and Order)*, 9 FCC Rcd 2348 at 2350 n.5 (1994).

<sup>13</sup> See 47 U.S.C. § 309(j)(2)(A) (1996).

the licensee is to receive compensation from subscribers for the use of the spectrum.<sup>14</sup> The Commission has interpreted the 1993 Budget Act's exemptions to refer to what it termed "private services", i.e. those that did not involve the payment of compensation to the licensee by subscribers, but were for internal use.<sup>15</sup>

7. Clearly, Petitioners have constructed a licensing scheme for PEBB licenses that would avoid mutually exclusive application filing. The Petitioners' plan is to (1) simply give away broadband licenses in MTAs throughout the United States to the single holder of some (but not all) narrowband geographic area licenses in some markets (thus to assign to PDV - without creating an opportunity for other entities to compete for such licenses - large amounts of new spectrum not currently held by PDV which PDV would not have to pay for, *including 40 B/ILT channels in each MTA that are proposed to be reallocated from narrowband use as part of the PEBB broadband allocation*); and (2) to rely on a vaguely stated negotiation process to select a PEBB licensee in those markets in which there is no holder of a majority of narrowband licenses (with no metric stated for determining how a single, consensus PEBB licensee is to emerge). This cannot *possibly* be found to be in the public interest. Assuming *arguendo* that the creation of a broadband allocation in the 900 MHz band is in the public interest in the first place (and as discussed hereinbelow, it is *not*), the Commission should avoid complicity in what amounts to an anticompetitive plan by PDV to acquire large swaths of spectrum in markets throughout the United States free, and without any opportunity for other broadband providers who might be far better qualified to provide broadband service in that band to enter the arena and to effectuate as necessary the relocation of displaced narrowband licensees that would be necessary. The D.C. Circuit United States Court of Appeals has recognized that the Commission is not obligated to

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<sup>14</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 Title VI, § 6002(a) (1996).

<sup>15</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348 at 2352, ¶¶ 23-25.

adopt a licensing scheme that avoids mutual exclusivity but undermines the public interest goals in Section 309(j) of the Communications Act of 1934.<sup>16</sup> Section 309(j)(3)(D) of the Act obligates the Commission to promote the efficient use of the spectrum. The Commission has found that adoption of a licensing scheme that results in the filing of mutually exclusive applications encourages efficient use of the spectrum as mandated by Section 309(j)(3).<sup>17</sup> It would unavoidably have to reach the same conclusion in this case. The spectrum giveaway proposed by PDV is neither in the public interest nor a fair or equitable means of distributing licenses among the states and communities as called for by Section 307(b) of the Communications Act of 1934.

8. Obviously, had the Petition merely proposed that PDV be permitted to utilize the 900 MHz SMR channels it has previously aggregated and now holds licenses for in various MTAs, acquired by purchase (from Sprint after the decommissioning of the Sprint iDEN network) in a broadband configuration, there would be little basis for objection. Indeed, the Commission's Rules [47 C.F.R. § 90.645(h)] now permit combining of up to ten channel blocks where additional bandwidth is required. If PDV wants to acquire licenses by purchase or application sufficient in number in a given MTA to commence a broadband service using those licenses that it holds and those it is able to acquire, the Commission might fairly consider amendment of the Part 90 rules to permit that. That is not, however, what the EWA/PDV Petition proposes. What is problematic about the scheme proposed by Petitioners is that there is a single beneficiary of this Petition attempting to acquire for its own use varying numbers of channels that it does *not now*

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<sup>16</sup> *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997); *Benkelman Telephone Company, et al., v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000).

<sup>17</sup> See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10009-10010 ¶ 115 (1997).

*have licensed to it*<sup>18</sup> without competitors and without any cost other than the obligation to relocate incumbent narrowband licensees from the spectrum it proposes to have given to it. It proposes to use its own licensed spectrum and that proposed to be given to it, and to sell broadband services on a commercial basis using that spectrum to third parties. As an incident to this spectrum grab, Petitioners propose to reduce by 40 channels in each and every MTA in the United States the number of narrowband B/ILT channels that are available for licensing now without any showing of the impact of that on present and future B/ILT needs.

#### **IV. It is Unnecessary and Untimely to Create a Broadband Allocation at 900 MHz.**

9. Even if the Petitioners' plan for reallocation of the 900 MHz band could be effectuated as proposed in the Petition, the Petition fails to establish that the disruption of 900 MHz narrowband licensing at the present time is in the public interest or that the establishment of a broadband allocation within the 900 MHz band is a preferential allocation of spectrum. The fact is that Petitioners, in proposing a 900 MHz broadband domestic allocation, are late to the party. The United States established in 2010 a comprehensive, ten-year plan for broadband access by all Americans (including CII and other business entities). In early 2009, Congress directed the Commission to develop a National Broadband Plan (NBP) to ensure every American has "access to broadband capability."<sup>19</sup> In less than a year, pursuant to that directive from Congress, the Commission developed and released the NBP to Congress. It is now approximately 4 years old. The NBP, among other things, calls for the reallocation of 500 MHz of spectrum for broadband use, principally mobile broadband. The first 300 MHz, which is to include spectrum in approximately the 222-3700 MHz band, would be made available within 5 years of the date of

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<sup>18</sup> This fact completely differentiates the instant proposal from the 800 MHz rebanding effort. In the latter, there was a compelling interference resolution basis for the process. Here, there is an anticompetitive and monopolistic motive.

<sup>19</sup> See, Section 6001(k) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (2009).

the NBP, and the remaining 200 MHz within 10 years of the date of the Plan. The Plan has been submitted to and accepted by Congress. In October of 2010, the National Telecommunications and Information Administration (NTIA) released a “*Plan and Timetable to Make Available 500 Megahertz of Spectrum for Wireless Broadband.*”<sup>20</sup> Table 2-1 of that Plan listed a total of 2,263.9 MHz of spectrum which could be made available for mobile broadband and supporting fixed wireless broadband facilities. That was of course more than four times the amount of spectrum that was mandated by Congress for broadband reallocation in 2009. The Table made no reference whatsoever to the band 896-901/935-940 MHz or any portion of it. Any suggestion that the 900 MHz band, or any portion of it should be reallocated for broadband use should have been made well before the United States adopted a master plan for broadband spectrum reallocation in 2010 and an opportunity to consider that relative to alternative bands.

10. Nor is it timely to consider any further disruption of the 900 MHz band, which has had absolutely no chance to mature as a narrowband allocation since 2004. Petitioners concede that, though the 900 MHz band was first created in 1986, the band was effectively frozen to applicants between 2004 and mid-2013, and even in 2013, the freeze was only lifted in a limited fashion, subject to consent in each case by Sprint due to the “temporary” use of the 900 MHz band to accommodate displacements<sup>21</sup> during the Sprint Nextel 800 MHz rebanding process. In June of 2013, the Commission finally allowed utilities and other commercial entities to file applications for new spectrum licenses in the 900 MHz B/ILT band (896-901/935-940 MHz), thus partially lifting a freeze that had been in place on applications for new licenses in this band

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<sup>20</sup> *Plan and Timetable to Make Available 500 Megahertz of Spectrum for Wireless Broadband*, U.S. Department of Commerce, Gary Locke, Secretary; Lawrence E. Strickling, Assistant Secretary for Communications and Information; October 2010. Available at: [http://www.ntia.doc.gov/reports/2010/TenYearPlan\\_11152010.pdf](http://www.ntia.doc.gov/reports/2010/TenYearPlan_11152010.pdf)

<sup>21</sup> The Commission chose the 900 MHz band as a temporary home for Sprint Nextel’s 800 MHz band commercial operations, to create “green space” that would facilitate the exchange of spectral locations in the 800 MHz band between Sprint Nextel and public safety licensees.

since 2004. The 2013 Order held that eligible applicants would be allowed to file applications for new licenses in the 900 MHz B/ILT band in any National Public Safety Planning Advisory Committee (NPSPAC) region where the 800 MHz rebanding process was not yet complete, as long as the application is accompanied by a letter of concurrence from Sprint Nextel. Previously (i.e. since 2008), the Commission would accept applications for new licenses in the 900 MHz B/ILT band only in those NPSPAC regions where rebanding had been complete for at least six months (at present, 800 MHz rebanding is still incomplete in some NPSPAC regions). Thus, the 900 MHz band has been effectively warehoused for new narrowband 900 MHz applications for a decade and even now, the freeze has not been completely lifted. There has not been a legitimate opportunity for B/ILT eligibles to plan new narrowband systems at 900 MHz since 2004 and to date. It is doubtless untimely for the Commission to, at this point, consider a major reallocation of the band without foreclosing necessary opportunities for narrowband licensing and construction of new narrowband systems in the Band.

11. Eligibility for narrowband licensing in the 900 MHz B/ILT band on a site-by-site basis (once actually permitted to occur) is extremely flexible and should be given a fair chance to develop. It is useful for base-mobile operations in support of various commercial (*e.g.*, utility, transportation, manufacturing and energy) and non-commercial (*e.g.*, clerical, philanthropic, educational, medical) activities.<sup>22</sup> Although B/ILT licenses are intended for private internal communications, the Commission has flexibly allowed licensees to modify their licenses to permit the provision of commercial communications services or assign their licenses to another entity for commercial use.<sup>23</sup> Narrowband licensees use their B/ILT communications facilities to

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<sup>22</sup> See 47 C.F.R. §§ 90.31, 90.33, 90.35, 90.603.

<sup>23</sup> Subsequent to grant of a 900 MHz B/ILT license, a licensee may apply to modify the license to permit commercial operation on the license or to assign the license to another entity for commercial use. See *id.* § 90.621(f).

ensure safety of operations, protect their plants, and enable the cost-effective production of goods and services offered to the public. Narrowband use of the band is, and will be increasingly critical for American business and industry, especially in view of potential reallocation of the band 470-512 MHz for commercial broadband use or as reaccommodation spectrum for displaced broadcast television operations after the 600 MHz incentive auctions. It is impossible to predict now whether or not the proposed reallocation of three-fifths of the 900 MHz B/ILT band for broadband use to accommodate the proposed broadband allocation will leave adequate narrowband spectrum available for B/ILT licensees, including those displaced from UHF allocations. The Petitioners speak to the loading of the band now in making the prediction that two paired, 2 megahertz segments will be sufficient going forward. That is not a logical argument and no amount of speculation by the Petitioners justifies the Petition.

12. The *Public Notice* asks a series of questions, given the incompleteness of the Petition on its face. The most important of these questions is what unmet need do B/ILT and CII entities have for broadband services that necessitates use of a 3/3 MHz channel that cannot be met by existing broadband service providers, and what functionality do these entities currently lack that could be provided pursuant to the proposed reallocation of spectrum, nationwide or otherwise. The answer to this question, fairly evaluated, is none at all. The combination of narrowband operations at 900 MHz, permitted without substantial licensing restraints, and the widespread availability of commercial broadband operations are sufficient to accommodate the communications needs of B/ILT and CII entities. There is nothing in the Petition that indicates otherwise.

## V. Conclusion

Because the Petition is procedurally inadequate; because the proposal made by Petitioners to assign broadband licenses to PDV for spectrum not currently held by PDV without competitive bidding is contrary to the public interest and to Section 309 of the Communications Act of 1934, as amended; and because any proposal to create a new broadband allocation within the 900 MHz B/ILT Band is untimely and preclusive, The Petition should be dismissed without further action. Therefore, the foregoing considered, JVCKenwood USA Corporation respectfully requests that the Commission take no further action with respect to the Petition for Rule Making other than to dismiss or deny the same pursuant to 47 C.F.R. § 1.401(e).

Respectfully submitted,

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