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

In the Matter of	)	
	)	
Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band for Use By White Space Devices and Wireless Microphones	)	MB Docket No. 15-146
	)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	)	GN Docket No. 12-268

COMMENTS OF GRAY TELEVISION, INC.

Robert J. Folliard, III
Gray Television, Inc.
Vice President and Deputy General Counsel
4370 Peachtree Road, NE
Atlanta, GA 30319
Phone: 202.750.1585

September 30, 2015

Table of Contents

I. Introduction and Summary 1

II. The Commission Should Provide a Legitimate Opportunity for Displaced LPTV and Translator Stations To Find A New Channel And Not Require the Vacant Channel Showing. 2

A. The Commission Does Not Have Authority To Prioritize Unlicensed Services Over Licensed LPTV and Translator Services. 3

B. The Commission's Tentative Conclusions Do Not Strike the Proper Balance Between Users of the Television Bands. 6

C. LPTV and Translator Stations Offer Significant Public Interest Benefits Which Were Not Considered by the Commission. 7

III. In the Alternative, The Commission Should Delay the Vacant Channel Showing Requirement Until The Close of the Special Displacement Filing Window. 10

IV. The Commission Should Open a New Class A Window for Qualified LPTV Stations. 10

V. Conclusion 11

I. INTRODUCTION AND SUMMARY

Gray Television, Inc. ("Gray") hereby submits its comments in response to the *Notice of Proposed Rulemaking* ("*Vacant Channel NPRM*") adopted by the Federal Communications Commission ("FCC" or "Commission") on June 11, 2015 in the above-captioned proceedings, [1] and also in response to the additional vacant channel proposal made by the Commission in the August 11, 2015 *Public Notice* ("*Procedures PN*").[2] Gray is the parent company of the licensee of sixty full power television stations, three Class A television stations, sixteen network-affiliated low power television ("LPTV") stations, and numerous TV translators across the country. Its LPTV stations originate Top-4 network programming in thirteen markets and broadcast twenty-one program streams, and its translators deliver Top-4 network programming to rural, underserved regions in more than a dozen markets. Gray has a well-deserved reputation for searching out new and innovative ways to serve the local communities in which it owns and operates stations. Gray's network-affiliate LPTV stations bring valuable, over-the-air, Top-4 network programming to small and mid-sized markets that, in many cases, previously had to rely on imported signals from adjacent markets, and its translators serve areas that might not otherwise receive any over-the-air television programming at all.

Gray urges the Commission to put licensed services first. The Commission's tentative conclusions to favor one or two vacant channels for unlicensed services over a new home for

---

[1] Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band For Use By White Space Devices and Wireless Microphones; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, MB Docket No. 15-146, GN Docket No. 12-268, *Notice of Proposed Rulemaking*, 80 Fed. Reg. 38158 (June 11, 2015) ("*Vacant Channel NPRM*").

[2] Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying To Bid, and Bidding in Auctions 1001 (Reverse) and 1002 (Forward), AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, MB Docket No. 15-147, *Public Notice*, 80 Fed. Reg. 52715 ¶ 32 (Aug. 11, 2015) ("*Procedures PN*").

displaced LPTV and translator stations must be rejected. LPTV and translator stations are a licensed service with priority over unlicensed uses of spectrum; these stations provide valuable network and local programming to their communities. Following the auction, the Commission must provide a legitimate opportunity for LPTV and translator stations to seek new channels if they are displaced by the spectrum auction and subsequent repacking. To this end, the agency should not implement the vacant channel showing requirement for LPTV or translator stations.[3]

Additionally, Gray renews its call for the Commission to commit to open a new Class A window post auction. LPTV stations that meet the criteria should be given an opportunity to remove their secondary status and receive protection in any subsequent spectrum shifts.

II. THE COMMISSION SHOULD PROVIDE A LEGITIMATE OPPORTUNITY FOR DISPLACED LPTV AND TRANSLATOR STATIONS TO FIND A NEW CHANNEL AND NOT REQUIRE THE VACANT CHANNEL SHOWING.

The Commission's proposals to require licensed LPTV and translator stations to protect one or two vacant channels improperly prioritize unlicensed services over licensed LPTV and translator services. The Commission, in the *Vacant Channel NPRM*, tentatively concludes that LPTV and translator facilities should be required "to make a demonstration that their proposed new, displacement, or modified facility will not eliminate the last available vacant UHF channel in an area for use by white space devices and wireless microphones."[4] It intends for this requirement to be implemented "commencing with the post-auction displacement filing window for operating LPTV and TV translator stations."[5] In the *Procedures PN*, the Commission tentatively concludes that in the event that the duplex band is impaired, it will designate a second

[3] As discussed further in Section III, if the Commission disregards these comments and adopts rules requiring a vacant channel showing, then Gray urges the Commission to delay the effective date of this requirement until the close of the LPTV special displacement filing window.

[4] *Vacant Channel NPRM* ¶ 12.

[5] *Id.*

vacant channel in the television band for shared use by white space devices and wireless microphones.[6]

Gray rejects the Commission's tentative conclusions because the Commission does not have the authority to prioritize unlicensed services over existing licensed services, the Commission fails to strike a fair balance between users of the television bands, and the Commission fails to recognize the vital public interest role that LPTV and translator stations play in their local communities. All licensed television services—including Class A, LPTV and translator stations—should be exempt from a requirement to make a vacant channel showing.[7]

A. The Commission Does Not Have Authority To Prioritize Unlicensed Services Over Licensed LPTV and Translator Services.

The Commission does not have the authority to prioritize unlicensed uses of the valuable UHF spectrum over existing licensed uses. Indeed, the Commission acknowledges that it previously has firmly held that licensed services must take priority over unlicensed ones.[8] The Commission's position on prioritizing licensed services has, until these proposals, been clear: "TV services for which . . . spectrum is allocated on primary and secondary bases are important media for the provision of news, information, and entertainment that warrant priority over . . . unlicensed broadband devices."[9]

---

[6] *Procedures PN* ¶ 32.

[7] For the same reasons that Gray opposes the vacant channel requirement for LPTV and translator stations—namely, that the Commission should not prioritize unlicensed services above licensed ones—Gray also opposes the Commission's proposals to require a vacant channel showing for applications for modification of Class A television stations and for modifications to full power television station licenses after the initial 39-month post-auction transition period. *See Vacant Channel NPRM* ¶ 12.

[8] *Vacant Channel NPRM* ¶ 19 & n.54.

[9] In the Matter of Digital Television Distributed Transmission System Technologies, MB Docket No. 05-312, *Report and Order*, 23 FCC Rcd. 16731 ¶ 19.

The Commission consistently has held this position because the Communications Act of 1934, as amended, requires it. Although Section 303 grants the Commission authority to manage the television band in the public interest, when determining that public interest, the Commission must be guided by the broad structure and overall statutory scheme of the Act.[10] Throughout Title III of the Communications Act, Congress stresses the importance of *licensed* services and the unique public interest obligations imposed on licensed services.[11] Indeed, Section 307(b) requires the Commission to ensure "a fair, efficient, and equitable distribution" among the states when considering applications for licenses.[12] Suddenly prioritizing unlicensed services, which have no public interest obligations much less any obligation to provide service at all, over licensed television services that are required to serve the public interest fails the Commission's most basic duty to manage the spectrum in the public interest.

---

[10] *Cf. King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (explaining that "we must read the words [of a statute] in their context and with a view to their place in the overall statutory scheme." (citations omitted)).

[11] *See, e.g.*, 47 U.S.C. § 301 ("It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority . . . ."); *id.* § 303a (creating a children's television programming obligation on television broadcast licensees); *id.* § 308(b) ("[A]pplications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require."); *id.* § 316 ("Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity . . . ."); *id.* § 317 (imposing an obligation on broadcast stations to make announcements regarding payment for broadcasts).

[12] *Id.* U.S.C. §307(b).

Additionally, the Commission lacks authority to prioritize unlicensed services over licensed ones under the Spectrum Act as well.

> The spectrum provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (MCTR) do *not* charge the Commission with the central goal of maximizing the amount of spectrum made available for not only licensed use, but also unlicensed use. Rather, the Commission was charged with implementing an incentive auction that maximizes the amount of high-quality spectrum licenses for wireless broadband while ensuring that the agency made all reasonable efforts to preserve the coverage area and population served of each broadcast television licensee during the repacking process.[13]

Not only does the Commission lack authority under the Communications Act and the Spectrum Act, but its vacant channel showing proposals also represent a seismic change in Commission policy that is neither properly recognized nor justified by the FCC.[14] These proposals flatly prioritize unlicensed services above licensed ones, in direct contradiction to the Commission's previous rulings that LPTV broadcasters and other licensed services are entitled to priority over unlicensed services. The Commission glosses over its prior decisions and disregards the many statutory provisions highlighting the importance of licensed services. It characterizes its changed position as a "limited departure;"[15] however, that is not the case. The Commission's new position is a complete about-face. The Commission argues that the "limited departure" is justified, in part, because the proposed showing will only have a "limited [impact on LPTV and translator stations] in terms of . . . the availability of channels for future use."[16] This, too, is flatly untrue. The impact of the proposals on LPTV and translator stations—which

---

[13] Letter from Congressman Greg Walden, Chairman, Subcommittee on Communications and Technology, to the Honorable Tom Wheeler, Chairman, Federal Communications Commission (Aug. 4, 2015) (internal quotation marks omitted) ("*Walden Letter*").

[14] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining that an agency can change prior policy if it "display[s] awareness that it *is* changing position" and if it "show[s] that there are good reasons for the new policy").

[15] *Vacant Channel NPRM* ¶ 19.

[16] *Id.*

already will struggle to find a vacant channel after the incentive auction and repacking process—is significant. The record is clear that hundreds of LPTV and translator stations across the country will be displaced, and the proposed vacant channel showing will have an overwhelming impact. The Commission's analysis of its legal authority is wrong. It does not have authority to elevate unlicensed uses above licensed uses and the impact of these proposals is in no way "limited."[17]

B. The Commission's Tentative Conclusions Do Not Strike the Proper Balance Between Users of the Television Bands.

The Commission's tentative conclusions unfairly prioritize unlicensed services over licensed services. In the *Vacant Channel NPRM*, even the Commission recognizes the administrative morass the vacant channel showing would create for LPTV and translator stations searching for a new channel following the spectrum auction.[18] Indeed, LPTV and translator stations not only would have to find a suitable displacement channel while protecting a vacant channel, but they would also face the overwhelming likelihood that their proposal would be mutually exclusive with another (if not multiple) LPTV and/or translator station(s).

Additionally, the *Procedures PN* proposal requires stations located in areas where the duplex gap is impaired to have to protect not just one, but two, vacant channels, which will only exacerbate the likelihood of mutual exclusivity amongst these applicants.[19] The agency must adopt a reasonable approach that provides the greatest opportunity for LPTV and translator stations to locate, apply for, and build a replacement facility—with the fewest opportunities for

---

[17] *Walden Letter* at 2 ("The Commission's proposals for unlicensed operation in the broadcast band to supersede use by licensed operations are inconsistent with both the statute and repeated calls from lawmakers to preserve LPTV and translators where possible.").

[18] *Vacant Channel NPRM* ¶ 16.

[19] *Procedures PN* n.124.

mutual exclusivity—before these stations are forced off their existing channels by new spectrum owners or relocating full power and Class A stations.

The effect of the vacant channel showing—as proposed by the FCC—goes against the Commission's stated goal of "strik[ing] a balance between the interests of all users of the television bands, including secondary broadcast stations."[20] Rather, as aptly identified by the National Association of Broadcasters, the vacant channel proposal "flatly prioritiz[es] hypothetical unlicensed services over licensed stations currently providing valuable services to viewers."[21] Gray encourages the Commission to strike the necessary balance between preservation of this important licensed service and flexibility for new technologies in the limited spectrum that will be available post-auction by not imposing a requirement to make a vacant channel showing on LPTV and translator stations.

C. LPTV and Translator Stations Offer Significant Public Interest Benefits Which Were Not Considered by the Commission.

Gray's LPTV and translator stations play a vital role in the communities they serve. LPTV stations overall bring diversity, localism, and competition to their communities and viewers. Likewise, translators bring broadcast television to communities and viewers who would otherwise not be served by broadcasting due to their geography. If these stations go dark because of the incentive auction and subsequent repacking process—which is a distinct possibility in many markets—consumers will lose the innumerable benefits that these stations offer.

---

[20] *Vacant Channel NPRM* ¶ 8 (internal quotations omitted).

[21] Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Amendment of Part 15 of the Commission's Rules to Eliminate the Analog Tuner Requirement, MB Docket No. 03-185, GN Docket No. 12-268, ET Docket No. 14-175, *Comments of the National Association of Broadcasters*, p. 5 (Jan. 12, 2015).

Take, for example, KJCT-LD in Grand Junction, Colorado. KJCT, the ABC affiliate in Grand Junction, provides seventeen hours of local news and has brought eight full time jobs to this market. Another example is Gray's KNPL-LD in North Platte, Nebraska, which was the first to offer a half hour truly local newscast to North Platte (Market #209). KNPL now provides over twenty-nine hours of local news each week. It also airs "Pure Nebraska," a half hour program focused on issues of local importance six days a week. KNPL is a vital partner with the local community, providing an over-the-air outlet for a variety of specials, including Husker Football, Our Town, and Nebraska Weather Network programming.

In Charlottesville, Virginia, WVAW-LD is the ABC affiliate. Prior to its launch, ABC viewers in Charlottesville obtained their weather report from Harrisonburg. While only sixty miles separate these cities, the mountains that divide these markets can result in dramatically different weather in the two towns. For example, during a storm last winter, Charlottesville received only two inches of snow, while Harrisonburg was buried by more than ten inches of snow. Local news and weather are essential to keeping viewers safe and informed and WVAW provides over fifteen hours of local news and weather each week. Additionally, during the Fall, it hosts "Friday Night Endzone," a show that features local high school football.

And for many communities, Gray's translator stations—like other translator stations—allow broadcast signals to be carried to otherwise unreachable viewers. As Congressman Walden recently highlighted for you, "translators allow broadcast signals to reach across challenging terrain to serve some of the most rural Americans. Without translators, much of the western half of the United States would not be served by broadcasting."[22]

[22] *Walden Letter* at 1.

In the aggregate, low power stations licensed to Gray provide over eighty hours of local news each week, in addition to Top-4 network and local programming of interest to these small and mid-size communities. Gray has brought over forty new jobs to these markets. If these stations go dark as a result of the auction and subsequent repacking process, these communities will not only lose the localism, diversity, and competition offered by their low powers, they will lose real jobs as well.

In the *Vacant Channel NPRM*, the Commission fails to recognize LPTV stations' broad array of public interest benefits, like the benefits of the Gray stations discussed above. Instead, the Commission solely focuses on the public interest benefits of white space devices and wireless microphones.[23] Likewise, in the *Procedures PN*, the Commission singularly highlights the "significant public benefits provided by white space devices and wireless microphones," failing to even once discuss the benefits of LPTV and translator stations.[24] But, the Commission is not ignorant of the significant public interest benefits of low powers. Indeed, in the recent *LPTV NPRM*,[25] the FCC wrote that "[t]hese stations are a source of diverse and local programming for viewers, especially in rural and remote locations."[26] Gray urges the Commission to be even-handed in its analysis and to consider low power and translator stations' public interest benefits in this proceeding as well.

---

[23] *See, e.g.*, *Vacant Channel NPRM* ¶¶ 8, 10, 19.

[24] *Procedures PN* ¶ 32 & n.124.

[25] Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Amendment of Part 15 of the Commission's Rules to Eliminate the Analog Tuner Requirement, MB Docket No. 03-185, GN Docket No. 12-268, ET Docket No. 14-175, *Third Notice of Proposed Rulemaking*, 29 FCC Rcd. 12536 (Oct. 9, 2014) ("*LPTV NPRM*").

[26] *Id.* ¶ 1.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD DELAY THE VACANT CHANNEL SHOWING REQUIREMENT UNTIL THE CLOSE OF THE SPECIAL DISPLACEMENT FILING WINDOW.

Gray urges the Commission to reject its proposals to require LPTV and translator stations to submit vacant channel showings. However, if the Commission disregards these comments and adopts such a requirement, Gray encourages the Commission to delay implementation of the vacant channel showing requirement for these stations until *after* the special displacement filing window. Imposing the vacant channel showing on LPTV and translator stations only after the displacement window will allow these stations at least one reasonable opportunity to find a new channel if displaced by the auction.

IV. THE COMMISSION SHOULD OPEN A NEW CLASS A WINDOW FOR QUALIFIED LPTV STATIONS.

Gray renews its call for the Commission to open a proceeding to allow LPTV stations that meet certain criteria to apply for Class A status.[27] It is clear that not all LPTV stations will find a new home after the spectrum incentive auction and subsequent repacking of full power and Class A stations.[28] However, those LPTV stations that do secure a channel <u>and</u> that demonstrate a commitment to serving their local communities should be given the opportunity to apply for Class A status and secure a permanent channel in the post-auction environment.

Gray encourages the Commission to declare those LPTV stations that demonstrate compliance with the following criteria by a future date-certain eligible to apply for Class A status. The eligibility criteria should track the current Class A operations and programming

---

[27] *See* Gray Notice of Ex Parte, MB Docket No. 03-185, GN Docket No. 12-268, ET Docket No. 14-175 (Mar. 11, 2015).

[28] Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, 29 FCC Rcd 6567 at ¶21 (2014) (*Incentive Auction Report and Order)* ("We conclude that protecting other categories of facilities, including low power television ("LPTV") stations …, which are secondary in nature and are not entitled to protection from primary services under our current rules, would unduly constrain our flexibility in the repacking process.").

requirements, namely: the station must (1) operate a minimum of 18 hours a day, (2) provide 3 hours of children's programming a week, and (3) provide 3 hours of locally produced programming a week.[29] Gray proposes that stations must remain in compliance with the Class A requirements from the date of certification forward.

Gray encourages the Commission to act promptly to secure the future of those LPTV stations that are actively serving their communities by giving them a path forward to obtain Class A status following the conclusion of the spectrum incentive auction.

V. CONCLUSION

For the reasons argued above, Gray respectfully urges the Commission to reject its tentative conclusions to require a vacant channel showing by displaced LPTV and translator stations. The Commission does not have the authority to prioritize unlicensed services over the preservation of licensed services as proposed in the *Vacant Channel NPRM* and the *Procedures PN*. The Commission's proposals will exacerbate an already difficult situation as displaced LPTV and translator stations search for a new channel from which they can continue to provide programming. The auction and subsequent repacking process will clearly have detrimental effects on LPTV and translator stations across the country, with many such stations likely to go dark because there will not be a channel available to them. Accordingly, Gray encourages the Commission to consider the innumerable public interest benefits of low power and translator stations to communities across the country. Additionally, Gray renews its call for the Commission to open a proceeding to allow LPTV stations that meet certain criteria to apply for Class A status.

[29] *See* §73.6001(b).

Dated: September 30, 2015

Respectfully Submitted,

GRAY TELEVISION, INC.

By: *<u>/s/ Robert J. Folliard, III</u>*

Robert J. Folliard, III
Gray Television, Inc.
Vice President and Deputy General Counsel
4370 Peachtree Road, NE
Atlanta, GA 30319
Phone: 202.750.1585