

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions)	GN Docket No. 12-268
)	
Policies Regarding Mobile Spectrum Holdings)	WT Docket No. 12-269
)	
Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auction 1001 and 1002)	AU Docket No. 14-252
)	
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
)	

REPLY COMMENTS OF THE ADVANCED TELEVISION BROADCASTING ALLIANCE

The Advanced Television Broadcasting Alliance (“ATBA”)¹ hereby replies to initial comments submitted in response to the Notice of Proposed Rulemaking released June 16, 2015² (the “*Vacant Channel Notice*” or “*NPRM*”). The NPRM proposes (i) to permit the FCC simply to refuse to process certain applications for new or modified broadcast facilities and (ii) to reserve auctionable spectrum and hold it for unlicensed use in perpetuity. In the process, it will eliminate existing broadcast service and preclude broadcasters from modifying or expanding

¹ The ATBA is an organization comprised of hundreds of low-power television (“LPTV”) broadcasters, owners and operators of translators, and allied industry organizations and companies. For efficiency, unless otherwise stated or implied by the context, references to “LPTV” in this filing include low power television broadcast translator and booster stations and services.

² *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*, Notice of Proposed Rulemaking, MB Docket No. 15-146, 30 FCC Rcd 6711 (2015); see also *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*, Order, MB Docket No. 15-146, DA 15-918 (rel. Aug. 12, 2015) (establishing September 30, 2015 comment deadline and October 30, 2015 reply comment deadline).

coverage over time to adjust to shifting populations and deploy advanced technology. It will also prevent launch of new broadcast services, raising serious questions about the FCC's continued belief that a multiplicity and diversity of voices are paramount public interest objectives.

The comments reflect that the *NPRM* is perhaps the FCC's most aggressive move yet to advance policy goals unrelated to the auction while using the auction as "cover" to ignore longstanding policies, rules and statutory provisions that would otherwise complicate or preclude the FCC's pursuit of those unrelated policy objectives.

ATBA supports the comments of Gray Television in full, and in particular, Gray's explanation that the FCC does not have authority to prioritize unlicensed service over licensed broadcast stations in the broadcast band.³ ATBA also supports commenters who note that adopting the NPRM's proposals would be arbitrary and capricious, because it is an abrupt change of course from the FCC's long-established rules and policies regarding (i) the status of unlicensed users generally, and the status of unlicensed "white spaces devices" ("WSDs") in the television band specifically;⁴ and (ii) the overriding policy goals and associated rules supporting the widest possible deployment of broadcast service in the bands allocated to broadcast service.⁵ And as we explain below (at page 4), a refusal by the FCC even to process a broadcast application simply because it may prevent use of that spectrum by unlicensed devices would violate the Communications Act, including Section 307(b).

Many commenters object that the *Vacant Channel Notice* proposes to give unlicensed users priority over incumbent, licensed LPTV and translator stations in bands that are allocated

³ *Comments of Gray Television, Inc.* ("Gray Comments") at 3-6. MB Docket No. 15-146, GN Docket No. 12-268 (filed Sept. 30, 2015).

⁴ *Comments of National Association of Broadcasters* ("NAB Comments") at 5. GN Docket No. 12-268, WT Docket No. 12-269, AU Docket No. 14-252, MB Docket No. 15-146 (filed Sept. 30, 2015). *Comments of Sinclair Broadcast Group, Inc.* ("Sinclair Comments") at 3-5. GN Docket No. 12-268, WT Docket No. 12-269, AU Docket No. 14-252, MB Docket No. 15-146 (filed Sept. 30, 2015).

⁵ *Sinclair Comments* at 5-6.

for broadcast television. As the NAB observes, the FCC proposes “a comprehensive restructuring of the white spaces rules that would provide white spaces with rights and protections unlike any other unlicensed service.”⁶

The FCC’s table of allocations does not even reflect an allocation for unlicensed use in television bands, and the FCC itself has consistently referred to the relevant bands as “the TV Bands.”⁷ Yet, the *NPRM* proposes to give WSDs greater status in the TV bands than unlicensed users have in bands that are actually allocated for unlicensed use. As NAB notes, the cornerstones of Part 15 of the FCC’s rules, under which WSDs operate, are that “unlicensed operations have no recognizable right to continue to operate on any particular frequency, they must not cause harmful interference to any authorized service, and [] they must accept harmful interference caused by any authorized service.”⁸

By the FCC’s own reckoning, the supposed virtue of WSDs is that they would “operate on frequencies in the TV bands in areas *where they are not used* by licensed services”.⁹ Again, by the FCC’s own definition, WSDs are intended as “opportunistic” users of otherwise unused spectrum. This is their claimed benefit and efficiency.¹⁰ And when used in that opportunistic capacity, ATBA does not object to their use.

But the claims put forth in the comments by parties seeking to greatly expand unlicensed access turn this benefit and efficiency on its head. Rather than employ otherwise unused spectrum opportunistically, the *NPRM* and the supporting commenters would do just the opposite: they would take existing service offline altogether to keep spectrum fallow, perhaps in perpetuity, so that it might be used at some future time by WSDs that are, for practical

⁶ *NAB Comments* at 4.

⁷ See, e.g., *In the Matter of Unlicensed Operation in the TV Broadcast Bands Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, Third Memorandum Opinion and Order, 27 FCC Rcd 3692 (2012), *passim*. (“*Third WSD Order*”)

⁸ *NAB Comments* at 3, citing 47 C.F.R. 15.5(a)-(b).

⁹ *Third WSD Order*, *supra*, at para 1 (emphasis added).

purposes, completely unused in spite of having been permitted for years. Doing so would be an arbitrary and capricious reversal of years of policy (including, without limitation, the policy that says licensed services in bands designated for their use need not protect unlicensed, opportunistic services that do not have even a secondary allocation.) As NAB points out, reversing policy and elevating the status of WSDs to the point of displacing licensed services and precluding expansion of licensed service for which the band is allocated is particularly unwarranted (and capricious) given that the market has shown *no* demand for WSDs.¹¹

But there is an even more fundamental flaw in the NPRM's proposal. Section 307(b) of the Communications Act¹², states that when there is demand for licenses, the FCC "*shall* make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." (emphasis added) But under the proposals of the NPRM, even when there is demand for television facilities in the TV band and available spectrum, the FCC would not grant a license by auction or otherwise if doing so might preclude theoretical unlicensed use that does not even nominally have secondary status in the band. The FCC has authority to permit opportunistic, non-interfering unlicensed use of the broadcast white spaces. But it does *not* have authority to refuse to process broadcast applications simply because granting those applications would preclude potential future use of that spectrum by unlicensed stations.

ATBA also agrees with other commenters who note that the NPRM proposals are contrary to the Spectrum Act.¹³ The Spectrum Act was intended in part to raise funds for the Treasury by auctioning spectrum licenses made available by repacking. Congress specifically prohibited the FCC from reclaiming broadcast licenses simply to create spectrum for unlicensed

¹⁰ *Id.*

¹¹ *NAB Comments* at 7-8.

¹² 47 U.S.C. § 307(b)

¹³ *NAB Comments* at 8-10; *Sinclair Comments* at 2;

use: the FCC is permitted to permit unlicensed use in guard bands, but those guard bands must be no larger than technically reasonable. The intent of Congress is clear: the FCC cannot manipulate the auction to create unlicensed bands

ATBA further submits that the NPRM proposals are contrary to the Spectrum Act on yet another basis, and also contrary to Title III of the Balanced Budget Act of 1997¹⁴. The latter requires the FCC, when faced with mutually exclusive applications for broadcast stations, to assign a license based on a competitive auction.¹⁵ This obligation, of course, underscores our earlier point that the FCC is required to process applications for broadcast stations when there is demand. The FCC acknowledges in the initial Incentive Auction Report and Order that mutually exclusive displacement applications must be resolved by auction if the mutual exclusivity cannot be resolved.¹⁶ Now, though, the FCC proposes to reserve portions of the broadcast TV bands specifically for unlicensed use and, on that basis, *refuse to accept or process applications for the primary and secondary services the band was allocated for, which applications otherwise might be auctioned*. This is exactly the opposite of what Congress told the FCC to do. Like Bartleby¹⁷, the FCC may “prefer not to” process valid broadcast facility applications. But the FCC is *required* to process applications for new or modified broadcast facilities, grant them if they comply with technical rules and the applicant is otherwise qualified, and auction them if they are mutually exclusive. The Bartleby option is not available.

We agree with NAB’s comment that the effects on low power and translator facilities will be widespread.¹⁸ The FCC asserts, without any backup or explanation, that at least two vacant channels will be available in most areas after repacking and that, in any event, the proposal will

¹⁴ *Balanced Budget Act of 1997*, Pub.L. 105–33, 111 Stat. 251.

¹⁵ 47 U.S.C. § 309(j)(1).

¹⁶ *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, GN Docket No. 12-268, 29 FCC Rcd 6567, 6836-37 (2014)

¹⁷ "Bartleby, the Scrivener: A Story of Wall Street" is Herman Melville's 1853 masterpiece short story about a clerk who, when given a task, simply responded, "I would prefer not to."

only *reduce* the number of channels available for LPTV and translator displacement, broadcast modifications, and new broadcast facilities, “will be limited”.¹⁹ But that provides neither the quantification required for reasoned decision-making, nor comfort for affected broadcasters and their viewers. Even a widespread impact, or complete preclusion in a subset of markets, could be considered “limited” in the sense that it is not “unlimited”. For reasoned decision-making, the FCC must make *some* accounting for the loss of and preclusion of service. But it has not. Elimination of one, two or three channels that would otherwise serve the primary purpose of the allocation would be devastating to the broadcast service.

The FCC has dismissed other calls to account for the loss of LPTV and translator service, asserting that the Spectrum Act does not require the FCC to protect LPTV and translator stations in the repacking process.²⁰ But in those cases, at least, the FCC was disregarding the impact on LPTV *with the stated goal of running a successful incentive auction, which is the very purpose of the Spectrum Act.*²¹ Here, the FCC is refusing to take any credible steps to quantify (and is grossly underestimating) the destruction of broadcast service, *to achieve a wholly unrelated policy goal that has no basis in the Spectrum Act and no essential nexus to the auction.*

Unlike thousands of LPTV and translator stations currently licensed and operating in the UHF band across the country, many or most at risk of being eliminated post-auction, there are essentially no services being provided by WSDs anywhere. If the FCC believes more spectrum should be made available for unlicensed services, it should identify suitable bands where that type of unmanaged service can proliferate. The FCC should not eliminate existing licensed

¹⁸ *NAB Comments* at 10-11.

¹⁹ *NPRM* at ¶ 11.

²⁰ See, e.g., *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Second Order on Reconsideration, GN Docket No. 120268, 30 FCC Rcd 6746 (2015).

²¹ ATBA does not concede that ignoring the impact on LPTV and translators is consistent with the FCC’s obligations under the Communications Act or the Spectrum Act, and supports Sinclair’s comments in this regard. See *Sinclair Comments* at 3-6.

service to preserve spectrum that may one day, possibly, find limited use for unlicensed devices, in spite of history suggesting otherwise. Especially, it should not do so as an afterthought to a complex incentive auction that is intended to create *licensed* wireless services while fully preserving *licensed* broadcast services.

ATBA also supports the comments of Pearl TV in full,²² and confirms that all broadcasters need flexibility to adjust service areas over time to implement new technology. In particular, the required white space showing would likely preclude broadcasters from deploying single frequency networks (“SFNs”) using ATSC 3.0.

ATBA strongly opposes the comments of The Open Technology Institute at New America and Public Knowledge²³ and other commenters who argue that the vacant channel demonstration requirement should apply immediately after the auction and should apply to digital replacement translators (“DRTs”).²⁴ DRTs provide broadcast service within the contours of full power stations, and exist simply to address coverage anomalies. It would be nonsensical to prevent broadcasters from using DRTs to fill in their service areas simply to protect theoretical unlicensed use. Given the Spectrum Act’s admonishment that the FCC use all reasonable efforts to preserve broadcast coverage area and population served in repacking, essentially reallocating broadcast spectrum *inside a licensed, primary service station’s service contour* to unlicensed use cannot be justified.

OTI/PK makes the bizarre argument that “a single LPTV or translator station in a single market could effectively undermine . . . the deployment of unlicensed devices nationwide.”²⁵ We assume that OTI/PK actually means that widespread LPTV and translator stations could mean fewer white spaces and thus less utility for WSDs. However, the utility of the television band for

²² Comments of Pearl TV. MB Docket No. 15-146, GN Docket No. 12-268 (filed Sept. 30, 2015).

²³ *Comments of Open Technology Institute at New America and Public Knowledge* (“OTA/PK Comments”). MB Docket No. 15-146, GN Docket No. 12-268 (filed Sept. 30, 2015).

²⁴ *OTT/PK Comments* at 2-3.

²⁵ *OTI/PK Comments* at 2-3.

unlicensed devices is not an appropriate consideration for the FCC in repacking. The band, post-repacking, will remain allocated to broadcast television and populated with licensed television broadcast facilities nationwide. Opportunistic use of remaining white spaces must be opportunistic. If the OTI/PK wishes for the FCC to re-allocate the television band for unlicensed use, it should submit a petition for rulemaking and stakeholders should confront that request directly.

What is true, though, is that eliminating a single translator station to preserve spectrum for WSDs could eliminate broadcast services to large areas that rely on translators. Most translator networks are “daisy-chained”. Like Christmas tree lights, if one goes out, so do the ones further down the chain. The translators closest to the source broadcast signal are often the most important. As the vacant channel showing would be more difficult to make closer to urban areas, it is highly likely that the most critical translators will be eliminated, also eliminating service for the rest of that chain of the network. Since many small cable operators serving small communities rely on translators to receive the signals of major networks and public broadcasting, loss of one translator could result in a near total loss of broadcast service in a large area.

OTI/PK also argue that multiple vacant channels must be available nationwide for the white spaces authorization to have any utility.²⁶ But even with the vacant channel reservation, the FCC cannot guarantee that vacant channels will be available nationwide. There seems to be at least a rough consensus on this point: even if the FCC prohibits LPTV stations and translators from using available displacement channels, and prevents broadcasters from launching single frequency networks, and refused to process applications for other facilities modifications or new broadcast stations in the TV bands, it is unlikely that the reserved white spaces will be much used. This, again, underscores how much this proposal departs from

²⁶ *OTI/PK Comments* at 3-6.

reasoned decision-making required by the Administrative Procedures Act.

OTI/PK argues that the Spectrum Act give the FCC authority to “continue its allocation of the TV band for unlicensed use” citing Section 6403(b) of the Spectrum Act.²⁷ OTI/PK contend that the FCC’s authorization under Section 6403(b) to “make such reassignments of television channels as the Commission considers appropriate; and (ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation,” authorizes the FCC to effectively reallocate broadcast spectrum to unlicensed.²⁸ But OTI/PK omits portions of that subsection (b) that make clear the FCC’s authority to “make reassignments” and “reallocate” spectrum is “[f]or purposes of making available spectrum to carry out the forward auction.”²⁹ Section 6403(b) of the Spectrum Act grants the FCC no authority to reallocate broadcast spectrum, or eliminate or diminish broadcast service, to achieve ancillary policy objectives of the FCC.

For these reasons, and for the reasons cited by NAB, Gray Television, PearlTV, Mako Communications, and others, ATBA urges the FCC to reject the proposal to require any broadcasters to make any “vacant channel” showings in connection with any broadcast facility applications.

Respectfully submitted,

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²⁷ OTI/PK Comments at 8.

²⁸ *Id.*

²⁹ *Middle Class Tax Relief and Job Creation Act of 2012*, Pub.L. 112-96, 126 Stat. 156, 201 §6403(b).