

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC, 20554**

In the matter of)	
)	
Amendment of Parts 73 and 74 of the)	
Commission’s Rules to Establish Rules for)	MB Docket No. 03-185
Digital Low Power Television, Television)	
Translator, and Television Booster Stations and)	
to Amend Rules for Digital Class A Television)	
Stations)	

To: The Commission

**PETITION FOR CLARIFICATION OR MODIFICATION
OF
NEW AMERICA FOUNDATION
and
THE CHAMPAIGN URBANA WIRELESS INTERNET NETWORK**

SUMMARY

The New America Foundation (NAF) and the Champaign Urbana Wireless Internet Network (CUWIN) (collectively, “NAF, *et al.*”) stress at the outset that they do not oppose the basic premise or outcome of the Commission’s *Report and Order*. To the contrary, NAF, *et al.* agree with the Commission that low-power television (LPTV) licensees play an important role in providing local content and serving underserved communities. This role has only increased in importance in recent years, as consolidation among full-power licensees has reduced outlets for local programming. NAF, *et al.* also agree that translators provide television reception in regions that would not otherwise receive these signals, and that translators therefore will continue to play an important role bringing free over-the air television in the digital transition.

NAF, *et al.* must express concern, however, that the Commission has failed to consider the impact of this docket on the Commission’s critically important effort to open the broadcast bands to low power unlicensed devices. *In re Unlicensed Operation in the TV Broadcast Bands*, Docket No.

04-186 (rel. May 25, 2004) (*04-186*). Creating opportunities for direct citizen access will have enormous benefits and will further the goals of the Communications Act and the First Amendment.

As a technical matter, the Commission has known for 15 years that low power devices can operate in the broadcast bands without interfering with television reception. *In re Revisions of Part 15*, 4 FCCRcd 3493, 3501 (1989) (*1989 Part 15 R&O*). In *04-186*, however, the Commission proposed to prohibit operation of unlicensed devices within the designated protective contour of any new channels awarded to LPTV and translator stations pursuant to this docket. *04-186* at ¶¶16 & n.31, 29. This creates an unfortunate and false dichotomy between digital LPTV and citizen access to spectrum. This false dichotomy is further compounded by the failure of the Commission to consider the impact of its decision in 03-185 on the availability of spectrum for Part 15 devices in *04-186*.

NAF, *et al.* therefore Petition the Commission to clarify or modify the *Report and Order* released September 30, 2004 to make clear that grant of new spectrum to LPTV and translator licensees will not, as an unintended consequence, smother the Commission's efforts to promote universal broadband through expanding direct citizen access to spectrum. The Commission should clarify that LPTV and translator licensees will receive any additional channels subject to the Commission's decision in OET Docket No. 04-186. This may include either co-primary status for the expanded digital channels with Part 15 devices approved for operation in the broadcast bands or accepting operation of an underlay similar to operation of the Part 15 underlay in the 2.4 GHz band.

INTEREST OF PETITIONERS

The New America Foundation is a nonpartisan, non-profit public policy institute based in Washington, D.C., which, through its Spectrum Policy Program, studies and advocates reforms to improve our nation's management of publicly-owned assets, particularly the electromagnetic spectrum. <http://www.newamerica.net>.

The Champaign-Urbana Wireless Internet Project (CUWIN), a project of the Urbana-Champaign Independent Media Center Foundation, has deployed an extensive mesh network using Part 15 spectrum in the Champaign-Urbana metro area. Its three-part mission is to (a) connect more people to Internet and broadband services; (b) develop open-source hardware and software for use by wireless projects world-wide; and, (c) build and support community-owned, not-for-profit broadband networks in cities and towns around the globe. CUWIN creates open source software and designs wireless networking equipment using off-the-shelf technology broadly deployed by other community wireless networks. If permitted to do so, CUWIN will manufacture and deploy devices capable of using broadcast band spectrum. <http://www.cuwireless.net>

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ARGUMENT

In the *Report and Order, In re Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules Digital Low Power Television* (rel. Sept. 30, 2004) (“*Digital LPTV Order*”), the Commission failed to consider two new relevant actions – the proposal to allow direct citizen access to the broadcast bands on a non-interfering basis pursuant to Part 15, and its recent clarification in the *Ultra-Wide Band Second Report and Order* detailing the nature of the Commission’s authority to implement the Part 15 regime. As both of these actions took place recently, well after the official comment period in this proceeding closed, they constitute sufficient grounds for reconsideration.

PART I. THE COMMISSION’S OVERLY CONSERVATIVE IN 04-186 CREATES AN UNNECESSARY CONFLICT WITH THE DECISION IN 03-185.

The problem arises from the tentative conclusion of the Commission to designate as “occupied,” and thus unavailable for use, any spectrum allocated to low power television stations and translators for digital transition purposes. *04-186* at ¶16.

As a general matter, the Commission’s reliance on the blunt instrument of declaring all assigned television channels off limits is unwarranted and overly cautious. The Commission received numerous comments detailing mitigation strategies far less draconian than the total exclusion proposed in *04-186*. Nor does the record support the Commission’s apparent tentative conclusion that an underlay operating pursuant to standard Part 15 certification, *i.e.*, even without additional features to mitigate interference, would cause harmful interference to existing analog television viewers. To the contrary, the FCC explicitly found more than fifteen years ago that operation of Part 15 devices was completely compatible with television reception. *In re Revisions of Part 15*, 4 FCCRcd 3493, 3501 (1989) (*1989 Part 15 R&O*).

In the case of future digital LPTV and digital translators, the Commission's refusal to permit underlays would render deployment in the broadcast band effectively impossible. In the *Digital LPTV Order*, the Commission states that it will "allow permittees and licensees of LPTV, translators, and Class A stations to seek a companion channel for their digital operations." *Digital LPTV Order* at ¶141. The Commission further states it will seek to minimize the number of companion channels in the 52-69 Channel bands and will prohibit use of Channel 37 and PLMRS bands. ¶¶59, 76. In *04-186*, the Commission has tentatively decided to exclude use of channels 37 and 52-69. *04-186* at ¶34.

As a result of these two decisions, the Commission will reduce available spectrum for unlicensed use to a practical nullity. The Commission further compounds the problem of availability by promising to open future windows "for new digital LPTV and TV translator stations without eligibility restrictions." *Digital LPTV Order* at ¶155.

As if these conditions did not make it difficult enough for equipment manufacturers to find "unoccupied" spectrum, the Commission provides no clear date on which it will open a filing window and select companion channels. Rather, the Commission will wait until after full service broadcasters complete their elections before even setting a date for filing. *Id.* at ¶159.

This uncertainty will render it effectively impossible for equipment manufacturers to develop devices that can use the broadcast bands. Manufacturers cannot hope to accurately assess whether enough spectrum will remain available nationally to make construction of equipment using broadcast spectrum worthwhile until the selection process is resolved. Nor can community wireless networks (CWNs) or commercial WISPs plan network deployments if available channels on which they rely become subject to sudden foreclosure. Because the Commission has failed to consider the

impact of its decision here on the expansion of direct citizen access to valuable spectrum envisioned in *04-186*, it has put the success of this extremely important proposal to expand unlicensed access at risk.

PART II: THE COMMISSION SHOULD CONDITION GRANT OF ANY COMPANION CHANNEL ON ACCEPTANCE OF UNLICENSED OPERATION ON THE NEW CHANNEL.

If the Commission wishes to permit any operation within the broadcast bands, it must permit operation in bands designated for expanded LPTV and translator services. Such an approach makes good engineering sense and also serves the public interest. Accordingly, the Commission should clarify that any applicant for a companion channel must accept operation of unlicensed devices in the companion channel subject to the conditions of operation determined in *04-186*.

NAF, *et al.* emphasize that this is not an “either/or” choice between Part 15 devices and digital LPTV. To the contrary, by permitting operation of Part 15 devices on channels designated for digital expansion, the Commission will facilitate *both* the public interest benefits of expanding the Part 15 regime and the public interest benefits of digital LPTV and translators.

A. The Commission Has The Authority To Condition Grant of a Companion Channel On Acceptance of Possible Interference By Part 15 Devices.

Petitioners anticipate that licensees may argue that the Commission has no authority to condition a grant of a licensed companion channel on acceptance of possible interference from Part 15 “unlicensed” devices. However, as the Commission has recently clarified:

While we do not apply the term ‘license’ to the Part 15 approvals...such approvals...constitute agency authorization for the manufacture, distribution and use of devices that have passed individualized requirements. As such, there is little to distinguish in a practical or legal sense Part 15 approvals of devices from the more overt Section 301 ‘licenses.’

In re Revision of Part 15 Rules Regarding Ultra-Wide Band Transmission Systems, Second Report & Order and Second Memorandum Opinion & Order, ET Docket No. 98-153 (rel. Dec. 16, 2004) (*UWB 2nd R&O*) ¶75. Accord 47 USC §153(42) (license refers to “instrument of authority...for use or operation of apparatus for transmission of energy...by whatever name the instrument may be designated by the Commission”).

There is therefore no reason why the Commission cannot make allocation of a companion channel for incumbent licensees “secondary” to Part 15 “unlicensed” devices in the same way that it has made other new spectrum rights secondary to existing rights or other public interest services.¹ Although the Commission has traditionally maintained a hierarchy of (primary) licensed—>(secondary) licensed →licensed by rule→ “unlicensed.” See *Intelligent Transportation Devices NPRM*, 17 FCCRcd 23136, 23167-68 (2002) (describing hierarchy), nothing in the Communications Act requires this. To the contrary, where Congress has directly spoken, it has chosen to protect Part 15 devices against interference from the intrusion of new licensed services. Balanced Budget Act of 1997, Pub. L. 105-33, Section 3002(c)(1)(C)(v) (prohibiting creation of new licensed services in “bands allocated or authorized for unlicensed use pursuant to Part 15” if such services “would interfere with operation of end-user products permitted under such regulation”).

¹Indeed, the FCC did this when it created the LPTV service, making it secondary to the pre-existing full power service. *Inquiry Into the Future of Low Power Television Broadcasting*, 47 FR 21468, 21471 (1982).

Other than certain Class A and translator stations that meet certain strict statutory criteria, LPTV and translator licensees have no right or expectation of a companion channel.² *Digital LPTV Order* at ¶¶137-41. While Petitioners stress again that they support this exercise of Commission’s discretionary authority to further the digital transition, it should not trump the equally important public policy of fostering direct citizen access to spectrum and the public interest benefits such access entails. It is therefore both permissible and desirable for the Commission to condition application for a companion channel on operation of Part 15 devices on the same channel. If licensees find this condition unacceptable, they remain free to convert via a “hot cut” on their assigned channels.

B. Proper Balancing of Interference Risk Demonstrates That Grant of a Companion Channel and Unlicensed Operation Are Compatible.

Fortunately, licensees need not chose between a companion channel with significant interference risk and an expensive “hot cut” conversion. The interference mitigation measures proposed in 04-186, such as dynamic frequency sharing (DFS) technology designed to avoid interference by sensing when a channel is in use and avoiding it, will protect LPTV and translator licensees on their companion channels.

Nevertheless, Petitioners recognize that until operation of Part 15 devices in the broadcast bands is authorized and the technology proves itself, an element of risk remains. Licensees, for understandable reasons, feel that any risk, however minimal, is too great to allow entry by new

²Even those entitled by statute to a companion channel have no right to exclude third party uses authorized by the Commission, if such uses do not create harmful interference. As the Commission has said repeatedly, a licensee has no right except for those printed on the face of the license and protection from *harmful* interference. 47 USC §309(h)(1); *UWB 2nd R&O* at ¶¶86-91; *MVDDS 2nd R&O*, 17 FCCRcd at 9628. *See also AT&T Wireless Services, Inc. V. FCC*, 270 F.3d 959, 964 (D.C. Cir. 2001).

services. Licensee therefore traditionally urge the Commission to prohibit any new entrants to “their” band, and demand that potential new entrants prove with absolute certainty that no interference of any sort is possible.

Such a standard of proof is, of course, impossible. Accordingly, it falls to the Commission to act as the final arbiter of what represents a reasonable risk of harmful interference, balancing this risk against the public interest benefits of permitting new services. As the Commission observed when it authorized the current Part 15 regime more than 15 years ago:

The actions being taken in this *Report and Order* represent the Commission's best judgments as to the trade-offs between beneficial low power spectrum use and possible interference to the authorized radio services. We recognize that certain increased risks of interference to authorized devices may result from altering our regulations....On balance, we believe that the public interest benefits of the rule changes being adopted outweigh the potential for increased interference.

Part 15 1989 R&O, 4 FCCRcd at 3519.

In determining the appropriate level of risk in this proceeding, the Commission must consider that while exposure to diverse programming and maintenance of over the air rural programming has tremendous public interest value, other interests are at play here as well. As discussed extensively in Part III *infra*, opening these bands to unlicensed access will serve the interests of the Communications Act and the interests of the First Amendment.

To reflect this balance, the Commission should employ the interference analysis it utilized in *In Re Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, Memorandum Opinion and Order and Second Report and Order*, 17 FCCRcd 9614, 9628 (2002) (*MVDDS 2nd Report & Order*). As the Commission stated there, interference is only a concern when it is ***harmful*** interference. Even if operation of a new service on the band might cause sporadic

incidents of interference a few times a year, such minor incidents do not justify denying the public the benefits of direct citizen access to spectrum. *See Id.*

The Commission used a similar test when addressing the potential for interference with the introduction of the low power FM service. *Creation of a Low Power Radio Service*, 15 FCCRcd 2205, 2230-46 (2000). There, as here, the Commission balanced the value of further sharing the spectrum against the potential risk of interference to the existing service. *Id.* The Commission found that the proper measure of interference was the well established user expectation, not the high-fidelity service that incumbents might wish to provide in an ideal world. *Id.*

Accordingly, even if operation of Part 15 devices might cause some interference to some users in some cases, this possibility does not justify complete exclusion. Indeed, it is worth noting here that nothing in the voluminous record the Commission has compiled in the two years it has considered permitting access to the broadcast bands suggested that allowing Part 15 devices to operate on channels assigned to LPTV stations would cause any interference, let alone harmful interference. To the contrary, as long ago as 15 years ago, the Commission found operation of unlicensed devices compatible with operation of broadcast television. *1989 Part 15 R&O*, 4 FCCRcd at 3501.

Grant of the *Petition*, therefore, will not require licensees to chose between a companion channel with unacceptable interference or a “flash cut” conversion which might cut off viewers without digital receivers. Accordingly, since grant of this *Petition for Clarification or Modification* will not endanger the important goals set forth in *Digital LPTV R&O*, the Commission should grant the *Petition* and make grant of any companion channel explicitly subject to use of Part 15 devices authorized in 04-186.

PART III: EXPANDING OPPORTUNITIES FOR DIRECT PUBLIC ACCESS TO SPECTRUM FURTHERS THE GOALS OF THE COMMUNICATIONS ACT AND OF THE FIRST AMENDMENT.

It takes nothing from the value of LPTV and translator stations and facilitating the digital transition of these services to call to the Commission's attention the critical importance of permitting access to the broadcast spectrum for Part 15 devices. Petitioners do not suggest that the Commission sacrifice LPTV and translators on the altar of Part 15. To the contrary, grant of the *Petition* will not hinder the digital transition, and may in fact encourage adoption of DTV by stimulating new technologies associated with digital television.

Petitioners recognize that the concerns of licensees, even where the risk to the provision of licensed services is minimal, should not be rejected without a showing that rejecting these concerns serves the public interest. Petitioners therefore provide this lengthy recitation of the benefits of direct citizen access to spectrum. These benefits apply with particular force in the broadcast bands, because of the unique physical characteristics of this spectrum. *See generally*, William Lehr, "The Economic Case for Dedicated Unlicensed Spectrum Below 3 Ghz," New America Foundation (2004).³ Accordingly, even if the potential benefits to the digital transition of granting this *Petition* are not considered, grant of the *Petition* will further the goals of the Communications Act and the First Amendment.

More than 15 years ago, the Commission prohibited operation of Part 15 devices in the broadcast bands for fear that operation of such devices would interfere with the conversion to analog High-Definition television. *1989 Part 15 R&O*, 4 FCCRcd at 3501. As a consequence of this

³Available at <http://www.openspectrum.org>

overabundance of caution, the public was deprived of new technologies that could have provided enormous economic and social benefits. In exchange, the public received nothing, because the transition to high definition analog never occurred. The Commission should not repeat the mistake of acting too timidly and thus deny the American people much needed access to the broadcast bands.

A. Grant of the Petition Will Spur Efficient Use of Broadcast Spectrum and Will Spur Innovation In DTV Technology.

Petitioners note that the LPTV digital transition has not even begun, and cannot begin for several years. As the Commission stated in the *Digital LPTV Order*, space will not exist to provide companion channels until after high-power stations make their own channel elections and give back their analog channels. *Digital LPTV Order* at ¶15.

There is a strong public interest value in allowing immediate deployment of unlicensed wireless services. The digital divide continues to cut off low-income, minority and rural communities from broadband services, while the unfortunate consequences for those on the “wrong side” of the divide grow worse daily. See Mark Cooper, “Expanding the Digital Divide and Falling Behind on Broadband,” Consumers Union (October 2004). Unlicensed spectrum has been termed a “silver bullet” against poverty and the digital divide. “Wireless Broadband A Silver Bullet for Poverty: A Digital Divide Case Study,” Civitium White Paper (2004).⁴ Permitting immediate use of valuable broadcast spectrum to address this important issue clearly serves the public interest. See also Telecommunication Act of 1996, Section 706(a) (federal policy to encourage deployment of advanced telecommunications capabilities to all Americans).

⁴Available at <http://www.muniwireless.com/reports/docs/CivitiumPEC.pdf>.

In addition, as the Commission observed in *04-186*, future digital television technologies that evolve in an environment of unlicensed spectrum access will be engineered to take advantage of this access. *04-186* ¶23. This weighs in favor of creating a testbed for unlicensed underlays in a digital environment. Since election of companion channels and subsequent construction of digital transmitters cannot even begin until after full power stations make their elections, digital LPTV stations remain some years away from deployment. This will allow time for manufacturers to develop the technologies foreseen in *04-186*.

B. Granting the *Petition* Will Further the Broader Goals of the Communications Act.

The Commission has repeatedly found that expanding direct citizen access to spectrum under Part 15 rules furthers encourages “new technologies and services to the public” in accordance with the goals of the Communications Act. *See, e.g., Amendment of the Commission’s Rules to Provide for Operation of Unlicensed NII Devices in the 5 GHz Range*, 12 FCCRcd 1576, 1580-85 (1997) (finding that expanding unlicensed access furthered interest of developing new technologies, new services, new competitors, deployment of advanced telecommunications capabilities to all Americans – with an emphasis on rural and educational uses – and helped fulfill the Commission’s obligations under Section 257 to promote entry by small businesses and to enhance diversity of information sources); *In re Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 12 FCC Rcd 16802, 16913-14 (1997). *See also* Ken Carter, *et al.*, “Unlicensed and Unshackled: A Joint OET-OSP White Paper on Unlicensed Devices and Their Regulatory Issues,” FCC Office of Strategic Planning Working Paper #39, Washington, DC: FCC, May 2003.

The paucity of service and the lack of ownership opportunities for minority communities in licensed services further highlights the importance of unlicensed access. Generally, providers of

broadband and other advanced telecommunications services focus their attention on the wealthiest markets. *See* Mark Cooper, “Expanding the Digital Divide & Falling Behind on Broadband: Why a Telecommunications Policy of Neglect is Not Benign,” Consumers Union (2004)⁵ (demonstrating that the “cozy duopoly” of cable and DSL have failed to deploy broadband to low-income households); Leonard M. Banes, “Deregulatory Injustice and Electronic Redlining: The Color of Access to Telecommunications,” 56 Admin. L. Rev. 263 (2004) (incumbent providers often fail to provide adequate basic services and generally do not deploy advanced services in poor minority neighborhoods). Furthermore, although the Communications Act directs the Commission to use auctions to promote “economic opportunity and competition ... by avoiding excessive concentration of licenses and by distributing licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,” 47 U.S.C. §309(j)(3)(C), ownership of telecommunications facilities remains excessively concentrated in the hands of a few, large corporations. Eli Noam, “The Effect of Deregulation on Market Concentration: an Analysis of the Telecom Act of 1996 and the Industry Meltdown.” Working Paper. Columbia Business School, Columbia Institute for Tele-Information (2002). Despite the Commissions consistent efforts to develop bidding criteria that will promote minority and small business ownership, spectrum auctions continue to fail in these goals. *See* Leonard M. Banes & C. Anthony Bush, “The Other Digital Divide: Disparity In the Auction of Wireless Telecommunications,” 52 Cath. U. L. Rev. 351 (2003).

⁵Available at <http://www.consumersunion.org/pub/ddnewbook.pdf>.

By contrast, unlicensed access creates immediate opportunities for deployment in any community by any entity. The Commission has in the past observed how unlicensed access removes regulatory barriers to minority and small business ownership of telecommunications facilities. *See Section 257 Report To Congress*, 19 FCC Rcd 3034, 3077 (2004); *Section 257 Report to Congress*, 15 FCC Rcd 15376, 15432 (2002). Nor will communities economically unattractive to incumbents need to wait for broadcast licensees or other incumbents to provide critical services. Rather, these communities will be able to deploy needed systems themselves. *See, e.g.*, Matt Stone, “Wireless Broadband, The Foundation for Digital Cities: A Cookbook for Communities,” Civitium (2004).

Petitioners will not dwell at length on the benefits expanded unlicensed access has brought to rural America, inner city and minority communities, and Americans of every walk of life. The Commission and individual commissioners have recognized these benefits in numerous studies, reports, notices, orders, and speeches.⁶ Others, such as the New America Foundation, have likewise extensively documented the benefits of unlicensed access.⁷

In weighing whether to grant the *Petition* and facilitate deployment of unlicensed devices in the broadcast bands, the Commission must give these goals of the Communications Act great weight. Unlicensed access will generally facilitate deployment of advanced telecommunications

⁶*See, e.g.*, UNLICENSED AND UNSHACKLED, *supra*; *The Harvest: Remarks of Commissioner Abernathy at the Wireless Communications Association International Annual Conference* (June 2, 2004); *Remarks of Commissioner Jonathon S. Adelstein, WISP Forum, South Dakota School of Mines and Technology*, May 25, 2004.

⁷*See, e.g.*, Matt Barranca, “Unlicensed Wireless Broadband Profiles: Community, Municipal and Commercial Success Stories,” NEW AMERICA FOUNDATION (2004); William Lehr, “Dedicated Lower Frequency Unlicensed Spectrum: The Economic Case for Dedicated Unlicensed Spectrum Below 3 Ghz,” NEW AMERICA FOUNDATION (2004).

services faster than the Commission's current policy of relying on phone and cable incumbents. Furthermore, it will facilitate speedy deployment in those communities that traditionally must wait the longest for licensed services to deploy. Accordingly, the public interest weighs heavily in favor of permitting unlicensed access in the broadcast bands.

C. Grant of the *Petition* Provides a “Deregulatory” Means to Further The Goals of Section 706 of the 1996 Telecommunications Act.

The Commission has acknowledged the growing role of unlicensed spectrum access in the deployment of broadband access to all Americans pursuant to the mandate of Section 706 of the Telecommunications Act of 1996. *Unlicensed Operation in the 3650-3700 MHz Band*, 19 FCCRcd 7545, 7546-47 (2004). In considering the value of unlicensed access to the Commission's Section 706 mandate, the Commission should consider that unlicensed access is an inherently “deregulatory” means of promoting broadband deployment. It frees all citizens to access spectrum with readily available consumer devices, rather than restricting the ability of citizens to access the public airwaves. In addition, there is no limit (other than that imposed by the economics of the marketplace) to the number of competitors using unlicensed spectrum access. This places greater emphasis on market mechanisms than does licensing, which creates an artificial scarcity that is aggravated, not alleviated, by allowing licensees to treat government-licensed monopolies as private property.

Accordingly, to the extent the Commission believes that the Telecommunications Act of 1996 encourages the Commission to facilitate deployment of broadband through “deregulatory” means and to rely on market competition, unlicensed access provides a far more potent avenue than any other strategy employed by the Commission to date. If the Commission is serious about

deregulation as a means of promoting competition, rather than as a means of preserving incumbent dominance, the Commission should grant the *Petition* so that manufacturers, WISPs, and CWNs can take advantage of the any final decision to open the spectrum to direct access in *04-186*.

D. First Amendment Considerations Weigh Heavily In Favor of Granting the *Petition*.

“The ‘public interest’ standard necessarily invites reference to First Amendment principles...and, in particular, to the First Amendment goal of achieving ‘the widest possible dissemination of information from diverse and antagonistic sources.’” *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (citations omitted). Indeed, the FCC has a fundamental responsibility to protect the public’s “collective right to have the medium function consistently with the ends and purposes of the First Amendment.” *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

Nowhere does this principle apply with greater force than in the broadcast bands. Broadcasters receive their spectrum for free, on condition that they provide service to their local community. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). No broadcaster has anything in the nature of a property interest in its spectrum. 47 USC §§301, 304, 309(h); *UCC*. To the contrary, where the Commission finds that a licensee has failed to serve the public interest, the Commission must deny renewal of the license and award it to another steward. 47 USC §309(e).

Given the tremendous imbalance at the moment between the modest amount of spectrum allocated for unlicensed access by all citizens in contrast with the vast amounts of spectrum assigned to exclusive licensees, and given the physical qualities that make this spectrum so inherently

valuable for public access, the “reference to First Amendment principles,” *NCCB supra*, weighs heavily in favor of opening new spectrum to unlicensed access. As the Supreme Court has observed “the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it.” *Red Lion*, 367 U.S. at 390-91. While technological limitations of the past generally required exclusively licensing in the hands of a few, this by no means makes exclusive licensing to the exclusion of all others the preferred regime under the First Amendment.

Permitting broader direct access to spectrum by the public serves the First Amendment both by creating more opportunities for people to speak and, concomitantly, more sources for people to hear. As technology continues to advance, and the need for exclusivity diminishes, it serves the interests of the First Amendment to permit as many citizens as possible to access spectrum as freely as possible. See Stuart Minor Benjamin, “The Logic of Scarcity: Idle Spectrum As First Amendment Violation,” 52 *Duke L.J.* 1 (2002); Stuart Buck, “Replacing Spectrum Auctions With Spectrum Commons,” 2002 *Stanford Technology L. Rev.* 2 (2002).

As a general rule, discretionary licenses on the right to communicate are repugnant to the First Amendment. See *Generally Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 161-64 (2002). Only because unregulated use of the electromagnetic spectrum by *everyone* would make impossible the effective use of the spectrum by *anyone* has the Supreme Court permitted the Federal Government to license spectrum. *National Broadcasting Co v. United States*, 319 U.S. 190 (1943); *Federal Radio Commission v. Nelson Bros.*, 289 U.S. 266 (1933); *In re Nextwave Personal Communications, Inc.*, 200 F.3d 43 (2nd Cir. 1999).

But this does not give the government complete *carte blanche* in managing spectrum. *NBC*, 319 U.S. at 217. To the contrary, the FCC must manage spectrum so as to promote the goals of the

First Amendment. *Red Lion*, 395 U.S. at 389-393. In light of the general antipathy of the First Amendment to discretionary licenses as a precondition of speech, the First Amendment imposes on the Commission a responsibility to consider whether direct access by citizens is technologically feasible. *Accord FCC v. League of Women's Voters of California*, 468 U.S. 364, 376 n. 11 (1984).

As the Supreme Court has found, the First Amendment prohibits the government from granting exclusive rights in communications media unless the physical characteristics of the medium require exclusivity as a precondition of productive use. In *City of Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986), Preferred Communications did not take part in an auction for an exclusive cable franchise. Nevertheless, it applied for a franchise in competition with the winner of the auction. The City of Los Angeles denied the application. The district court upheld the power of the city to award an exclusive license, but the Ninth Circuit Court of Appeals reversed on First Amendment grounds. *Id.* at 492-93.

The Supreme Court remanded for further fact finding on the question of whether any physical limitations required the city to limit the number of franchises. The Supreme Court explicitly held that the desire of the city to maximize revenue or maximize economic efficiency did not permit limiting the ability of citizens to speak through the new medium any more than the city could limit the number of newspapers in the name of economic efficiency. *Id.* at 494-95. Where the laws of physics no longer require exclusivity, exclusivity cannot be justified on economic or efficiency grounds alone.

Petitioners do not argue here that technology has advanced to the point where the spectrum may accommodate all who wish to use it, and that therefore the days of exclusive licensing have passed. *Cf. League of Women Voters supra* (observing that technological advances might someday

render exclusive licensing obsolete). Indeed, many applications, such as public safety, will continue to demand exclusivity for the foreseeable future. The ability of technology to provide unlicensed access to all citizens under some conditions does not render the underlying basis of *FRC v. Nelson Bros.* or *NBC* obsolete.

Rather, Petitioners urge the Commission to consider how grant of this *Petition* will further the broader goals of the First Amendment and respect the general repugnance of the First Amendment for licensing as a precondition of speech. In weighing where the public interest lies, the Commission should seek to maximize opportunities for unlicensed access as best serving the goals of the First Amendment. As grant of the *Petition* removes an unnecessary barrier to speech between citizens, the Commission should grant the *Petition*.

Finally, the Commission must consider that nothing in this *Petition* requires a choice between the public interest value of LPTV stations and translators and public access to spectrum. Licensees will still hold their licenses so that they may provide their local communities with “suitable access to social, political, esthetic, moral, and other ideas and experiences.” *Red Lion*, 395 U.S. at 390. By permitting simultaneous use of the channels by licensees and citizens using Part 15 devices, the Commission will further the public interest goals identified in the *Digital LPTV Report & Order* while additionally promoting the broader goals of the Communications Act and the First Amendment.

CONCLUSION

WHEREFORE, for the reasons stated above, Petitioners request that the Commission clarify that grant of any companion channel to LPTV stations and translator stations pursuant to the Commission's *Report & Order* in this proceeding is contingent on the licensee accepting operation of Part 15 devices on those channels in a manner set forth in OET Docket No. 04-186.

Respectfully submitted

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