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March 17, 2005

VIA ELECTRONIC FILING

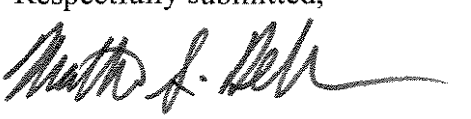
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ET Docket Nos. 02-380, 03-237, and 04-186

Dear Ms. Dortch:

Attached please find a presentation of the Association for Maximum Service Television, Inc. (MSTV) which responds to faulty claims made by the Media Access Project (MAP) concerning the Commission's Part 15 authority. As the presentation explains, the Commission would violate the Communications Act were it to grant MAP's requests to authorize unlicensed devices with the right or ability to interfere with licensed services.

Respectfully submitted,



Matthew S. DelNero
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PRESENTATION OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.
RESPONDING TO MEDIA ACCESS PROJECT'S CLAIMS
REGARDING THE FCC'S PART 15 AUTHORITY

Since its inception and in accordance with the Communications Act, the Commission has prohibited unlicensed uses of the radio spectrum from interfering with licensed services. This bedrock principle safeguards the nation's radiocommunications infrastructure. Recent proposals advanced by the Media Access Project (MAP), however, would substantially weaken that infrastructure by granting unlicensed devices "co-equal" or similar status to certain licensed services. Grant of these proposals would violate the Communications Act and harm the public's interest in reliable and interference-free radiocommunications. In fact, "co-equal" status would convert unlicensed devices into the "primary user," because interference from the infinite proliferation of unlicensed devices in the band would overwhelm the licensed service.

By asking that the Commission "provid[e] Part 15 devices co-equal status with more traditional station licenses," MAP seeks a radical departure from the Commission's decades-long history of limiting unlicensed device operation. Such departure would be inconsistent with the underlying goals of the Communications Act.[1] For example, in comments to the Commission's *Notice of Proposed Rulemaking* concerning unlicensed use of the television broadcast spectrum, MAP, on behalf of the New America Foundation (New America), has argued that "to prohibit deployment of Part 15 devices in the broadcast bands because such devices might create harmful interference and cannot easily be recalled is unreasonable and

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[1] *See Ex Parte* Presentation of the Media Access Project relevant to ET Docket Nos. 03-108, 03-237, 04-151, and 04-186, at 7 (Dec. 14, 2004) (MAP Presentation).

irrational."[2] In a Petition for Reconsideration to the Commission's new rules for digital operation of low power television services, MAP has asked the Commission to make digital low power channels "explicitly subject to" any interference from unlicensed devices (if authorized) in the television broadcast spectrum.[3] In addition to violating the licensing requirement of the Communications Act, MAP's proposals would violate the Commission's public interest responsibilities by creating a "tragedy of the commons" and degrading the quality of radiocommunications for both licensed and unlicensed users. Accordingly, the Association for Maximum Service Television, Inc. (MSTV) urges the Commission to maintain its longstanding and legally-required commitment to protect users of licensed radiocommunications services from unlicensed device interference.

I. THE COMMUNICATIONS ACT REQUIRES THE COMMISSION TO LICENSE ANY USE WHICH COULD INTERFERE WITH A LICENSED SERVICE.

A. Permitting Unlicensed Devices "Co-Equal" Status Would Violate The Communications Act.

Since the 1930s, the Commission has required unlicensed spectrum uses to operate under a strict "do no harm" principle. The Commission has enforced and honored this statutory commitment by requiring a license for any use of the spectrum which could, when lawfully operated, interfere with a licensed service. As the Commission has explained, it "regulated [unlicensed devices'] technical capabilities to ensure that they did not interfere with

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[2] Comments of the New America Foundation *et al.*, ET Docket Nos. 02-380 and 04-186, 34 (filed Nov. 30, 2004). MAP makes clear its desire to elevate unlicensed devices to the same status as licensed services, arguing that "[t]he risk this proposed [unlicensed] equipment poses to broadcast reception should be compared to the risk that exists today absent this rulemaking." MAP Presentation at 7.

[3] Petition for Clarification or Modification of New America Foundation and the Champaign Urbana Wireless Internet Network, MB Docket No. 03-185, 7 (filed Dec. 29, 2004).

the orderly operation and development of radio communications."[4] These rules of operation have applied to devices ranging from the earliest remote control "clicker" to today's state-of-the-art Wi-Fi chips.[5] In accordance with Section 301, every unlicensed device lawfully sold in the U.S. during the past seven decades has been *required* to *not* interfere with any licensed service.[6] Likewise, unlicensed devices have had no right of protection from interference generated by other services, whether licensed or unlicensed.[7] When an unlicensed device does create harmful interference to a licensed user, the unlicensed device has always been legally bound to cease operation unless and until it corrects the problem. Congress expects the FCC to regulate unlicensed devices to *prevent* interference to licensed services, not to allow it.

Section 302 of the Act, which the Commission has occasionally viewed as an alternative source of authority for permitting non-interfering unlicensed devices, also prohibits the grant of "co-equal" status to unlicensed devices. Specifically, Section 302(a) allows the Commission, "consistent with the public interest, convenience, and necessity" to make "reasonable regulations . . . governing the interference potential of devices which in their operation are capable of emitting radio frequency energy . . . in sufficient degree to cause harmful interference to radio communications." As the legislative history explains, Section 302(a) was added only to ensure the FCC's authority to regulate incidental radiators of

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[4] *Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems*, 19 FCC Rcd 24558, at ¶ 69 (2004).

[5] *See, e.g.*, Tom Krazit, *Intel Unveils Tri-Mode Wi-Fi Chip*, PCWorld.com (Aug. 26, 2004), *available at* http://www.pcworld.com/news/article/0,aid,117584,00.asp (last visited Jan. 27, 2005).

[6] *See* 47 C.F.R. § 15.5. The Commission's rules define "harmful interference" as "[i]nterference which endangers the functioning of a radionavigation service ... or seriously degrades, obstructs, or repeatedly interrupts a radiocommunications services." *Id.* at § 2.1.

[7] *Id.* at § 15.5.

electromagnetic energy, even when they do not emit electromagnetic energy across state lines.[8] Thus, Section 302 is not even a source of authority to permit *non*-interfering unlicensed devices, much less those which would interfere with licensed services.

In subsequent amendments to the Communications Act, Congress has acknowledged its understanding that unlicensed devices are not to interfere with licensed services.[9] For example, in the 1990s, Congress created the FCC's auction authority to ensure that when interference limitations prevent two parties from sharing a specific channel, the free market (*i.e.*, auctions) will dictate which party should obtain the entitlement to that channel. While the statute was written to apply to initial "licenses" only, this limitation was based on Congress's clear understanding that unlicensed devices would never be allowed to be "mutually exclusive" to a licensed service. As the legislative history to the Commission's auction authority explains, Congress recognized that "competitive bidding would not be permitted for unlicensed devices," because they are not considered "mutually exclusive."[10] That pronouncement is a logical outgrowth of Congress's understanding of statutory limits on unlicensed devices: because they have held no right to interference protection from each other or from licensed services, unlicensed uses could not be "mutually exclusive."[11] Congress has never contemplated that the Commission would allow unlicensed devices to interfere with licensed services.

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[8] *See* H.R. Rep. No. 97-765, at 21-23, 32-33 (1982).

[9] *See also Hernstadt v. FCC*, 677 F.2d 893, 902 n.22 (D.C. Cir. 1980) (finding that Congress is presumed to be cognizant of and legislative against background of existing agency interpretation of law).

[10] H.R. Rep. No. 104-350, 995 (1995).

[11] MAP erroneously points to Section 3002 (c)(1)(C)(v) of the Balanced Budget Act of 1997 as an endorsement of interference rights for unlicensed devices. *See* MAP Presentation at 6. In fact, that Act merely exempted from a 2002 auction deadline bands "allocated or authorized for unlicensed use" if the introduction of licensed services in such band would "interfere with operation of end-user products permitted under [Part 15] regulations." Thus, Congress merely sought to protect consumers' *existing* cordless telephones, remote controls, and other unlicensed (continued...)

The Commission has consistently acknowledged that the Communications Act prevents authorization of any unlicensed device which would interfere with a licensed service. As the Commission explained in its *Second Memorandum Opinion and Order* concerning unlicensed ultra-wideband (UWB) devices, Section 301 of the Act requires licensing of "any apparatus that transmits enough energy to have a significant potential for causing harmful interference."[12] In that proceeding, the Commission found that because it concluded that certain UWB devices could operate without constraining the operations of licensed services, those devices could be handled under Part 15 "and are not required to be licensed on a formal basis."[13] The obvious corollary to that finding is that a device which does constrain the operations of licensed services must itself be licensed. In another recent Order, the Commission has explained that unlicensed devices "do not have any allocation status, but are authorized to operate under our Part 15 rules on an unprotected, non-interference basis with respect to all other users."[14] When the Commission has relied on Section 302(a) as authority for its Part 15 rules, it has also confirmed that its Part 15 authority is limited to those unlicensed uses with "little risk of interference to licensed services."[15]

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devices from displacement by new licensed services – which, of course, would have had statutory rights to create interference to, and receive interference protection from, the unlicensed devices.

[12] 19 FCC Rcd 24558, at ¶ 68. Although the UWB Order rejected the notion that Section 301 requires the licensing of "any apparatus that transmits any amount of energy, no matter how negligible," it confirmed the need for licensing of any device capable of interfering with licensed services. *Id.*

[13] *Id. See also Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, 18 FCC Rcd. 24484, ¶ 19 (2003) (announcing that the Commission will treat U-NII devices in the 5.470-5.725 GHz band "similar to all other unlicensed intentional radiators," meaning that "they will operate on a non-interference basis under Section 15.15(c) of the rules.").

[14] *Amendments of Parts 2 and 97 of the Commission's Rules to Create a Low Frequency Allocation for the Amateur Radio Service*, 18 FCC Rcd 10258, 10260 (2003).

[15] *Amendment of Part 15 of the Commission's Rules to Allow Certification of Equipment in the 24.05 - 24.25 GHz Band*, 16 FCC Rcd. 22337, 22342 (2001).

If Sections 301 and 302 of the Act are to have any meaning, the Commission should reject any request that any unlicensed device be granted "co-equal" or similar status to spectrum uses licensed by the Commission. While parties may disagree as to where exactly to draw the statutory line on the FCC's Part 15 authority, MAP's proposal to afford such devices "co-equal" status, thereby subjecting licensed broadcast services to interference from such devices, is well beyond the FCC statutory authority. If MAP's proposals are permitted, the unlicensed devices "exception" to Section 301 will supplant the statute.

B. Even When Unlicensed Devices Do Not Necessarily Interfere With A Licensed Service, Continued Expansion of The Unlicensed Regulatory Regime Poses Serious Statutory Questions.

The Communications Act makes clear that, as a general matter, transmitting on a radio frequency requires a license. This licensing regime empowers and instructs the government to preserve a vital national resource, the radio spectrum. Specifically, Section 301 of the Act states:

> "It is the purpose of this Act ... 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* ...
>
> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and *with a license* in that behalf granted under the provision of this Act."[16]

Thus, to meet the goal of controlling interference *ex ante*, Congress affirmatively required the Commission to license uses of the spectrum. As a regulatory concept, the

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[16] 47 U.S.C. § 301 (emphasis added).

unlicensed device model has always been an exception to the general rule that a license is required to operate radio communications in the United States.

Even outside of their massive interference potential, extension of unlicensed devices (such as unlicensed WiMax networks) to the elevated status advocated by MAP and proposed in various FCC proceedings perilously stretches the Act's bedrock requirement that spectrum users operate with a license. Congress never intended the Commission's limited unlicensed authority to create an alternate regulatory regime. As expressed in the Communications Act, licensing is fundamental to Congress's intent for preserving the nation's spectral resources.

In recent years the Commission has opened proceedings that propose extending its unlicensed authority well beyond incidental, short-range and low-power uses such as garage door openers, low-power 2.4 GHz Wi-Fi cards, or remote control devices. These proposals, which are novel and untested in terms of the Commission's authority, have applied the unlicensed device model to communications systems that serve large geographic areas and populations. The proposed extension of the unlicensed device concept to higher-power services is at tension with the fundamental premise of Section 301 that the Commission preserve the radio spectrum through the licensing process.

The statutory concerns become most apparent where the Commission proposes to have vital licensed services share spectrum with unlicensed devices. For example, in the television broadcast spectrum, the Commission has proposed to permit portable Wi-Fi devices providing coverage of up to 35 miles to operate without a license. Yet at the same time, it (appropriately) requires low power television and television translator services, operating in the same frequency band, to secure a license to cover a similar geographic area and to operate on a

secondary basis (*i.e.*, the accountable licensee must cease operations if there is *any* harmful interference to the services of primary spectrum licensees). Expansion of the unlicensed regime to higher-powered services tears at the very fabric of the Act.

II. PLACING UNLICENSED DEVICES ON EQUAL FOOTING WITH LICENSED SERVICES WOULD VIOLATE THE COMMISSION'S STATUTORY COMMITMENT TO THE PUBLIC INTEREST.

A. By Dramatically Increasing Interference To Licensed Services, MAP's Proposal Would lead to the "Tragedy of the Commons" And Impair The Public's Ability To Communicate.

If unlicensed devices were elevated to the regulatory status of licensed services, they would impair the public's ability to communicate. As more and more interfering unlicensed devices entered a given band, *no* user would be able to effectively communicate. The Commission should uphold its statutory commitment to the public interest by protecting licensed services from unlicensed device interference.

Presently, most unlicensed devices are of low power and short distance, and thus are generally under the control of a common operator (*e.g.*, a homeowner). As the Spectrum Policy Task Force has identified, the appropriate place for these types of communications is in the higher frequencies (above 5 GHz), which can "accommodate multiple devices operating within a small area without interference."[17] This would not be true in the world which MAP asks the FCC to create. For example, it asks that unlicensed devices be allowed to transmit signals reaching up to 35 miles on the public's broadcast television spectrum, which operates below 1 GHz. For these higher-power and longer-range uses in spectrum "shared" by both licensed and unlicensed users, interference from the unlicensed devices would exponentially multiply. As Commissioner Abernathy has recognized, when too many devices are allowed to "speak" at the

[17] *See* Report of the Spectrum Policy Task Force, ET Docket No. 02-135, 39 (Nov. 2002).

same time, communal use results in "reckless abuse by individual users."[18] This is when the "tragedy of the commons results" – whereby no user, licensed or unlicensed, is able to enjoy the benefits of radiocommunication.

The technologies that MAP promotes as allowing peaceful "co-equal" use of the spectrum by unlicensed devices are untested at best. For example, in the 5 GHz unlicensed National Information Infrastructure (U-NII) band, the Commission has allowed unlicensed devices to share (on an allegedly non-interfering basis) spectrum with licensed military radar through use of dynamic frequency selection (DFS) technology. In fact, the putative unlicensed users of that spectrum have yet to develop a functioning means to permit coexistence of the unlicensed devices and licensed military radar.[19] The Commission recently announced that "[t]he industry and the Federal Government have found the implementation of DFS to be more complex than originally envisioned."[20] And when unlicensed devices have operated in that band, they have caused harmful interference to licensed services. For example, United States Air Force officials recently reported that wireless Internet connections in the 5 GHz band are interfering with military radar at the Eglin Air Force Base in Florida.[21] Officials from the county which is home to the base mistakenly (but understandably) opined, "There are evidently people who are firing up [wireless Internet] hotspots without [FCC] licensing."[22] In fact, those Wi-Fi

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[18] Remarks of Commissioner Kathleen Abernathy before the San Diego Telecom Council, July 18, 2002.

[19] *OET Chief Confident That 5 GHz Sharing Issue Can Be Resolved*, TR Daily, Dec. 9, 2004.

[20] Order, *Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, ET Docket No. 03-122, FCC 05-43, ¶ 8 (2005).

[21] *See, e.g.*, Associated Press, *High Speed Net, Wi-Fi Interfering with Military Radar*, USA Today (Jan. 28, 2005).

[22] *Id.*

hotspots are in the *unlicensed* U-NII band.[23] It is unclear when, or even if, officials will be able to locate and remedy the unlicensed sources of harmful interference to the military radar. Of course, if MAP's proposals were accepted, there would be no point to such a search – the offending unlicensed device would have the right to interfere with the licensed service.

There is thus no merit to MAP's claims that "there is no limit (other than that imposed by the economics of the marketplace) to the number of competitors using unlicensed spectrum access."[24] MAP's request that the Commission make digital low power television services "subject to" unlicensed device interference suggests that even MAP does not believe the spectrum would be free of interference. Indeed, New America has analogized the alleged ability of licensed services to "co-exist" with high-power unlicensed devices to individual conversations which take place within "a crowd of people at a football stadium."[25] New America writes, "Though thousands of [people] are talking at the same time . . . there is no need for regulation to ensure effective communication."[26] Yet most people would not want their everyday conversational abilities to be subjected to the noise level present at the average football stadium. Just as a massive crowd raises the conversational "noise floor," the proliferation of unlicensed

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[23] *See also* Glenn Fleishman, *Radar Violators in Florida*, Wi-Fi Networking News (Jan. 28, 2005), *available at* http://wifinetnews.com/archives/004757.html (last visited Jan. 31, 2005) ("Any device using the 5.250-5.350 GHz band (available for a while) or the 5.470-5.725 GHz band (new as of Nov. 2003) must avoid stepping on existing signals and back down power to only use as strong a signal as is needed at any given time. It's possible that someone is using a 5 GHz channel that was previously assigned in the 5.725-5.825 GHz band. Since those were intended for outdoor point-to-point use and don't require the limits that are defined for two of the three lower bands, it might be legal and unintentional. Or they're using equipment not approved for use in the US or have modified US-licensed equipment. Or, even, it's very sloppy out-of-band spillover.").

[24] MAP Presentation at 11. If such claims were true, unlicensed device manufacturers should have no need for additional spectrum.

[25] Kevin Werbach, *Radio Revolution – The Coming Age of Wireless*, New America Foundation, 6 (2003), *available at* http://www.newamerica.net/Download_Docs/pdfs/Pub_File_1427_1.pdf (last visited Jan. 25, 2005).

[26] *Id.*

devices with rights to interfere with licensed services would significantly degrade the quality of radiocommunications over licensed spectrum.

B. MAP's Proposal Would Be Particularly Harmful In The Context Of The Public's Free, Over-The-Air Television Service.

MAP's proposal that unlicensed devices be allowed to interfere with licensed services would be particularly harmful if applied to the television broadcast spectrum and the 21 million Americans that rely exclusively on over-the-air television. As interfering unlicensed devices raise the noise floor in the broadcast spectrum, viewers would lose access to free, over-the-air television services.

When the Commission adopted the digital LPTV Order, it stated, "These stations are a valuable component of the nation's television system, delivering free over-the-air TV service, including locally produced programming, to millions of viewers in rural and discrete urban communities."[27] Yet under MAP's proposal, those same viewers would lose access to digital LPTV services if a profit-maximizing unlicensed device manufacturer sells enough interfering devices to raise the noise floor above an acceptable level. In other words, MAP's proposal provides no mechanism for unlicensed manufacturers and services to "internalize" the costs of interference to services sharing spectrum such as LPTV and translator stations. To the contrary, by according unlicensed services rights to interfere with LPTV and translator stations, MAP's proposal *discourages* unlicensed device manufacturers from avoiding interference with broadcast services. MAP's request that licenses for digital LPTV stations be made subject to

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[27] *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, 19 FCC Rcd. 19331, at ¶ 1 (2004).

interference from unlicensed devices illustrates well the public interest harms of undermining Part 15's "do no harm" principle.

As noted above, MAP has also sought revisions to the Part 15 rules which would allow unlicensed devices to interfere with the public's full-power television service. Free over-the-air television, however, cannot tolerate a "shared" spectrum environment with unlicensed devices. Unlike most licensees and pay television services, television broadcasters have no control over the devices (*i.e.*, television sets) to which their service is delivered. The ability of receivers to be insulated from interference from unlicensed devices depends on TV set manufacturers, not broadcasters. As a result, broadcasters cannot provide equipment upgrades to receivers to protect viewers from what would be ever-increasing interference from unlicensed devices. Television sets – which often remain in working condition for many years after purchase – cannot be "fixed" to tolerate increased interference.[28]

Also, because broadcasting reaches hundreds of thousands or even millions of viewers in a market, broadcasters cannot necessarily identify when, if, or to what extent an unlicensed device will interfere with the public's ability to receive the free, over-the-air television. And with millions of potential unlicensed devices, viewers are equally constrained from correctly identifying the source of unlicensed interference. As a result, interference from unlicensed devices to free, over-the-air television is impossible to police and impossible to correct. Interference from unlicensed devices may completely undermine the ability of full-service, LPTV, and television translator stations to operate effectively. Consumers, in turn,

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[28] Indeed, a free, over-the-air television system necessitates an "open architecture" for receiving equipment.

would be *forced* to subscribe to pay television services. The Commission would violate its public interest responsibilities were it to allow such a result.

C. MAP's Plan Would Chill Investment, Harm The Free Market, And Mismanage A Vital National Resource.

By allowing an infinite number of unlicensed devices with interference rights to proliferate throughout a licensed spectrum band, MAP's proposal would prioritize the business interests of unlicensed device manufacturers over the public's access to interference-free communications. No matter how harmful addition of the *nth* unlicensed device would be to an affected licensed service, the licensed service would be powerless to prevent introduction of that device and its accompanying interference. In the end, MAP's proposal would undermine free market investment in licensed services and mismanage America's vital spectrum resource.

Contrary to MAP's unsubstantiated assertions, unprecedented interference rights for unlicensed devices would frustrate any "deregulatory" goals for the provision of advanced services to the American public.[29] By subjecting licensed services to unprecedented interference, MAP's proposals would further violate the Communications Act by stifling investment in advanced services such as wireless broadband and digital television.[30]

Billions and perhaps trillions of dollars have been invested in reliance on the existing licensing regime established by Congress and executed by the Commission. As Commissioner Martin has recognized, "Licensed users have legitimate expectations of protection

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[29] MAP Presentation at 11-12.

[30] Section 706 of the Act requires the Commission to "encourage the deployment ... of advanced telecommunications capability to all Americans ... by utilizing ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

against interference."[31] To subvert these investments by permitting spectral anarchy, whereby any and all users may increase the noise floor *ad infinitum*, is not "deregulatory."[32] True deregulatory measures grant licensees reasonable flexibility in serving their communities of license, thereby encouraging investment in advanced services using that spectrum. MAP's proposals, on the other hand, would discourage such investments because licensees would face substantial interference risks from unlicensed devices.

Furthermore, if the FCC were to grant unlicensed devices the same rights and benefits as spectrum licensees, there would be a giant loophole in the FCC's auction authority – thus undermining that genuinely deregulatory system. Licensees would pay for spectrum which unlicensed users, with the same privileges, would get for free. As noted above, an unlicensed device with a "co-equal" or similar entitlement to interfere with a licensed service in the same frequency band would, by definition, become "mutually exclusive" to that licensed service. By allowing mutual exclusivity between a licensed service and unlicensed device, the FCC would violate Congress's deregulatory intent for the market-based assignment of mutually-exclusive spectrum uses.

Similarly, if the Commission were to allow unlicensed devices to degrade the technical integrity of licensed spectrum, potential bidders in future spectrum auctions would place a lower value on licensed spectrum. As QUALCOMM, Inc. has argued in opposition to

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[31] Howard Buskirk, *FCC Must Protect Spectrum Licensees, Martin Says*, Comm. Daily, 3 (Oct. 18, 2004).

[32] As the Spectrum Policy Task Force has written, "Although the common model is in many ways a highly deregulatory 'Darwinian' approach, as its proponents point out, productive use of spectrum commons by unlicensed devices, particularly in lower spectrum bands, typically requires significant regulatory limitations on device transmitter power that preclude many other technically and economically feasible spectrum uses that rely on higher-power signal propagation over longer distances, or that require greater protection from interference." Spectrum Policy Task Force, Report of the Spectrum Rights and Responsibilities Working Group, ET Docket No. 02-135, 20 (rel. Nov. 15, 2002).

the proposal to introduce interfering unlicensed devices into the television broadcast spectrum, "permitting unlicensed devices to operate in the TV bands ... may discourage parties from bidding for licenses in Commission auctions."[33] This depression of spectrum auction revenues would further disappoint Congressional expectations for a deregulatory, market-based approach to spectrum management.

III. THE COMMISSION ALREADY HAS MADE SIGNIFICANT AMOUNTS OF SPECTRUM AVAILABLE FOR UNLICENSED USE.

The Commission need not sacrifice the public's well-established reliance on communications over licensed spectrum to promote unlicensed device use. Contrary to MAP's assertions, the Commission has made significant amounts of spectrum available for dedicated unlicensed use.

Within the so-called "beachfront" spectrum below 3 GHz, the Commission has already dedicated over 100 MHz of spectrum to unlicensed uses. In addition, at the urging of unlicensed device manufacturers, the Commission in late 2003 expanded the aforementioned U-NII band – which already had a 300 MHz-wide unlicensed allocation – by *255 MHz* of spectrum. As a result, unlicensed devices in the U-NII spectrum have access to 555 MHz of spectrum.[34] The Commission rightly characterized its decision to expand the U-NII band as "a significant increase in the spectrum available for unlicensed devices across the overall radio spectrum."[35] As rationale for devoting such a large swatch of spectrum to new unlicensed uses, the

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[33] Letter from Dean R. Brenner, Senior Director, Government Affairs, Qualcomm, to Marlene H. Dortch, Secretary, FCC, ET Docket Nos. 04-186 and 02-380 (filed Sept. 28, 2004).

[34] Unlicensed devices may now operate in the following 5 GHz-band frequencies: 5.150-5.250 GHz, 5.250-5.350, 5.470-5.825. Thus, in the U-NII band alone, unlicensed devices have access to nearly twice the amount of spectrum that will be allocated to the public's free, over-the-air television service after the digital transition is complete.

[35] News Release, *FCC Makes Additional Spectrum Available for Unlicensed Use*, FCC (rel. Nov. 13, 2003).

Commission cited arguments of unlicensed device advocates that "the additional spectrum for U-NII would provide vitally important capacity and security for innovators to further the reach and potential of unlicensed broadband networks."[36] Over one year later, unlicensed device manufacturers have made little use of the expanded U-NII spectrum. Instead, they and advocates such as MAP have devoted their energies to demanding even more unlicensed spectrum.[37]

In light of the overabundance of underutilized unlicensed spectrum, the Commission would have no cause – even if it had the authority – to allow unlicensed devices to interfere with licensed services. Sufficient spectrum is available for new unlicensed services; the Commission need not put the public's licensed radiocommunications infrastructure at risk.

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[36] 18 FCC Rcd. 24484, at ¶ 15.

[37] The Commission has allowed unlicensed devices to access many other bands as well. For example, in late 2003, the Commissioned permitted unlicensed devices to use the 92-95 GHz band for indoor purposes. *See* 18 FCC Rcd. 23318 (2003). The Commission cited the "considerable interest in using the 92-95 GHz band for unlicensed, Part 15 devices" and Chairman Powell announced that the Commission was "open[ing] yet another new frontier in bringing the power of broadband Internet services to the American people." *Id.* at 23334, 23358. The Commission had previously opened up the 57-64 GHz band to unlicensed use. *See* 47 C.F.R. § 15.255. Unlicensed device manufacturers thus have an abundance of spectrum in which to deploy their services.

CONCLUSION

In light of the above, MSTV respectfully requests that the Commission reject any proposal that unlicensed devices be allowed to interfere with licensed services. Proposals such as those advanced by MAP would violate the Communications Act, disappoint Congressional expectations for market-based allocations of mutually exclusive spectrum, and substantially degrade the public's radiocommunications infrastructure.

Respectfully Submitted,

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March 2, 2005