

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

In the Matter of

Revisions to Rules Authorizing the Operation of
Low Power Auxiliary Stations in the 698-806
MHz Band

WT Docket No. 08-166

Public Interest Spectrum Coalition, Petition for
Rulemaking Regarding Low Power Auxiliary
Stations, Including Wireless Microphones, and
the Digital Television Transition

WT Docket No. 08-167

REPLY COMMENTS OF THE WHITE SPACES COALITION

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INTRODUCTION AND SUMMARY

As the White Spaces Coalition (“Coalition”) explained in its opening comments, the fundamental facts relevant to this proceeding are largely uncontested. Everyone agrees that a substantial number of unauthorized wireless microphones operate in the television broadcast bands. Everyone also agrees that some of these microphones operate using 700 MHz band spectrum that will be used for critical public safety and commercial operations. Finally, even wireless microphone manufacturers concede they have marketed TV band wireless microphones for uses and users not permitted by the Commission’s rules.

Remarkably, however, most wireless microphone manufacturers insist that they have done nothing wrong, or even if they have, there is nothing the Commission can do to stop them. The record thus confirms that swift action is needed, lest others be similarly tempted to make a quick profit undermining the Commission’s spectrum rules by inviting large numbers of unauthorized users to occupy frequencies allocated for other purposes. The Coalition urges the Commission to hold these manufacturers responsible for the widespread unauthorized use they have caused, and to ensure that any remedy the Commission implements does not result in additional widespread general microphone use in channels 21-51 at the expense of innovative white space applications.

I. THE COMMISSION HAS NOT AUTHORIZED GENERAL WIRELESS MICROPHONE USE IN THE TV BANDS, AND HAS AMPLE AUTHORITY TO ACT AGAINST THOSE WHO ENCOURAGE SUCH UNAUTHORIZED USES.

As the Commission recognized in the *NPRM*, its rules restrict operation of wireless microphones in the TV bands to low power “broadcast auxiliary” uses and

users.¹ Nevertheless, even TV band wireless microphone manufacturers now concede there has been a “dramatic increase in the use of unlicensed wireless microphones in the TV spectrum by persons who were outside those few industries eligible for licenses,”² with the result that “most wireless microphones ... [now] operate in radio frequency (RF) spectrum that corresponds to locally unused TV channels.”³

Wireless microphone manufacturers have been quick to point the finger at others for this widespread unauthorized use, even blaming their own customers for using their products consistently with how they were marketed.⁴ But when it comes to their own conduct, manufacturers have maintained that this proceeding is somehow “not the appropriate forum” to discuss their activities,⁵ or that their conduct is excused because “[w]here there is no harm, there is no foul.”⁶ Silly sports metaphors aside, these manufacturers are irresponsible to suggest that the Commission should ignore widespread violations of its rules, and wrong to suggest that it is powerless to enforce them.

¹ *Revisions to Rules Authorizing the Operation of Low Power Auxiliary Stations in the 698-806 MHz Band; Public Interest Spectrum Coalition, Petition for Rulemaking Regarding Low Power Auxiliary Stations, Including Wireless Microphones, and the Digital Television Transition*, WT Docket Nos. 08-166, 08-167, Notice of Proposed Rulemaking and Order (Aug. 15, 2008) (“NPRM”) (citing 47 C.F.R. Part 74 Subpart H—Low Power Auxiliary Stations).

² Comments of Nady Systems, Inc., WT Docket Nos. 08-166, 08-167, at 4 (filed Oct. 3, 2008) (“Nady Comments”).

³ Shure White Spaces Overview, available at http://www.shure.com/ProAudio/PressRoom/WhiteSpaces/us_pro_pr_whitespacespage.

⁴ *See, e.g.*, Nady Comments at 10 (claiming that “federal law [does not] require [manufacturers] to answer for the acts and omissions of wireless microphone end users”).

⁵ Comments of Shure Incorporated, WT Docket Nos. 08-166, 08-167, at 15 n.27 (filed Oct. 3, 2008) (“Shure Comments”).

⁶ Nady Comments at 7.

A. The Commission’s Rules Prohibit General Wireless Microphone Operations in the TV bands.

Most wireless microphone manufacturers do not challenge the Public Interest Spectrum Coalition’s (“PISC”) claim that they have marketed and sold TV band wireless microphone systems for general uses.⁷ Rather, they have come up with a series of specious rationales to justify their misconduct, suggesting they were in “no position to predict user eligibility.”⁸ Each of their rationales fails.

First, Audio-Technica says that because Part 90 of the Commission’s rules contemplates a broad range of wireless microphone uses, somehow it was permissible for it to market wireless microphones for such uses in the TV bands.⁹ But Part 90 does not authorize uses and users in the TV bands¹⁰ and the principal contention of the PISC Petition is that manufacturers are illegally marketing TV band microphone systems to ineligible users and for unauthorized uses. Part 90 offers no defense for manufacturers who have marketed TV band wireless mics for non-broadcast auxiliary uses and users.

For its part, Sennheiser concedes that the limited categories of eligible Part 74 wireless microphone users enumerated by the Commission “may once have been clear-

⁷ See generally Complaint of Public Interest Spectrum Coalition (PISC) Against Shure, Inc., Nady Systems, Inc., VocoPro, Audio2000, Sennheiser Electronic Corporation, Audix Microphones, Electro Voice, Hisonic International, Inc., Pyle Audio, *et al.*; Petition To Create a General Wireless Microphone Service (GWMS), Informal Complaint and Petition for Rulemaking (filed Jul. 16, 2008) (“PISC Petition”).

⁸ See, e.g., Shure Comments at 20.

⁹ See Comments of Audio-Technica U.S., Inc., WT Docket Nos. 08-166, 08-167, at 15-16 (filed Oct. 3, 2008) (maintaining that it is “simply disingenuous for PISC to claim that wireless microphone manufacturers intentionally sought to violate FCC rules by selling wireless microphones to organizations outside of the limited class of users authorized under Part 74 of the rules when almost anyone can qualify for a wireless microphone license under Part 90”).

¹⁰ See 47 C.F.R. § 90.265(b).

cut,” but maintains that this is no longer the case because the costs of television and film production have decreased.¹¹ The unstated premise of this argument – that marketing for general wireless microphone use in the TV bands should be permitted because anyone *might become* a television or motion picture producer – is unavailing. The Commission’s rules don’t contemplate eligibility based on possible future conduct, but rather restrict eligibility to those entities actively “engaged in the production or filming of motion pictures ... [or] the production of television programs.”¹² Moreover, Part 74 limits the scope of acceptable uses to those related to the creation of those programs,¹³ a fact that manufacturers’ marketing typically fails to disclose. For example, manufacturers do not market TV band microphones to houses of worship solely for television “broadcast ministries,” but rather for a number of non-broadcast uses such as communication with congregations.¹⁴ In addition, much of the general purpose marketing cataloged by PISC – including for karaoke bars, corporate boardroom meetings, and aerobics studios – is directed at users that not even the manufacturers can plausibly claim are making TV shows or films.

Shure makes much of the Commission saying in its 1977 wireless microphone order that it would consider applications by certain non-broadcast entities to operate TV

¹¹ Comments of Sennheiser Electronic Corp., WT Docket Nos. 08-166, 08-167, at 10 (filed Oct. 3, 2008) (“Sennheiser Comments”).

¹² 47 C.F.R. § 74.801.

¹³ 47 C.F.R. § 74.831.

¹⁴ *See, e.g.*, PISC Petition at 6 and Ex. A.

band microphones “on a case by case basis.”¹⁵ *Yet this was the very order that considered and rejected the argument that the Commission should extend general eligibility to groups other than those specifically enumerated in Part 74.*¹⁶ Indeed, the rules ultimately issued by the Commission do not even mention “case by case” eligibility determinations. Rather, these rules make clear that “[a] license authorizing operation of one or more low power auxiliary stations will be issued *only* to” entities involved in television or film production, and only then for a specifically limited “scope of service and permissible transmissions.”¹⁷ The possibility that a party could seek a waiver of these rules (just as it could for any other FCC rule) does not change in any way the fact that the rules specifically limit eligible entities and eligible uses. The argument that since permission to do something could be granted one may do it without seeking permission might sound good to a teenager, but is otherwise obviously absurd.

Shure goes so far as to blame the Commission for its misconduct, asserting that the Commission has a “long history of awarding [low power broadcast auxiliary] licenses” to ineligible individuals notwithstanding the Part 74 limitations.¹⁸ But this does not appear to be true. In fact, most of the examples provided by Shure of applications by putative “nonbroadcast entities” that nevertheless received licenses included a form noting their eligibility under Part 74. Nor would the Commission have any reason to

¹⁵ See Shure Comments at 20 (citing Amendment of Part 2, and Subpart D, Part 74, of the Commission's Rules and Regulations, with Respect to the Use of Wireless Microphones, Report, Memorandum and Order, 63 FCC 2d 535 (¶ 30) (1977)).

¹⁶ 63 FCC 2d at 542 (¶ 30)

¹⁷ 47 C.F.R. §§ 74.831-832 (emphasis added).

¹⁸ Shure Comments at 20 and n.41.

doubt the legitimacy of these forms or that the applicants were eligible. For example, the “house of worship” cited by Shure is Kansas City Youth for Christ, Inc., the former licensee of KYFC-TV channel 50;¹⁹ the “athletic department” cited by Shure is the University of Washington, whose UWTV television programming is available on numerous cable and satellite systems;²⁰ and one of the corporations cited by Shure is Walt Disney World, which routinely hosts television programming and whose parent company owns ABC, ESPN, and the Disney Channel.²¹ Shure’s claim that the Commission intended to open up the broadcast bands to accommodate non-broadcast general microphone users such as karaoke enthusiasts or home hobbyists is no more trustworthy than its marketing.

Finally, manufacturers object that the Commission has known for years about widespread illegal uses and failed to act.²² Indeed, one manufacturer has conceded that it principally “relied on that benign neglect for its marketing.”²³ In other words, manufacturers claim that they are justified in knowingly breaking the rules because they

¹⁹ Although KCYFC subsequently sold this station to Paxson, an account of the sale notes that “Paxson bought only the station’s license and transmitter [and] KCYFC will retain the production facility for evangelistic purposes.” Aaron Barnhart, *New Owner Hopes to Revitalize KYFC: Deeper Pockets Will Let Station Keep Focus on Christian Mission*, TV Barn (Jan. 29, 1997), available at http://blogs.kansascity.com/tvbarn/1997/01/new_owner_hopes.html.

²⁰ See generally University of Washington Television, available at www.uwtv.org.

²¹ Shure also objects that the Commission granted an authorization to Boeing in April of this year. But as the application makes clear, Boeing sought to use Part 74 headset monitors *inside a wind tunnel*, and even then sought coordination of this proposed limited use with the Society of Broadcast Engineers prior to submitting its application. See The Boeing Company, Radio Station Authorization, Call Sign WQIP722, File No. 0003345019. The fact that the Commission would grant a limited authorization to a corporation premised on coordination with incumbents in no way suggests that it would routinely waive its rules to allow general purpose microphones to be used by consumers in the TV bands.

²² See, e.g., Shure Comments at 20-21; Nady Comments at 7.

²³ Nady Comments at 7.

thought the Commission would not enforce them. But believing you will get away with it is not a defense to violating Commission rules.

Moreover, the Commission has routinely made clear that it expects its part 74 rules to be obeyed. For example, when certain operators of nuclear power plants recently sought a waiver of Part 74 to enable limited operation of TV band headsets and intercoms at their remote nuclear plant sites – clearly a public interest use – the Commission did not simply grant their request, but rather opened up a new docket to seek public comment.²⁴ In addition, when the Commission authorizes a wireless microphone system for use in the TV bands, the official certification issued to the wireless microphone manufacturer continues to make clear that the equipment is not authorized for general use, confirming that “[o]peration of [the] unit is limited to use at stations licensed for use under Part 74 of FCC Rules.”²⁵ These are not the actions of an agency that thinks its TV band wireless microphone rules can simply be ignored.

In short, both the Commission’s rules and actions belie manufacturers’ suggestions that the Commission envisioned widespread general wireless microphone use in the TV bands, and that it was therefore acceptable for them to violate the rules by marketing their Part-74 certified equipment for a wide range of unauthorized purposes.

²⁴ See *Office of Engineering and Technology Seeks Comment On Nuclear Energy Institute and United Telecom Council Request For Waiver of Section 74.832(h)*, ET Docket No. 05-345, Public Notice, 20 FCC Rcd. 20035 (OET 2005).

²⁵ See, e.g., Grant of Equipment Authorization for Shure, Inc. Wireless Boundary Microphone, FCCID: DD4MX690G5.

B. The Commission’s Rules Prohibit Marketing Wireless Microphones in Ways that Cause Widespread Unauthorized Use.

Several wireless microphone manufacturers also maintain that, even if the Commission’s rules do restrict TV band microphone uses and users, the Commission cannot act to prevent them from misleading consumers and encouraging unauthorized spectrum use. Indeed, one manufacturer explicitly admitted “directing advertising at end users who may be ineligible to obtain LPAS licenses,” but nevertheless claims that the Commission is powerless to act against it because no such law prohibits manufacturers “from advertising wireless microphones to musicians and churches.”²⁶ As the PISC Petition makes clear, this is not the case.

Section 302a(b) of the Communications Act mandates that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.”²⁷ Section 2.803 of the Commission’s rules similarly provides that “no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless ... such device has been authorized by the Commission in accordance with the rules in this chapter.”²⁸ All wireless microphones systems operating in the TV bands must be marketed and sold under a FCC grant of equipment authorization. As discussed above, these authorizations make clear that the equipment is not for general purposes such as karaoke bars, but rather must be limited to

²⁶ Nady Comments at 10.

²⁷ 47 U.S.C. § 302a(b).

²⁸ 47 C.F.R. § 2.803(a)(1).

stations licensed for use under Part 74. Yet despite these rules, *wireless microphone manufacturers aggressively and intentionally market their Part 74-authorized systems in direct violation of their authorizations.*

Manufacturers have suggested that these provisions do “not dictate to *whom* equipment can be sold,”²⁹ but this is simply not so. The Enforcement Bureau has found that companies violate Section 302a(b) by advertising devices to those who cannot lawfully use them, even when others can. For example, the Bureau has issued citations to companies advertising cell phone jammers to state and local law enforcement agents, even though the Commission’s rules permit marketing and sale of such equipment to the federal government.³⁰ Similarly, the Bureau has cited a company for marketing an uncertified video transmitter “for professional video production,” even though it was permitted to market the device for amateur use.³¹ Simply put, companies are not permitted under Section 302a(b) to market and sell wireless microphones in ways that lead to widespread violations of the Commission’s rules.

In addition, the PISC Petition demonstrates that several manufacturers have referenced equipment certifications in a misleading manner in violation of 47 C.F.R. § 2.927(c), which prohibits the misleading use of equipment certifications in advertising.³²

²⁹ Shure Comments at 17 (emphasis in original). Shure also maintains that the Commission cannot “impose eligibility verification requirements” on manufacturers, noting that, unlike rules governing decryption/demodulating equipment, Part 74 does not mandate verification of licensees. *Id.* at 18-19. As Shure well knows, however, manufacturers willfully marketed and sold devices to entire classes of individuals who could not even qualify for a license, and for uses prohibited by Part 74.

³⁰ *See, e.g. In re Henry*, Citation, File No. EB-08-SE-203 (EB May 27, 2008); *In re BRD Sec. Prods, Inc.*, Citation, 22 FCC Rcd. 20957 (EB 2007); *In re Clark*, Citation, 20 FCC Rcd. 9097 (EB 2005).

³¹ *In re Jensen*, Citation, 20 FCC Rcd. 14470 (EB 2005).

³² *See* PISC Petition at 8-15.

Shure claims that Section 2.927(c) is limited to advertising claims that equipment authorizations are more than “merely an acknowledgment that the ... wireless microphone meets the Commission’s technical requirements.”³³ In fact, section 2.927(c) requires that

*No person shall, in any advertising matter, brochure, etc., use or make reference to an equipment authorization in a deceptive or misleading manner or convey the impression that such equipment authorization reflects more than a Commission determination that the device or product has been shown to be capable of compliance with the applicable technical standards of the Commission’s rules.*³⁴

In other words, *any reference to an equipment authorization can violate this rule if it deceives or misleads consumers.* Even the Telecommunications Research and Action Center Complaint Order (“TRAC Order”) cited by Shure supports this interpretation.³⁵ In the TRAC Order, the Commission declined to find a violation of Section 2.927(c) in part because the statements at issue “either by themselves or in the context in which they appear on equipment packaging do not carry the meaning, convey the impression, state or imply that this agency has ... determined that [the equipment] is suitable for the consumers’ purposes.”³⁶ In contrast, *wireless microphone manufacturers have made repeated reference to Part 74 in advertising matter describing uses and users that are prohibited by the Commission’s rules* – sometimes with the barest disclaimer that a license may be required, sometimes with no disclaimer at all, and virtually never with any mention of the Commission’s Part 74 usage and eligibility restrictions.³⁷ Advertising

³³ Shure Comments at 22.

³⁴ 47 C.F.R. § 2.927(c) (emphasis added).

³⁵ *See Complaint and Petition for Rulemaking Concerning Advertising of Terminal Equipment Registered under Part 68 of the Commission’s Rules filed by the Telecommunications Research and Action Center*, Memorandum Opinion and Order, 1 FCC Rcd. 147 (1986).

³⁶ *Id.* at 148.

³⁷ PISC Petition at 8-15.

certain specific uses along with a statement in that same material that the product is certified to Part 74 of the Commission's rules clearly implies that those uses are not prohibited by the Commission. Indeed, no rational consumer would expect otherwise.

Finally, Shure objects that deceptive trade practices are usually reviewed by the Federal Trade Commission rather than the FCC.³⁸ It is certainly the case that the FTC Act prohibits advertising in a way that misleads customers into violating FCC rules, and there is little doubt the FTC could also find Shure and other manufacturers liable for violating its rules.³⁹ For example, in *Western Radio Corp.*, the Seventh Circuit upheld an FTC decision prohibiting a manufacturer from representing or implying that use of its transmitter did not require an FCC license “unless the specific conditions under which such a license or permit would be required are conspicuously set forth,” finding that such action was necessary “lest purchasers be misled into violating FCC regulations.”⁴⁰ But the fact that manufacturers' actions also violate FTC Act does not limit the FCC's authority to enforce its own marketing rules. Indeed, it is a longstanding principle of statutory interpretation that overlapping federal statutes must each be regarded as effective in absence of an “inherent conflict.”⁴¹ In this case both the FCC and the FTC ban misleading and deceptive advertising, and this Commission has ample authority to

³⁸ Shure Comments at 21.

³⁹ See *Western Radio Corp. v. FTC*, 339 F.2d 937 (7th Cir. 1964).

⁴⁰ *Id.* at 938, 940. In the case of wireless microphones, the argument for enforcement is even stronger, because there is virtually no way that most customers could comply with FCC rules if they used wireless microphone systems consistent with their advertised use.

⁴¹ See, e.g., *J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 143-144 (2001) (“When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”)(quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

act against those who encourage widespread violations of its rules. It should exercise that authority to remedy the situation manufacturers have caused and deter others from taking similar actions.

II. THE ENORMOUS BENEFITS OF THE WHITE SPACES MUST NOT BE SACRIFICED TO ACCOMMODATE WIDESPREAD GENERAL MICROPHONE USE.

As the Coalition explained in its opening comments, the Commission can ensure that the public realizes the enormous potential of the television white spaces and that public interest microphone uses are preserved by expanding the Part 74 authorization for wireless microphones to include groups such as houses of worship and theaters.⁴² Yet almost without exception, wireless microphone manufacturers have proposed “solutions” that would merely result in even more general microphone use at the expense of white space operations in channels 21-51. The Commission must not squander the vast potential of the white spaces merely to sustain business models premised on unauthorized spectrum access.⁴³

To the extent that parties have used this proceeding to propose restrictions on operation of white space devices rather than wireless microphones that are the subject of the NPRM, these suggestions are properly addressed in the white spaces proceeding.⁴⁴

⁴² Comments of the White Spaces Coalition, WT Docket Nos. 08-166, 08-167, at 6 (filed Oct. 3, 2008) (“Coalition Comments”).

⁴³ Indeed, when the Office of Engineering and Technology conducted field tests of wireless microphone operations as part of the white spaces proceeding, it found that operation of TV band microphones at FedEx Field in Landover, MD and the Majestic Theatre in New York, NY resulted in a substantial increase in spectrum “noise,” even on channels other than those used by wireless microphones. *See* Steven K. Jones *et al.*, *Evaluation of the Performance of Prototype TV-Band White Space Devices Phase II*, OET Report FCC/OET 08-TR-1005, App. E, F (2008). Authorizing widespread general wireless microphone use in channels 21-51 would only magnify this issue.

⁴⁴ *See* Comments of the Ass’n for Maximum Service Television, Inc. and the National Ass’n of Broadcasters, WT Docket Nos. 08-166, 07-167, at 13 (filed Oct. 3, 2008); Shure Comments at 9-10.

Indeed, with few exceptions, these proposals are already reflected, and already have been discussed at length, in the white spaces dockets. Moreover, as several parties have observed, resolution of the white spaces proceeding will almost certainly aid in determining what, if any, TV band spectrum also could be made available for general wireless microphone use.

However, the Commission should reject out of hand Sennheiser's proposed exclusion of *all* white spaces devices from channels 14-36.⁴⁵ As Sennheiser is well aware, the Commission first proposed several of these channels for white space operations years ago.⁴⁶ Excluding these channels would make white space operations all but impossible in urban and other densely populated areas, frustrating the Commission's goals of increasing spectrum efficiency and fostering innovation. Indeed, Sennheiser's proposal exceeds even the most aggressive demands for exclusive channel use by wireless microphones made by Shure in the white spaces proceeding.⁴⁷

In addition, the Commission should not grant senior status – either *de facto* or *de jure* – to a new class of general wireless microphones operating in channels 21-51. As the Coalition previously has explained, white space devices may well have to avoid all wireless microphone signals if the Commission approves “detect and avoid” sensing technologies. Wireless microphone manufacturers have maintained that even unauthorized wireless microphones should be entitled to interference protection from

⁴⁵ Sennheiser Comments at 3.

⁴⁶ *See generally Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, Notice of Proposed Rulemaking, 19 FCC Rcd. 10018 (2004).

⁴⁷ *See, e.g.*, Ex Parte Letter of Shure Inc., ET Docket No. 04-186, WT Dockets 08-166, 08-167 (filed Oct. 2, 2008).

legal white space devices,⁴⁸ but it is completely untenable to grant large numbers of unauthorized uses senior status over other devices that seek to operate in compliance with the Commission's rules.

Finally, the Commission should reject calls by manufacturers to do away with the Part 74 individual licensing requirement altogether.⁴⁹ Such an act not only would decrease accountability even further in a service that is already overwhelmingly characterized by unauthorized use, but would lead to substantial spectrum inefficiency if the use of protective beacons contemplated for Part 74 microphones is not tightly controlled.⁵⁰ The Commission should instead maintain the Part 74 licensing requirements, updating eligibility for additional uses that are clearly in the public interest. Remaining uses can, and should, go to other options outside of television channels 21-51 authorized by the Commission for general wireless microphone use.

⁴⁸ See Nady Comments at 10.

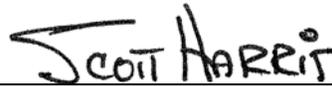
⁴⁹ See, e.g. Shure Comments at 9 n. 17; Sennheiser Comments at 5.

⁵⁰ See Coalition Comments at 7.

CONCLUSION

The record in this proceeding makes clear that wireless microphone manufacturers are marketing and selling devices that they know are – and which they fully intend to be – routinely used in violation of the Commission’s rules. The Commission has ample authority to sanction this behavior, and should do so. However, the Commission also must take special care to ensure that the public will realize the enormous benefits of innovative white space applications as it considers policies to address the widespread unauthorized use of TV band microphone systems.

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