

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

In the Matters of

Unlicensed Operation in the TV Broadcast Bands

ET Docket No. 04-186

Additional Spectrum for Unlicensed Devices
Below 900 MHz and in the 3 GHz Band

ET Docket No. 02-380

OPPOSITION TO “EMERGENCY REQUEST”

The White Spaces Coalition hereby opposes the “Emergency Request” filed by the Association for Maximum Service Television, *et al.* (collectively “broadcasters”) seeking an additional 70 days to comment on the results of Phase II white space prototype testing performed by the Office of Engineering and Technology.¹ After more than four years, multiple notice and comment periods, multiple rounds of lab and field testing, and over 30,000 filings by the public,² broadcasters now accuse the Commission of a rush to judgment on the white spaces. They do so on the thinnest of pretexts – that the Commission somehow has denied them a “meaningful opportunity” to review and comment on test data that they watched OET collect, and about which they have already made no fewer than sixteen oral and written presentations on the record. The Commission should dismiss out of hand the broadcasters’ attempt to deny the public the benefits of the white spaces by delaying a decision that, if anything, is overdue.

¹ See generally Emergency Request of the Ass’n for Maximum Service Television, Inc. (“MSTV”), the National Ass’n of Broadcasters (“NAB”), the ABC, NBC, CBS, and FOX Television Networks, and the Open Mobile Video Coalition (“OMVC”), ET Docket Nos. 04-186, 02-380 (filed Oct. 17, 2008 (“Emergency Request”) (citing 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 (2008) (“Phase II Report”)).

² See generally ET Docket No. 04-186. The NPRM opening the white spaces docket was adopted by the Commission on May 13, 2004. 19 FCC Rcd. 10018 (2004).

I. THE BROADCASTERS HAVE CONSTANTLY OBSERVED AND REPEATEDLY COMMENTED ON THE OET TESTS OF WHITE SPACE DEVICES

The fundamental but faulty premise of the broadcasters’ argument is that the Commission has not provided opportunity to access and comment on information in the Phase II Report, “rais[ing] serious questions about compliance with the Administrative Procedures Act.”³ The broadcasters do not cite the section of the APA they believe the Commission to have violated. However, the record in this proceeding is clear that the only potentially applicable APA requirement – that a party should not be “deprived of the opportunity to present relevant information by lack of notice that the issue was there”⁴ – has been amply met.

To hear the broadcasters tell it, this is the first time they have had the opportunity to see the test results that constitute the majority of the Phase II Report.⁵ This is nonsense. As both the Commission and the broadcasters are well aware, the Commission publicly posted its testing plans, and every stage of the Phase II testing was “open to observation by any interested parties.”⁶ Indeed, in keeping with the Commission’s desire to “ensure the testing process is open and transparent,”⁷ OET even consistently updated its publicly accessible website with announcements describing the white spaces testing

³ Emergency Request at 3.

⁴ *WJG Tel Co., Inc. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982)(quoting *Chicago v. FPC*, 458 F.2d 731, 748 (D.C. Cir. 1971)).

⁵ In addition to the test results and a few paragraphs of analysis provided by OET, the Phase II Report also contains approximately 150 pages of background material such as plots of television service contours. *See, e.g.*, Phase II Report App. D, G.

⁶ *Public Notice, Office of Engineering and Technology Announces Plans for Conducting Measurements Of Additional Prototype TV White Space Devices*, ET Docket No. 04-186 (released Jan. 17, 2008).

⁷ *Id.*

scheduled to take place the following week.⁸ In other words, the public – including the broadcasters – had every opportunity to review the OET test results in real time as they unfolded.

Not only were the broadcasters aware of the opportunity to observe the OET test results, they exercised it repeatedly. In fact, as the broadcasters acknowledge, an MSTV executive (and former OET Chief) was present at their behest for most of the period during which testing took place.⁹ This should come as little surprise to anyone – a substantial number of the tests performed by OET at the broadcasters’ insistence were based on testing recommendations that broadcasters placed in the record, including the specific locations where several of the field tests took place.¹⁰

Finally, the broadcasters’ own filings belie their claim that “the Commission has not allowed members of the public to comment meaningfully on the results of the OET tests.”¹¹ In reality, the broadcasters have submitted oral or written presentations regarding these test results no fewer than sixteen times – including thirteen filings made even before OET released the Phase II Report.¹² Nor were the broadcasters alone in

⁸ See Office of Engineering and Technology, TV Band Device Testing, 2008 Test Schedule, available at http://www.fcc.gov/oet/projects/tvbanddevice/previousTesting_2008.html.

⁹ Emergency Request at 1 n. 1.

¹⁰ See, e.g., OET Phase II Report at 87, 95, 103.

¹¹ Emergency Request at i.

¹² See, e.g., Ex Parte letters of MSTV, Inc. (filed Oct. 17- Oct. 22, 2008) (reporting meetings with Commissioners’ offices and OET discussing OET test data and submitting presentations claiming the data does not support a proof of concept for spectrum sensing); Ex Parte letter of MSTV, Inc. (filed Oct. 9, 2008) (submitting a seven page white spaces proposal allegedly “supported by ... the test results”); Ex Parte letter of MSTV, Inc. (filed Oct. 1, 2008) (reporting a meeting with OET “discuss[ing] the results of recent field testing in this proceeding” and submitting presentation arguing that the results of laboratory and field tests supported certain restrictions proposed by the broadcasters); Ex Parte letter of MSTV, Inc. (filed Sept. 24, 2008) (arguing that “OET’s tests demonstrate that sensing is a dead-end technology and should not be authorized”); Ex Parte letter of MSTV, Inc. (filed Aug. 22, 2008) (discussing “the results of recent field testing in this proceeding” and what MSTV believes these results “conclusively show”); Ex Parte letters of MSTV, Inc. (filed Jul. 2 – Jul. 7, 2008) (reporting meetings with Commissioners’ offices in which broadcasters’ representative

observing the OET test results and filing comments regarding those results.¹³ These and other filings in the record have already discussed at length every issue related to the operation of white space devices that the broadcasters now maintain justifies delaying this proceeding until the next calendar year.

II. THE BROADCASTERS MISUNDERSTAND THE PURPOSE OF OET TESTING

Time and again, the Commission has explained that the purpose of its testing is not to verify that early test devices will work in every possible context, but rather to gather information that will play a role in informing the Commission's decision-making process.¹⁴ Indeed, the Phase II Report makes clear that the OET results are not the only factors the Commission will take into account, but rather "will be considered along with other information in developing the Commission's final decision on white space

present at the testing "reported on the recent series of OET laboratory tests of unlicensed devices," and arguing that the test results did not support spectrum sensing); Ex Parte letter of MSTV, Inc. (filed Jul. 2, 2008) (reporting a meeting with OET discussing "recent interference testing conducted at OET's Laboratory"); Ex Parte letter of MSTV, Inc. (filed Jun. 26, 2008) (arguing that "OET's tests have demonstrated that unlicensed devices cannot rely on sensing technologies to avoid interference"); Ex Parte letter of MSTV, Inc. (filed Mar. 31, 2008) (reporting a meeting with Chairman Martin and his legal advisor noting that the broadcasters' representative who was "observing the tests of unlicensed devices being conducted by the FCC's Labs" reported on those results, and submitting a chart in the record summarizing MSTV's evaluations of those results); Ex Parte letter of MSTV, Inc. (filed Mar. 13, 2008) (describing meeting with OET staff in which MSTV "discussed [its] observations of the lab tests"); Ex Parte letters of MSTV, Inc. (filed Feb. 8 – Feb. 20, 2008) (reporting meetings with Commissioners' offices and noting that those meetings "focused on the tests currently being conducted by OET").

¹³ See, e.g., Ex Parte Letter of Shure, Inc. (filed Oct. 2, 2008) (discussing spectrum sensing of wireless microphones "observed during the FCC's laboratory and field tests"); Ex Parte letter of the Nat'l Cable and Telecomms. Ass'n (filed Sept. 18, 2008) (describing observations of "the recent field tests conducted by the Office of Engineering and Technology").

¹⁴ See, e.g., Steven K. Jones and Thomas W. Philips, Initial Evaluation of the Performance of Prototype TV-Band White Space Devices, FCC/OET 07-TR-1006 at vi (2007) (observing that the "devices are not intended as actual consumer products but rather are development tools"); Steven K. Jones and Thomas W. Philips, Plan for Tests of Prototype Personal/Portable TV White Space Devices (Phase II) at 2 (released Jan. 17, 2008) ("The Commission may ultimately establish requirements that the current prototype devices do not meet."); Phase II Report at iv-v ("The tests are not intended for equipment authorization or to determine whether the devices would comply with any possible standards that the Commission might adopt. Rather, they will provide information in support of the Commission's action in this matter.").

devices.”¹⁵ Nevertheless, the broadcasters claim that a few cherry-picked data points somehow add up to an obligation on the part of the Commission to delay this proceeding. This argument fails.

First, while the broadcasters devote a substantial amount of their “emergency request” to alleged deficiencies they perceive in spectrum sensing, the Phase II Report makes clear that OET is not even recommending the immediate authorization of sensing-only devices. Rather, the Report merely observed that “issues regarding future development and approval of ... devices relying on sensing alone, can be addressed.”¹⁶ Moreover, as the broadcasters acknowledge, OET believes that while “it may be possible to authorize products that rely on spectrum sensing,” it must first “be demonstrated that they will not interfere.”¹⁷ None of these conclusions cited by the broadcasters are “patently in conflict” with OET’s test results.¹⁸ Indeed, the Phase II Report demonstrates that, “[i]n most cases, the devices correctly reported channels as occupied when the device was operated within the service contour of the stations broadcasting on those channels and viewable signals were observed.”¹⁹

More fundamentally, however, the release of the Phase II Report, which the Commission is considering in concert with other factors, in no way demonstrates a lack of notice about other issues in this proceeding. In fact, the broadcasters’ “Supplement to Emergency Request” doesn’t even bother to discuss the substance of the Phase II Report

¹⁵ Phase II Report at iv.

¹⁶ *Id.*

¹⁷ *Id.* at 115.

¹⁸ *See* Emergency Request at 2.

¹⁹ Phase II Report at vii.

at all.²⁰ Rather, it cites as justifications for delay the allegation that white spaces proponents are “indifferent” to television,²¹ the broadcasters’ belief that adjacent channel operations should be severely limited,²² and the existence of a supposedly “compromise” proposal submitted by MSTV last month.²³ None of these claims are evidence that the Commission failed to provide the public with a “meaningful opportunity” to comment on the Phase II Report, and none of these claims justify the further delay the broadcasters seek.

* * * *

Throughout this proceeding, the broadcasters have made no secret of their opposition to widespread public use of the television white spaces. They are certainly entitled to press that position before the Commission, and the record proves that they have done so repeatedly. But broadcasters are *not* entitled to delay this proceeding based on a putative need to review data they have already been granted an unprecedented opportunity to see, and about which they have already made numerous substantive presentations to the Commission. After four years of deliberation resulting in one of the most voluminous records in the Commission’s history, the Commission can and should

²⁰ See generally Supplement to Emergency Request of the Ass’n for Maximum Service Television, *et al.*, ET Docket Nos. 04-186, 02-380 (filed Oct. 22, 2008) (“Supplement”).

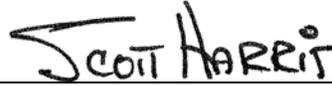
²¹ *Id.* at 2-3. The argument that this claim – premised on the broadcasters’ belief that the New America Foundation and others are out to get them – entitled the broadcasters to a delay under administrative law borders on frivolous. In any event, while some parties may view terrestrial broadcasting as an inefficient spectrum use, the White Spaces Coalition has repeatedly reaffirmed that its member companies have business models that rely on broadcast television, and have strong incentives to preserve the service. See, e.g., Coalition FNPRM Comments at 26-27 (filed Jan. 31, 2007) (explaining the ways in which members of the Coalition derive substantial benefit from ensuring that demand for over the air TV is preserved); Ex Parte letter of Dell, Inc. (filed Sept. 17, 2007) (discussing integration of DTV and white spaces technology in Dell’s products). Simply put, if there were any risk to over the air television from the Coalition’s proposed white spaces operations, its members would not be engaged in this proceeding.

²² Supplement at 4-5.

²³ *Id.* at 5-7.

proceed with the vote it has scheduled for its November meeting. By doing so, the Commission will enable Coalition members and others to begin the process of creating an new market for innovative products and services that will benefit all Americans.

Respectfully submitted,

A handwritten signature in black ink that reads "SCOTT HARRIS". The signature is written in a cursive style with a horizontal line underneath it.

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