

May 15, 2009

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: *Ex Parte Communication, Revision to Rules Authorizing the Operation of Low Power Auxiliary Stations in the 698-806 MHz Band, et al., WT Docket Nos. 08-166 & 08-167; Unlicensed Operations in the TV Broadcast Bands, et al., ET Docket Nos. 04-186 & 02-380*

Dear Ms. Dortch:

Although the June 12, 2009 DTV transition deadline is less than a month away, the Commission has yet to direct wireless microphones and other LPAS operations to vacate the 700 MHz band – despite its pronouncement last year that the 700 MHz band “will be fully available for public safety as well as for commercial wireless services” by the end of the DTV transition.¹ Both the wireless industry and Public Safety have raised concerns about the need for the Commission to act now. To be effective, Commission action cannot simply declare that all wireless microphone and LPAS operations must cease in the band; the Commission must also allow these users (authorized and unauthorized alike) to transition into alternate spectrum readily available for such operations – the TV bands.

CTIA—The Wireless Association® (“CTIA”) notes that New America Foundation and Public Knowledge recently urged the Commission to ban wireless microphones and other LPAS device operations in the 700 MHz band, and they support a proposal to enable “existing and new users of wireless microphones outside the band ... to legally use their wireless microphones in the future.”² To that end, the two organizations suggested that unauthorized wireless microphone users be licensed by rule in the TV bands with co-equal status to approved TV band devices. They also identified the possibility that “given a showing of actual harmful interference, the

¹ *Revisions to rules Authorizing the Operation of Low Power Auxiliary Stations in the 698-806 MHz Band, et al.*, Notice of Proposed Rulemaking and Order, 23 FCC Rcd 13106 ¶ 1 (2008) (“700 MHz Wireless Microphone Notice”).

² Letter from Alex Curtis, Public Knowledge, to Marlene H. Dortch, FCC, WT Docket Nos. 08-166, 08-167, ET Docket Nos. 04-186 at 1 (Apr. 22, 2009)

Commission could allow a smaller subset of users to license under Part 74 by waiver.”³

CTIA believes that proposals like this can facilitate prompt and decisive action that will result in wireless microphone operations vacating the 700 MHz band. As the Commission weighs the interests of secondary users in the TV bands, it is imperative to acknowledge that *no other spectrum bands* are effectively available for the migration of wireless microphones. Part 90 wireless microphone frequencies, for example, lack the bandwidth necessary for migration out of the band.⁴ Further, even if the Commission were to identify new spectrum for wireless microphone usage, actual operations in such a band would not occur for years given that new devices would need to be developed, certificated, and constructed. This would significantly delay the movement of wireless microphone users out of the band, causing interference to both Public Safety and commercial use of the spectrum. In contrast, LPAS equipment is currently available in the TV bands and many wireless microphone users are already purchasing replacement equipment that operates in the TV bands.

Commercial wireless providers, who spent billions of dollars to acquire 700 MHz licenses at auction, are eager to invest in new network deployment and roll out next-generation wireless broadband services. Public Safety, moreover, has already begun deploying systems in its narrowband spectrum. Absent prompt and decisive action to clear wireless microphones from the 700 MHz band, interference and communications disruption is inevitable – to first responders, to broadband customers, and to users of wireless microphones. CTIA and its members are deeply concerned that, if the Commission fails to identify a “new home” for wireless microphones, such operations in the 700 MHz band will persist.

In recent weeks, some have called on the Commission to do just the opposite – to delay any action that could affect the TV bands and instead issue “a separate public notice”⁵ on possible solutions or “wait until open issues in [the white spaces] docket are resolved before taking any action that would impact the white spaces.”⁶ Although the Commission may seek to balance the interests of both white space proponents and wireless microphone users in the TV bands, one thing is clear: the public interest as a whole cannot afford delay.

³ *Id.*

⁴ *See, e.g.* Comments of Shure Incorporated, WT Docket Nos. 08-166 & 08-167, at 11 (filed Oct. 3, 2008).

⁵ Letter from Richard S. Whitt, Google, to Marlene H. Dortch, FCC, WT Docket Nos. 08-166, 08-167, ET Docket Nos. 04-186, 02-380 at 2 (April 24, 2009) (“Google Letter”).

⁶ Letter from Kerry Murray, Dell Inc. and Paula Boyd, Microsoft Corp., to Marlene H. Dortch, FCC, WT Docket Nos. 08-166, 08-167, ET Docket Nos. 04-186, 02-380 at 3 (May 6, 2009) (“Dell/Microsoft Letter”).

Further, contrary to a recent filing, CTIA believes that the Commission clearly has provided sufficient notice to transition licensed and unauthorized wireless microphone services out of the 700 MHz bands and into the TV bands.⁷ The *700 MHz Wireless Microphone Notice* not only posed broad questions regarding the migration of wireless microphone operations out of the 700 MHz band,⁸ but it also specifically sought comment on the proposal in the PISC Petition to create a new service “licensed by rule pursuant to Section 307(e) to operate on vacant broadcast UHF channels below Channel 52 on a secondary basis to broadcast licensees and individually licensed wireless microphone systems...”⁹ Thus, the *700 MHz Wireless Microphone Notice* is “sufficiently descriptive of the ‘subjects and issues involved’ so that interested parties may offer informed criticism and comments.”¹⁰

Moreover, the mere fact that similar issues were raised in petitions for reconsideration of the *White Space Second Report and Order* does not dictate where the Commission may act; what matters from an APA perspective is whether an action requires notice and comment and if so, whether such procedures have effectively occurred.¹¹ The *700 MHz Wireless Microphone Notice* squarely addressed wireless microphone migration into the TV bands, and the Commission has thus satisfied the APA’s requirement that an agency make clear “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹² The issues are properly raised in this proceeding. Prompt and effective action is now necessary.

Finally, CTIA takes this opportunity once again to urge the Commission to issue a Consumer Advisory that will inform the public at large about the wireless

⁷ See Dell/Microsoft Letter at 3 n.8 (“Because the Administrative Procedure Act and the Commission’s rules require the Commission to provide ‘either the terms of the proposed rule or a description of the subjects and issues involved,’ most or all of these matters must be subject to a separate public notice in any event.”); Google Letter at 2 (suggesting that issue of expanded rights for unauthorized microphone users in the TV bands “was not properly noticed in WT Docket No. 08-166”).

⁸ See, e.g., *700 MHz Wireless Microphone Notice* at ¶¶ 14-16 (tentatively concluding to modify licenses authorizing secondary use in the 700 MHz bands and highlighting possibility that licensees might seek amendments “to include additional frequencies”).

⁹ *Id.* at ¶ 21, quoting PISC Petition at i-ii.

¹⁰ *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976), citing *Portland Cement Assn v. Ruckelshaus*, 486 F.2d 375, 392-394 (D. C. Cir. 1973); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1251 n.39 (D.C. Cir. 1973).

¹¹ 5 U.S.C. § 553(b).

¹² Further, the courts have “long recognized that a final rule that is a ‘logical outgrowth’ from the notice of proposed rulemaking does not violate the notice requirement of the Administrative Procedure Act.” *Engine Mfgs. Assoc. v. US EPA*, 88 F.3d 1075, 1083 (D.C. Cir. 1996), citing *Connecticut Light and Power Co. v. Nuclear Reg. Comm’n*, 673 F.2d 525, 533 (D.C. Cir.), cert. denied, 459 U.S. 835, (1982), and cases cited therein; *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237-38 (D.C. Cir. 1994). See also *Chocolate Mfgs. Assoc. v. Block*, 755 F.2d 1098 (4th Cir. 1985); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979); *Taylor Diving & Salvage Co. v. Dept. of Labor*, 599 F.2d 622, 626 (5th Cir. 1979).

microphone transition out of the 700 MHz band. U.S. Government leadership will be particularly helpful to ensure the appropriate information is disseminated. Further, CTIA wishes to clarify that in the event that a 700 MHz licensee intends to operate in the band prior to the nationwide hard date for vacating the band, CTIA supports a 60-day notification to affected LPAS licensees. These LPAS licensees, in turn, would be required to vacate the band within the 60-day period.

Please contact the undersigned if you have any questions.

Respectfully Submitted,

/s/ Christopher Guttman-McCabe

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