Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Nuclear Energy Institute and Utilities Telecom Council Request for Waiver to Permit The Use of Two-Way Wireless Headsets and Intercom Devices Inside Nuclear Power Plants	))))	WT Docket No. 09-176

To: Chief, Wireless Telecommunications Bureau

OPPOSITION OF VERIZON WIRELESS

Verizon Wireless hereby opposes the above-captioned Petition for Waiver asking the Wireless Telecommunications Bureau (the "Bureau") to license commercial nuclear power plants to use Part 74 Subpart H low power auxiliary service ("LPAS") devices in various frequency bands, including 698-806 MHz (hereinafter, the "700 MHz band"), under Part 90 of the Rules.[1] Petitioners explain that existing Experimental Authorizations for such operations are set to expire in February 2010.[2] Verizon Wireless submits this opposition in light of Petitioners' request for authority to use LPAS devices with the capability to operate in the 700 MHz band.

As an initial matter, the Petition should be seen for what it is: a thinly-disguised effort to expand the category of eligible operators of Part 74 Subpart H LPAS devices, cloaked in the

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[1] *See* Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Request by Nuclear Energy Institute and Utilities Telecom Council for Waiver to Permit the Use of Part 74 Two-Way Wireless Headsets and Intercom Devices Inside Nuclear Power Plants*, WT Docket No. 09-176, DA 09-2171 (WTB rel. Oct. 5, 2009) ("*Public Notice*"); Nuclear Energy Institute and Utilities Telecom Council, Petition for Waiver, dated Sept. 23, 2009 ("Petition").

[2] *See* Petition at 1 n.10.

guise of a Part 90 rule waiver. The Bureau denied a similar request by Telex, the manufacturer of the equipment at issue in the Petition, in 2004.[3] As the Bureau rightly explained:

> Telex request[ed], in essence, that equipment certified for use under Part 74 of the Commission's rules now be regulated under Part 90 … to permit the blanket authorization of the operation of those devices at nuclear facilities nationwide.[4]

The Bureau denied the request, in part on the basis that Telex did not address potential for interference to over-the-air broadcast transmissions licensed on a primary basis in the bands.[5] The Bureau affirmed its decision on reconsideration in 2007, and noted further that Telex had "fail[ed] to acknowledge the eligibility requirements in Section 74.832 of the Commission's Rules for obtaining a license to operate the Telex equipment."[6]

In the interim period, while reconsideration of the *Telex Order* was pending, Petitioners filed a similar request with the Office of Engineering and Technology on behalf of nuclear power plant operators, but couched that request for relief as a short-term waiver *of the Part 74 eligibility requirements*.[7] That request was subsequently withdrawn, but Petitioners now seek the same relief yet again – although on a *permanent* basis and again styled (like Telex's original petition) as a waiver of the Part 90 authorized frequencies for Power Licensees. In the meantime, nuclear power plants operate these LPAS devices pursuant to experimental authorizations.[8]

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[3] *In the Matter of Telex Communications, Inc.*, Order, 19 FCC Rcd. 23169, 23170 ¶ 4 (WTB 2004) ("*Telex Order*"), *aff'd on recon.* 22 FCC Rcd. 1250 (WTB 2007) ("*Telex Recon Order*").

[4] *Telex Order* at 23171 at ¶ 6.

[5] *Id.* at 23171 ¶ 7.

[6] *Telex Recon Order* at 1252 ¶ 7 n.19.

[7] *See* Nuclear Energy Institute and United Telecom Council, Request for Waiver, ET Docket No. 05-345, filed July 20, 2005, at 1 ("2005 Petition"); Public Notice, ET Docket No. 05-345, DA 05-3216 (OET Dec. 6, 2005).

[8] *See Public Notice* at 1.

The Petition inexplicably takes no notice of the DTV transition and Congress's intent to clear the 700 MHz band for new commercial and public safety licensees, and it ignores the Commission's 2008 order explicitly prohibiting new license applications for LPAS operations in the 700 MHz band. Further, it does not contain any analysis of the interference risks the proposed operations could cause to both 700 MHz band commercial services *and* First Responder communications now authorized on a primary basis in the 700 MHz band. For the reasons discussed below, the Bureau should (1) deny the Petition with prejudice, at least insofar as it seeks authority to use LPAS equipment capable of operating on 700 MHz band frequencies, and (2) prohibit current and future Part 5 Experimental operations from using such equipment in the 700 MHz band.

DISCUSSION

I. PETITIONERS' WAIVER REQUEST PAYS NO HEED TO THE LAW OR RULEMAKINGS GOVERNING THE 700 MHZ BAND AND SHOULD BE SUMMARILY DENIED

For well over a decade, Congress and the Commission have endeavored to facilitate the DTV transition – moving over-the-air broadcasters from analog to digital and out of the 700 MHz band *and* facilitating the use of the band by commercial wireless and public safety licensees.[9] Indeed, Congress established early on that clearing the 700 MHz band for new public safety and commercial licensees was an important element of the DTV transition.[10] During this period, moreover, the Commission recognized that limiting new secondary uses in the 700 MHz

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[9] *See* Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251, § 3004 (1997) (adding new §§ 337(a) and (b) of the Communications Act); Auction Reform Act of 2002, Pub. L. 107-195, 116 Stat 717, 1575 (2002); and Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, Title III (2006), as amended by the DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

[10] *See* H. Conf. Rep. No. 105-217, at 578, 580 (1997), *reprinted at* 1997 USCCAN 176, 198-200 (explaining conferees' intention that the Commission "reclaim and reorganize the spectrum" previously used for analog television service and that it be "assign[ed] by means of competitive bidding" for commercial use, and to reallocate another segment "for public safety services").

band, and the eventual clearing of interfering secondary Part 74 low power devices, was part and parcel to its statutory obligations to facilitate new entry by commercial wireless and public safety licensees.[11]

Following adoption of the Digital Television Transition and Public Safety Act of 2005 (later amended in 2009),[12] which set a firm deadline for the end of the DTV transition, the Commission observed the importance of clearing the 700 MHz band for new services, stating "[i]t is incumbent on the Commission to take all the steps necessary to make this spectrum effectively available to both public safety as well as commercial licensees as of the end of the DTV transition."[13] In 2008, the Commission took a critical step in adopting the *700 MHz Wireless Microphones Order and NPRM*. There, the Commission expressly held "that continuing to accept new license applications for low power auxiliary station licenses that involve the operation of such stations on [700 MHz band] spectrum after [the DTV transition] would impair the objectives that we are proposing in this proceeding" and "*[a]ny* applications received on or after [August 21, 2008] will be returned as unacceptable for filing."[14]

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[11] *See, e.g.*, *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Services in Parts 74, 78, and 101 of the Commission's Rules*, Report and Order, 17 FCC Rcd. 22979, 23035-37 ¶¶ 150-155 (2002); *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd. 1022, 1037-38 ¶ 33 (2002) (denying request "to afford continued secondary status to Part 74 low power broadcast auxiliary devices"); *see also Unlicensed Operation in the TV Broadcast Bands, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, First Report and Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd. 12266, 12275 ¶ 21 (2006) (excluding 700 MHz from unlicensed white space use as "channels 52-69 have been reallocated for services other than broadcast television and will no longer be part of the TV bands after the transition" and "that spectrum will be occupied by services that have different interference considerations than those at issue in this proceeding.").

[12] *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, Title III (2006), as amended by the DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

[13] *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al*., Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 8064, 8066 ¶ 2 (2007) ("*700 MHz First Report and Order*").

[14] *See 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*, Notice of Proposed Rulemaking and Order, WT
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At best, the Petition represents an attempted end run around Congress's and the Commission's policies governing the licensing and use of spectrum in the 700 MHz band, and for this reason alone should be dismissed with prejudice as procedurally infirm. The fact that the Petition is now styled as a waiver of the Part 90 and Part 2 rules, rather than as a waiver of the Part 74 eligibility rules (like Petitioners' substantively identical 2005 waiver request), does not avoid this conclusion.[15] The Petition contemplates that individual plant operators would seek licenses in their own right.[16] By the terms of the *700 MHz Wireless Microphones Order*, then, any such applications seeking authorization in the bands above 698 MHz must be "returned as unacceptable for filing." The Petition should thus be dismissed insofar as it would authorize the filing of such license applications.

To the extent the Petition is viewed, appropriately, as a request to reconsider the August 2008 *Wireless Microphones Order*, it is clearly untimely.[17] Alternatively, even if the Commission treats the Petition as a request for waiver, Petitioners have not sought a waiver of the *700 MHz Wireless Microphones Order* or the Part 74 rules, much less purported to address why a waiver of those rules would serve the public interest or otherwise meet the Commission's waiver standards.[18] It thus fails to plead with particularity the facts and circumstances that

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Docket Nos. 08-166 and 08-167, 23 FCC Rcd. 13106, 13115-16 ¶¶ 23-24 (2008) (emphasis added) ("*700 MHz Wireless Microphones NPRM*" or "*Order*," as applicable). The abeyance and freeze was published as a Final Rule in the Federal Register on September 3, 2008. 73 Fed. Reg. 51375 (Sept. 3, 2008). No parties sought reconsideration of the Order.

[15] *See* 2005 Petition at 12 (seeking waiver of Part 74 eligibility rules).

[16] Petition at 22, n.39.

[17] 47 U.S.C. § 405(a).

[18] The Commission's rules authorize grant of a waiver request if a petitioner demonstrates that: "(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." *See* 47 C.F.R. 1.925. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest –
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warrant a waiver, as the Commission requires.[19] For all these reasons, the Petition should be dismissed with prejudice.

Moreover, the Petition fails on the merits as well. It does not account for the fact that the Commission's 700 MHz licensing regime and interference protection concerns are no longer premised on primary broadcast use. Conspicuously absent from the Petition is any acknowledgement of the new 700 MHz commercial wireless and public safety licensees or their interference protection rights – despite the fact the Petition was filed well after the auction of 700 MHz licenses, the 2009 DTV transition date, licensees' announced deployment of facilities in their 700 MHz spectrum, and adoption of the *700 MHz Wireless Microphones Order and NPRM*.

The Petition suggests that grant of the waiver would not pose interference concerns to incumbent licensees, relying on the fact that neither Petitioners "nor any of the plants have received, or are aware of, any claims by other licensees that the plants' use of the [Telex] Headsets is causing, or has ever caused, any interference" with respect to incumbent *broadcast licensees*.[20] Petitioners' arguments are irrelevant as they do not address the potential for interference to commercial wireless or public safety operations in the 700 MHz band. Harmful interference issues for new 700 MHz commercial wireless and public safety licensees raise fundamentally different technical considerations than those involving incumbent analog broadcast operations. Commercial wireless and public safety stations are mobile, not fixed. These deployments will have far more sites in a given geographic area and will operate using

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i.e., only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972).

[19] *See WAIT Radio v. FCC*, 413 F.2d at 1157 (citing *Rio Grande Family Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)).

[20] Petition at 16, n.25.

digital air interface technologies and at far lower power than an analog broadcast licensee. Thus, factors that may have been relevant in analyzing potential interference, such as the distance between the nuclear plant and the broadcaster's wide area transmission facilities, are irrelevant now. The distinction drawn between indoor and outdoor usage in the Petition (and under the previously-granted Experimental authorizations) may be less relevant now as well.

It is noteworthy that the Commission previously denied the earlier waivers due to concern for "interference to over-the-air broadcasting" – even in conjunction with coordination with Part 74 Broadcast Auxiliary frequency coordinators.[21] Yet despite the Bureau's obvious concern for co-channel interference between the Part 74 devices and primary licensees' operations, Petitioners have made no effort whatsoever to address the potential for harmful interference to new 700 MHz licensees here. Nor is Verizon Wireless aware of any efforts by nuclear plant operators to notify new wireless licensees of their current spectrum usage.

Finally, while the Petition in part couches the basis for relief in safety-related terms,[22] it fails to acknowledge the countervailing public safety impact on 700 MHz public safety licensees. As the Commission has stated, "[t]he Homeland Security obligations of the Nation's public safety agencies make it imperative that their communications systems are robust and highly reliable."[23] In its comments in support of the Commission's proposals in the *700 MHz Wireless Microphones NPRM*, APCO explained how Petitioners' proposed operations would undermine that objective:

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[21] *See Telex Order* at 23171-72 ¶ 8, *aff'd on recon. Telex Recon Order* at 1252 ¶ 6.

[22] *See* Petition at 11-12.

[23] *See Improving Public Safety Communications in the 800 MHz Band, et al.*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd. 14969, 14971 ¶ 1 (2004) (subsequent history omitted).

> Much of the current low power auxiliary use is for auxiliary broadcast operations and for wireless microphones that can be found almost anywhere large groups might gather, such as schools and colleges, hotels, convention and conference centers, places of worship, theaters, concert venues, night clubs, sports venues, etc. The danger is that wireless microphones being used in such locations could interfere with first responders' 700 MHz public safety radios in the vicinity.[24]

Grant of the Petition would provide permanent authority for LPAS operations at nuclear power plant premises. There is no doubt that the public interest demands interference-free First Responder communications in and around such locations. Petitioners, however, have not attempted to demonstrate how their proposed waiver would not undermine the Commission's public safety objectives for the 700 MHz band.

II. ANY EXISTING EXPERIMENTAL AUTHORIZATIONS MUST BE MODIFIED TO PROHIBIT FUTURE OPERATIONS ON 700 MHZ SPECTRUM

As noted above, some nuclear power plants are operating Telex equipment today pursuant to experimental authorizations that permit utilization in a variety of bands including the 700 MHz band. Any Experimental authorizations OET grants under delegated authority must be consistent with the Commission's *700 MHz Wireless Microphones Order*. Section 5.83 of the Rules provides that an applicant for an Experimental authorization "accepts the license with the express understanding: (a) that the authority to use the frequency or frequencies assigned is granted upon an experimental basis only and does not confer any right to conduct an activity of a continuing nature; and (b) that said grant is subject to change or cancellation by the Commission

[24] Comments of APCO in WT Docket Nos. 08-166 and 08-167, filed October 3, 2008, at 2. APCO further posited that "one can imagine an emergency at a public gathering where somebody uses a wireless microphone to direct an evacuation, not realizing that they are disrupting radio communications for first responders arriving on the scene." *Id.* at 2 n.2

at any time without hearing if in its discretion the need for such action arises."[25] For that reason alone, OET must exercise its authority to modify any existing Part 5 Experimental authorizations to prohibit further operations in the 700 MHz band for the remainder of the authorization term. Such action is consistent with the condition OET imposed in nuclear power plant operators' existing Experimental authorizations prohibiting operations in the spectrum licensed to Medical Telemetry devices at Channel 37.[26] In no event may future Experimental authorizations, or extensions of current authorizations, authorize operations in the 700 MHz band.

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[25] 47 C.F.R. § 5.83.

[26] *See, e.g.*, Call Sign WE2XNG, File No. 0242-EX-RR-2008 ("No transmission is permitted in the Medical Telemetry band 604-614 MHz").

CONCLUSION

For the foregoing reasons, the Bureau should (1) deny the Petition with prejudice insofar as Petitioners continue seek authority to operate their Part 74 devices in 700 MHz band spectrum, and (2) modify existing Part 5 Experimental authorizations to prohibit operations in 700 MHz band spectrum for the remainder of the authorization term and prohibit such operations in any future Experimental authorizations, or extensions of current authorizations.

Respectfully submitted,

VERIZON WIRELESS

By: /s/ *John T. Scott, III*_____

John T. Scott, III
Vice President & Deputy General
Counsel – Regulatory Law

Donald Brittingham
Assistant Vice President
Spectrum Policy

1300 I Street, N.W.
Suite 400 West
Washington, DC 20005
(202) 589-3760

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