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

In the Matter of	)	
	)	
Requests for Waiver of Certain TV Tuner	)	
Requirements in Order To Import and	)	MB Docket No. 10-111
Distribute Mobile DTV Receivers Without	)	
Analog Tuners	)	

APPLICATION FOR REVIEW

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SUMMARY

Elgato Systems, LLC ("Elgato") requests that the Commission clear away a regulatory hurdle to the introduction of innovative digital devices that will improve consumers' access to over-the-air HDTV signals. Elgato is a leading manufacturer of over-the-air DTV broadcast receivers and home network devices that enable customers to receive, record, and replay over-the-air HDTV on personal computers and other home network devices. The NTSC-tuner mandate, however, increases consumer costs for these devices without providing a functionality purchasers of Elgato's advanced devices are likely to want or need. Elgato is seeking the opportunity to sell ATSC-only versions of its DTV receivers to provide customers with maximum flexibility at a reasonable price, a result that is unattainable so long as the NTSC tuner mandate remains in place for these devices.

The Media Bureau's *Order* in this proceeding affirmed the NTSC tuner requirement, which predates the full power DTV transition, and granted only a very limited waiver that applies only to mobile DTV receivers. The *Order* rejected Elgato's arguments that previous Commission orders and enforcement decisions already have rescinded the NTSC tuner requirement for post-transition TV broadcast receivers. And, the *Order* also rejected Elgato's request for a slightly expanded waiver of Section 15.117 that would permit ATSC-only computer peripherals that depend on a downstream device like a personal computer or gaming console to decode and display DTV signals.

On review, the Commission should confirm that the NTSC tuner requirements of Section 15.117 of the rules no longer applies now that the full-power DTV transition is complete. The rule is no longer necessary to ensure that customers can receive all full-power local television stations and the rule does not mention analog stations or Class A and LPTV stations. Moreover, the market has moved on, with numerous companies selling ATSC-only tuner products in

apparent reliance on the Commission's previous orders and enforcement decisions, including its approval of ATSC-only DTV converter boxes. The Commission has recognized the important policy priority of completing the low-power digital transition, and continuing to require NTSC tuners in new devices is no way to spur that transition. The NTSC tuner requirement has outlived its usefulness, and the Commission should confirm that it no longer applies.

But even if the Commission still believes the NTSC tuner requirement continues to serve the public interest, there is ample basis for waiving the rule for devices like Elgato's computer peripheral DTV receivers. Elgato's request for an expanded waiver was unopposed and would affect a relatively small number of devices and consumers. Elgato's computer peripherals are unlikely to replace the main television receiver in any household in the near future, so viewers who use traditional televisions to watch over-the air signals will not lose service. Permitting ATSC-only peripherals would, however, increase consumer choice by making affordable products that can display HDTV signals on computer screens and other home network devices to a wider range of customers than would be possible if companies remain required to include expensive NTSC tuner functionality in every TV broadcast receiver. The increased flexibility would encourage further innovation and ensure that ATSC-only network DTV receivers that already are available to overseas customers are available to U.S. consumers as well. And, granting Elgato's requested expanded waiver also would be another step forward toward the final transition to digital broadcasting, discontinuance of all analog broadcasting, and the clearing of valuable spectrum for wireless and other high-value uses.

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APPLICATION FOR REVIEW

Elgato Systems, LLC ("Elgato"), by its attorneys and pursuant to Section 1.115 of the Commission's rules,[1] hereby seeks partial review of the Media Bureau's (the "Bureau") decision in the above-referenced docket.[2] The *Waiver Order* granted a limited waiver of Section 15.117(b) of the Commission's rules[3] to permit marketing of innovative mobile DTV receivers without NTSC tuners, but denied Elgato's unopposed request for broader relief that would have permitted companies to market additional innovative ATSC-only devices designed for the niche market of consumers who want to watch over-the-air HD signals on their personal computers. As described below, granting the additional relief sought by Elgato would serve the public interest far more than requiring NTSC tuners in the limited class of devices identified by Elgato. Elgato therefore requests that the Commission extend the relief granted in the *Waiver Order* to include ATSC-only computer peripherals that enable consumers to view HD signals on devices that are not otherwise unequipped to receive them.

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1 47 C.F.R. § 1.115.

2 *See* Dell Inc. and LG Electronics USA, Inc. Request for Waiver of Section 15.117 of the Commission's Rules, *Order*, MB Docket No. 10-111, DA 10-1313 (rel. July 15, 2010) (the "*Waiver Order*").

3 47 C.F.R. § 15.117(b).

I. Background

Elgato is a leading international provider of computer hardware peripherals and software solutions that permit consumers to watch, record, and edit HDTV on both Macs and personal computers and on other devices connected to home networks. Elgato is dedicated to providing computer users worldwide with the highest quality options for viewing over-the-air broadcast television on their home computers and networked devices. Elgato's peripheral DTV receivers (one model of which is small enough to fit in the palm of a customer's hand) are designed to be connected to a separate over-the-air DTV antenna and to plug into the USB port of a viewing device and a separate over-the-air DTV antenna. This allows consumers to convert any attached device (such as computers and game consoles) capable of decoding and displaying a digital signal into a powerful HDTV/DVR combination, capable of providing the same sophisticated functionality for over-the-air HDTV that consumers typically associate with cable set-top-boxes or popular stand-alone DVRs.[4]

Elgato's devices are marketed and sold to a relatively small and highly sophisticated customer base as HDTV solutions for computers and home-networked devices. Most of its models include both ATSC and NTSC tuners for customers who want to use the device to view cable television signals on their computers. One of its models (the "EyeTV One"), however, is marketed exclusively for reception of over-the-air HDTV signals, and that model does not include an NTSC tuner. This device is cheaper than Elgato's hybrid models and allows customers who have no need for NTSC reception capability to customize their viewing option without being forced to pay for NTSC functionality they neither want nor need. Elgato has never

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[4] Elgato's peripheral DTV receivers accept signals from a DTV antenna and convert those signals into a compressed data stream that can be transported over a USB cable to a downstream device that performs the decoding and display functions.

received a single complaint from a customer that was disappointed to find out that its device did not include NTSC reception capability.

Elgato also is a leader in the design and production of home network devices that permit viewers to enjoy HDTV display and recording functionality on all devices connected to their home networks. Elgato already markets a networked digital-only product in Europe and Australia, and would like to begin offering an ATSC-only version in the United States in the near future.[5] These innovative devices will vastly increase the flexibility of over-the-air DTV because they will eliminate the need to hook every viewing device up to an over-the-air antenna. With a network device like Elgato's, customers need only one reliable DTV antenna, which they can hook up to an Elgato receiver, and the programming received at that one point can be distributed throughout the home.

For technical reasons, however, a reasonably priced network device cannot be produced if it must feature NTSC reception capability. NTSC signals occupy too much bandwidth to be sent to downstream devices. Even if the bandwidth was available, most downstream devices cannot decode NTSC signals. Thus, to facilitate NTSC functionality, peripheral DTV receivers would need to include hardware that essentially converts NTSC signals to an ATSC data stream. That is an expensive proposition. Whereas Elgato today offers the lower-priced EyeTV One ATSC-only TV broadcast receiver to customers mainly to suit customer convenience, excluding NTSC functionality will be key to marketing a reasonably priced network device in the future. Elgato is already selling these devices to consumers around the world, and it would like to begin selling them in America this year.

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[5] In Europe and Australia, Elgato's products receive digital signals transmitted in the DVB over-the-air DTV signal format.

Following the introduction of the DTV tuner mandate, Elgato believed that over-the-air NTSC receivers were no longer required by Section 15.117 of the Commission's rules. That is why it began marketing the EyeTV One and made plans to market an additional ATSC-only network device later this year. Elgato's conclusion that the NTSC tuner requirement has been rescinded was based in part on the activities of Elgato's competitors. As Elgato explained to the Bureau in its comments, many companies have been marketing NTSC-only TV broadcast receivers since at least 2003.[6] In addition, a number of Commission pronouncements and enforcement decisions also indicated that ATSC-only devices complied with the rule.

In March 2010, however, Elgato received a letter of inquiry from the Commission indicating that Elgato's sale of the ATSC-only EyeTV One may have violated the Commission's rules.[7] Elgato responded that it believed, for the reasons described above, that ATSC-only devices complied with the rules based on prior Commission rulings and the policies underlying the Commission TV broadcast receiver rules.[8]

Shortly after Elgato responded to the Commission's inquiry, Dell, Inc. and LG Electronics USA jointly filed a petition for waiver of Section 15.117 that gave rise to this proceeding.[9] Recognizing that granting the Dell Waiver Request would require the Bureau to

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6 *See* Elgato Comments at 5-6.

7 *See* Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to Adam Steinberg, Director, Product Line Management, File No. EB-10-SE-018, dated March 18, 2010.

8 *See* Response of Elgato Systems, LLC to March 18, 2010 Letter of Inquiry, File No. EB-10-SE-018, dated April 19, 2010..

9 Request for Limited Waiver of Section 15.117 of the Commission's Rules To Permit the Marketing of Digital-Only Television Receivers Designed to Provide Mobile Television Reception, Dell, Inc. and LG Electronics USA, Inc., filed May 12, 2010 (the "Dell/LG Petition"). Shortly after the Dell/LG Petition was filed, Hauppauge filed an additional waiver request. *See* Request for Waiver of Section 15.117 of the commission's Rules to Permit the Manufacture, Importation, Marketing, Distribution and Sale of Digital Only Television Receivers for Mobile Devices, Hauppauge Computer Works, Inc., filed May 20, 2010 (the "Hauppauge Petition").

first confirm that Section 15.117 still requires over-the-air TV reception devices to include NTSC tuners, Elgato filed comments and reply comments in response to the Dell Waiver Request. Elgato argued that (1) based on previous Commission decisions and enforcement policies, Section 15.117 should not longer be read to require TV broadcast receivers to include over-the-air NTSC tuning capability; but that (2) even if it did, the Commission should waive the rule for computer peripherals like those manufactured by Elgato, which are marketed as HDTV solution to a small niche audience that would be unlikely to value the ability to receive NTSC signals.[10] No party opposed Elgato's requests.[11]

The *Waiver Order* did not address Elgato's arguments, finding them "beyond the scope" of this proceeding. The Bureau found instead that allowing ATSC-only TV broadcast receivers would require a change in the rules that "would be more appropriately pursued through the rulemaking process."[12] The *Waiver Order* did not address Elgato's request that the Bureau grant a slightly more expansive waiver than requested in the Dell and Hauppauge waiver requests.

II. The Commission Should Clarify That Section 15.117 of the Commission's Rules No Longer Requires NTSC Reception Capability.

In the proceeding before the Bureau, Elgato showed that the text, history, policy, and previous Commission construction of Section 15.117 of the Commission's rules strongly support the conclusion that over-the-air DTV receivers manufactured after the close of the DTV transition are not required to include NTSC tuners.[13] The Bureau did not address Elgato's arguments, relying instead on its own contrary reading of the text of the rule to conclude that

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10 Elgato Comments at 8-13; 13-16; Elgato Reply Comments at 1-4.

11 *See Waiver Order* at ¶ 18. The Bureau noted that Hauppauge suggested the Commission should not delay grant of the waiver for mobile products in order to deal with the issues raised by Elgato. *Id.* (citing Hauppauge Reply Comments at 3).

12 *Id.* at ¶18.

13 Elgato Comments at 8-13.

NTSC reception capability is still required.[14] The Bureau then concluded that grant of Elgato's requested relief would "essentially constitute a revision of Section 15.117, removing analog reception requirements . . . from all television receivers."[15] The Bureau then rejected this outcome because "some viewers" – those who continue to receive Class a and LPTV stations over-the-air – "still . . . need . . . analog reception capability."[16] This conclusion was in error, however, because Elgato was not asking for a "revision" of the rule, it was asking the Bureau to give effect to the rule and the Commission's previous interpretations of it.[17] The Commission should reverse the *Waiver Order* to the extent it concludes that NTSC reception capability is required for broadcast TV receivers manufactured after the close of the full power DTV transition.[18]

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14 *Waiver Order* at ¶ 2.

15 *Id.* at ¶18

16 *Id.*

17 For this reason, the Bureau's suggestion that the allegedly requested "revision" of the rule "would be more appropriately pursued through the rulemaking process" is inapposite. Elgato has not requested a change to 15.117, it is requesting clarification of the Commission's rules in light of its previous statements and enforcement positions. Additional notice and comment procedures are not required for the Commission to clarify its rules as Elgato has requested in the context of this waiver proceeding. *See, e.g., Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106 (1992). *See also* 5 U.S.C. § 553(b)(3)(A).

18 The Commission plainly has the authority to adopt TV broadcast receiver rules that do not require reception of legacy NTSC signals. Section 15.117 implements Section 303(s) of the Communications Act, which gives the Commission the authority to require all broadcast TV reception devices to include the capability of tuning all frequencies allocated by the Commission, but does not require the Commission to adopt such rules. *See* 47 U.S.C. § 303(s). As the *Waiver Order* acknowledged, authority vested by Section 303(s) is discretionary. *Waiver Order* at ¶7. The Act does not mandate all-channel reception; it gives the Commission authority to adopt channel reception requirements for TV broadcast receivers consistent with the public interest. Thus, the Commission has the authority to permit ATSC-only TV broadcast receivers.

A. Section 15.117 of the Rules and the Commission's Previous Orders and Enforcement Activities Signaled to the Market that NTSC Tuners Are No Longer Required.

The *Waiver Order* held that NTSC tuner requirement is clearly set forth in the language of the rule and that the Commission had provided notice of this requirement in December 2009 through an entry in its Knowledge Database.[19] In the face of the substantial contrary evidence in the text of Section 15.117 and prior Commission decisions Elgato advanced in its comments, neither of these bases supports the Bureau's conclusion that Section 15.117 continues to require NTSC tuner capability.

1. The Text of Section 15.117 Applies Only to Devices Designed To Receive Full-Power Television Signals, not Low-Power or Class A Signals.

The text of Section 15.117 does not require NTSC tuning capability solely for the purposes of facilitating reception of Class A and LPTV signals. On its face, the tuner requirement applies only to "TV broadcast receivers." As defined in Section 15.3(w) of the rules, TV broadcast receivers are devices designed to receive "television channels authorized under Part 73" of Chapter 47.[20] LPTV and Class A television stations do not operate on channels authorized under Part 73; they operate on channels authorized under Subpart G of Part 74.[21] The channels authorized for low-power and Class A use are not defined in Part 73, but rather in Section 74.702(a).[22]

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19 *Id.* (citing Office of Engineering and Technology Laboratory Division Knowledge Database (available at https://fjallfoss.fcc.gov/oetcf/kdb/index.cfm), Publication Number 218634 (rel. Dec. 17, 2009)).

20 47 C.F.R. § 15.3(w).

21 *Id.* §§ 74.701, *et seq.*

22 *Id.* § 74.702(a).

The *Waiver Order* points out that Class A stations "operate in the analog format under Part 73 of the rules,"[23] but that fact is irrelevant to the question of whether TV broadcast receivers must be designed to receive Class A and LPTV channels. Section 15.3(w) refers to "channels authorized under Part 73." The only "channels" currently authorized under Part 73 are those included in the DTV Table of Allotments. 47 C.F.R. § 73.622. The fact that the service rules for Class A stations are situated in Part 73 does not mean that those stations' channel frequencies were licensed to those stations under Part 73. As a matter of historical fact, to be eligible for Class A status, a station had to be an operating low-power station operating for 90 days as of December 28, 1999,[24] and every low-power station that was eligible would have received its channel pursuant to the provisions of Part 74.

Now that the DTV transition is complete, no NTSC channels are authorized under Part 73 anymore; all NTSC channels are authorized under Part 74. It therefore makes no sense to read Section 15.117 to continue to require NTSC functionality in over-the-air TV broadcast receivers. If the Commission intended Section 15.117 to require devices to tune Class A and low-power channels, the definition of TV broadcast receivers would include devices designed to receive channels assigned under Part 74. As written, however, Section 15.117 applies only to "TV broadcast receivers," a class of devices that does not include over-the-air receivers designed to tune LPTV or Class A signals.

Consequently, the plain language of Section 15.117 cannot be read to require continued NTSC reception capability solely for the purpose of facilitating Class A and LPTV reception.

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23 *Waiver Order* at ¶2.

24 47 C.F.R. § 73.6001(a).

Such a requirement would require either a change to Section 15.3(w) or a change to section 15.117 of the rules.[25]

2. The Commission's *DTV Tuner Mandate Order* Approved ATSC-Only Devices as Complaint with Section 15.117.

Elgato also demonstrated that the Commission's *DTV Tuner Mandate Order* establishes that ATSC-only TV broadcast receivers are acceptable under Section 15.117 of the rules.[26] The rule that the Commission adopted for determining compliance with the DTV tuner phase-in timetable stated that "[r]esponsible parties may include combinations of DTV monitors and set-top DTV tuners in meeting the required percentages of units with a DTV tuner if such combinations are marketed together with a single price."[27] At that time, some manufacturers were selling TV monitors with no NTSC or ATSC reception capability at all for use with DVDs or set-top digital converters, and Section 15.117(i)(3) permitted the sale of such monitors bundled with set-top DTV tuners. The resulting combination would have lacked NTSC reception capability. Nothing in the rule or the *DTV Mandate Order* suggest that NTSC reception capability was required to be part of a bundled "DTV receiver" and "set-top DTV tuner," and there is no reason to believe such a combination would have had NTSC tuning capability.[28]

Under the interpretation of Section 15.117 adopted in the *Waiver Order*, ATSC-only receivers that would have satisfied the DTV tuner mandate during the full-power DTV transition would today violate Section 15.117. The Commission should not uphold a reading of the rule

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[25] Of course, any such change would require notice and comment procedures. *See, e.g.*, *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

[26] Elgato Comments at 10-11.

[27] 47 C.F.R. § 15.117(i)(3).

[28] *See* Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Second Report and Order and Second Memorandum Opinion and Order*, 17 FCC Rcd 15978, 15997 ¶ 40 (2002).

that leads to this absurd result. Here again, the *Waiver Order* did not explain how its reading of Section 15.117 is in harmony with the Commission's adoption of Section 15.117(i). The Commission can only resolve this conflict between the Bureau's *Waiver Order* and the *DTV Tuner Mandate Order* by clarifying that TV broadcast receivers are no longer required to tune NTSC signals.

3. The Commission's Prior Enforcement Policies Under Section 15.117 Confirm that the NTSC Tuner Requirement Did Not Survive the DTV Transition.

Elgato further showed that the Commission's enforcement policies prior to December 2009 confirmed that NTSC tuning capability was not required for TV broadcast receivers.[29] Specifically, the Commission endorsed ATSC-only TV reception devices as Section 15.117-compliant during its participation in and promotion of the Coupon Eligible Converter Box ("CECB") program. The Commission cooperated with the National Telecommunications and Information Administration and consumer electronics manufacturers in the CECB program, which led to the wide-spread distribution of TV broadcast receivers that did not have NTSC reception capability or the ability to pass through NTSC signals.[30] In some cases, the television receiver connected to the CECB would have had NTSC reception capability, but when connected to a television monitor that lacked over-the-air reception capability, it would not.[31] The Community Broadcasters Association (the "CBA"), a trade group representing low-power and Class A television stations, asked the FCC for a declaratory ruling that Section 15.117 required

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[29] Elgato Comments at 10-11.

[30] *See* FCC Consumer Advisory: The DTV Transition and LPTV/Class A/Translator Stations, available at http://www.fcc.gov/cgb/consumerfacts/DTVandLPTV.html.

[31] Moreover, because of the way many CECBs were designed, using the analog functionality of the attached television was impossible without disconnecting the CECB and reconnecting an analog antenna. This rendered the underlying analog functionality of the television practically unusable. Nonetheless, the Commission declined to require an analog pass-through or other solution to permit continued reception of NTSC signals.

CECBs to either receive or pass-through analog low-power and Class A signals, but the FCC never acted on the petition.[32]

The Commission's decision not to require CECBs to include NTSC reception capability was consistent with its decision to permit bundled DTV products that lacked NTSC reception capability to satisfy the phase-in requirements of the DTV tuner mandate. Moreover, while Elgato showed that ATSC-only devices have been on the market since at least 2003,[33] Elgato is unaware of any Commission enforcement action previous to 2010 alleging that the rules were violated because a broadcast TV reception device lacked NTSC tuning capability. Given this enforcement history, Elgato and other manufacturers were completely justified in their view that Section 15.117 no longer required TV broadcast receivers to include NTSC tuning capability

B. The *Waiver Order* Offered No Explanation for the Apparent Inconsistency Between Its Current Reading of Section 15.117 and the Commission's Past Rulings.

The *Waiver Order* did not explain or justify the apparent inconsistency between its interpretation of Section 15.117 of the rules and the Commission's TV tuner or CECB policy or the Commission's decision not to enforce the rule against devices that have been on the market for at least seven years. Agencies are required to provide regulated entities with clear notice of what the rules require before attempting to enforce them.[34] And they are required to provide a

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[32] In addition, the CBA made the same argument to the United States Court of Appeals for the D.C. Circuit, seeking a writ of mandamus ordering the FCC to cease permitting distribution of converter boxes without NTSC reception capability, arguing that such devices did not comply with the Commission's Rules or Section 303(s). *See In re Community Broadcasters Association*, Petition for Issuance of a Writ of Mandamus to the Federal Communications Commission, No. 08-1133 (D.C. Cir. filed Mar. 26, 2008). That petition was denied in a brief, *per curiam* order. *See In re Community Broadcasters Association*, No. 08-1133 (D.C. Cir. May 7, 2008).

[33] Elgato comments at 5-6.

[34] *See McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993) (requiring fair notice of the requirements of the rules prior to enforcement). *See also* Elgato Comments n.30.

reasoned explanation of their decisions, which at a minimum, must result in consistent rulings.[35] Moreover, the Bureau is bound by previous Commission decisions, so the Bureau was required to explain how the *Waiver Order* is consistent with those decisions.[36] Elgato demonstrated in the proceeding below that the confused state of Section 15.117 required clarification (at the very least) before the Commission could seek to waive or enforce the rules. The *Waiver Order*, however, remained silent about the apparent inconsistency or confusion surrounding Section 15.117.

Rather than address the apparently inconsistent prior Commission decisions described by Elgato, the *Waiver Order* cites to the Office of Engineering and Technology's ("OET") December 2009 "guidance" from its Knowledge Database as support for its interpretation of the rule.[37] OET's interpretation of the rule, however, also did not explain how it is consistent with the text of Section 15.117 or the Commission's decisions and enforcement actions implementing the rule. Standing alone, OET's interpretation cannot support a ruling that is contrary to Commission precedent and practice.

The Commission has consistently indicated through its rulings and actions that Section 15.117 no longer requires NTSC tuners in over-the-air TV broadcast receivers. The *Waiver Order* did not address these apparent inconsistencies. In holding that the rule still requires NTSC

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35 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983); *Ramaprakash v. FAA.*, 346 F3d 1121, 1125 (D.C. Cir. 2003)(an agency's "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making")(internal quotation marks omitted).

36 *See Donald Martin*, 21 FCC Rcd 6945 (Med. Bur. 2006) ("The staff is, of course, bound by Commission precedent."); *WLDI*, 17 FCC Rcd 14750, 14752 (Enf. Bur. 2002) ("[T]he Bureau has no authority to alter or depart from Commission precedent."); *Leonard J. Kennedy*, 13 FCC Rcd 4028 n.6 (Wireless Bur. 1998) ("[T]he Bureau lacks authority to depart from established Commission precedent interpreting and implementing the Commission's rules and policies.").

37 *Waiver Order* at ¶2 (citing Office of Engineering and Technology Laboratory Division Knowledge Database (available at https://fjallfoss.fcc.gov/oetcf/kdb/index.cfm), Publication Number 218634 (rel. Dec. 17, 2009).

reception capability, the *Waiver Order* itself is apparently inconsistent with the text of the rule and the Commission's decisions implementing it, and it must therefore be reversed.

II. ASSUMING SECTION 15.117 REQUIRES CONTINUED NTSC RECEPTION CAPABILITY, THE COMMISSION SHOULD WAIVE THAT REQUIREMENT FOR COMPUTER PERIPHERALS.

Even assuming the *Waiver Order* correctly interpreted Section 15.117, the Commission should reverse the denial of Elgato's request for an expanded waiver that would apply to computer peripherals that rely on a downstream device to decode and display television signals. The Bureau did not consider Elgato's request because it was beyond the scope of the proceeding and because it concluded that grant would "remove[e] analog reception requirements . . . from all television receivers."[38] The Bureau was simply mistaken. Elgato's requested relief was closely related to that requested by the Dell, LG, and Hauppauge petitions, and the public had ample time to comment on Elgato's proposals. Moreover, the expanded waiver requested by Elgato would remove the NTSC reception requirement from a very small number of devices. Though small in number, the devices covered by the requested waiver are on the cutting edge of new digital technology and they should be available to American consumers at reasonable prices. And the technologically sophisticated customers likely to purchase these devices would be highly unlikely to buy those devices expecting to watch over-the-air Class A or LPTV stations.

A. Elgato's Requested Waiver Was Substantively Unopposed and Is Within the Scope of This Proceeding.

The limited waiver Elgato seeks plainly is within the scope of this proceeding. Under familiar principles of administrative law, an administrative act is within the scope of a proceeding so long as it is a "logical outgrowth" of the proposals released for public comment.[39]

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[38] *Waiver Order* at ¶18.

[39] *See, e.g.*, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

The "logical outgrowth" test is designed to ensure that the public and interested parties are given sufficient notice and an opportunity to comment on proposed administrative action and the inquiry focuses on whether an agency's action could reasonably be anticipated by interested parties.[40]

Elgato's requested waiver plainly was a logical outgrowth of this proceeding. First, Elgato's request was nearly identical to that of Dell/LG and Hauppauge and would have extended their requested waiver to only a small class of additional devices. Dell/LG and Hauppauge sought a waiver to manufacture and sell innovative new digital devices to a new and relatively small market of consumers unlikely to benefit from inclusion of NTSC reception capability in mobile devices. Elgato merely sought to slightly broaden that waiver to a small class of additional devices for all of the same reasons. Just as the Dell/LG and Hauppauge waivers were designed to expand television service by allowing customers to receive digital television signals on mobile screens, Elgato's request was designed to expand service by allowing consumers to view (and record) HDTV on computers and other downstream viewing screens.

Second, interested parties were given more than sufficient time to comment on Elgato's proposed waiver.[41] Elgato filed its comments three days before the comment deadline and also filed reply comments noting that no party had opposed its request. The Commission's decision was not released until more than a month following the reply comment deadline, but still no parties filed any objection to Elgato's request. Elgato's unopposed request for a slightly

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40 *See id.*

41 Only Hauppauge urged the Commission not to consider Elgato's request and that position was based on a concern about delay, not about the substance of Elgato's position. *Waiver Order* at ¶ 18 (citing Hauppauge Reply Comments at 3).

expanded waiver thus is clearly within the scope of this proceeding and can be granted by the Commission.

B. Elgato's Request for an Expanded Waiver Is in the Public Interest.

Though the *Waiver Order* did not discuss the merits of Elgato's proposed waiver in any depth, it indicated that the public interest favors a continued NTSC reception requirement for all ATSC TV broadcast receivers because some consumers continue to rely on over-the-air NTSC service provided by Class A and LPTV stations.[42] While Elgato acknowledges that some consumers do continue to rely on NTSC Class A and LPTV stations, Elgato submits that the public interest strongly favors granting the requested waiver for at least three reasons.

First, Elgato markets its ATSC-only computer peripherals to computer users who want to watch HDTV on their high-resolution computer screens. These customers – mostly Mac users – are among the most sophisticated consumer electronics purchasers and are highly unlikely to be expecting NTSC reception. Instead, these customers are looking for a cutting-edge way to view cutting-edge programming. Just as mobile DTV users are unlikely to expect mobile NTSC programming, customers who have purchased an Elgato peripheral for the purpose of watching HDTV are highly unlikely to expect to use that product to watch over-the-air NTSC signals.[43] Thus, while the Commission may see a public interest benefit to continuing the NTSC reception requirement for traditional television sets, there is no such benefit to requiring that functionality for computer peripheral TV broadcast receivers.

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[42] *Waiver Order* ¶18.

[43] In fact, as it explained above, Elgato has never received a single complaint from a customer that was disappointed to find out that its device did not include NTSC reception capability. If the company ever does receive such a complaint, it will refund the purchase or allow the customer to upgrade to a product that does include NTSC reception capability. For customers who do desire NTSC functionality, Elgato markets higher-priced premium hybrid devices that feature over-the-air NTSC reception.

Second, the requested waiver would promote innovation in over-the-air DTV broadcast reception technology and lower the cost of advanced, innovative computer peripheral products, making them financially accessible to a greater number of viewers. Most industry observers agree that in time, the functions of televisions and personal computers will converge, eliminating the need for multiple stationary screens in the home. For some high-end consumers, this potential is becoming a reality faster than for the rest. By seeking to provide relatively low-cost HDTV solutions, Elgato is helping to bring more consumers into the world where every viewing screen in the home can be a multi-function device in a home network. The public does not benefit if this process is slowed due to requirements that manufacturers incorporate legacy functionality into the advanced devices customers actually want. Moreover, the increased costs of including legacy technology in innovative DTV devices are borne by consumers. By relieving companies like Elgato from devoting their resources to including soon-to-be-obsolete components in their new products, the requested waiver would promote innovation and lower consumer cost by freeing manufacturers to devote their resources to improving DTV technology that will be used for the foreseeable future.

Third, allowing ATSC-only devices, even on the limited basis requested by Elgato, furthers the final transition from analog to digital broadcasting. The National Broadband Plan sets 2015 as the latest target date for termination of NTSC broadcasts by LPTV and Class A stations.[44] Recent press accounts indicate the Commission is considering a date of 2012 for final conversion of Class A and LPTV stations to DTV.[45] Granting Elgato's request would encourage Class A and low-power TV stations to transition to DTV more quickly, in keeping with the

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[44] *See* Connecting America: The National Broadband Plan at 84.

[45] *See* Jonathan Make, *FCC Draft Rulemaking Eyes 2012 Low-Power Switch to DTV*, CONSUMER ELECTRONICS DAILY, June 10, 2010, at 5.

Commission's policy of clearing analog broadcasters from valuable spectrum for broadband and other purposes.[46] By taking this step, the Commission would be promoting the same important interests that led it to commence the DTV transition in the first place – the wide public dissemination of the great benefits of over-the-air digital television.

These public interest benefits significantly outweigh the at best questionable public benefits that would be gained by requiring computer peripherals to include NTSC reception capability. In addition, the small likelihood that consumers would be confused and purchase an Elgato device expecting to receive NTSC signals can easily be remedied by enforcing the same labeling regime on computer peripherals that it adopted for mobile devices.[47] Elgato volunteered to undertake such a labeling regime in its comments and renews that commitment here.[48]

III. CONCLUSION

For the foregoing reasons, Elgato hereby requests that the Commission partially reverse the *Waiver Order* and either (1) hold that Section 15.117 of the Commission's rules no longer requires TV broadcast devices to include NTSC tuning capability; or (2) grant an expanded

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46 *See id.*

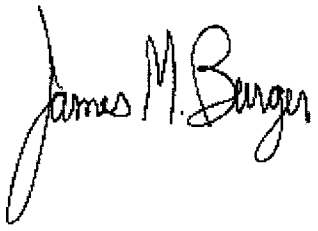
47 *See Waiver Order* at ¶¶ 25-27.

48 Elgato Comments at 15.

waiver of Section 15.117 to permit marketing of ATSC-only computer peripheral devices that rely on downstream devices to decode and display television signals.

Respectfully submitted,

ELGATO SYSTEMS, LLC



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August 4, 2010

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

In the Matter of	)	
	)	
Requests for Waiver of Certain TV Tuner	)	
Requirements in Order To Import and	)	MB Docket No. 10-111
Distribute Mobile DTV Receivers Without	)	
Analog Tuners	)	

DECLARATION OF ADAM STEINBERG

1. My name is Adam Steinberg and I am Vice President of Marketing for Elgato Systems, LLC ("Elgato").

2. I am submitting this declaration to verify the truth and accuracy of the factual assertions in the foregoing Application for Review of Elgato Systems, LLC (the "Application").

3. My responsibilities as Vice President of Marketing include general oversight of and responsibility for Elgato's policies, procedures, and practices for ensuring the regulatory compliance of Elgato's products. My duties also require me to track market conditions and developments and to monitor the activities of Elgato's competitors.

4. I have read the foregoing Application for Review and I am familiar with the contents thereof. The facts contained therein are true and accurate to the best of my knowledge, information, and belief formed after reasonable inquiry and based on my personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 3, 2010

Adam Steinberg
Vice President of Marketing
Elgato Systems, LLC

CERTIFICATE OF SERVICE

I, Sandra Jeter, of Dow Lohnes PLLC do hereby certify that on this 4th day of August, 2010, copies of the foregoing Application for Review of Elgato Systems, LLC were served upon the following via hand delivery:

Chairman Julius Genachowski
445 12th St. SW
Washington, D.C. 20554

Commissioner Michael J. Copps
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Commissioner Robert M. McDowell
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Sandra Jeter

Sandra Jeter
Dated: August 4, 2010