



NEW AMERICA
FOUNDATION

July 21, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of Oral *Ex Parte* Presentation

Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268

Dear Ms. Dortch:

On July 17, 2014, Michael Calabrese of the New America Foundation's Open Technology Institute (OTI) and Harold Feld of Public Knowledge (PK), on behalf of the Public Interest Spectrum Coalition (PISC), and Stephen Coran, counsel to the Wireless Internet Service Providers Association (WISPA), met with Barbara Kreisman, chief of the Video Division in the Media Bureau, Gary Epstein and Howard Symons, chair and vice chair of the Incentive Auction Task Force, respectively, and additional staff from the Media Bureau and OET.¹

The PISC and WISPA representatives began by observing that broadcast station repacking and relocation will have an enormous impact on the future of the unlicensed economy, since it will largely determine whether the Commission preserves sufficient access to unlicensed spectrum in every market nationwide, including the viability of both personal/portable devices and the higher-power fixed wireless broadband services so critical to rural and other underserved communities. We expressed our appreciation and strong support for the Commission's conclusion in the incentive auction *Report and Order* that it will "permit TVWS devices to operate on all other available channels in those portions of the UHF band that remain allocated and assigned only to broadcast services."² Accordingly, we stated it is critical that the

¹ FCC staff attending included Matthew Hussey of the Office of Engineering and Technology, A.J. Glassman of the Incentive Auction Task Force, and Dorann Bunkin, Joyce Bernstein, Kevin Harding, Shawn Maher, and Alison Nedokh, all of the Media Bureau.

² *Report and Order, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268 (May 15, 2014) (hereinafter *Report and Order*), at ¶ 265.

Commission makes channel reassignments with a goal of maximizing the number of white space channels available for unlicensed use above channel 20 while simultaneously striving to maintain as many consecutive white space channels as possible to facilitate higher-power rural broadband services (since under existing rules higher-power fixed wireless services can operate only on the middle of three consecutive white space channels).

The PISC and WISPA representatives stated that secondary broadcast licensees (LPTV, translator and booster stations) that are not eligible to participate in the incentive auction serve many fewer people than do full power and Class A stations that are eligible, even though there are more than twice as many. And although they typically use only 1 or 2 MHz of actual capacity to broadcast a standard definition stream of content they will, under the current rules, continue to occupy a full 6 MHz channel of TV band spectrum. In many cases this will serve the public interest well since, as the *NPRM* correctly observed, low power television stations “are a source of diverse and local television programming, and television translator stations are an important free, over-the-air resource in rural and remote locations.”³ At the same time, there are many LPTV operators occupying channels with Construction Permits that may never provide a substantial free over-the-air broadcast service to their communities; and there are LPTV licensees still broadcasting in analog format that will not in the end make the digital TV transition, or which are occupying far more spectrum capacity than they actually need to fulfill their mission – and, cumulatively, blocking access to fallow spectrum that could be accessible to everyone in these same communities for unlicensed use.

The representatives urged staff to clarify in the forthcoming FNPRM on repacking and secondary broadcast licensees what constitutes a “vacant” TV band channel and that the TV Bands Database can govern access to any TV Band spectrum when it is not in use, just as the *Report and Order* determined that the TV Bands Database (TVDB) can manage contingent access to 600 MHz spectrum post-auction until such time as mobile carrier licensees commence service.⁴ More specifically, the PISC and WISPA representatives requested that the FNPRM clarify that channels reserved with Construction Permits, as well as any other TV channel not currently providing a substantial broadcast service, be available at least on a temporary basis for unlicensed use.

As an example of the potential problem of unnecessarily restricted access to fallow TV band spectrum, the PISC representatives noted that Google’s TV Bands Database reports that not a single channel is available for even low-power unlicensed use (at 40 mW) in midtown Manhattan, at the Rockefeller Center, even though there are locally “vacant” channels.

³ *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118, Docket No. 12-268 (rel. Oct. 2, 2012), at ¶ 358.

⁴ “We will allow TVWS devices to continue to operate in those portions of the UHF band that will be repurposed for the 600 MHz Band until a 600 MHz Band licensee commences operations.” *Report and Order*, *supra* note 2, at ¶ 268.

According to the TVDB, at that location in New York City, 14 channels above channel 6 are not available due to LPTVs. Five of these channels are occupied by Construction Permits and are not actually in operation, according to the Media Bureau's licensing database.⁵

The PISC and WISPA representatives suggested that the FNPRM should request comment on steps that would ensure that secondary broadcast stations are able to block unlicensed use of channels *only* to the extent they are actually in use to provide a substantial service in the public interest. Under the Commission's Part 15 rules governing unlicensed access to white space, the TV Bands Database must block access to channels based on "only TV station information from station license or license application records." This makes it critical that broadcast licensees provide accurate and updated information on their *actual* operations, including any periods of time the station will not be broadcasting (whether particular days, or hours during each day) so that the TVDB can fully reflect the availability of fallow spectrum that can be used by unlicensed devices (and/or licensed microphone operators) without causing harmful interference to actual broadcast operations.

Accordingly, the representatives suggested that the FNPRM seek comment on appropriate affirmative reporting requirements, since the static "license applications records" in the Media Bureau's current filing and database system were intended for a different purpose and typically are neither sufficiently current nor granular enough to adequately inform a spectrum access system governed by the TV Bands Database. Since broadcast licensees occupy the public spectrum at no cost, a requirement that they report changes in their operational status from time to time would present a trivial and appropriate obligation. The information reported also would inform the Commission and the public on specific service obligations that could be adopted to better define service consistent with the public interest.

The representatives also discussed the benefits of spectrum "neighborhoods" that would optimize the TV band for higher-power fixed unlicensed use. Under existing Part 15 rules, higher-power fixed white space operations must avoid transmitting co-channel to TV stations as well as the six megahertz of spectrum on both sides of that channel (requiring, in practice, three contiguous vacant channels). If the adjacent channel guard bands were arranged in a spectrally inefficient way, unlicensed use would be significantly curtailed as TV spectrum is auctioned and stations relocate to lower channels. The representatives suggested that, where feasible, through channel-sharing and clustering of TV, LPTV and TV translator stations in one part of the TV band, the Commission may be able to create a contiguous block of white space spectrum in another portion of the TV band. The representatives encouraged the Commission, through repacking, displacement and other means, to optimize the remaining white space for higher-power fixed use.

⁵ FCC, "TV Query Broadcast Station Search," available at <https://www.fcc.gov/encyclopedia/tv-query-broadcast-station-search>.

Consistent with previous filings, the PISC representatives emphasized that LPTVs and other licensees hold their licenses as public trustees for the benefit of their communities. In situations where licenses are conflicting (MXed), the Commission should resolve these conflicts in favor of licensees that have best served “the public interest, convenience and necessity.” The Commission should consider the following:

1. As with NCE and LPFM MXed licenses, the Commission should weight programming that originates in and serves the local community.
2. The Commission can and should consider the extent of time the licensee engages in broadcasting on a regular basis.
3. The Commission should solicit comment on other suitable and content neutral criteria that would allow for a determination between MXed license applications post-repacking.

PISC representatives stressed that this is not creating a new service rule. The criteria are designed solely to help the FCC select among applicants when applications conflict. Indeed, the general criteria are all part of the obligation to serve the community, and are cognizable as part of the licenses renewal process. Nor does consideration of suitable criteria raise issues of content. As the courts have held repeatedly, preference for local content over non-local content does not raise First Amendment concerns because it does not address the specific *message*. Rather, a preference for locally generated content and consideration of how the licensee provides such content is a “compelling government interest of the highest order.”⁶

Finally, the PISC and WISPA representatives urged that the FNPRM solicit comment on how to encourage parties to share spectrum more efficiently. Options would include possible voluntary reduction in power, encouraging sharing agreements among LPTV broadcasters and, as in the case of LPFMs, encouraging MXed applicants to use sharing agreements or other means to resolve conflict and use spectrum more efficiently.

In its initial comments in this proceeding,⁷ PISC strongly supported the Commission’s proposal to allow LPTV and translator stations to share channels with one another or with full-power TV stations.⁸ PISC highlighted a public policy paradox: public auction revenue will be paid to *full power* stations willing to give up 3 MHz and share a channel with another station, but *low power* stations (LPTVs and translators) that are ineligible to participate can in most cases continue to occupy 6 MHz even if they are using only 1 or 2 MHz of capacity (as most will). In large urban markets, this paradox suggests that the Commission is willing to pay tens of millions of taxpayer dollars to recover 3 MHz from a full power station – but will then permit low power

⁶ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 624 (1994). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁷ Comments of Public Interest Spectrum Coalition, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118, Docket No. 12-268 (Jan. 25, 2013), at 53-54.

⁸ See *NPRM* at ¶ 359.

stations to warehouse 3 MHz or more of a channel's capacity that is not being used to provide substantial broadcast service (such as multicasting original content).

As a result, PISC asserted that merely allowing voluntary channel sharing does not go far enough considering the value and current waste of broadcast spectrum capacity. PISC proposed that as part of the channel repacking and relocation process, that the Commission should require secondary broadcast licensees to co-locate and share a single 6 Mhz channel where that is feasible without reducing their broadcast service to the community. PISC suggest that initially the Commission should analyze the rationale and feasibility of such a requirement in at least the 30 largest DMAs and, if it appears technically feasible for a substantial number of stations and markets, the Commission seek further comment on the nature of such a requirement, its potential impact, and the least burdensome means of implementing it.⁹

Respectfully submitted,

/s/

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⁹ *ibid.*