Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In The Matter of	)	
	)	
Digital Audio Broadcasting Systems And	)	MM Docket No. 99-325
Their Impact On The Terrestrial Radio	)	
Broadcast Service	)	
	)	
	)	

PETITION FOR RECONSIDERATION
OF NEW AMERICA FOUNDATION, PROMETHEUS RADIO PROJECT, BENTON FOUNDATION, COMMON CAUSE, CENTER FOR DIGITAL DEMOCRACY, CENTER FOR GOVERNMENTAL STUDIES, AND FREE PRESS

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SUMMARY

The FCC should reconsider its decision to allow incumbent radio licensees to expand into neighboring spectrum without imposing additional public interest requirements. The Second Report & Order is premised on the unexamined and unsupported assumption that the Commission is not assigning new spectrum for mutually exclusive commercial uses to incumbent licensees. Because of this erroneous premise, the FCC completely fails to consider a key question of whether the spectrum should be used for alternative purposes, such as noncommercial low power FM ("LPFM") or unlicensed uses, or auctioned pursuant to Section 309(j).

In addition, the FCC should reconsider its decision because allowing incumbent radio licensees to indefinitely occupy the sidebands surrounding their current signals, without adopting enhanced public interest requirements, unjustly enriches incumbent licensees. This spectrum may be worth billions of dollars, and may allow incumbents to provide additional program streams, engage in datacasting, and provide other types of services. Yet, the FCC neither requires licensees to pay for the use of this additional spectrum nor to provide any additional benefits to the public in return for its use.

TABLE OF CONTENTS

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	)	
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Pursuant to Section 1.429 of the Commission's Rules, the New America Foundation, Prometheus Radio Project, Benton Foundation, Common Cause, Center for Digital Democracy, Center for Governmental Studies, and Free Press, ("Petitioners'), by their attorneys, the Institute for Public Representation ("IPR") and Media Access Project, respectfully ask the Commission to reconsider its Second Report & Order in the above-captioned proceeding.[1]

I. Background

This proceeding grew out of a Petition for Rulemaking filed October 7, 1998, by USA Digital Radio, Inc., 2 which later merged with Lucent Digital Radio to form iBiquity.[3] The petition sought to permit the introduction of digital audio broadcasting ("DAB") in the AM and FM bands.

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[1] *Digital Audio Broadcasting Systems And Their Impact On The Terrestrial Radio Broadcast Service*, Second Report and Order, 2007 FCC LEXIS 4087 ("*2d R&O*").

[2] *See Amendment of Part 73 of the Commission's Rules to Permit the Introduction of Digital Audio Broadcasting in the AM and FM Broadcast Services*, Public Notice, Petition for Rulemaking, 13 FCC Rcd 22489 (1998).

[3] *See Company History*, iBiquity.com, http://www.ibiquity.com/about_us/company_history.

In the First Report and Order released in October 2002, the Commission selected iBiquity's in-band, on channel ("IBOC") technology as the system to be employed to transition analog radio to digital service.[4] The 2002 Order authorized stations to begin digital operations provided that they used the same antenna, broadcast the same programming as analog, and notified the FCC within 10 days of commencing such operation.[5] It deferred consideration of a number of issues to a later date.

A. The FNPRM And Comments

In April 2004, the Commission issued a FNPRM to promulgate rules governing digital radio.[6] The FNPRM sought comment on programming, operational, and technical rule changes. While stating that digital broadcasters must serve the public interest, it asked how public interest requirements should apply to the new capabilities offered by digital radio such as multicasting, datacasting and other new services.[7] Among other things, the FNPRM asked how digital broadcasters would meet community needs, advance localism, enhance political discourse and candidate access, and assist in cases of emergencies.[8]

Petitioners filed comments which advocated for increased and meaningful public interest requirements. We pointed out that:

> Digital audio broadcasters will receive significant additional benefits through DAB, and will receive even more benefits when the Commission adopts a technical standard for all-digital broadcasting. With this new technology, digital broadcasters use

[4] *Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, First Report & Order, 17 FCC Rcd 19990, 20006 ¶ 44 (2002) ("*2002 Order*").
[5] *Id. at* 20004-05 ¶ 41-42.
[6] *Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, Further Notice of Proposed Rulemaking and Notice of Inquiry, 19 FCC Rcd 7505 (2004) ("*2004 FNPRM*").
[7] *Id. at* 7516-18 ¶ 27, 33-35.
[8] *Id. at* 7518-19 ¶ 34-37.

> more spectrum, have increased flexibility, and have increased opportunities to earn revenue. As such, the digital radio broadcasters will receive benefits that should not only improve the mass media industry, but should also result in direct, concrete benefits for the listening public.[9]

Specifically, we argued that in light of the new technology and documented past failures to adequately serve the public interest, all digital radio broadcasters should fulfill minimum public interest obligations beyond those that apply to analog broadcasters.[10] In addition, broadcasters choosing to offer subscription services should have to fulfill additional public interest requirements selected from a flexible menu. We argued further that "digital broadcasters should vacate the sidebands once a digital transition is complete."[11]

Later in 2004, before adopting any of the proposals, the Commission broadened broadcasters' rights by allowing them to use a separate antenna for digital transmissions subject to special authorization.[12] In 2005, the Commission went a step further by issuing a Public Notice announcing that broadcasters were permitted to broadcast multiple streams, as long as they obtained experimental authority to do so.[13]

B. The Second Report And Order

In March 2007, the Commission adopted the 2d R&O along with a 2d FNPRM.[14] The 2d

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[9] Public Interest Coalition ("*PIC*") Comments at 3-4 (June 16, 2004).

[10] *PIC Comments* at 25. For example, we advocated for the adoption of a processing guideline for local civic and electoral programming and a requirement that stations air some locally originated programming.

[11] *Id.*

[12] This permission was conditioned on the antenna being a "licensed auxiliary antenna" that was sufficiently close to the original antenna and receiving a "Special Temporary Authorization" (STA). The decision to permit dual antenna operations was conducted through notice and comment procedures. *See* Public Notice, *Use of Separate Antennas to Initiate Digital FM Transmissions Approved*, 19 FCC Rcd 4722 (2004).

[13] Public Notice, *Commission Clarifies Policy Regarding Multiple Audio Streams in IBOC Transmissions*, 20 FCC Rcd 5136 (2005).

[14] *2d R&O*, 2007 FCC LEXIS 4087.

R&O authorizes the FM extended hybrid mode, which allows incumbent licensees to use additional spectrum at no charge.[15] The Commission notes that according to the NAB, extended hybrid mode "adds up to 50 kbps of data carrying capacity to an FM IBOC signal," and "increases the bandwidth occupancy of the digital carriers."[16]

The 2d R&O does not address why the spectrum could not be made available to new voices, despite Petitioners' repeated urging in their comments and *ex parte* filings.[17] Nor does it consider whether the spectrum could or should be auctioned under its authority under Section 309(j) of the Communications Act even though such arguments were presented by the Petitioners.[18] Nor does it require broadcasters to meet any build out requirements, or to return the spectrum when the transition to digital is completed.[19]

Regarding public interest obligations, the 2d R&O restates the Commission's previous finding that digital broadcasters are required to air programming responsive to community needs and interests and to meet existing statutory and regulatory public interest requirements.[20] It concludes specifically that rules regarding political broadcasting, payment disclosure, contest

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[15] *Id. at* *4 ¶ 3. The FCC had not previously authorized operation in extended hybrid mode. *See, e.g., 2004 FNPRM*, 19 FCC Rcd at 7507 ¶ 3 (noting "neither the extended hybrid FM systems nor the all-digital system have been tested by the NRSC."); *2002 Order*, 17 FCC Rcd at 19994 ¶ 18.

[16] *See 2d R&O*, 2007 FCC LEXIS 4087, at *23 ¶ 18. *See also id. at* *99 ¶ 80 ("using the extended hybrid mode increases the bandwidth occupancy"); *2004 FNPRM*, 19 FCC Rcd at 7512-13 ¶ 18 (finding that in FM system's "extended hybrid modes," "digital sidebands are extended closer to the analog signal.").

[17] *See PIC Comments* at 9-10; Letter from Angela Campbell, Institute for Public Representation, to Marlene Dortch, Secretary, FCC, in MM Docket No. 99-325, at 1 (July 26, 2006) ("*IPR Letter*"). At best, it "encourages" but does not require or even provide any incentives for licensees to engage in time brokering with "eligible entities." *See* 2d R&O, 2007 FCC LEXIS 4087, at *46 ¶ 40.

[18] *See PIC Comments* at 19, n.27; *IPR Letter* at 3 (July 26, 2006).

[19] *2d R&O*, 2007 FCC LEXIS 4087, at *27 ¶ 22 (deferring consideration of issues regarding all-digital operations).

[20] *2d R&O*, 2007 FCC LEXIS 4087, at *74-75 ¶ 60-61; *see also FNPRM*, 19 FCC Rcd at 7517 ¶ 31.

practices, sponsorship identification, cigarette advertising, and the broadcast of taped or recorded material will apply to all free over-the-air digital audio program streams and that stations must comply with existing requirements regarding station logs and public files.[21] However, it does not adopt any new public interest requirements, and defers consideration of any new public interest obligations to the FNPRM.[22]

II. The FCC Should Consider Whether The Public Interest Would Be Better Served By Allocating The New Spectrum To Low Power FM Or Unlicensed Uses, Or Through An Auction

The FCC should reconsider its 2d R&O allowing incumbent radio licensees to expand into neighboring spectrum without imposing additional public interest requirements. The order is premised on the unexamined and unsupported assumptions either that no additional spectrum is involved or that only incumbent broadcasters are able to use the guard bands. Because of these erroneous premises, the FCC completely fails to consider a key question of whether the spectrum should be made available for other uses, such as LPFM or unlicensed use, or auctioned pursuant to Section 309(j).

A. The FCC's Order Is Based On Inconsistent Reasoning And Erroneous Assumptions

FM broadcasters are licensed to use channels that consist of a band of frequencies "200 kHz wide."[23] The iBiquity plan calls for an FM broadcaster to transmit its analog signal within the 200 kHz channel and then to transmit digital signals on the two 100 kHz bands on either side

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[21] *2d R&O*, 2007 FCC LEXIS 4087, at *83-84 ¶ 65-66.

[22] *Id. at* *84 ¶ 67. While noting that the "commenters have raised important and complex issues concerning how broadcasters' public interest obligations should be tailored to the new radio services made possible through digital technology," *id.*, there is little discussion of these issues in the FNPRM section. *See id. at* *145-53 ¶ 115-120.

[23] *See 2004 FNPRM*, 19 FCC Rcd at 7524. *See also* 47 C.F.R. § 73.310 (defining "FM broadcast channel" as "[a] band of frequencies 200 kHz wide and designated by its center frequency.").

of the assigned channel.[24] iBiquity has a similar plan for the AM bands allowing broadcasters to use 10 additional kHz on either side of their designated frequency.[25] In the 2d R&O, by allowing hybrid and extended modes of transmission that use the sidebands, the Commission authorizes FM broadcasters to transmit on up to 400 kHz.[26]

The Commission itself has acknowledged that the IBOC system requires the use of additional spectrum in prior statements in this proceeding. For example, the NPRM issued in 1999 stated that "[c]urrent IBOC system designs are premised on *doubling the bandwidth licensed to* AM and FM stations to 20 kHz and *400 kHz*."[27] Indeed, before the AM stations are to convert to all-digital operations, the stations triple their usage to 30 kHz.[28] The 2004 FNPRM sought comment on the FM system's "extended hybrid modes," in which the "digital sidebands are extended closer to the analog signal."[29]

Petitioners' Comments pointed out that the IBOC plan would allow existing licensees to increase their use of the spectrum:[30]

> It bears emphasis that the digital radio proposals grant broadcasters permanent occupancy of the sidebands surrounding their current

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[24] *See 2d R&O*, 2007 FCC LEXIS 4087, at *7 ¶ 5; *see also* iBiquity Digital Corp., *IBOC FM Transmission Specification*, at 19-20, Figures 5-5 and 5-6, (Aug. 2001), *available at* http://www.nrscstandards.org/DRB/iBiquityFM%20test%20data%20report/Appendix%20A.pdf.

[25] *See* iBiquity Digital Corp., *AM All-Digital IBOC Field Test Report*, at 1, *available at* http://www.nrscstandards.org/DRB/Non-NRSC%20reports/AM_All_Digital_Report.pdf.

[26] *See id*.

[27] *Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, Notice of Proposed Rulemaking, 15 FCC Rcd 1722 at 1737 ¶ 38 (1999) ("*1999 NPRM*") (emphasis added).

[28] *See, e.g.*, Letter from Albert Shuldiner to Magalie R. Salas, received Oct. 9, 2001, MM Dkt. No. 99-325, page 5.

[29] *2004 FNPRM*, 19 FCC Rcd at 7512-13 ¶ 18; *1999 NPRM*, 15 FCC Rcd at 1726, n.21.

[30] According to J.H. Snider, the Commission's expansion of broadcasters' rights can be measured in terms of MHz, MHz per population, MHZ per square mile, and standard definition radio streams per square mile. By any of these measures, the Commission is giving away valuable spectrum rights with little deliberation and, as discussed, in contravention of statute.

> signals and these sidebands will not be returned to the public even in an all-digital environment. iBiquity's long-term projections for the digital technology do not forecast that the sidebands will eventually be relinquished. iBiquity's projections for the all-digital environment include removing the central analog signal, but not moving digital signals back toward the center of the band.[31] Instead the digital sidebands will increase in power, and the center of the band will be used for additional digital signals. Thus, the amount of spectrum that digital broadcasters occupy will have almost doubled.[32]

Consequently, we argued further that "digital broadcasters should vacate the sidebands once a digital transition is complete."[33]

In July 2006, our *ex parte* filing argued that the Commission should not permit incumbents to keep the additional spectrum in adjacent channels, as demand for radio spectrum is intense, and thousands of groups seeking low-power FM licenses had been turned away for lack of spectrum.[34] We attached a report by J.H. Snider that discussed how the digital radio proceeding amounted to a massive spectrum giveaway and that such "beachfront" spectrum should be allocated to broadband, not radio broadcast, through which consumers could also receive audio programming.[35]

A later *ex parte* filing argued that the expansion of the spectrum usage should trigger an auction under Section 309(j) of the Communications Act.

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[31] iBiquity Digital Corp., *FM All-Digital IBOC Field Test Report* at 1, Figure 2, (Feb. 1, 2002); iBiquity Digital Corp., *Public Interest Presentation* (Jun. 3, 2004), *available at* http://www.nrscstandards.org/DRB/non-NRSC%20reports/FM_all_digital_report.pdf.

[32] *PIC Comments* at 18.

[33] *Id.* In our Reply Comments, we similarly noted that the incumbent "licensees that transition to DAB will use additional sideband spectrum." *PIC Reply Comments* at 3 (Aug. 2, 2004).

[34] *See IPR Letter* at 1 (July 26, 2006).

[35] *See id. at* 3; J.H. Snider, *The Art of Spectrum Lobbying: America's $480 Billion Spectrum Giveaway, How it Happened, and How to Prevent it from Recurring*, New America Foundation, August, 2007, at 23-25, *available at* http://www.newamerica.net/files/art_of_spectrum_lobbying.pdf.

> Section 309(j) of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997, requires that where the Commission issues an exclusive license, it must avoid unjust enrichments and recover for the public "a portion of the value of the public spectrum use." The DAB "IBOC" standard under consideration extends licenses into the adjacent guard bands, essentially doubling each incumbent's bandwidth. This extension of spectrum use should trigger an auction for exclusive use of the available "guard band" space. This should, in the case of commercial stations, trigger an obligation to consider competing applications and auctions of the space where new applicants conflict with the proposed expansion.[36]

We argued that:

> If the Commission determines that it should use its authority pursuant to Section 309(j)(6)(E) or other relevant statutes to avoid accepting mutually exclusive applications, the Commission should require licensees pay a fee that will recover "a portion of the value of the public spectrum use." Furthermore, . . . it should also impose meaningful public interest requirements to ensure the public is benefiting from the broadcasters' exclusive use of the spectrum, which the public did not have the opportunity to gain access to through an auction.[37]

Despite these filings, the 2d R&O fails to address the question of whether it should hold auctions or take other action to prevent unjust enrichment. Instead, it asserts in some places that it is not authorizing broadcasters to use spectrum beyond their existing channels, while it acknowledges that it is, in other places.

For example, the 2d R&O claims that the "IBOC technology makes use of the existing AM and FM bands (In-Band) by adding digital carriers to a radio station's analog signal, allowing broadcasters to transmit digitally *on their existing channel assignments* (On-Channel) while simultaneously maintaining their analog service."[38] It likewise states that the "IBOC FM

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[36] *See* Letter from Parul Desai, Media Access Project, to Marlene Dortch, Secretary, FCC, in MM Docket No. 99-325, at 2-3 (August 10, 2006) (citations omitted).
[37] *Id. at* 3 (citations omitted).
[38] *2d R&O*, 2007 FCC LEXIS 4087, at *5-6 ¶ 4 (emphasis added).

DAB system permits an FM radio station to broadcast multiple audio programming services *within its assigned channels*."[39] But in the section authorizing hybrid mode, the 2d R&O quotes the NAB's assertion that "the use of the FM extended hybrid mode increases the bandwidth occupancy of the digital carriers."[40]

The reasoning offered in the 2d R&O is internally inconsistent, and for this reason alone, reconsideration is warranted. However, the Commission must also consider whether it should prevent unjust enrichment by reallocating the spectrum to LPFM or unlicensed uses, or at least hold an auction.

B. The Commission Should Not Confer The Guard Band Spectrum To Mutually Exclusive Commercial Uses Without Considering The Application Of Section 309(j)

Section 309(j) of the Communications Act, as amended, requires with certain exceptions, that if "mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection." The spectrum made available to commercial radio broadcasters in this proceeding fits these criteria.

1. These Are Initial Licenses

The Commission has defined "initial licenses" broadly to include all "first time licenses

[39] *Id. at* *188 (emphasis added). Indeed, the definition of "In Band On Channel DAB System" adopted in the Order is: "A technical system in which a station's digital signal is broadcast in the same spectrum and on the same channel as its analog signal." 47 C.F.R. § 73.402(b); *2d R&O*, 2007 FCC LEXIS 4087, at *188-89, app. B.

[40] *Id. at* *23 ¶ 18. *See also id. at* *99 ¶ 80 ("using the extended hybrid mode increases the bandwidth occupancy").

for systems and not renewals or modifications of existing licenses."[41] The D.C. Circuit has held that "nothing in the text of [§ 309(j)] forecloses [the FCC] from considering a license 'initial' if it is the first awarded for a particular frequency under a new licensing scheme, that is, one involving a different set of rights and obligations for the licensee. Even if such a license authorizes no new service and covers spectrum already in use, it is the first license for that spectrum issued under the new regulatory regime."[42] Similarly, "a newly issued license must differ in some significant way from the license it displaces."[43]

The 2d R&O's general authorization permitting FM radio broadcasters to transmit digital signals in the sidebands confers initial licenses, as broadcasters were not previously licensed to broadcast on the sidebands. This is not a modification because broadcasters were never licensed to broadcast in these sidebands.[44] The Commission is conferring new rights to transmit, not just one analog audio stream, but multiple, and digital, audio streams.

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[41] *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (upholding the Commission's definition as reasonable in light of the ambiguous statutory text) ("In sum, because [the new license] is substantially different from [the applicant's old license], the agency did not act unreasonably in treating [the new licenses] as 'initial licenses' within the meaning of § 309(j)(1)."); *see also Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605 (D.C. Cir. 2000).

[42] *Fresno Mobile Radio*, 165 F.3d at 970. *See also DirecTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C Cir. 1997) (reclaimed licenses allocated under new regime are "initial" permits).

[43] *Fresno Mobile Radio*, 165 F.3d at 970.

[44] Even if granting new rights were a "modification," the modification would still be an "initial license" for purposes of the Commission's auction authority. In adopting rules to implement auctioning authority, the Commission held that "[w]here a modification would be so major as to dwarf the licensee's currently authorized facilities and the application is mutually exclusive with other major modification or initial applications, the Commission will consider whether these applications are in substance more akin to initial applications and treat them accordingly for purposes of competitive bidding." *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2355 ¶ 37 (1994) ("*Competitive Bidding 2d R&O*").

2. IBOC Use Is Mutually Exclusive To Other Uses.

Applications are generally considered "mutually exclusive" if only one can be granted because they seek the same license or different licenses that would interfere with each other.[45] A similar definition is used in the digital broadcast satellite context: "Applications for DBS channels are considered mutually exclusive when the requests for channels exceed the available supply."[46]

Here, the Commission is granting exclusive rights to use the guard band spaces to the incumbent licensees, even though the current dual antenna system makes multi-licensee coexistence technologically feasible.[47] As pointed out in our Comments, far more people would like to have radio stations than can be accommodated under existing FCC policies.[48] Moreover, others may want to use this spectrum for unlicensed uses.[49] The situation here is like that presented in *DIRECTV, Inc. v. FCC,* where the court upheld an FCC decision to require auction of reclaimed DBS channels instead of allocating them *pro rata* among preexisting permittees as it had indicated in a prior order.[50] The fact that no competing applications are currently on file with the Commission is not determinative of mutual exclusivity. It would be futile for applicants to file mutually exclusive applications, as the Commission automatically rejects applications not facially complying with the Table of Allotments listing permissible community-frequency

[45] *See Benkelman,* 220 F.3d at 603, n.2 (D.C. Cir. 2000); *Lakeshore Broadcasting, Inc. v. FCC,* 199 F.3d 468, 470 (D.C. Cir. 1999); *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327, 333 (1945).
[46] *DirectTV,* 110 F.3d at 822 (explaining that specific channels are considered to be of equal value by the Commission, so the "mutually exclusive" consideration takes place in terms of overall channel availability and applications).
[47] Snider, *supra* note 35, at 4.
[48] *PIC Comments* at 4.
[49] Snider, *supra* note 35 at 7, 45.
[50] *DirectTV,* 110 F.3d 816.

pairings.[51] Determining that spectrum is not subject to mutually exclusive "applications" just because the Commission does not accept applications, and to confer additional spectrum instead on existing licensees, is a circular argument. If upheld, the Commission could choose to avoid auctioning in every proceeding in direct contravention of Congressional intent.[52]

3. The Spectrum Could Be Used For LPFM Or Unlicensed Uses And Thus Avoid The Need To Auction.

Congress has specified that spectrum shall be auctioned except for three, very narrow enumerated exceptions -- public safety radio services, noncommercial educational broadcasting, and digital television service.[53] The Commission has interpreted this list to be exhaustive.[54] The Commission's assignment of new spectrum to noncommercial FM digital broadcasters falls

[51] 47 C.F.R. § 73.203 ("[A]pplications may be filed to construct FM broadcast stations only at the communities and on the channels contained in the Table of Allotments (§ 73.202(b)). Applications that fail to comply with this requirement, whether or not accompanied by a petition to amend the Table, will not be accepted for tender."). Applicants can petition the FCC to amend the Table of Allotments, but the proposed change must satisfy the minimum spacing requirements. 47 C.F.R. § 73.207.

[52] The legislative history indicates the reference to "accepting" applications was not intended to limit the type of application that would trigger the auction requirement. Rather, before conferring spectrum, the Commission is under a duty actively to seek competing applications. The Conference Report on the Balanced Budged Act states: "*Any* mutually exclusive applications for radio and television broadcast licenses received after June 30, 1997, shall be subject to the Commission's rules regarding competitive bidding … The conferees recognize that there are instances where a single application for a radio or television broadcast license has been filed with the Commission, but that no competing applications have been filed because the Commission has yet to open a filing window. In these instances, the conferees expect that … the Commission will provide an opportunity for competing applications to be filed." Balanced Budget Act of 1997, H.R. Conf. Rep. 105-217, at H6174 (1997).

[53] *See* 47 U.S.C. § 309(j)(2).

[54] *See, e.g., Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 22709, 22716 ¶ 15 (2000). Another possible exemption is also not relevant here. *See* 47 U.S.C.A. § 765f (exempting, "[n]otwithstanding any other provision of law" authority "to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services").

within the exemption for noncommercial educational broadcasting. However, commercial digital radio operations do not fall under any of these exemptions.

On reconsideration, the Commission could decide to use the spectrum for uses that would fall within the auction exceptions. For example, it could serve the public interest and avoid auctioning the spectrum to mutually exclusive commercial uses by assigning the spectrum for noncommercial LPFM.[55] As the Commission has found, noncommercial LPFM "serves specialized community needs that have not been well served by commercial broadcast stations" by creating "opportunities for new voices on the air waves and [allows] local groups, including schools, churches and other community-based organizations, to provide programming responsive to local community needs and interests . . . more . . . effectively than a commercial service."[56] Alternatively, the Commission could assign the spectrum for unlicensed uses, which are not mutually exclusive.[57] Unlicensed spectrum supports robust innovation in communications services and can help bring internet services to underserved areas.[58]

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[55] *See Creation of Low Power Radio Service* , R&O 15 FCC Rcd 2205, 2209 ¶ 5 (2000) (ruling that "licenses for noncommercial educational or public broadcast stations are specifically exempted from auction by Section 309(j)"); *recon. granted* in 15 FCC Rcd 19208, 19210 ¶ 4 (affirming Report and Order in large part and "declin[ing] to alter the noncommercial nature of the service"); 2d R&O, 16 FCC Rcd 8026, 8031 ¶ 12 (codifying requirement precluding former unlicensed operators from obtaining LPFM licenses); Second Order on Recon. and FNPRM, 20 FCC Rcd 8717 ¶ 17-19 (reconsidering certain technical and ownership issues unrelated to noncommercial educational use requirements).

[56] *See* 15 FCC Rcd 2205, 2213 ¶ 17.

[57] It would also serve the public interest to allocate this spectrum to unlicensed uses because then the public would have direct access to the resource, equipment manufacturers could innovate freely, and the public will receive greater access to mobile internet technologies. Significantly, an unlicensed allocation would reduce the asset specificity associated with the radio bands, and, according to a recent report, asset specificity harms consumers, reduces the likelihood of women and minority entering spectrum-based businesses, and permits incumbents to warehouse and annex spectrum. Snider, *supra* note 35, at 20-21, 40-47.

[58] Michael Calabrese & Sascha Meinrath, *The Feasibility of Unlicensed Broadband Devices to Operate on TV Band "White Space" Without Causing Harmful Interference: Myths & Facts*, Sept. 10, 2007, http://www.newamerica.net/files/WhiteSpaceDevicesBackgrounder.pdf.

Because the Commission's decision to license currently unused spectrum for commercial radio use triggers the competitive bidding procedures, on reconsideration the Commission should either decide to use the spectrum for uses that are exempt from auction, adopt auction procedures, or explain why it is not required to auction this spectrum.

III. In The Alternative, The FCC Should Require Digital Radio Licensees To Pay For The Use Of The Additional Spectrum In Cash Or Through Increased Public Service

If, after thorough consideration, the Commission concludes that it is not required to use competitive bidding under Section 309(j), it must nonetheless ensure that incumbent radio licensees are not unjustly enriched.

The 2d R&O allows incumbent radio licensees to use extremely valuable spectrum without charge or imposing any enhanced public service requirements. It allows incumbents to provide additional program streams, engage in datacasting, and provide other types of revenue-generating services.[59]

By annexing the sidebands surrounding their assigned channels, incumbent licensees are able to use roughly 22 MHz of prime spectrum across the country.[60] While the exact value of this spectrum is not easy to determine, the most recent calculation placed it between 1.5 and 6 billion dollars.[61] This spectrum is extremely valuable because frequencies in this band can easily penetrate walls and trees. As noted above, this spectrum could be utilized for a variety of other uses, including digital broadcast services offered by non-incumbent radio broadcasters—such as women, minorities, or nonprofit organizations—as well as for non-broadcast service, including unlicensed uses.

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[59] *2d R&O*, 2007 FCC LEXIS 4087, at *4 ¶ 3.

[60] This includes 8.8 Mhz of spectrum licenses to stations on a national basis and an additional 13.2 Mhz of sideband spectrum to protect those stations. Snider, *supra* note 35, at 8.

[61] *Id. at* 18-20.

Yet, the FCC neither requires licensees to pay for the use of this additional spectrum nor to provide any additional benefits to the public. Although, the FCC has issued a Further Notice of Proposed Rulemaking which asks about enhanced public interest requirements, there is no guarantee that such requirements will in fact be adopted.[62]

In fact, the FCC does not even require radio stations to convert to digital despite the public benefits it offers.[63] Nor does it adopt any build-out or performance requirements.

Most licensed commercial services are subject to performance and build-out requirements. Congress specified that in adopting competitive bidding rules, the Commission shall "include performance requirements, such as appropriate deadlines and penalties for performance failures to ensure prompt delivery of service to rural areas [and] to prevent stockpiling or warehousing of spectrum by licensees or permittees."[64] The House Report recognized that, when incumbent broadcasters warehouse spectrum, the public is denied "both the benefit of having access to the new service, and the benefits of competition."[65] When the Commission adopted rules implementing its auction authority, it noted that "the service rules for most existing services … already contain performance requirements, such as the requirement to construct within a specified period of time." In addition, the Commission committed to prescribe

[62] We note that the Commission has yet to act on a Notice of Inquiry regarding enhanced public interest requirements for digital television that was issued in 1999. *See Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633 (1999); *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, 2810 ¶ 93 (2005).

[63] The Order specifically states: "Stations may decide if, and when, they will provide digital service to the public." *2d R&O*, 2007 FCC LEXIS 4087, at *20 ¶ 15.

[64] 47 U.S.C. § 309(j)(4)(B).

[65] *See* Omnibus Budget Reconciliation Act of 1993, H.R. Rep. No. 103-111 (1993).

rules as necessary when promulgating competitive bidding rules for "the few services where no performance requirements currently exist." [66]

The Commission gives only two reasons for lack of build-out requirements. First, the Commission claims that "band-clearing is not an issue" because "radio stations, unlike television stations, are not using additional spectrum to provide digital service."[67] But as discussed above, that assumption is factually incorrect. Second, the Commission states that "unlike television licensees, radio stations are under no statutory mandate to convert to a digital format."[68] But, whether or not there is a specific statutory mandate, radio broadcasters have received additional spectrum and should have to use that spectrum promptly and in the public interest. The Commission does not explain why radio broadcasters, unlike television broadcasters, should never have to return their spectrum once the digital transition is complete. The Commission never explains how it could serve the public interest for radio broadcasters to receive a windfall of billions in spectrum that could be put to other uses.

Thus, on reconsideration, the Commission should ensure that incumbent broadcasters are not unjustly enriched by imposing significant and meaningful additional public interest requirements and adopting build-out requirements coupled with a date certain for return of some portion of the spectrum.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission reconsider its 2d R&O.

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[66] *See Competitive Bidding 2d R&O*, 9 FCC Rcd at 2386 ¶ 20 (1994).
[67] *2d R&O*, 2007 FCC LEXIS 4087, at *17 ¶ 13.
[68] *Id. at* *20 ¶ 15.

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