Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Permit MVDDS	)	
Use of the 12.2-12.7 GHz Band for	)	
Two-Way Mobile Broadband Service	)	File No. RM-11768

COMMENTS OF PUBLIC KNOWLEDGE AND OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA

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Public Knowledge ("PK") and the Open Technology Institute at New America ("OTI") submit these comments in response to the MVDDS 5G Coalition's *Petition for Rulemaking to Permit MVDDS Use of the 12.2-12.7 GHz Band for Two-Way Mobile Broadband Service*.[1]

ARGUMENT

As this petition, the incentive auction, and other regulatory proceedings before the Federal Communications Commission ("FCC" or "Commission") demonstrate, the Commission and stakeholders are increasingly presented with the thorny policy problem of how best to repurpose legacy spectrum for modern, flexible uses. On the one hand, the Commission has a responsibility to discourage speculation and avoid conferring undeserved windfalls to legacy licensees.[2] At the same time, the Commission has an obligation to promote wireless competition, promote investment in new wireless technologies and services and generally encourage new and more efficient uses of wireless to meet our national needs.[3]

Here, the MVDDS licensees have actively sought to use the MVDDS licenses to provide service as the Commission envisioned. This is not, therefore, a case of rewarding speculators or spectrum squatters for their refusal to invest or allow spectrum to lie fallow. Since the development of the MVDSS service rules, new technologies have emerged that would allow licensees to better serve the public. It is therefore sensible to re-examine the MVDDS license rules, as requested in the Petition.

Nevertheless, the Commission can and must recognize that any expansion of exclusive use rights, such as that proposed by the Petition, ***does*** confer a windfall on the legacy licensees,

[1] MVDDS 5G Coalition, *Petition for Rulemaking to Permit MVDDS Use of the 12.2-12.7 GHz Band for Two-Way Mobile Broadband Service*, File No. RM-11768 (Apr. 26, 2016) ("Petition").
[2] *See* 47 U.S.C. §§ 309(j)(3), 309 (j)(3)(c), 309(j)(4)(B), 309(j)(4)(E).

particularly when those rights are expanded without auction. As wireless spectrum remains a public resource, and the Commission is obligated to allocate it in the public interest, the public must be compensated for this *de facto* windfall in the form of additional public interest benefits.

Nor is it enough to note that enhancing flexibility will enhance the ability of providers to deliver new services. This is equally the case when the Commission authorizes a new wireless service as it is when the Commission expands the spectrum rights of an existing service. If the statute requires a clear return to the public for the exclusive use of the public airwaves when the Commission creates a wireless service, the statute equally requires a clear return to the public when spectrum rights are expanded.

I. Public Interest Spectrum Policy in the 21st Century

This proceeding presents the Commission with another opportunity to reframe its public interest analysis in a manner consistent with the evolution of technology and policy in the 21st Century. Traditionally, because the Commission could only grant licenses to a handful of licensees, it required the licensee of the "public airwaves" to serve as a trustee for the community.[4] Modern technology, at least in some cases, removes the necessity to rely on an intermediary to serve as trustee. As an initial matter, therefore, the Commission should consider the highest form of public interest to be permitting direct access by the public to the public airwaves.

At the same time, this is not possible for all uses. In such cases, however, the Commission should recognize that the public interest requires that a grant of exclusivity, or an

[3] *See* 47 U.S.C. §§ 309(j)(3), 309(j)(3)(D), 309(j)(4)(C)
[4] *See generally Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969).

expansion of existing exclusive rights, should be compensated to the public both through concrete benefits[5] and by enhancing the existing open spectrum.

II. Suitable Public Interest Obligations for Expanding the Rights of MVDDS Licensees

In order to compensate the public for the windfall constituted by an expansion of exclusive use rights, and in accordance with the framework the Commission should impose a number of public interest obligations on the licensees.

First, the Commission should include use-or-share conditions in the service rules it will need to establish to guide licensees in making new use of the 12.2-12.7 GHz band. As discussed by PK and OTI in other proceedings,[6] use-or-share obligations ensure maximum utilization of spectrum, both prior to licensee buildout, and in areas where licensees lack economic incentives to deploy. The Commission should take the opportunity to incorporate use-or-share rules within its broader service rules for the band in question, thus ensuring that the public interest is served as it best can be, by providing direct access to public spectrum in areas where the incumbent has not, or will not, deploy services.

Additionally, the Commission should recognize that policy consistency serves the public interest. Accordingly, it should impose whatever performance obligations and pro-competitive spectrum screen or cap polices arise from the Spectrum Frontiers proceeding, to Petitioners' 12.2-12.7 GHz licenses, as well. This spectrum, like that high-band spectrum addressed by the Spectrum Frontiers proceeding, will likely play a major role in the next generation of wireless technology – 5G. Accordingly, it should be treated consistently to ensure that the spectrum is

[5] *See generally* 47 U.S.C. § 309(j)(3)(C).
[6] *See generally* Comments of Public Knowledge and Open Technology Institute at New America, *Use of Spectrum Bands Above 24 GH z for Mobile Radio Services,* GN Docket No. 14-177 (Jan. 28, 2016)

promptly put to productive use, and does not present too great an opportunity for incumbents to foreclose competition by circumventing important spectrum holdings policy.

Lastly, the Commission should consider whether allowing licensees to lease their spectrum on a real-time basis, and withdraw it from availability when licensees put it to use, would adequately satisfy the use-or share and performance obligations. Such an approach could provide a mechanism by which the Commission might ensure that the spectrum would be capable of being put to productive use, even in those areas where the provider would not have economic incentives to deploy.[7]

Respectfully Submitted,

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[7] *See generally* Comments of Public Knowledge, *Promoting More Efficient uses of Spectrum Through Dynamic Spectrum Use Technologies*, ET Docket No. 10-237 (Feb. 28, 2011).