

August 29, 2023

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

Dear Ms. Dortch:

The following organizations whose members are incumbent licensees in the 6 GHz band are submitting this written *ex parte* presentation to respectfully request that the Commission provide the public with notice and opportunity for comment on any new rules it is considering for unlicensed use of the 6 GHz band, consistent with the Administrative Procedure Act.<sup>1</sup> The Commission may not adopt rules which were not proposed in the *Further Notice of Proposed Rulemaking* or otherwise considered in this proceeding.<sup>2</sup> Actual notice of any new rules must come from the Commission and not from monitoring comments in the record.<sup>3</sup> Although the Commission may adopt rules that are the logical outgrowth of those that were proposed, it must provide fair and sufficient notice, including about the material components of such a rule.<sup>4</sup> The opportunity for such notice and comment is particularly vital where, as here, the matter involves complex technical issues and a modification of the proposed rule results in a substantial change affecting the technical issues under consideration.<sup>5</sup>

Incumbent stakeholders are concerned that the Commission is considering adopting rules that some parties claim will protect against interference in theory, but may or may not

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<sup>1</sup> 5 U.S.C. § 555

<sup>2</sup> See *Report and Order and Further Notice of Proposed Rulemaking*, ET Docket No. 18-295, 35 FCC Rcd 3852 (2020)(hereinafter "*Report and Order*" or "*FNPRM*").

<sup>3</sup> *Small Refiner Lead Phase Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)( "As a general rule, EPA must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.")

<sup>4</sup> *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013), *citing* ' *City of Waukesha v. EPA*, 320 F.3d 228 at 246 (DC Cir. 2003)(stating "the EPA 'entirely failed' to provide notice of its intention to amend its regulation in the NPRM, and 'offered no persuasive evidence that possible objections to its final rule[ ] have been given sufficient consideration, instead treating its revision as a clarification rather than a substantive change.")

<sup>5</sup> *Kooritsky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994).(stating that "[s]omething is not a logical outgrowth of nothing. The notice of proposed rulemaking contains nothing, not the merest hint, to suggest that the [agency] might tighten its existing practice...")

do so as a matter of practice.<sup>6</sup> Insufficient notice of these rules has been provided, because they have only been discussed by parties proposing and reacting to these changes in a very recent flurry of *ex parte* filings on the record. Nowhere has the Commission itself proposed these rules, nor has the Commission invited comment on them. Moreover, the public has not had a meaningful opportunity to consider the effectiveness of these rules to protect against interference, a matter of vital importance to the incumbents in this band. Adoption of additional components that were not part of the rules initially proposed cannot be considered a logical outgrowth of those proposed rules, particularly here where the components are inextricably intertwined with the central technical issue in this proceeding -- the effectiveness of interference protection.

The incumbent stakeholders request that the Commission formally propose any new rules that it is considering adopting for VLP or other unlicensed operations in the band so the public has fair and sufficient notice to comment on them. Although such requirements may protect against interference, it is impossible to make that determination without the specific technical parameters involved. Accordingly, the Commission must provide such information by public notice and provide sufficient opportunity for comment on any such proposals. It may not adopt them as a logical outgrowth of the *FNPRM*.

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<sup>6</sup> See e.g. Letter from Paul Cartj, Counsel to Apple, Inc., Broadcom, Inc., Google, LLC, and Meta Platforms, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, ET Docket No. 18-295 (filed July 26, 2023)(suggesting exclusion zones for very low power devices, and related issues such as geolocation accuracy, re-check periods for devices in motion, and the time period for obtaining new licensee information from ULS). See also Letter from Paul Margie, Counsel to Apple, Inc., Broadcom, Inc., Google, LLC, and Meta Platforms, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, ET Docket No. 18-295 (filed July 25, 2023)(suggesting creating a transmitter power control (TPC) rule for VLP equipment that contains a specific and measurable power-reduction mandate.); and Letter from Christopher Szymanski, Director, Product Marketing, Technology Strategy Wireless Communications and Connectivity Division at Broadcom Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission in ET Docket No. 18-295 (filed August 22, 2023 (also suggesting TPC for VLP as a rule). And see e.g. Letter from Michael Calabrese, Director, Wireless Future Program, New America's Open Technology Institute to Marlene H. Dortch, Secretary, Federal Communications Commission in ET Docket No. 18-295 (filed Jul. 23, 2023)(suggesting that "the Commission should reconsider, if necessary, whether the -6 dB I/N metric that was adopted in the 2020 6 GHz Order is an accurate proxy for link failure (i.e., actual harmful interference)"); or see Letter from Michael Calabrese, Director, Wireless Future Program, New America's Open Technology Institute and Kathleen Burke, Policy Counsel, Public Knowledge to Marlene H. Dortch, Secretary, Federal Communications Commission in ET Docket No. 18-295 (filed Aug., 4, 2023)(suggesting that the Commission "not base any analysis or rules on the -6 dB I/N threshold.")

Thank you for your consideration. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

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