

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

In the Matter of )  
)  
Expanding the Economic and Innovation ) Docket No. 12-268  
Opportunities of Spectrum through Incentive )  
Auctions )

To: The Commission

**CONSOLIDATED REPLY TO  
OPPOSITIONS TO PETITION FOR RECONSIDERATION**

Free Access & Broadcast Telemedia, LLC (“FAB”), by counsel, hereby replies to the Oppositions filed November 12, 2014 by CTIA – The Wireless Association® (“CTIA”), Google Inc. and Microsoft Corporation (“Google/Microsoft”), and The Wireless Internet Service Providers Association (“WISPA”) to FAB’s Petition for Reconsideration (“Petition”) filed September 15, 2014. In its Petition, FAB demonstrated that:

1. The Commission failed to evaluate the benefit of including low power television (“LPTV”) stations in the incentive auction. The Commission did not conduct a benefit-cost analysis to consider including LPTV in the auction and the *Report and Order*<sup>1</sup> adopted in this proceeding and failed to acknowledge or analyze FAB’s request that LPTV stations permissibly be included in the auction.

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<sup>1</sup> *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014)(“*Report and Order*”). The Commission erred in not listing FAB as a commenter in Appendix D of the Report and Order, since FAB did timely file Reply Comments. Further, the Commission’s conclusion in the Final Regulatory Flexibility Analysis (“FRFA”) in Appendix B of the *Report and Order* at page 384, para. 13, is wrong when it states that “no commenter directly responded to the IRFA.” The Commission ignored FAB’s written *ex parte* presentation filed May 5, 2014, which also included a round of meetings at the Commission, about the Initial Regulatory Flexibility Analysis (“IRFA”) conclusion that the Commission has the authority to invite LPTV to the incentive auction. In the FAB *ex parte* filing, note 3, FAB specifically cited multiple references that requested LPTV

2. The Commission did not clarify that it will sell in the forward auction (and use as guard bands) only as much spectrum as is sold in the reverse auction, plus that amount of spectrum already vacant today. The Commission may not lawfully consider spectrum occupied by our nation's some 1,875 LPTV stations as *vacant* and available for sale in the forward auction.
3. In the *Report and Order*, the Commission created "remainder spectrum" and set aside an additional six MHz block of spectrum in each market for unlicensed use, above and beyond what is technically necessary for guard bands. These set asides exceed the authority granted to the Commission in the Spectrum Act. Such set asides will have a life-threatening impact on many LPTV stations in spectrum-congested areas.

**I. CTIA's Opposition Does Not Contest that LPTV May and Should Be Allowed to Participate in the Auction.**

CTIA briefly responded to the LPTV industry's entreaties, which the Commission has deflected or remains unresponsive to in the *Report and Order* with the simple, oft-repeated refrain that LPTV is secondary and has no formal protection rights.<sup>2</sup> CTIA did not address, however, whether LPTV should be invited to the auction. Its silence admits its lack of opposition to LPTV participation in the auction. Rather, CTIA's essential concern is that it does not want

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auction participation, in part also based on the Commission's IRFA. *See, generally*, statements clarifying Commission proposals regarding LPTV stations set forth in the Transcript from the 2014 LPTV NAB Show Info-Session with FCC Media Bureau Chief William T. Lake, April 7, 2014, which was filed in Docket 12-268 on April 22, 2014, by the LPTV Spectrum Rights Coalition ("Transcript"). *See also* Comments of Mike Gravino, filed March 12, 2013, at p. 2; Reply Comments of Civic Media Advisors, filed May 20, 2013, at p. 10; Ex Parte Comments of LPTV Spectrum Rights Coalition, filed August 27, 2013, Summary p. 3; LPTV Spectrum Rights Coalition –Spectrum Auction Task Force Presentation on March 18, 2014, filed in Docket 12-268 on March 21, 2014, points 4 and 5 at pp. 4-6.

<sup>2</sup> CTIA Opposition at p. 18.

the auction to be slowed down by having the Commission take into account issues the LPTV industry has raised.

In support of CTIA's claim that LPTV has no rights, it contends that the Commission quelled in the past any "basis for LPTV licensees to assume extensive rights to continued operations" when it reallocated TV Channels 60-69 to public safety and commercial wireless services.<sup>3</sup> Yet with that previous reduction of the TV band, channels remained available for displaced LPTV stations. In fact, LPTV stations had and still have the right of displacement.<sup>4</sup> In this proceeding, however, the Commission's current design will improperly trample that right, in violation of section 6403 of the Spectrum Act ("Nothing in this subsection shall be construed to alter the spectrum usage rights of low power television stations.")<sup>5</sup> Even CTIA does not contend that the Commission may lawfully interpret section 6403 to mean that LPTV stations have no spectrum usage rights merely because they are classified for regulatory purposes as secondary licensees.

## **II. The FCC Must Disclose the Scope of LPTV Displacement Indicated as a Result of its Late-Released "Greenhill Pitch Book" Analyses.**

A mere 15 days after the September 15, 2014 deadline to petition to reconsider the *Report and Order*, the Commission released its October 2014 *Incentive Auction Opportunities for Broadcasters: Prepared by the Federal Communications Commission by Greenhill*, an investment banking firm (the "Pitch Book").<sup>6</sup> The timing of the release of that Pitch Book was

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<sup>3</sup> *Id.*, at p. 19.

<sup>4</sup> 47 C.F.R. Sec. 73.3572.

<sup>5</sup> Pub.L.No. 112-96, § 6403, 126 Stat. 156, 227 (2012).

<sup>6</sup> Available at: <http://wireless.fcc.gov/incentiveauctions/learn-program/docs/ia-opportunities-book.pdf> (last visited November 21, 2014).

unhelpful to the transparency and objectivity of this proceeding that has extended now for over 1,000 days since the passage of the Spectrum Act. The Commission paid Greenhill to produce the Pitch Book to entice broadcasters to participate in the incentive auction. Surely such an analysis could have been released before petitions to deny the *Report and Order* became due.

The Pitch Book highlighted just how much the Commission expects to reclaim from voluntarily participating broadcasters, with the initial target set at 126 MHz. Clearing 126 MHz and selling a net 100 MHz (after deduction of the guard bands and the free white space channel reservation),<sup>7</sup> will as a technical matter make it completely impossible to accommodate displaced LPTV stations in highly populated areas unless additional protections are put in place.<sup>8</sup>

The Commission needs to clarify its reverse auction volume target methodology. Based on FAB's analysis and assumptions, the LPTV industry will be contributing, without compensation, up to 50 MHz of the 100 MHz sold in the forward auction. FAB assumes that the Commission does intend to sell in the forward auction much more spectrum than is voluntarily relinquished by invited broadcasters who opt to participate in the reverse auction. The offering of more spectrum than willingly contributed by participating broadcasters, however, will be at the expense of LPTV's broadcast stations. Those LPTV broadcast stations hold formal,

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<sup>7</sup> Pitch Book, "Estimated Potential Auction Compensation," at p. 34.

<sup>8</sup> See Interview by The Honorable Gordon Smith, President of the National Association of Broadcasters, at the 2013 NAB Show with Verizon Chairman Lowell McAdam, available at <http://www.youtube.com/watch?v=UHz8xgv5ZOW> (last visited November 21, 2014). At minute 33:30, the Honorable Gordon Smith said "I was on the (Senate) Commerce Committee when we went analog to digital and I remember the broadcasters giving up like 103 MHz, and now the FCC is hoping for 120 (MHz). I would say if they got anywhere near that there wouldn't be much left of the broadcast space." At minute 34:15, he said "...When you're doing video, and you know this better than I do, eventually spectrum's a finite resource. And we wonder where this keeps heading. So it sort of goes to the seed corn for us and the seed corn for you. We can only give up so much and (still) have a crop." The prospect of giving up more than 120 MHz will possibly result in there not being much left of a broadcasting industry.

longstanding, and settled displacement rights *before* any new class of primary licenses are created and sold atop them.

The Spectrum Act was enacted by Congress to facilitate a trade of one broadcast channel to another company – largely one for one. What the Commission has adopted goes far beyond that simple trade – it reclaims spectrum by taking it from uncompensated LPTV broadcasters, with far more spectrum sold in the forward auction than is offered up in the reverse auction.

What is brewing here is a Washington-driven, *Kelo*-style unconstitutional spectrum taking.<sup>9</sup> In *Kelo*, the government condemned non-blighted individually-owned properties for a private redevelopment project. After that particular taking (which *included* at least some level of just compensation) was upheld by the Supreme Court, the developer failed, and the city was left with empty blocks warehoused lying fallow in private hands, resulting in many States since repudiating that behavior.<sup>10</sup> Cutting the broadcast UHF band by more than half of channels 14-51

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<sup>9</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>10</sup> For a summary history and the aftermath of the *Kelo* case, go to: [http://en.wikipedia.org/wiki/Kelo\\_v.\\_City\\_of\\_New\\_London](http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London) (last visited November 22, 2014). The Wiki reports that since the Court decision, such overreaching governmental behavior has been repudiated by many States. FAB believes such behavior is anathema to many if not most members of Congress. Chairman Wheeler at the 2013 FCBA Chairman’s Dinner invited those seeking to persuade him to use examples from history. FAB hereby asks the Commission to draw some lessons from what is occasionally a sadly ruthless American economic development history. Analogies to what LPTV businesses can expect could be drawn to the plight of Indian Removal Act of 1830s. See [http://en.wikipedia.org/wiki/Indian\\_Removal\\_Act](http://en.wikipedia.org/wiki/Indian_Removal_Act) (last visited November 22, 2014). While LPTV owners are not facing the cruel physical and human life-or-death taking that occurred during the infamous Trail of Tears, thousands of LPTV broadcast entrepreneurs who have invested years and family fortunes in free over-the-air broadcasting will face the death of their stations. FAB sees some resemblance in the actions of the Commission to the darker side of President Andrew Jackson who history has perhaps proven was excessive in use of force against those too weak to fight back against the injustice. FAB also notes, however, some hope in there being an honest Henry Knox in the process ([http://en.wikipedia.org/wiki/Henry\\_Knox](http://en.wikipedia.org/wiki/Henry_Knox) (last visited November 22, 2014)), from what FAB has seen from members of Congress to date who are coming to appreciate the mini, high-tech

in order to clear 126 MHz plus a 6 MHz white space reservation, for a total of 132 MHz, forces free over-the-air broadcast services to be squeezed in below channel 30 with little to no space left for LPTV in populated areas. Once the spectrum is purchased by the big wireless carriers, it will never be recovered again, leaving a trail of uncompensated former LPTV small business broadcasters in its wake.<sup>11</sup> FAB believes Congress never intended such a crushing of small broadcasters very much akin to a "Wireless *Kelo*." To minimize the adverse impact and avoid the prospect of additional appellate litigation over its auction design and discretion, the Commission must not take more spectrum to sell in the forward auction than is offered by broadcasters in the reverse auction.

FAB is aware certain Commission and Congressional staffers indicated to the Congressional Budget Office and others, and repeated by CTIA in its Opposition, that "LPTV

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"trail of tears" which the Commission has planned for LPTV. In the end, CTIA is really asking on behalf of all those coveting a massive taking to rely on the Spectrum Act as if it is a kind of Discovery Doctrine (go to: [http://en.wikipedia.org/wiki/Discovery\\_doctrine](http://en.wikipedia.org/wiki/Discovery_doctrine) (last visited November 22, 2014)), through which the spectrum privileged and cash-flow powerful hope the Commission will bludgeon bona fide licensed LPTV incumbents. FAB asks the Commission to reconsider and not make Spectrum Act implementation another excessive and unseemly taking in U.S. economic history. Ample symbolism and analogies can be drawn here regarding legitimate license expectancy rights, looming takings, and repeated forced-march relocations by the Commission of an entire industry since 2008. Or for that matter, perhaps the Commission might see similarity to Hetch Hetchy, yet in the case of LPTV without any iota or cent of just compensation. Go to: [http://en.wikipedia.org/wiki/Hetch\\_Hetchy\\_Valley](http://en.wikipedia.org/wiki/Hetch_Hetchy_Valley) (last visited November 22, 2014).

<sup>11</sup> Experts have estimated that current incentive auction design will saddle the LPTV industry with \$1 Billion in unreimbursed relocation expenses. See *Auction-Displaced LPTV Costs Could Reach \$1 Billion*, TVTechnology, November 20, 2014, available at <http://www.tvtechnology.com/guest-commentary/0123/auction-displaced-lptv-costs-could-reach-billion/273183> (last visited November 22, 2014); *TV Spectrum Sellers Say TVStudy Shortchanges LPTVs*, TVTechnology, November 3, 2014, available at <http://www.tvtechnology.com/article/tv-spectrum-sellers-say-tvstudy-shortchanges-lptvs/273121> (last visited November 22, 2014).

has no rights, since they are secondary.”<sup>12</sup> FAB believes there is growing consensus that such a position cannot withstand due process scrutiny. Courts rely on the law as embodied in the Communications Act, the Spectrum Act, the Administrative Procedures Act, the Regulatory Flexibility Act, as well as on Congressional intent and longstanding settled Commission rules and licensing procedures. In the interests of transparency, due process, and development of a complete record, FAB requests that the Commission immediately disclose the true magnitude of the planned LPTV broadcast industry dismantlement, so that all may understand the *Kelo*-like implications now, not after a black-box, lickety-split auction is run as fast as possible.

### **III. FAB Urges the FCC To Disclose Promptly its Transmittal to the SBA’s Chief Counsel for Advocacy including Work Product in order to Comply with Two Presidential Executive Orders Regarding Benefit-Cost and Takings Analyses.**

Although the Commission as an independent agency is not obliged to follow Executive Orders,<sup>13</sup> the Small Business Administration (“SBA”) most certainly is. Under its statutory oversight authority, the SBA needs to evaluate a benefit-cost analysis on LPTV auction participation and unreimbursed relocation expenses, as well as an analysis of potential takings, as part of its Regulatory Flexibility Act stewardship, and consistent with President Obama’s

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<sup>12</sup> See FAB Ex Parte Comments filed May 5, 2014, at p. 8. CTIA Opposition at pp. 19-20.

<sup>13</sup> Nevertheless, President Obama’s Executive Order 13579, dated July 11, 2011 (available at <https://www.sba.gov/sites/default/files/13regflx.pdf> (last visited November 22, 2014), Appendix F), encourages independent agencies to comply with President Obama’s Executive Order to produce a “Benefit-Cost Analysis” consistent with Executive Order 13563, available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf> (last visited November 22, 2014).

Executive Order # 13563 on January 18, 2011,<sup>14</sup> and President Reagan’s Executive Order #12630 on March 15, 1988.<sup>15</sup>

FAB has yet to see the Commission’s transmittal letters forwarding its Initial and Final Regulatory Flexibility Analysis work product to the SBA’s Counsel for Advocacy as set forth in the *Report and Order*,<sup>16</sup> even though more than 90 days have elapsed since the release of the *Report and Order*. The Commission needs to enter into the Docket 12-268 all required statutory documents that have been presented to the SBA.

**IV. Neither Google/Microsoft nor WISPA Deny that Spectrum Not Needed to Mitigate Interference Should Not Be Used by the FCC to Create a New Service Block Outside the FCC’s Preexisting Statutory Auction Responsibilities, which the Spectrum Act Does Not Trump.**

Google/Microsoft and WISPA do not refute that the Commission in the *Report and Order* is poised to use guard bands in a manner outside their normal interference-based definition, nor that the value of 10 MHz squirreled away for white space devices and additional “remainder” spectrum could well approach \$4.5 billion or more in lost auction revenues.<sup>17</sup> The ongoing WCS-3 auction may prove the blatant giveaway is even larger. FAB cautions the

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<sup>14</sup> *Id.*

<sup>15</sup> President Reagan’s Order to produce a “Taking Analysis” to comport with EO# 12630, available at <http://www.archives.gov/federal-register/codification/executive-order/12630.html> (last visited November 22, 2014).

<sup>16</sup> Report and Order, at p. 329 (para. 815) and p. 401 (para. 65).

<sup>17</sup> The Greenhill “Pitch Book” at page 10 assumes that the forward auction of 100 MHz nationwide will produce \$45 billion in revenue, meaning that a 10 MHz block will generate \$4.5 billion, which is more than three times (3x) the less desirable H-block revenues FAB cited two weeks before release of the Pitch Book in FAB’s Petition at page 8. Indeed, valuations of the LPTV taking are going up.

Commission not to redefine the Guard Band so that it forsakes its Section 309(j) responsibility to sell spectrum, not give it away.<sup>18</sup>

FAB notices that as of September 30, 2014 Google had ready cash and equivalents on hand of \$62 billion,<sup>19</sup> and Microsoft had ready cash and equivalents of \$89 billion.<sup>20</sup> These pools of cash exclude their massive borrowing power to invest in spectrum. Between the two of them, they possess over three times the entire expected auction revenues. Thus, their clamor for free spectrum on the backs of legitimate bona fide, largely small-business LPTV licensees seems more than a bit greedy to FAB.

Conclusion: FAB stands by its Petition and urges the Commission to enter the late-released Greenhill “Pitch Book” into the record of this proceeding, including its certainly preexisting underlying modeling of the residual impacts on LPTV broadcasters. FAB further requests that the Commission now disclose all transmittals to date to the SBA under its formal Regulatory Flexibility Act statutory reporting responsibilities, including a benefit-cost analysis

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<sup>18</sup> Section 309(j) of the Communications Act, as amended, 47 U.S.C. Sec. 309(j).

<sup>19</sup> Go to <https://investor.google.com/financial/tables.html> (last visited November 22, 2014).

<sup>20</sup> Go to <http://www.microsoft.com/Investor/EarningsAndFinancials/Financials/FY15/Q1/BalanceSheets.aspx> (last visited November 22, 2014).

and a separate takings analysis FAB hopes the SBA saw fit to request, if it has not yet received these from the Commission, so that SBA can fulfill its Executive Branch and statutory oversight responsibilities.<sup>21</sup>

Respectfully submitted,

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<sup>21</sup> FAB also wishes to correct Footnote 22 in its Petition to reflect the middle initial is “D” in John D. Rockefeller’s name.