

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

In the Matter of	)	
	)	
Amendment of Parts 73 and 74 of the	)	MB Docket No. 03-185
Commission's Rules to Establish Rules for	)	
Digital Low Power Television and Television	)	
Translator Stations	)	
	)	
Expanding the Economic and Innovation	)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive	)	
Auctions	)	
	)	
Amendment of Part 15 of the Commission's	)	ET Docket No. 14-175
Rules to Eliminate the Analog Tuner	)	
Requirement	)	

To: The Commission

**COMMENTS OF FREE ACCESS & BROADCAST TELEMEDIA, LLC**

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## Summary

Free Access & Broadcast Telemedia, LLC (“FAB”) respectfully requests that the FCC use this 3<sup>rd</sup> *NPRM* to revisit and consider new approaches to protect, not lethally damage, what the FCC and Congress have affirmed is an important entrepreneurial segment of the American telecommunications industry – LPTV. The FCC specifically invited new approaches in this 3<sup>rd</sup> *NPRM*, as well as comment on its proposals for “LPTV Channel Sharing” and the wholly new creation of licensed Digital Replacement Translators (“DRTs”).

In its Comments FAB offers the following:

- I. LPTV should be included in the incentive reverse auction, an option the FCC acknowledge is possible in initial *NPRM*, but has not yet substantively addressed;
- II. All commenters require more information in order to offer new benefit-cost approaches, as specifically requested in this 3<sup>rd</sup> *NPRM*. The Commission needs to release the information regarding the FCC’s own analysis that gave rise to investment banking representations being marketed on behalf the U.S. Government;
- III. The FCC should not sell more spectrum in the forward auction than is purchased in the reverse auction or already vacant, until all current LPTVs are repacked;
- IV. The channel sharing proposal is not a solution but rather imposes additional damage to thousands of existing LPTV licensees;
- V. The proposed Digital Replacement Transmitters further lower the status of existing LPTV licensees, and cast more uncertainties on the ability of displaced

LPTV stations to find an available channel after the rebanding of TV broadcast spectrum;

- VI. If auction eligibility and repack assurances are not affirmed, inverse condemnation claims are possible.

The Commission should therefore correct the off-course trajectory it is placing the auction and successful reallocation of the TV spectrum band on by revising the auction and spectrum repacking plans to protect legitimate, and statutorily protected, interests of LPTV licensees.

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Free Access & Broadcast Telemedia, LLC (“FAB” or “Free Access”), d/b/a FAB telemedia,<sup>1</sup> by counsel, respectfully submits these Comments in the above-captioned proceedings in response to the *Third Notice of Proposed Rulemaking*.<sup>2</sup> FAB continues to add its voice in

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<sup>1</sup> FAB is an investor in LPTV stations around the country, and its investments will be hurt by FCC action that proposes to displace LPTV stations in the upcoming repacking of the television band. It is already harmed by the ongoing rulemaking that has placed an added chill on investment in existing LPTV stations. Meanwhile, the Commission continues to restrict service innovation that could be afforded by spectrum flexibility which every other wireless licensee enjoys, so long as they do not interfere with others. FAB is committed to providing America’s substantial number of local, underserved, and often overlooked consumers with free residential and mobile services, both video and interactive, on an ad-supported basis, without subscription fees and related obligations. The kinds of freedoms to innovate and grow which are sought by FAB and other small-business LPTV licensees are precisely the proven way growth and innovations occur in the United States. FAB notes the proverbial Silicon Valley garages that fuel the U.S. economy in many ways are not so encumbered by crushing rulemakings and choking regulatory restrictions on when and how technical innovations may take place.

<sup>2</sup> FCC 14-151, released October 10, 2014 (“3rd NPRM”), available at <http://apps.fcc.gov/ecfs/document/view?id=60000976624>.

support of the future of low power television stations (“LPTV”) so that they can operate in an economics-based marketplace offering a diversity of media voices.

The Commission should not just assume that it may effectively extinguish this valuable, free over-the-air broadcast service as part of its implementation of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”). The Spectrum Act was designed so that licensees could voluntarily reallocate spectrum via an innovative market-based auction system. The Commission should not exclude LPTV from this market-based reallocation process. It should not use the heavy hand of government to take away LPTV licenses for the benefit of other new services without consideration. The Commission’s current trajectory, however, will likely result in significant disruption of LPTV businesses which may well give rise to inverse condemnation claims in the federal courts.

**I. Paragraph 59 of the 3<sup>rd</sup> NPRM supports FAB’s requests that the FCC conduct a benefit-cost analysis regarding inviting LPTV into the auction.**

The 3<sup>rd</sup> NPRM specifically solicited comment on “additional measures we should consider in order to mitigate the impact of the incentive auction on LPTV and TV translator stations and to help preserve the important services they provide,” including “any perceived benefits and disadvantages of the measures advocated.”<sup>3</sup>

FAB finds it ironic that the Commission now seeks benefit-disadvantages analysis (*i.e.*, benefit-cost) for every recommendation. FAB has asked the Commission to employ that same analysis when it sought auction participation for LPTV stations after emphasizing that the Commission itself said it is empowered to allow LPTV to participate in the auction.<sup>4</sup> To date,

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<sup>3</sup> 3<sup>rd</sup> NPRM at 23.

<sup>4</sup> See FAB’s Written Ex Parte Comments, filed May 5, 2014, available at <http://apps.fcc.gov/ecfs/document/view?id=7521107089>. In *Expanding the Economic and*

the Commission has not even acknowledged FAB's requests, on the very point the Commission admitted is a possible policy alternative within its powers. FAB still awaits word that the Commission has conducted (or will now conduct) such a cost-benefit analysis and will release the results. Otherwise, the Commission's basic conclusion that LPTV will not be invited to participate in the auction is arbitrary and capricious after raising that opportunity as a policy alternative and then dismissing it without analysis.

**II. Analysis of the benefit-cost of allowing LPTV in the auction is impossible for FAB to begin to conduct, yet is necessary to conform to the requirements of paragraph 59, without further disclosure by the Commission of analyses it used to create the Greenhill Pitch Book.**

In order to size the magnitude of the impacts of clearing 132 MHz of spectrum without allowing LPTV to participate in the auction, and in turn to consider the alternative benefits and disadvantages of doing so (*i.e.*, benefit-cost), as the Commission requested in paragraph 59, FAB needs access to the quantified outputs the FCC already surely has in hand. This analysis enabled

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*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, available at <http://apps.fcc.gov/ecfs/document/view?id=7022130273>. 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* Comments, referenced above, which also included a round of meetings at the Commission, about the Initial Regulatory Flexibility Analysis (“IRFA”), which demonstrated that the Commission has the authority to invite LPTV to the incentive auction. In FAB's Written *Ex Parte* Comment, note 3, FAB specifically cited multiple references that requested LPTVs auction participation and urged the Commission to conduct a benefit-cost analysis akin to the “benefit-disadvantages” requirement required by the Commission in the *3rd NPRM* in paragraph 59 and in part also based on the Commission's IRFA. The glaring need for such an analysis was raised in 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.

the Commission to provide the data that lead to the creation of the detailed investment banking report entitled *Incentive Auction Opportunities for Broadcasters: Prepared by the Federal Communications Commission by Greenhill* (the “Pitch Book”), which has been marketed to thousands of broadcasters nationwide.<sup>5</sup>

With a high degree of precision, the Pitch Book analysis is sorted by over 200 Designated Market Areas (“DMAs”) and represents to auction-eligible stations specific prices in order to clear fully 60% of all US broadcast spectrum nationwide (a full 132 MHz). FAB urges the Commission again to publicly release the quantified outputs the FCC provided to Greenhill in developing the Pitch Book.<sup>6</sup>

In denying FAB’s Motion to Toll the comment period,<sup>7</sup> the Commission made three points. First, in paragraph 6, the Commission stated “[w]hat Free Access seems to be seeking is *Greenhill Report* data that demonstrates the impact of the incentive auction on LPTV and TV translator stations.” This is manifestly correct. FAB needs this access to assess impacts and alternatives including but not limited to an enhanced benefit-cost of auction participation. Access in a free society allows assessment that can almost always lead to improved and creative alternatives in precisely the benefit-disadvantage format the FCC requires. This is why FAB urges the Commission to release the data.

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<sup>5</sup> *Incentive Auction Opportunities for Broadcasters: Prepared by the Federal Communications Commission by Greenhill*, released its October 1, 2014. Available at: <http://apps.fcc.gov/ecfs/document/view?id=60001012317>.

<sup>6</sup> After three requests filed by Free Access (which is the Commission’s name for FAB), on January 8, 2015, the Commission denied FAB access to the assumptions and corollary outputs of the analysis that gave rise to the production of the detailed Pitch Book representations. See [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0108/DA-15-31A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0108/DA-15-31A1.pdf)

<sup>7</sup> See FAB’s Motion to Toll the Comment and Reply Comment Deadlines (Dec. 22, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=60001010739>.

Second, in paragraph 6, the Commission states:

The Greenhill Report, however, did not involve an analysis of LPTV and TV translator stations, but instead was crafted to explain the business opportunities presented by the reverse auction to eligible broadcasters and provide maximum and median high-end estimated potential auction compensation values for full power and Class A stations in each DMA. In estimating potential auction compensation values, the Commission considered a variety of assumptions and factors regarding potential net forward auction proceeds, a spectrum clearing target, auction-eligible stations' individual adjusted coverage population, and other matters.

FAB realizes all this but, nevertheless, in order to clear 132 MHz at very specific prices by DMA market area, there are indeed assumptions about LPTV and outputs of stations remaining on air by DMA, that can generate \$37 billion in reverse auction purchases and in turn generate \$45 billion in forward sales resulting in a loss of 60% of the US broadcasting spectrum. This obviously is a locked-down analysis that certainly must also reveal spectrum clearing results by DMA or Partial Economic Area ("PEA") in order to report out at the DMA-specific reverse prices generating U.S. Government purchase of \$37 billion.

The Greenhill bankers must surely have verified with their U.S. Government client the representations being made that were the result of a holistic analysis that tied off the reverse with the forward financials in order to make representations by DMA. To not do so could put them in jeopardy of facing legal actions by broadcasters who may feel misrepresentations were made by agents of the Commission. FAB is confident the impacts requested are readily at hand, and the FCC does not deny it in its denial of FAB's Motion. FAB never stated the impacts are revealed in the Greenhill Report, but the impacts surely are embedded in the locked-down analysis that gave rise to the Greenhill Pitch Book representations.<sup>8</sup>

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<sup>8</sup> Stated another way, while the IRS normally does not request to see the receipts and the worksheets that give rise to a completed 1040 Form, those must surely exist and must be retained in order to receive a tax credit. The Greenhill Pitch Book is a kind of 1040 Form being filed with the U.S. public at large and we taxpayers who fund the FCC respectfully request to see the

The FCC is making sweeping, and potentially misleading, financial representations to squeeze the TV band down by 60%. FAB continues to request access to the worksheets in order to offer creative alternatives the FCC is specifically requesting – and knows it must – for purposes of the Administrative Procedures Act (“APA”) and the Regulatory Flexibility Act (“RFA”). Releasing the outputs requested by Free Access will allow all to assess and weigh the policy impacts and other creative alternatives.

Finally, in paragraph 7, the FCC concluded that “to the extent Free Access seeks access to *any data* (emphasis added) demonstrating the impact of the incentive auction on LPTV stations, the issue of such impact, which has been raised in the docket of the incentive auction proceeding, will be considered at a future date.” This statement mystifies FAB. The *Report and Order* has already been issued. A mere 15 days after Petitions for Reconsideration were due, the Commission released its first economic pricing analysis in the form of the Pitch Book, but only a small part. Now we are embarked on yet another 3<sup>rd</sup> NPRM, and the Commission is stating that the analysis it already has now may be (but not certainly will be) disclosed, and only *after* this added public comment period and perhaps the entire rulemaking is concluded. FAB urges the Commission to not continue on the course of syncoated information release after official decisions have already been made without providing analytical benefit-disadvantage or benefit-cost rationale as required by the Commission itself, the APA, and the RFA.

The underlying data for the Greenhill Report contains vital informational and analytical outputs which can help everyone, including the Commission itself, once it is honestly disclosed.

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receipts and the worksheets now regarding this historic U.S. Governmental “deal of the Century” which is impacting many segments of the vital free broadcasting industry, not just LPTV. FAB hereby resubmits its formal request for the information it needs, in order to offer more detailed comments in the analysis form now required by, but not yet of, the Commission itself, as an APPENDIX to these comments.

The Commission concludes in paragraph 6 stating: “Thus, we do not see the relevance of the *Greenhill Report* to potential measures the Commission can take “to mitigate the impact of the incentive auction on LPTV and TV translator stations and to help preserve the important services they provide.” To be clear, FAB seeks not the Greenhill Report, but the very specific and locked-down outputs that gave rise to it, in order for the U.S. Government to claim to its shareholders (the American public) that 132 MHz of broadcast spectrum used to provide free broadcasting services could be cleared for sale to private parties with such precision by DMA.

FAB is willing to work with the Commission and its economic analysts to modify FAB’s information request, or to request that the U.S. Small Business Administration (SBA) assist the FCC in sorting the analysis outputs by DMA or PEA. FAB is confident an information sort by DMA should be almost effortless, with or without the SBA’s assistance.

**III. The FCC must not sell in the forward auction more than is offered in the reverse (or already vacant) unless and until LPTV is repacked, thus preserving competition, entrepreneurship, and a free market for innovation going forward.**

FAB has previously implored the Commission not to sell more spectrum in the forward auction than is bought in the reverse auction or already vacant until LPTV is repacked.<sup>9</sup> Yet the Commission now is picking winners and losers in media markets, far beyond what Congress *ever*

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<sup>9</sup> The arguments for giving LPTV consideration due to its longstanding right of displacement and its licensed status secondary only to other full power and Class A television stations (but not secondary to myriad new entrants license aspirants or unlicensed services) will not be repeated at length here. Since FAB has received no response from the FCC on its Petition for Reconsideration due to omission of this discussion in the *Report & Order*, for the record, nevertheless, see FAB’s Petition for Reconsideration, filed September 15, 2014, at page 5, available at <http://apps.fcc.gov/ecfs/document/view?id=7522677333> and FAB’s Reply Comments filed March 12, 2013, in Docket 12-268 at page 4, available at <http://apps.fcc.gov/ecfs/document/view?id=7022130273>

envisioned.<sup>10</sup> Rather, implementation of Spectrum Act is supposed to be a market-driven auction consistent with the overriding requirements of the Communications Act of 1934 for equitable treatment.<sup>11</sup>

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<sup>10</sup> The following is excerpted from a July 24, 2014, House Commerce Communications Subcommittee hearing, as reported by Warren Communications' *Communications Daily* on July 25, 2014:

. . . While Harold Feld, senior vice president at Public Knowledge, told the lawmakers that he supported the E-LABEL and Anti-Spoofing bills, he said his group cannot support the LPTV and TV Translator Act. He said the legislation would add "uncertainty" to the FCC's already complex task of setting up the broadcast incentive auction.

"If Congress passes the proposed legislation, it will introduce significant delay and uncertainty into the auction process," Mr. Feld said. "The FCC will be forced to consider how the new law impacts the repacking process. Despite clear direction that the proposed bill does not alter the rights of full power broadcasters and Class As, the FCC will nevertheless need to entertain comments and arguments from stakeholders on how the new statutory language does or does not alter the FCC's previous determinations or influence how the FCC should conduct the repacking.

Subcommittee Chairman Greg Walden (R., Ore.) told Mr. (Harold) Feld, "You have far more confidence in the FCC than I do."

"My message here, and I think it's shared by Mr. Barton, is that I don't want a runaway FCC that simply squishes [LPTV] because they can and takes them out," Rep. Walden said. "I'm also not going to give them full power authority, because they didn't have that to begin with. I think you're over the top in this notion that it's going to blow up the whole auction."

Rep. Walden (also) said he is "seeing some really bad behavior from the top down, where Republican Commissioners are kept out of the loop."

"In places like my district, these translators are really important, and I want to send a clear message, without screwing up the auction, that they need to be thoughtful about this, whether it's in an urban area or a rural area," Rep. Walden said. "You can have a band plan that just squishes [them] out just for the sake of getting more spectrum for the big companies that want to buy it." [end]

For the full video of the same House Communications subcommittee hearing go to <http://energycommerce.house.gov/hearing/legislative-hearing-anti-spoofing-act-lptv-and-translator-act-and-e-label-act> at minute mark 36:00 for the dialogue above, plus minute 43:00 where Congresswoman Eshoo joins in to say she also does not want to see LPTV "squashed." (footnote continued)

The Commission is now engaged in actively creating four significant new licensed and unlicensed services to sit atop and crush LPTV's existing, bona fide license rights holders which will most likely be the death knell of LPTV. Notably, as FAB has argued in its Petition for Reconsideration, the FCC is creating arbitrary "guard bands" using a new phenomenon called "remainder spectrum" in order to gift spectrum to unlicensed services. The Commission should cease the unauthorized grant of "white space" comprising 6 MHz in every market which the Commission says will somehow be available nationwide post-auction based on its non-disclosed analyses, with no justification whatsoever of the impact on licensed LPTV in clearing an entire channel in every market for unlicensed use. Both of these points alone could amount to gifts of 10 MHz or more nationwide, amounting to over \$4.5 billion denied the U.S. Treasury based on recent auction comparables and at the lifeblood expense of LPTV license value.<sup>12</sup>

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Also, during an unrelated C-SPAN broadcast on Monday, October 6, 2014, former House Commerce Committee Chairman and current House Communications Subcommittee Member Mr. Joe Barton mentioned his concerns about LPTV, as well as, by name, ranking Democrat Ms. Anna Eshoo, subcommittee chair Mr. Greg Walden, and full House Commerce Committee chair Mr. Fred Upton regarding their shared concerns on LPTV. Go to <http://www.c-span.org/video/?321925-1/communicators-technology-legislation> and go to minute marks 7:00-10:00.

<sup>11</sup> See, e.g., *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); see also *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard."). In the case of LPTV license holders, "similarly situated" means before the Congress added the new incentives. In enacting the Spectrum Act, Congress took no existing LPTV rights away whatsoever, nor erased settled FCC rules and procedures.

<sup>12</sup> The Greenhill Pitch Book, available at <http://apps.fcc.gov/ecfs/document/view?id=60001012317>, 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. Indeed, valuations of the current ongoing AWS auction for 10 MHz are even higher.

While these giveaways seemingly may serve beneficial goals for the Commission to advance, they are well outside the scope of the Spectrum Act and the Commission's Section 309(j) obligations<sup>13</sup> and, thus, will not survive judicial review. The Commission needs to work with Congress outside of this auction rulemaking to achieve those goals, or to let the marketplace achieve them without regulatory overreach.

To that end, FAB again requests that the FCC assure space for LPTV stations in the repacking of all television stations, that the repacking process be concluded and the results announced transparently prior to the forward auction, and that the Commission explicitly state it will not sell more spectrum in the forward auction than Congress intended via purchase in the reverse auction. Congress never stated LPTV was explicitly excluded from the auction or excluded from any repack protections as asserted in the 3<sup>rd</sup> NPRM. The FCC has the authority.

Indeed, LPTV was explicitly referenced and protected in the Spectrum Act. Section 6403(b) of the Spectrum Act governs the FCC's reorganization of all licensed Broadcast TV Spectrum in order ultimately to carry out the forward auction. Subsection (5) of Section 6403(b) is explicit that in implementing the statute, the Commission must not alter the spectrum usage rights of LPTV stations:

LOW-POWER TELEVISION USAGE RIGHTS.—Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.<sup>14</sup>

Yet repeated actions by the Commission in this proceeding to carve out new services, seize spectrum used by all broadcasters for unlicensed service, and squirrel away precious

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<sup>13</sup> 47 U.S.C. § 309(j).

<sup>14</sup> See also FAB's Reply Comment filed March 12, 2013 in response to the 1<sup>st</sup> NPRM available at <http://apps.fcc.gov/ecfs/document/view?id=7022130273>.

spectrum for wholly new reasons unrelated to Congress' mandates in the Spectrum Act do not comport with LPTV's existing licensed rights versus *unlicensed* services that are subordinate and tertiary rights to LPTV. Nor do the Commission's actions comport with the settled right of finding a displacement home vis á vis other TV stations, not every new class of licensed or unlicensed services the FCC now creates at the expense of existing LPTV license rights holders.

Rather, the Commission should rededicate itself to preserving LPTV as a form of entrepreneurship to be free to innovate going forward. It is true some LPTV operators may wish to remain small and serve only their local communities. Others may in fact have big plans, if only granted technical flexibility and to be assured a place without constant possible shuffling or existential threats. The Commission in other recent proceedings publically frets about consolidations, mergers, and market power increasing at the top of the American telecommunications pyramid. Yet it is small businesses, and their diversity of innovation and business plans, that allow small companies to grow out of the garage into market leaders.

Consequently, the Commission should not sell more than is offered up in order to unleash LPTV post auction, and to allow stations finally to offer two way services, to merge, sublicense, or even sell to other entities eager to convert the spectrum to white space services, especially in key markets. The Commission need not plan or force any of these market-based decisions. It merely needs, respectfully, to get out of the way and avoid tipping the economic scales in favor of a few large privileged oligarchs over small businesses.

**IV. The centerpiece of the 3<sup>rd</sup> NPRM, Channel Sharing, provides almost zero benefits in light of the looming issues regarding repacking, is overly complicated and excessively costly for LPTV.**

Channel sharing for auction-eligible operators makes sense, especially where they would like to "have some cake (but not all) and eat it too." Where preserving cable carriage makes real

sense and over-the air broadcasting is not a business case priority due to cable carriage, some broadcasters may choose to limit their spectrum usage, sell some off, and share to retain cable rights and total viewers, all before going into the auction as a business opportunity. For LPTV, however, channel sharing offers few if any cognizable benefits.

With very limited exceptions, LPTV has no cable carriage right.<sup>15</sup> Its wireless business case is everything going forward. Most of the operators FAB is working with are already using all their sub channels right now. The rest intend to do so to drive revenue, once they are allowed to innovate and use the ATSC 3.0 standard of other two-way technologies. The channel sharing scenario for LPTV would create little ghettos of entrepreneurs who, after most spectrum is sold out from under them, will somehow desperately try to find a place to go.

This is not sustainable. Consequently, it is nearly nonsensical for the Commission to propose LPTV channel sharing before deciding the far more important issues raised by FAB above and on reconsideration. In addition, even if FAB is wrong and there may be some slim value to enter into a sharing agreement, the legal costs will be likely prohibitive. In this pre-auction period, none of the big operators has announced templates that may work. Nor has the Commission offered one. Small businesses like LPTV could rely on the Commission to provide a template agreement and assistance to execute these, but such offers tellingly are absent in the NPRM, almost as if the FCC intends to layer on more complexity and more timing uncertainty,

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<sup>15</sup> 47 U.S.C. § 534(h)(2). A low power television station is qualified for must carry only if certain criteria are met. Among the most limiting are that the LPTV station must be located outside the largest 160 Metropolitan Statistical Areas, the population of its community of license cannot exceed 35,000, and no other full power TV station can be licensed to any other community in the same county. *Id.* Once all the criteria to be “qualified” for must carry have been met, other limits come into play depending on the size of the cable system, as well as limits on the maximum number of one or two qualified LPTV stations that must be carried on a particular system when all other qualifications have been met. See 47 U.S.C. § 534(b)(2)(A) and § 534(c). Only a few LPTV stations can run that gauntlet to successfully demonstrate must carry eligibility.

not to ameliorate any of it. FAB believes the courts will see through this complex “non-benefit benefit” which is the only bone the Commission is offering in the entire NPRM and view it for what it is: another level of regulatory injury.

**V. Yet another brand new service creation of “Digital Replacement Translators” is now envisioned in this NPRM that also is targeted to receive immediate and higher priority over LPTV in the repack which will further damage LPTV licensees, if the issue of selling more spectrum than is offered is not addressed first.**

The proposed creation of a new class of Digital Replacement Translators with higher priority than LPTV will cause LPTV licensees even *greater* likelihood of finding no future home. Providing a new class of translators with greater rights than existing LPTV stations in the repack aggravates the environment for inverse condemnation discussed below.

**VI. If auction eligibility or repack protections are not granted, then calculable damages in the form of a regulatory taking will ripen and likely attract inverse condemnation claims.**

Without a course correction, the Commission’s current philosophy to ignore LPTVs in the auction and repacking will result in a regulatory taking of their licenses. In *Lingle v. Chevron U.S.A. Inc.*,<sup>16</sup> the Supreme Court reaffirmed “that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories . . . by alleging a “physical” taking, a *Lucas*-type “total regulatory taking,”<sup>[17]</sup> a *Penn Central* taking,<sup>[18]</sup> or a land-use exaction violating the standards set forth in *Nollan and Dolan*.”<sup>19</sup>

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<sup>16</sup> 544 U.S. 528 (2005).

<sup>17</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Court held that regulatory actions will be deemed *per se* takings requiring just compensation when the regulations completely deprive the owner of “all economically beneficial us[e]” of the property. 505 U.S. at 1019 (emphasis in original).

<sup>18</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The Court in *Lingle*, 544 U.S. at 538-39, summarized the *Penn Central* case as follows: “The Court in *Penn Central*

The record in this proceeding, even though incomplete today, already demonstrates the intent to take away many LPTV license rights through regulatory action.<sup>20</sup> This is especially true where new services and new applicants seek to usurp or become primary at the expense of an already valid licensee. All this is even more egregious with new carve-outs of unlicensed spectrum that diminish or hamper LPTV license rights and ability to find a new channel on which to operate through filing a displacement application.

This is why addressing Item III above relating to not selling more spectrum in the forward auction than is offered in the reverse auction is so critical for the FCC to adopt. If FAB's requested Items I and/or III above are not addressed, the only uncertainty is how vast, if

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acknowledged that it had hitherto been 'unable to develop any 'set formula' for evaluating regulatory takings claims, but identified 'several factors that have particular significance.' Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' In addition, the 'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'—may be relevant in discerning whether a taking has occurred. *Ibid.* The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules" (citations omitted).

<sup>19</sup> *Lingle*, 544 U.S. at 548.

<sup>20</sup> To conclude that spectrum rights holders cannot be subject to a "taking" as they have no property interest in spectrum would be a knee-jerk response; the lack of a property interest does not at all preclude the constitutional conclusion that an economic taking would amount to an unconstitutional taking without just compensation. For instance, in [\*Valley Bank and Trust Co. v. Spectrum Scan, LLC\*](#) (*In re Tracy Broadcasting Corp.*), No. 11-1453, 2012 WL 4874485 (10<sup>th</sup> Cir. Oct. 16, 2010) slip op. at 7-11, the Tenth Circuit analyzed the private rights and interests of FCC licensees to create value in their use of spectrum balanced with the government's public interest right to consent to assignments and transfers as required by the Communications Act. See also *FCC v. Nextwave Personal Communications Inc.*, 537 U.S. 293 (2003) (FCC itself took a security interest in auctioned spectrum; Court ruled that auction payments were enforceable obligations to pay within the meaning of debt and thus subject to the Bankruptcy Act). As such, the private economic rights that attach and businesses that are built through the use of licenses would be taken away by the FCC's proposals to give LPTV no just compensation if no channels can be found for the LPTV stations after the full service and Class A TV stations are repacked.

not total, extinguishment of the LPTV industry will be in key U.S. markets. This is why it is so important for the FCC to disclose now the scope and sweep and tradeoffs involved in extinguishing 40%-60% of free over-the-air broadcasting to the American public nationwide in order to privatize the spectrum permanently for generations to come for a handful of oligopoly companies. In fact, the Commission's construct of offering LPTV channel sharing will clearly be viewed by the federal courts as a veneer to gloss over the otherwise effective ouster of LPTV license rights.<sup>21</sup>

The only solution seemingly offered by the Commission to prevent the regulatory taking of all economic value ("beneficial use) of LPTV licenses is complex and costly channel sharing. Unfortunately, no business case exists for a licensee that has been denied must carry. Use of the full 6 MHz channel is important to future TV licensees of all classes if technical flexibility is allowed or multiple channels are offered to the public free or on a subscription basis. Channel sharing severely reduces that potential. Furthermore, in the case of LPTV channel sharing is

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<sup>21</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in which a regulatory taking is considered to occur when the regulation of the property's use is so severe that it goes "too far," as Justice Holmes put it, and deprives the owner of the property's value, utility or marketability, denying him or her the benefits of property ownership thus accomplishing a constitutionally forbidden de facto taking without compensation. See also *Nollan v. California Coastal Commission and Dolan v. City of Tigard*, 483 U.S. 825 (1987), where the Supreme Court articulated three situations in which inverse condemnation occurs. These are (a) physical seizure or occupation, (b) the reduction of the regulated property's utility or value to such an extent that it is no longer capable of economically viable use, and (c) where as a precondition to the issuance of a permit, the government demands that the regulated owner convey property to the government even though there is no rational nexus between the owner's activity's impact on public resources, and the owner's proposed regulated use, or where the extent of the exaction is not proportional to the effect of the owner's. The burden of the incentive auction regulations will fall squarely on LPTV – they may not have a hope of running the gauntlet to stay on the air in major markets. The occupation and ultimate seizure of their spectrum, the reduction in the value of LPTV's businesses through the ongoing real threat of extinction with the downsizing of the TV band, and the government's exaction of LPTV's businesses is wholly out of proportion to the benefits conveyed on others resembles the *Nollan* injury.

wholly unlike that being offered to other licensees in this proceeding; it would result in a special, gerrymandered artifice that merely increases the scope of the regulatory taking based on “sharing’s” myriad uncertainties and reduction of available megabits per second remaining to each licensee, as well as introducing new open-ended timing delays. The folly of channel sharing for LPTV cannot be compared equitably to channel sharing for auction eligible stations who are able to participate for compensation, voluntarily. In contrast, for LPTV, the industry is being offered far down the line of uncertainties almost as a public relations device for the FCC to stave off responsibility for striking what nevertheless is a *coup de grace* of its own design.<sup>22</sup>

If the FCC does not find a home for displaced LPTV, the government will face many, serious inverse condemnation claims. The *3rd NPRM* proposals for more regulations and the prospect of new, repeated delays and uncertainties are so onerous, convoluted, and time-gulping in their contingencies and uncertainties that they will now surely make validly-licensed LPTV properties unusable by largely entrepreneurial, small-business station operators for any reasonable or economically viable purpose. The creation in the *3rd NPRM* of a “Digital Replacement Translator” is proof perfect of this constitutional injury with the creation of new services that trump current licensed LPTV operators’ rights. Inverse compensation claims will

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<sup>22</sup> In the *3rd NPRM*, page 2, paragraph 2, the FCC portends it all in saying: “In May 2014, we adopted a *Report and Order* promulgating rules to implement the broadcast television spectrum incentive auction authorized by the Middle Class Tax Relief and Job Creation Act (the “Spectrum Act”). As we recognized in the *Incentive Auction Report and Order*, the auction will potentially displace a significant number of LPTV and TV translator stations. As part of the incentive auction, we will reorganize or “repack” the broadcast television bands in order to free up a portion of the ultra high frequency (UHF) band for new flexible uses. Consistent with the requirements of the Spectrum Act, we will make all reasonable efforts to preserve the coverage area and population served of eligible full power and Class A television stations in the repacking process, but LPTV and TV translator stations will not receive such protection. Accordingly, a significant number of LPTV and TV translator stations may be displaced as a result of the auction or repacking process and required to find a new channel from the smaller number of channels that will remain in the reorganized spectrum or discontinue operations.”

ripen before the 2016/2017 auction payments are due, if they do not stop an auction itself before the FCC redresses the situation. Once filed, those claims will halt the wire transfer or payments to the U.S. Treasury by wireless carriers.

FAB is convinced the LPTV industry will not wait many months post auction to be herded into extinction, via direct taking and by regulatory suffocation, before licensees seek judicial redress for the FCC's regulatory overreaching. Hence, it is better to reveal the scope of impacts now, rather than allow them to fester until just before an auction or immediately in the post-auction but pre-licensing period.

**VII. If auction eligibility or repack protections are not granted, then APA/RFA challenges are also possible.**

FAB also believes the incentive auction rulemaking to date is littered with arbitrary and capricious decisions, however unintentional, in violation of the APA, the Communications Act, the Spectrum Act, and the RFA. Nevertheless, the FCC has time and leeway in this *3rd NPRM* to correct its course and fortify the auction's possible success within the hoped-for timeline.

Specifically, by denying LPTV the straightforward right to participate in the auction, by selling more spectrum in the forward auction than is offered in the reverse auction, by refusing to repack LPTV before more spectrum is sold in the forward auction, by selling vacant spectrum without accommodating LPTV first, by granting new unlicensed uses for vacant spectrum before LPTV has been allotted channels in the re-sized TV band, collectively and individually violates the APA, under which the FCC may not issue a rule that is "arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with law," or unsupported by record evidence and settled FCC licensing procedures and displacement rules.<sup>23</sup> To satisfy its obligations under the APA, the Commission "must examine and consider the relevant data and factors, and articulate a

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<sup>23</sup> 5 U.S.C. § 706(2)(A) & (E).

satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>24</sup> Failure to permit LPTV licensed stations to participate in the auction and a refusal to protect these same stations in repacking continues to run afoul of these requirements. Adding on new levels of licensing complexity such as channel sharing does not ameliorate the other lethal conclusions the FCC already appears to have reached, although Petitions for Reconsideration are outstanding, including FAB’s that was filed because the FCC completely avoided any mention on the record made by FAB and others on those very points.

For the reasons stated above, Free Access & Broadcast Telemedia, LLC respectfully requests that the FCC use this 3<sup>rd</sup> NPRM to take a fresh look at fully including LPTV stations in both the auction and the repacking stage to enable them all to thrive in the future communications landscape.

Respectfully submitted

**FREE ACCESS & BROADCAST  
TELEMEDIA, LLC**

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January 12, 2015

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<sup>24</sup> *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

# FAB

telemedia

December 22, 2014

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: **Request for Greenhill Report to be Placed into 12-268 Docket along with DMA Assumptions as to Auction Participation and Spectrum Clearing**

Dear Ms. Dortch:

Free Access & Broadcast Telemedia LLC (d/b/a FAB telemedia) has twice requested since November 24, 2014, that the Commission place into FCC GN Docket 12-268 (a) the full *Incentive Auction Opportunities for Broadcasters: Prepared by the Federal Communications Commission by Greenhill* (“Greenhill Report”), and (b) the corollary impact results and underlying assumptions for each DMA, as consistent with Appendix A of the Greenhill Report. We consider both sets of material essential to our review and analysis.

To assist the Commission staff in understanding and subsequently fulfilling our request, I have attached to this letter a sample report which we feel can quite easily be extracted for each DMA from the analyses that gave rise to the results and assumptions to clear 132 MHz (126 MHz as stated in the report, plus another 6 MHz the Commission indicated would be available nationwide post-auction for unlicensed whitespace services) included in the Greenhill Report. We ask the Commission to report out the full 132 MHz assumed cleared in each DMA in the format provided in the attachment. We believe the FCC auctions team has analysts who can easily extract these results.

FAB telemedia needs at least two weeks to analyze these results in order to develop possible recommendations consistent with Paragraph 59 in the *Third Notice of Proposed Rulemaking*, FCC 14-151, released October 10, 2014, soliciting comments from the LPTV broadcast industry.

If you have any questions, please contact me through our legal counsel, Melodie Virtue, at [mvirtue@gsblaw.com](mailto:mvirtue@gsblaw.com), or 202-298-2527.

Respectfully,

/s/

Sean M. Patty  
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[sean@fabtelemedia.com](mailto:sean@fabtelemedia.com)

Attachment (1)

## Individual DMA Impact Report Based on Greenhill Outputs

[Sample Report Requested per DMA; 210 Total Reports Requested]

DMA Number: \_\_\_\_\_

DMA Name: \_\_\_\_\_

VIEW A: STATIONS AFFECTED	NO. OF 6-MHz STATIONS				
	Participating in Auction <small>(incl. VHF moves)</small>	Not Moving <small>(stay as is)</small>	<u>Repacked</u>	Stranded (pending displacement)	TOTAL All Stations
AUCTION-ELIGIBLE (at this time)					
Full Power.....	?	?	?	---	?
Class A.....	?	?	?	---	?
AUCTION-INELIGIBLE (at this time)					
LPTV.....	---	?	---	?	?
Translators (if separate).....	---	?	---	?	?
"Ineligible Class As" *.....	---	?	?	---	?
<b>TOTAL NO. OF STATIONS.....</b>	<b>?</b>	<b>?</b>	<b>?</b>	<b>?</b>	<b>?</b>

VIEW B: SPECTRUM CLEARED	NO. OF MHz CLEARED**			
	Cleared via <u>Auction</u>	Already <u>Vacant</u>	Cleared via <u>Repack</u>	TOTAL CLEARED FOR DMA
<b>TOTAL MHz CLEARED**.....</b>	<b>? MHz</b>	<b>? MHz</b>	<b>? MHz</b>	<b>132 MHz***</b>

**NOTES:**

\* Totals to 100 stations -- FCC needs to release these names

\*\* Spectrum cleared per DMA in MHz

\*\*\* Total spectrum cleared per DMA in every market is 132MHz, including the 6MHz also cleared and available for whitespace.

Channel sharing (if assumed in the modeling) can be reported any number of ways so as not to double count; FCC should decide; footnoted cases are acceptable.