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February 12, 2015

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, D.C. 20554

*Re: Expanding the Economic and Innovation Opportunities of Spectrum Through
Incentive Auctions, GN Docket No. 12-268*

*Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital
Low Power Television and Television Translator Stations, MB Docket No. 03-185*

Notice of *ex parte* presentation

Dear Ms. Dortch:

In accordance with FCC Rule 1.1206(b)(2), this letter is submitted to notify you that on February 10, 2015, David J. Mallof, Principal of Free Access & Broadcast Telemedia, LLC (“FAB”), and I met with William T. Lake, Chief of the Media Bureau, and Thomas Reed, Director of the Office of Communications Business Opportunities (“OCBO”) and Daniel Margolis from OCBO. We discussed the following points and provided a copy of the attached memorandum to the meeting participants:

1. OCBO’s current and future role in advocating for small businesses such as LPTV stations to the Commission in the incentive auction proceeding.¹

¹ Mr. Margolis confirmed he began serving in the role of SBA liaison for the above-referenced dockets about a month and a half ago, and that previously, Mr. Gilberto De Jesus, from OCBO, who is now recused, had that responsibility.



2. FAB's December 15, 2014 request, made jointly to FCC Chairman Wheeler and the Chief Counsel for Advocacy of the Small Business Administration, to conduct a benefit-cost analysis of allowing LPTV stations to participate in the auction.

As was requested in that letter, FAB again asked during the meeting that the FCC correct the inaccurate finding in the *1st Report & Order* in Docket 12-268 that no parties raised any issues related to the Initial Regulatory Flexibility Analysis ("IRFA") in the *1st NPRM*. To the contrary, FAB reiterated it had, along with other parties, repeatedly raised IRFA issues, and that no quantification of *any* impacts on LPTV small business was provided in the Final Regulatory Flexibility Analysis. FAB requested that OCBO take this up with Media Bureau Chief Lake and the Incentive Auctions Task force again after the meeting. FAB also repeated its request to receive in writing a copy of the communication(s) to SBA clarifying these points for the record.

3. The need to reveal quantitatively now, not at some later time, that portion of the FCC's modeled aggregate spectrum clearing impacts resulting from the displacement of LPTV stations in over 200 markets (*i.e.*, the scenario(s) which reflect the number of displaced LPTV stations per market that achieve the unified end results flowing from the total spectrum cleared, total reverse auction purchase expenditures anticipated, and forward auction gross revenues targeted).

Information about the scope of LPTV displacement by market had to have been an integral part of the FCC's analysis that resulted in specific potential winning reverse auction bid amounts and forward auction revenues, based on clearing 132 MHz of spectrum. A portion of those conclusions and granular outputs was then repackaged and provided to the public and Congress in the 1st Greenhill Report dated October 1, 2014. Discussion took place on the extent to which the FCC already has in hand such an analysis that was "locked down" with fixed assumptions in order to make the precise 1st Greenhill Report financial and spectrum clearing representations. That data has allowed Greenhill to present to the broadcast community the FCC's estimated high-end and median compensation on a granular basis per market, as well as total clearing achieved, expected total reverse payments, and total forward auction revenues. FAB asked how the scenarios presented in the Greenhill Report could be calculated with such precision without generally concluding how much spectrum would be bought in the reverse auction, how much spectrum is presumed to be vacant per market, and how much would come from LPTV licensees in order to clear 132 MHz of spectrum on average. Mr. Mallof volunteered to meet with the Auctions Task Force's internal and outside consulting financial modeling experts who provided this analysis to Greenhill. FAB will follow-up with Mr. Lake and OCBO to request this meeting with FCC staff and its consulting personnel, if the requested other existing 1st Greenhill outputs are not released soon.



4. FAB's request for the FCC not to sell more in the forward auction than broadcasters relinquish in the reverse auction, and interpretation of the Spectrum Act relating to that point.

FAB clarified for OCBO it is awaiting a decision on this point in its Petition for Reconsideration of the *1st Report & Order*. Discussion ensued on Congressional intentions in clearing spectrum and at what point extensive clearing was beyond the bounds of the Spectrum Act. All of these points are on the record in the Docket 12-268 proceeding. FAB requests OCBO in its small business oversight and advocacy role to take up this issue now to help ensure the Commission addresses this point on reconsideration.

5. The request not to reserve additional spectrum for white space and additional guard band spectrum at the expense of displacing LPTV stations, and the point that LPTV licensees have rights as existing licensees over unlicensed users for whom the FCC is proposing to allot 6 MHz of spectrum nationwide.

LPTV spectrum usage rights are affirmed in the Spectrum Act. FAB asked OCBO to take proactive stewardship on this point to protect the integrity of thousands of LPTV and translator licenses held largely by small businesses. FAB also noted the Multicultural Media, Telecom, and Internet Council ("MMTC") has filed supportive comments in Dockets 12-268 and 03-185 requesting the FCC implement policies mindful of LPTV.²

6. The failure of LPTV to appeal the 700 MHz rebanding should not be construed as appropriate precedent to render LPTV secondary to all license-seeking newcomers and other new services, both licensed and unlicensed, in the 600 MHz band.

FAB referred to D.C. Circuit Court of Appeals ruling in *Bechtel v. FCC*, 10 F.3rd 875 (D.C. Cir. 1993), which rejected the Commission's comparative broadcast hearing procedures for awarding licenses even though no one had objected to that process for decades. FAB noted this point was sharpened by Mako Communications ("Mako") in a recent filing in the dockets.³

7. The potential for a court to be sympathetic to takings and inverse condemnation claims when LPTV stations are extinguished or grievously affected in the reallocation of spectrum for the overall public good without any just compensation.

² See MMTC's comments at <http://apps.fcc.gov/ecfs/document/view?id=60001026510>.

³ See Reply Comments of Mako Communications at page 3, citing the D.C. Circuit's remand in *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992):
<http://apps.fcc.gov/ecfs/document/view?id=60001025594>.



FAB mentioned the property-like qualities of spectrum the FCC has recognized in allowing security interests in proceeds from the sale of businesses, and how bankruptcy courts have recognized the private rights of licensees to build a business with a license, versus the public right of the FCC to approve assignments and transfers of licenses.

8. Similarities of the massive LPTV business displacement to the repeated inequities and failures of U.S. Government stewardship reported in the *Broken Trust* documentary now broadcast by a variety of television stations nationwide.⁴

All the points made in the presentation, with the exception of references to MMTC's and Mako's filings, are more fully set forth in FAB's twelve submissions filed since March 12, 2013 in Dockets 12-268 and 03-185.⁵

Respectfully submitted,

/s/

Melodie A. Virtue

Counsel to Free Access & Broadcast Telemedia, LLC

Attachment

cc: William T. Lake, Chief, Media Bureau (via e-mail to William.Lake@fcc.gov)
Thomas Reed, OCBO Director (via e-mail to Thomas.Reed@fcc.gov)
Daniel Margolis, OCBO (via email to Daniel.Margolis@fcc.gov)

⁴ Go to www.brokentrust.com and click on the "Broken Trust Documentary" icons to run the trailer or the full 28-minute program.

⁵ For FAB's twelve filings in dockets 12-268 and 03-185 viewed on the FCC's ECFS website, [click here](#).