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December 15, 2014

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

The Honorable Dr. Winslow Sargeant
Chief Counsel for Advocacy
U.S. Small Business Administration
409 3rd St, S.W.
Washington, DC 20416

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

Gentlemen:

Free Access & Broadcast Telemedia LLC (“FAB”), by counsel, hereby respectfully requests that the Chairman instruct the FCC’s Incentive Auctions Task Force (“Task Force”) to transmit a written correction to the Chief Counsel for Advocacy’s office regarding the Final Regulatory Flexibility Analysis (“FRFA”) in the recent FCC Spectrum Incentive Auction *Report and Order* in FCC Docket 12-268.¹ The *Report and Order* contains incorrect statements within the FRFA which the SBA is now evaluating under its statutory oversight authority under the Regulatory Flexibility Act. In Appendix B of the *Report and Order*, the FCC found that:

No commenters directly responded to the IRFA. However, a number of commenters raised concerns about the impact on small businesses of various auction design issues. We have nonetheless addressed these concerns in the FRFA.²

¹ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (“*Report and Order*”).

² *Id.* at 6949 (¶13).



The first sentence in the above quote is inaccurate because several submissions were made for the record and meetings were held involving either or both FAB and the LPTV Spectrum Rights Coalition (“Coalition”) with FCC staff directly involving the topic of the Initial Regulatory Flexibility Analysis (“IRFA”). Meetings were held with all of the Commissioners’ offices, members of the Task Force, the Media Bureau Chief, Video Division managers, Wireless Bureau managers, and three attorneys from the FCC Office of General Counsel. All ten of those submissions and meetings were documented with *ex parte* filings on the record before the *ex parte* window closed on May 8, 2014.³

Regarding the second sentence in the quote above, FAB and other commenters requested that FCC findings and analyses supposedly conducted in order to size quantitatively the financial scope of displacement and relocation cost impacts on thousands of bona fide licensees in the

³ Written Ex Parte Comments of FAB, filed May 5, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=7521107089>; Notices of Ex Parte Presentation filed on behalf of FAB dated May 7, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=7521116921>; May 8, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=7521118037>; and May 9, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=7521120243>. For links to additional documents in the record regarding requests for benefit-cost analysis, see FAB Petition for Reconsideration dated September 15, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=7522677333>; Reply by FAB to Objections to FAB’s Petition for Reconsideration dated November 24, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=60000988557>; Petition for Reconsideration by the LPTV Spectrum Rights Coalition dated September 15, 2014 (costs and auction benefit-costs) at <http://apps.fcc.gov/ecfs/document/view?id=7522654599>; written Ex Parte Comments of the LPTV Spectrum Rights Coalition filed on November 17, 2014 (compendium) at <http://apps.fcc.gov/ecfs/document/view?id=60000985326>; November 12, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=60000982517>; October 30, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=60000977233>; August 29, 2014 (on cost and auction benefit-cost in the IRFA at <http://apps.fcc.gov/ecfs/document/view?id=7521825878>; April 21, 2014 as a transcript from the 2014 LPTV NAB Show Info-Session with FCC Media Bureau Chief William T. Lake, April 7, 2014 at <http://apps.fcc.gov/ecfs/document/view?id=7521098954> and the session presentation at <http://apps.fcc.gov/ecfs/document/view?id=7521098955>; 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 at <http://apps.fcc.gov/ecfs/document/view?id=7521094687>; and August 27, 2013 regarding costs and auction eligibility (summary) at <http://apps.fcc.gov/ecfs/document/view?id=7520940050> and (full presentation) at <http://apps.fcc.gov/ecfs/document/view?id=7520940051>. See also written Reply Comments of Mike Gravino, filed March 12, 2013 on p. 2 regarding auction eligibility at <http://apps.fcc.gov/ecfs/document/view?id=7022130171>; Reply Comments of Civic Media Advisors, filed May 20, 2013, on p. 8 regarding auction costs and benefit-cost at <http://apps.fcc.gov/ecfs/document/view?id=7022414957>.



Low Power Television (“LPTV”) broadcast industry be disclosed in the record.⁴ Regarding the assertion in the third sentence quoted above, no impact analysis was disclosed anywhere within the IRFA, the FRFA, or within the body of the *Report and Order*. The Commission needs to correct the record regarding these errant statements cited above when it writes to the Chief Counsel for Advocacy.

Finally, no analysis was provided in support of the FCC’s assertion in the initial NPRM’s IRFA that it would serve no useful purpose to the goals of the auction for the FCC to include LPTV broadcast licensees in the auction, even though the FCC explicitly stated it *has* the authority to do so. In the IRFA, the Commission observed:

The proposal to limit reverse auction participation to only full power and Class A stations and to not permit participation by low power television

⁴ Numerous written Comments, Replies, and Notices of Ex Parte Meetings were filed by parties seeking FCC financial impact analysis and policy alternatives on the looming costs of relocation facing LPTV broadcast licensees, displacement, and possible extinguishment of their license rights in this proceeding. *See* note 3, *supra*. In addition, as of December 11, 2014, there are at least 10 additional Ex Parte submissions from the Coalition which affirm that licensed stakeholders repeatedly sought a quantified impact analysis by the FCC on separate displacement and relocation cost impacts on LPTV broadcast licensees, akin to an Unfunded Mandates Regulatory Act analysis not ever sized by the Congressional Budget Office, including (but not limited to) the Transcript of the NAB Show-Info Session with Media Bureau Chief William Lake and the Coalition’s companion presentation cited above. Additional Coalition submissions are dated April 24, 2014 (handout presented to Chairman Wheeler) at <http://apps.fcc.gov/ecfs/document/view?id=7521099405>; March 21, 2014 (talking points on IRFA and industry cost impacts) at <http://apps.fcc.gov/ecfs/document/view?id=7521094687>; February 6, 2014 (talking points seeking an LPTV industry impact analysis) at <http://apps.fcc.gov/ecfs/document/view?id=7521071384>; January 16, 2014 (letter to Chairman Wheeler on relocation costs impacts, cost of delays/uncertainty, and seeking auction eligibility) at <http://apps.fcc.gov/ecfs/document/view?id=7521066173>; November 26, 2013 (meeting with Cm. O’Rielly) at <http://apps.fcc.gov/ecfs/document/view?id=7520959630>; November 8, 2013 (meeting and e-mail with Chairman Wheeler) at <http://apps.fcc.gov/ecfs/document/view?id=7520957172>; August 27, 2013 (summary) at <http://apps.fcc.gov/ecfs/document/view?id=7520940050> and (presentation) at <http://apps.fcc.gov/ecfs/document/view?id=7520940051>; July 30, 2013 (letter to then Acting Chairwoman Clyburn seeking a fact finding on impacts/costs) at <http://apps.fcc.gov/ecfs/document/view?id=7520934408>; July 3, 2013 (presentation to Commissioner Rosenworcel’s office) at <http://apps.fcc.gov/ecfs/document/view?id=7520926932> and (cover letter) at <http://apps.fcc.gov/ecfs/document/view?id=7520927779>; and others too numerous to continue to footnote here from the FCC Docket 12-268 website, last visited as of December 11, 2014. FAB can provide additional examples from the docket upon request.



stations will have a greater impact on small entities since all low power television stations are small entities. Alternatively, the Commission could allow low power television stations to participate in the reverse auction but this would have no practical use since low power television stations do not have to be protected in repacking and clearing them from their channels in the reverse auction would be unnecessary. The Commission believes the additional burden on low power stations is outweighed by the need to implement Spectrum Act provisions, to recover a sufficient amount of spectrum in the reverse auction and to complete the successful repacking full power and Class A stations.⁵

As a policy alternative, inclusion of LPTV in the auction should have continued to have been considered and reported out transparently in the FRFA, not ignored as though the Commission never initially concluded it had the authority to include LPTV in the auction in the IRFA.

The Commission should also provide its supporting analysis now for the statement to the Chief Counsel for Advocacy when the Commission corrects the record regarding the errant statements cited above. FAB respectfully requests that the Commission serve FAB with a copy of the clarifications sent to the SBA.

Although the Commission has been asked repeatedly for over 18 months in myriad meetings and submissions if any economic analysis has been conducted to support any of the findings in the *Report and Order* regarding total LPTV broadcast television licensee cost impacts or benefit-cost of LPTV broadcast licensee auction participation, the Task Force staff finally admitted last month to the LPTV Spectrum Rights Coalition, apparently in a large group meeting with the Task Force, that no such quantitative studies, either on impacts thrust upon LPTV broadcasters or on the benefit-cost of auction participation, have ever been done. This admission to the LPTV Spectrum Rights Coalition was made in a group setting on October 22, 2014, as noted in its *ex parte* filing of October 30, 2014 (at ¶5). This admission occurred *after* the window closed for filing for review with the Court of Appeals or to submit Petitions for Reconsideration to the FCC regarding analysis omissions in the *Report and Order*.

The admission damages the integrity and sustainability of the FCC's rulemaking process and its concomitant obligation to report accurately to the SBA's Chief Counsel for Advocacy, who has oversight of the Docket 12-268 rulemaking pursuant to the Regulatory Flexibility Act. In no instance does the *Report and Order's* FRFA offer any economic sizing on the financial impact quantified in dollars on any type of small business. Nor is there any reference quantifying jobs that will be affected. The body of the *Report and Order*, likewise, is devoid on both counts.

⁵ *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd. 12357, 12539 (2012) ("NPRM"), at ¶ 71.



A search of the entire *Report and Order* yields no economic impact analysis on any broadcast licensee stakeholders, and especially on thousands of low power broadcast television and translator licensees, other than a few references to unrelated Comments the FCC received in connection with wireless medical telemetry service (WMTS) impacts. The rest of the *Report and Order* provides no quantified financial impacts on the benefit-cost estimated to the U.S. Government and to the U.S. Economy from pursuing any alternative approaches for LPTV broadcast licensees, including but not limited to auction participation. Yet the FCC's promotional analysis entitled *Incentive Auction Opportunities for Broadcasters: Prepared by the Federal Communications Commission by Greenhill* (the "Pitch Book")⁶ was released on October 1, 2014, just 15 days after the Petition for Reconsideration period window had closed during the then 1,000-day long rulemaking. The Pitch Book signals a likely crushing of thousands of bona fide LPTV broadcast licensees – and their livelihoods.⁷

The FCC has not yet placed the Pitch Book formally into the docket for the SBA to review. The Pitch Book and related displacement impact analysis which the Task Force surely already has in hand need to be disclosed. The Pitch Book quantifies in dollar terms what auction-eligible broadcasters are likely to be offered as compensation for relinquishing spectrum.⁸ The likely adverse impacts on LPTV broadcasters that are byproducts of the precisely quantified scenario being promoted to other auction-eligible broadcast television licensees, however, are completely absent. The Commission should disclose modeled impacts on small broadcast television licensee businesses to the Chief Counsel for Advocacy. An analysis of the impacts to LPTV broadcast licensees, should the auction proceed as the FCC's own sponsored marketing materials project, needs to be provided for the record.

Thus, as the record now stands, FAB believes neither the FRFA nor the *Report and Order* itself will withstand judicial review. This is because chosen regulatory alternatives must follow quantified impacts. No impacts were quantified, and no empirical policy alternatives were weighed and considered in the balance.

⁶ Available at <http://wireless.fcc.gov/incentiveauctions/learn-program/docs/ia-opportunities-book.pdf> (last visited December 11, 2014).

⁷ See FAB's Reply to Objections to Petition for Reconsideration, filed November 24, 2014, at p. 4.

⁸ Indeed, "opening prices for most [auction-eligible] stations will be higher than the high-end compensation estimates developed by FCC staff and included in the information materials prepared by the Greenhill investment banking firm." Statement of Chairman Tom Wheeler, *In the Matter of Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001, and 1002* (GN Docket No. 12-268, AU Docket 14-256), released December 11, 2014.



FAB understands that the FCC is on track to spend \$19 million in this fiscal year alone for incentive auction economic analysis and modeling. Unfortunately, it appears the Commission will not use that budget to determine the size of the cost impacts on LPTV broadcast licensee displacements and relocations. Nor, as the FCC has admitted, will it be able to release a sizing of the benefit-cost of including LPTV broadcast television licensees in the auction as specifically represented by the FCC in the IRFA as a possible policy alternative. Rather, it seems the preferred policy alternative simply is to remove mention of LPTV broadcast licensee auction participation in the FRFA as if it were never stated in the IRFA.

Consequently, FAB urges the Chief Counsel for Advocacy to seek the assistance from the SBA's staff economists and second them to the FCC to participate in producing an overdue, straightforward impact analyses for the Commission, the public, and Congress to weigh, and for the SBA to then also use in its ongoing review of the FRFA. Further, as FAB requested in its Reply to Objections to its Petition for Reconsideration to the *Report and Order*, the Commission should enter into the record of the proceeding all transmittals sent to the SBA.

As the voice for small businesses such as LPTV broadcast licensees, the SBA should assist the FCC with assessing the impact of the regulatory burden the incentive auction will pose on such entities. Only by exercising that voice will the Commission be provided with the needed analysis to weigh alternatives to balance the voices of large, well-financed wireless companies.

Respectfully submitted,

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cc: Hon. Marie Cantwell, Senate Committee on Small Business and Entrepreneurship
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Hon. Sam Graves, House Committee on Small Business
Hon. Nydia Velázquez, House Committee on Small Business
Hon. Chris Collins, House Committee on Small Business
Hon. Janice Hahn, House Committee on Small Business
Hon. Mignon Clyburn, FCC Commissioner



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Hon. Michael O’Rielly, FCC Commissioner
Hon. Agit Pai, FCC Commissioner
Hon. Jessica Rosenworcel, FCC Commissioner
Ms. Jamie Belcore Saloom, Assistant Chief Advocacy Counsel, SBA
Mr. Jonathan Sallet, FCC General Counsel
Mr. Gary Epstein, FCC Auctions Task Force
Mr. William Lake, FCC Media Bureau Chief
Mr. William J. Scher, FCC Office of General Counsel
Mr. Mike Gravino, LPTV Spectrum Rights Coalition
With submission into the Docket 12-268 official record