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June 3, 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 June 1, 2015, David Mallof, Principal of Free Access & Broadcast Telemedia, LLC ("FAB"), and undersigned counsel met with Matthew Berry, Chief of Staff in the office of FCC Commissioner Ajit Pai. Topics discussed are set forth on the attached agenda which was distributed at the meeting, including FAB's requests that the Commission:

- Release data specifically describing the impacts the incentive auction and repacking process will have on low power television ("LPTV") stations. The Commission indicated in its January 8, 2015, *Order* denying FAB's "Motion to Toll the Comment and Reply Comment Deadlines in the Third Notice of Proposed Rulemaking" the impacts would be considered at a later date.¹ Such data remains necessary in order to offer meaningful proposals on how to

¹ See *Order*, DA 15-31, released January 8, 2015, para. 7, available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-15-31A1.pdf. See also FAB's *Motion to Toll*, dated December 22, 2014 submitted in three parts, available at: <http://apps.fcc.gov/ecfs/document/view?id=60001010739>, <http://apps.fcc.gov/ecfs/document/view?id=60001010740>, and <http://apps.fcc.gov/ecfs/document/view?id=60001010741>.



mitigate the harm to LPTV licensees, as requested by the Commission in the Third Notice of Proposed Rulemaking.² FAB indicated in the agenda it likely will file a request for documents under the Freedom of Information Act for this information and also ask the Commission to reopen comments in the *Third NPRM* when the requested information is produced. Otherwise, FAB believes the integrity and completeness of the rulemaking and the statutorily required Regulatory Flexibility Analysis (“RFA”) will be compromised if a Report and Order is issued without the opportunity to review the impact and comment on the data.

- Invite LPTV to participate in the auction, and provide a benefit-cost analysis of including LPTV in the incentive auction.³ FAB discussed the public interest benefits of conducting such an analysis.
- Respond to FAB’s repeated requests that the Commission meet with the Small Business Administration regarding the impact on LPTV small businesses, and provide its response in the record to FAB’s Joint Letter to FCC Chairman, the Honorable Tom Wheeler and Chief Counsel for Advocacy at the United States Small Business Administration, the Honorable Dr. Winslow Sargeant, dated December 15, 2014.⁴ FAB mentioned that if the Commission has

² The Commission requested comments 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.” Third Notice of Proposed Rulemaking, FCC 14-151, released October 10, 2014 (“*Third NPRM*”), para. 59, available at <http://apps.fcc.gov/ecfs/document/view?id=60000976623>. The Commission also directed commenters to “...describe in detail any perceived benefits and disadvantages of the measures advocated.” *Id.*

³ See FAB’s Petition for Reconsideration of the *First R&O*, dated September 15, 2014, which was required to be filed before the release of the first “Greenhill Report.” The underlying assumptions and outputs of the FCC analyses that gave rise to the precise turnkey marketing business case representations in that Greenhill Report remain central to the Commission arriving at thoughtful and transparent policy considerations needed to mitigate negative impacts on LPTV. Such considerations are essential for reconsideration and the promulgation of any policy alternatives and conclusions required for the *Third NPRM* and to conform to the FCC’s obligations under the RFA. FAB mentioned that in a meeting with the Incentive Auction Task Force (“IATF”) on May 21, 2015, that adopting measures in the *Third NPRM* without release of the scope of the impacts on LPTV of clearing 126 MHz, reserving an added 6 MHz block for unlicensed services, and selling 100 MHz in open market at highly specific price points for full-power and Class A stations in 210 market areas will undermine the rulemaking as well as the Final Regulatory Flexibility Analysis.

⁴ See FAB’s letter available at: <http://apps.fcc.gov/ecfs/document/view?id=60001009742>. FAB’s meeting Agenda (attached) included the intention to discuss its Motion to include the December 15, 2014 letter into the Petition for Reconsideration record. FAB respectfully seeks



limited resources to analyze economic impacts on LPTV and benefit-costs of LPTV auction involvement, FAB understands from discussion with the Counsel for Advocacy that the office has its own team of economists on staff who can be seconded to the FCC to assist in producing the needed analysis on impacts and benefits related to LPTV, as is sometimes the case in working with other agencies and executive branch departments.

- Correct the record to indicate that parties did comment on the Initial Regulatory Flexibility Analysis (“IRFA”) of the *First NPRM*⁵ and that the appeal timeline on the *First R&O*⁶ under the Regulatory Flexibility Act is different and separate from the timing on appeal of decisions on the pending petitions for reconsideration.
- Not construe the previous rebanding of the 700 MHz spectrum 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. Changed circumstances such as the complete rebanding and repacking of the entire remaining TV band necessitate a fresh look at the impact on LPTV stations. 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.⁷ An unconstitutional taking will likely result if LPTV is not accommodated in the repacking particularly if they are not invited to participate in the incentive auction.
- Realize that it should not look exclusively to the Spectrum Act for guidance in designing the auction as an excuse to take LPTV licenses without compensation, rather than viewing the Spectrum Act as part of a “suite” of other laws and policies that must be weighed, including the superordinate 5th Amendment of the U.S. Constitution, as well as the Administrative Procedures Act, the RFA, the Communications Act, and settled FCC LPTV licensing policies and procedures.
- Grant the other requests in FAB’s Petition for Reconsideration in order to mitigate the existential peril to LPTV licensees and the potential for delay of successful repurposing of the TV spectrum for wireless use. All requests are well within the FCC’s discretion to act on favorably.

clarification that the Motion has been accepted. The FAB Motion is available at:

<http://apps.fcc.gov/ecfs/document/view?id=60001009741>.

⁵ Notice of Proposed Rulemaking, 27 FCC Rcd 12357, 12539-40 (2012).

⁶ Report and Order, 29 FCC Rcd 6567 (2014).

⁷ See also Reply Comments of Mako Communications in docket 03-185 dated February 2, 2015 at page 3, available at <http://apps.fcc.gov/ecfs/document/view?id=60001025594>, citing the D.C. Circuit’s remand in *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992).



Points made in the presentation are more fully set forth in FAB's submissions filed in Dockets 12-268 and 03-185.

Respectfully submitted,

/s/

Melodie A. Virtue

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Enclosure – Agenda

Agenda 6/1/15 - FAB Telemedia
LPTV RFA and 1st R&O Reconsideration Issues

1. RFA Lack of Transparency – on a track for appeal separate from 1st R&O Reconsideration
 - a. Letter to Chm. Wheeler and SBA Chief Advocacy Counsel, Dr. Sargeant from December 15, 2014 to clarify misstatements in the record.
 1. No status update on meetings or discussions with SBA.
 2. Requests made for a written reply to SBA entered into the 12-268 & 03-185 dockets.
 3. Also requested status of FAB’s Motion to include the letter as part of our Petition for Reconsideration (includes **Item b** below).
 4. 5+ months total elapsed time on this issue.
 5. FAB may file a FOIA if necessary and ask to reopen comments in the 3rd NPRM.
 - b. Lack of release into the record the FCC staff analysis of LPTV impacts and assumptions on LPTV clearing run last year in order to produce “Greenhill 1.”
 1. October 1st Greenhill 1 release implies LPTV impact analysis was well in hand before the Petition for Reconsideration window closed Sept 14th.
 2. It was impossible to comply in January with the 3rd NPRM para 59 request that Commenters provide “benefit-disadvantage” justification for proposals to mitigate impact on LPTV (i.e., benefit-cost) without a release the analysis by DMA of the full scope and sweep of LPTV clearing and stranded LPTV stations.
 3. Denial of our Motion to Toll Comments has damaged the 3rd NPRM process.
 4. Recite dates/occasions this info was respectfully requested
 - i. December 15, 2014 Joint letter included a request for this analysis (plus inclusion into the Petition for Reconsideration).
 - ii. Dec 22, 2014 Motion to Toll again requested this info for 03-185.
 - iii. Repeated as a topic in the Initial OCBO meeting January requests.
 - iv. Bill Lake meeting early Feb. 10th.
 - v. OCBO meeting March 27 after 2 follow-up meetings were not set.
 - vi. Three other OCBO requests for meetings during April/May.
 - vii. Meeting finally May 21st with the Task Force.
 - viii. Almost 5 months total time has elapsed on this outstanding issue.
2. FAB Petition for Reconsideration on the 1st R & O –
 - a. Staff reported to have said LPTV-related Recon Petitions are largely recommended to be denied and are now circulating with the Commissioners.
 - b. Our three reconsideration requests –
 1. LPTV Auction Eligibility – Request Benefit-Cost Analysis.
 2. LPTV Repack Reassurances.
 3. Excessive Remainder Spectrum plus a proposed nationwide 6MHz unlicensed block harm LPTV repack options after the auction.
3. How can FAB help 1st R&O, upcoming 3rd R&O Recon. and separate RFA appeal processes?
4. Thank you for taking the meeting.