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Please reply to COLIN B. ANDREWS
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TEL EXT 1736

February 5, 2016

VIA ECFS

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

Re: **Notice of Ex Parte Presentation**

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

Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band for Use by White Spaces Devices and Wireless Microphones, MB Docket No. 15-146

Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auction 1001 and 1002, AU Docket No. 14-252

Dear Ms. Dortch:

In accordance with Section 1.1206(b)(2) of the Commission's rules and in the spirit of full disclosure, this letter is submitted on behalf of Free Access & Broadcast Telemedia, LLC ("FAB") to provide documentation for the public record regarding a meeting held to discuss open and new Freedom of Information Act ("FOIA") requests directly related to the above mentioned dockets.

The meeting was held February 3, 2016 with Mr. Ryan Yates, Attorney Advisor in the Office of General Counsel, and Ms. Elizabeth Lyle, Assistant General Counsel, by phone, regarding an ongoing



FOIA request, which FAB included in an Ex Parte on November 13, 2015. FAB was represented by David J. Mallof, Managing Director, and myself as counsel to FAB.

In addition to discussion on administrative FOIA processing and release preferences related to the requests, FAB noted the following relevant to the dockets above:

1. FAB requested additional FCC employees be added to the ongoing next “batch” of its existing FOIA request.¹
2. In the FCC’s Response to FAB’s initial FOIA request, dated September 21, 2015, the FCC determined that there were no “scenarios that analyzed channel clearing for each designated market [and] that cast light on possible impacts on LPTV clearing and new LPTV assignments.” In a meeting on December 16, 2015, Mr. Edward Smith, the Chairman’s personal top staff member for the auction, stated that he had indeed recently reviewed analysis of expected LPTV impacts that confirmed “...LPTV could survive in many markets.” Given this statement, FAB disclosed its intention to file a FOIA request regarding the analysis Mr. Smith discussed in the December meeting.
3. FAB also discussed the criteria the FCC has been using to determine if responsive documents were “predecisional” under FOIA exemption b(5) and how that should apply to auction simulations and analysis, which are factual by nature as argued in the appeal of FAB’s initial FOIA request (Attachment “B”).
4. FAB requested a status update on its currently pending administrative appeal, dated October 21, 2015 and agreed to reserve the portions of the appeal concerning the adequacy of the search performed until after the ongoing FOIA has been completed.
5. FAB discussed the joint request to Congress’ Government Accountability Office (GAO) dated October 1, 2014 (Attachment “C”) from Members Hon. Anna Eshoo and Hon. Joe Barton. FAB understands GAO began the requested study on LPTV impacts and other requested considerations therein, which are similar documents to those requested in FAB’s FOIA. FAB urged the FCC to use great care in replying to the specific requests to disclose anticipated impacts on LPTV if 84MHz or 126MHz are cleared. Even if this information is not released to FAB via FOIA, FAB noted for the record that the GAO and the Comptroller General have significant authority to seek out and obtain all agency facts, trends, and analyses available from any agency on behalf of Congress under the Congress’ Constitutional and the GAO’s added

¹ FAB requested the following employees be included in the current batch: Roger Sherman, WTB; Mark Colombo, WTB, OET, IATF (Including private emails from his “Trip Ericson” pseudonym that involve official FCC matters. See an example as Attachment “A”); Chris Helzer, WTB; Alan Stillwell, OET; Matthew Hussey, OET; Martin Doczkat, OET; and Barbara Pavon, OET. Additionally, similar to former FCC employee Lawrence Chu, FAB requests that John Leibovitz and Robert Weller’s names are included as individual search terms associated with LPTV impacts, since they are no longer with the Commission.



statutory authority "...to exercise continuous watchfulness..." over programs and agencies under Congress' jurisdiction.

6. FAB also indicated its intention to ask the House Commerce Committee, including its Oversight and Investigations Subcommittee, to request the FCC Chairman now direct FCC staff to comply with the requests stated in Representative Ellmers' letter, dated October 22, 2015, regardless of the Chairman's response to Congress on November 16, 2015 that stated "...we have not systematically analyzed the potential displacement impact on those [LPTV] stations."

If you have any questions about this submission, please contact the undersigned.

Sincerely,

Colin B. Andrews

Counsel to Free Access & Broadcast Telemedia, LLC

cc: Ryan Yates, Attorney Advisor, OGC (ryan.yates@fcc.gov)
Elizabeth Lyle, Assistant General Counsel (elizabeth.lyle@fcc.gov)
William Scher, Associate General Counsel, OGC (william.scher@fcc.gov)
Edward Smith, Office of Chairman Thomas Wheeler (edward.smith@fcc.gov)

Enclosures: Attachments A, B and C.

Attachment A

ATTACHMENT A

From: Trip Ericson [<mailto:webmaster@rabbitears.info>]
Sent: Monday, October 19, 2015 10:05 AM
To: Julius Knapp <Julius.Knapp@fcc.gov>; Gary Epstein <Gary.Epstein@fcc.gov>
Cc: Alan Stillwell <Alan.Stillwell@fcc.gov>; Howard Symons <Howard.Symons@fcc.gov>
Subject: Fwd: Error in NYC TV Data in latest TV Study impacting population / IA ?

All,

Below is the e-mail I got from Doug.

Mark

----- Forwarded message -----

From: Doug Lung <dlung@transmitter.com>
Date: Sun, Oct 18, 2015 at 7:57 PM
Subject: Error in NYC TV Data in latest TV Study impacting population / IA ?
To: Trip Ericson <webmaster@rabbitears.info>

Hi Mark/Trip --

I wanted to give you a heads-up on this via your private email as you may hear about it tomorrow.

One of our FCC attorneys discovered the October 15 Final Baseline of Eligible Stations (Appendix I) used the licensed facilities for WNJU (File # 0000001043) instead of the CP for the WTC facilities approved in the R&O (File # 0000001402). This moved WNJU to a lower opening bid price compared to WCBS. I don't mind having less of a target on our station, but am concerned that post auction we won't be protected to the WTC contour in the repacking.

The problem appears to be in the CDBS files, as the June 2015 CDBS files show the correct facility (0000001402) while I can't get that file to show up in the patched October 2015 TV Study even doing a radius search on CP's. Doing a text search on the application.dat file in the October CDBS, only the 0000001043 file # is shown.

If I've missed something, please let me know!

Thanks for all your hard work on this!

...Doug

Attachment B



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Please reply to COLIN BLACK ANDREWS
candrews@gsblaw.com TEL EXT 1736

October 21, 2015

VIA E-MAIL

Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Review of Freedom of Information Action – FOIA Control No. 2015-729

Dear Sir or Madam:

Our firm represents Free Access & Broadcast Telemedia, LLC (“FAB”) with regard to its August 20, 2015, Freedom of Information Act (“FOIA”) request to the Federal Communications Commission (“FCC”) (the “Request”). This letter is FAB’s appeal to the FCC’s September 21, 2015, Response Letter denying FAB’s Request (the “Denial”). A copy of FAB’s Request and the FCC’s Denial are attached hereto for your reference.

The Request as submitted sought responsive documents and communications relating to the Incentive Auction and the FCC’s Greenhill 1 Report. The Request’s scope was narrowed via email on August 28, 2015, to focus on the following items: 1) “any and all comments, underlying assumptions, and/or output analysis conducted by staff and consultants in preparation for the FCC’s Greenhill 1 Report (the “Report”)” and 2) “extensive auction simulations referred to in fn. 2 on p. 35 of the Report.” With regard to the first set of documents sought by the Request, the Denial determined there was no reasonable expectation of finding responsive documents. As for the auction simulations referred to by the Report, the Denial refused to release the documents under FOIA exemption 5. Accordingly, FAB files this timely appeal.

The basis for this appeal is twofold: 1) the FCC has violated FOIA by failing to conduct an adequate search for the records that are responsive to item one of the Request and 2) the FCC employed an overly broad application of FOIA exemption 5 for withholding records that were responsive to item two.



The FCC has a duty to demonstrate beyond a reasonable doubt that a search was “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); see also *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp. 2d 83, 92 (D.D.C. 2009). FOIA is designed to empower the public to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” See, e.g., *Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). As the Supreme Court has observed, “virtually every document generated by an agency is available in one form or another, unless it falls within one of the Act’s nine exemptions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

In order to withhold a document under FOIA exemption 5, the FCC must prove that the responsive document is both predecisional and deliberative, as opposed to factual material which would be generally available to discovery. See *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974). Even in a situation where a document would fall under FOIA’s exemption 5, that document’s privilege can be waived where a final decisionmaker chooses expressly to adopt or incorporate it by reference. See *Sears*, 421 U.S. at 151.

With respect to the first set of documents identified in the Request, the Denial determined that the FCC did not model any scenarios or channel clearing impacts in connection with the Greenhill Report that “cast light on possible impacts on LPTV clearing and new LPTV assignments.” Therefore, the Denial concluded that there is no reasonable expectation of finding responsive documents. The Request, however, was broader in scope than the characterization in the Denial. The Request sought “any and all” comments or other records concerning the report, including but not limited to comments that pertain to underlying assumptions and/or output analysis conducted by the FCC.

The Denial also withheld the auction simulations referred in footnote 2 of the Report under FOIA exemption 5, claiming that the responsive documents were privileged intra-agency documents that were both predecisional and deliberative. The Denial’s broad application of the FOIA exemption 5 to withhold even redacted versions of these documents fails to meet the requisite statutory mandate under FOIA. The auction simulations identified by the Report are factual by nature and do not reveal the agency’s pre-deliberative decision making, and are therefore not subject to FOIA exemption 5 because they are not deliberative as to any FCC final decision. Further, even if the withheld documents were subject to FOIA exemption 5, the FCC had waived this privilege by expressly incorporating the auction simulations into the Report.

Disclosure of the responsive documents identified in the Request would promote transparency and better inform the public of the possible impact of the FCC’s Incentive Auction. Such government transparency directly reflects the Obama administration’s policy to support our nation’s fundamental commitment to open government and a presumption of disclosure, as expressly proclaimed in both Attorney General Holder’s March 29, 2009 FOIA Memorandum to



all Executive Departments and Agencies, and the FOIA policies announced by President Obama's January 21, 2009 Freedom of Information Act Memorandum to all federal agencies.

Please inform my office of any "unusual circumstances" that will cause a delay in timely responding to this FOIA appeal and also provide me the approximate date by which you expect to issue a final response to this FOIA appeal.

If you have any questions concerning this appeal or need any further clarification, please call me at (202) 298-1736, or email me at candrews@gsblaw.com.

Sincerely,

Colin Black Andrews

CBA:cll
Enclosures

GSB:7347865.1

Attachment C

Congress of the United States

Washington, DC 20515

October 1, 2014

The Honorable Gene L. Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Dodaro,

The Middle Class Tax Relief and Job Creation Act of 2012 became law in February 2012. This law directs the Federal Communications Commission (FCC) to conduct an incentive auction allowing a broadcaster to voluntarily relinquish some or all of their spectrum usage rights in return for compensation (better known as the “reverse auction”).¹ The law also requires the FCC to hold a “forward auction” allowing wireless carriers to bid on the available cleared spectrum.² Only full-power broadcasters and low-power broadcasters with a Class A license are able to participate in the reverse auction.

In May 2014, the FCC adopted an Incentive Auction Report and Order addressing important issues related to the incentive auction.³ The FCC also announced that the agency is planning to initiate a future Low-Power Television station (LPTV) and TV Translator station proceeding to consider measures that help alleviate the impact of LPTV and TV Translators during the incentive auction.

While we are thankful for the ongoing efforts of the FCC, we ask the Government Accountability Office (GAO) to study the impacts of the incentive auction on LPTV stations and TV Translator stations, as well as their viewers. Consistent with the FCC’s Report and Order, we ask that the GAO evaluate the impact of the incentive auction for each of the two potential scenarios for repurposing broadcast spectrum: (a) 84 megahertz and (b) 126 megahertz. Within each of the two categories, please provide the following information:

1. The total number of LPTV stations that provide original programming or broadcast local news and information, especially those serving racial and ethnic minority communities;
2. The total number of TV translator stations that rebroadcast local news and information programming of a full-power TV broadcast station;
3. A projection of the number of LPTV stations and TV translator stations listed under (1) and (2) that may lose either their current input or output channel as a result of the forward auction;

¹ Middle Class Tax Relief and Job Creation Act of 2012, 26 U.S.C. §6403 (2012).

² *Id.*

³ Federal Communications Commission. (2014). FCC adopts rules for first ever incentive auction; will make available additional airwaves, increase competition for mobile broadband [Press Release]. Retrieved from https://apps.fcc.gov/edocs_public/attachmatch/DOC-327100A1.pdf

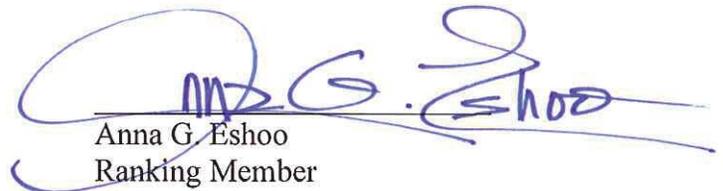
4. A projection of the number of such LPTV stations and TV translator stations that will subsequently be able to locate and operate on replacement channels after the auction, together with an aggregate estimate of the costs of relocation, including new equipment, legal and engineering services, and facility construction;
5. A projection of the number of such LPTV stations and TV translator stations that will be unable to locate to or operate on replacement channels after the auction;
6. A projection of the number of viewers that will lose over-the-air access to at least one such local LPTV station that provide local news and information, especially to underserved communities of interest;
7. A projection of the number of viewers that will lose over-the-air access via such TV translator stations to at least one of the signals of the regional affiliates of the major commercial or noncommercial educational television broadcast networks; and
8. Recommendations to the FCC and Congress on ways to remedy adverse impacts of the auction on LPTV stations and TV translator stations, and, most importantly, their viewers.

Thank you for your timely attention to this request. If you have any questions, please contact Emmanuel Guillory (Rep. Joe Barton) at 202-225-2002 or David Grossman (Rep. Anna Eshoo) at 202-225-8104.

Sincerely,



Joe Barton
Chairman Emeritus
House Committee on Energy and Commerce



Anna G. Eshoo
Ranking Member
Subcommittee on Communications
& Technology