

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

In the Matter of )  
 )  
Expanding the Economic and Innovation ) GN Docket No. 12-268  
Opportunities of Spectrum through Incentive )  
Auctions )

**PETITION FOR STAY PENDING JUDICIAL  
REVIEW BY FREE ACCESS & BROADCAST  
TELEMEDIA, LLC, WORD OF GOD  
FELLOWSHIP, INC. AND MAKO COMMUNICATIONS, LLC**

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## INTRODUCTION

1. Pursuant to Sections 1.41 and 1.43 of the FCC's rules,<sup>1</sup> Free Access & Broadcast Telemedia, LLC ("Free Access"), Word of God Fellowship, Inc. ("WOGF") and Mako Communications, LLC ("Mako" and, collectively, "Petitioners") hereby request that the Commission stay implementation of its incentive auction orders in this docket—the *First Report & Order*, released June 2, 2014,<sup>2</sup> and the *Second Order On Reconsideration*, released June 19, 2015<sup>3</sup>—until the conclusion of judicial review of the decisions pending before the U.S. Court of Appeals for the District of Columbia Circuit.<sup>4</sup>

2. Central parts of the Commission's multi-docket efforts to fashion an incentive spectrum auction scheduled to commence on March 29, 2016, these Orders (i) contravene the express terms of the agency's underlying statutory authority (the Spectrum Act of 2012),<sup>5</sup> (ii) reverse decades of settled Commission policy regarding the "secondary" status of licensed low-power television ("LPTV") broadcasters, and (iii) will eliminate the channels currently used

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<sup>1</sup> 47 C.F.R. §§ 1.41, 1.43.

<sup>2</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd. 6567 (rel. June 2, 2014), 79 Fed. Reg. 48442 (Aug. 15, 2014) ("*First Report & Order*").

<sup>3</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Order On Reconsideration, 30 FCC Rcd. 12016 (rel. June 19, 2015), 80 Fed. Reg. 46824 (Aug. 6, 2015).

<sup>4</sup> *Mako Communications, LLC v. FCC*, No. 15-1264 (D.C. Cir.) (consolidated with No. 15-1280); *Free Access & Broadcast Telemedia LLC v. FCC*, No. 15-1346 (D.C. Cir.). The FCC's brief in *Free Access* was filed on February 22, 2016 and the reply brief of Free Access and WOGF is due March 7, 2016; the Court has stated it will "schedule the cases for oral argument on the first appropriate date in May 2016." Order, Nos. 15-1280, 15-1346 (D.C. Cir. Feb. 8, 2016).

<sup>5</sup> Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified in part at 47 U.S.C. §§ 1451-57.

by countless LPTV stations, forcing many if not most larger-market LPTV licensees to shut down—a fact the Commission itself readily concedes.

3. This case fully satisfies the requirements for a stay. Petitioners are likely to succeed on the merits because the Commission disregarded the command of 47 U.S.C. § 1452(b)(5), which prohibits the FCC from reorganizing broadcast spectrum in the incentive auction in a way that would “alter the spectrum usage rights of low-power television stations.” The Commission asserts that LPTV stations are subject to so-called “displacement” simply because they are “secondary” licensees. This result-oriented conclusion transparently distorts and impermissibly redefines the concept of secondary broadcast licensees, which are “secondary” *only* to other licensed services, and *only* for purposes of interference, and indisputably enjoy priority, by both statute and rule, as against unlicensed wireless services.

4. The Commission’s unprecedented decisions threaten to extinguish innumerable LPTV stations in the United States. They arise in large part from the FCC’s desire to maximize the amount of spectrum to be re-allocated for unlicensed data use, *e.g.*, white spaces devices, WiFi and wireless broadband. Because it can achieve that policy objective only by treating LPTV service—a centerpiece for 35 years of the Commission’s core diversity and localism broadcasting policies—as if it were non-existent, starting the auction before the legality of the FCC’s approach can be reviewed by the federal courts would put in motion a sequence of interrelated auction-related events that will imminently and irreparably harm Petitioners, indeed nearly all LPTV licensees and investors, with no practicable financial or judicial recourse.

5. The brief delay of a stay pending appellate review will not have any material adverse impact on the auction. Immediate commencement of the initial phase of the auction under the current shadow of legal uncertainty is altogether unnecessary: the Spectrum Act

requires that the reverse *and* forward auctions be “conducted” before the “the end of fiscal year 2022,” 47 U.S.C. § 1452(f)(3), with payments due only thereafter. A brief delay of a few months while the D.C. Circuit considers the pending challenges to the Commission’s alleged mis-treatment of LPTV stations will not prevent timely completion of the incentive auction. In sum, the balance of hardships and the public interest thus strongly favor a stay of the auction.

6. Presentation of a motion to stay to the agency in question is “ordinarily” a predicate to a request to federal court for a stay pending judicial review. FED. R. APP. P. 18(a)(1). Petitioners therefore respectfully request that the Commission dispose of this petition and provide an answer by March 8, 2016 or we will have no choice but to treat it as rejected and turn to the Court of Appeals for equitable relief. FED. R. APP. P. 18(a)(2)(A)(ii).

### **BACKGROUND**

7. In 2012 Congress passed the Spectrum Act, specifying a three-phase process for the FCC to reclaim spectrum voluntarily from broadcasters and make it available for new uses. Pub. L. No. 112-96, Tit. VI §§ 6401-14, 126 Stat. 156, 222-37 (2012). Congress prescribed an approach comprising (i) a “reverse auction” to incentivize broadcast television licensees to sell their spectrum rights back to the FCC; (ii) a “reorganization” of broadcast TV spectrum to reassign channels and reallocate portions of the spectrum; and (iii) a “forward auction” to assign new licenses within the newly reorganized broadcast bands. *See National Ass’n of Broadcasters v. FCC*, 789 F.3d 165, 168-69 (D.C. Cir. 2015).

8. This three-phase process and its complex underlying mechanics, including spectrum clearance assumptions, initial and reserve reverse auction prices, so-called “repacking” and forward auction simulations, have been explained in detail by the Commission throughout the course of GN Docket No. 12-268 and related proceedings, such as the pending *Vacant*

*Channel NPRM*,<sup>6</sup> and in many workshops, presentations and other venues not included in the formal rulemaking records. Of key importance, however, is that the Commission has chosen, and reaffirmed, to exclude LPTV from the spectrum reorganization (“repack”) phase of the auction and not to exercise its discretion, even for some Class A licensees, to include LPTV in the reverse auction. *See, e.g.*, Order On Reconsideration, GN Docket No. 12-268, FCC 16-12 (rel. Feb. 12 2016) (“*Videohouse Order*”) (reiterating determination not to “protect LPTV stations in the repacking process or make them eligible for the reverse auction”), *petition for review pending sub nom. The Videohouse, Inc. v. FCC*, No. 16-1060 (D.C. Cir.)

9. The Commission’s decision not to include LPTV stations in the spectrum reorganization—phase two of the auction process—together with its corollary recognition that a substantial number of LPTV stations will as a result be forced to go dark (“displaced”), are beyond dispute. First, the FCC explained as early as the *First Report & Order* that even with respect to so-called “out-of-core” Class A stations (*i.e.*, those formerly operating on channels 52-59), “protecting these stations, which numbered approximately 100, would encumber additional broadcast television spectrum, thereby increasing the number of constraints on the repacking process and limiting the Commission’s flexibility to repurpose spectrum for flexible use.”<sup>7</sup> The FCC consequently determined that it would include “full-power and Class A television stations only” in the spectrum reorganization, stating that for thousands of LPTV stations it would not

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<sup>6</sup> *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 Space Devices and Wireless Microphones*, Notice of Proposed Rulemaking, 30 FCC Rcd. 6711, 6712 (2015) (proposing that LPTV licensees now be required to “demonstrate that their proposed new, displacement, or modified facilities would not eliminate the last vacant UHF television channel for use by [unlicensed] white space devices and wireless microphones in an area.”)

<sup>7</sup> *See, e.g., Videohouse Order* ¶ 3, citing *First Report & Order* ¶ 234.

“extend protection in the repacking process” anywhere in the broadcast television spectrum band.<sup>8</sup>

10. Second, the Commission has repeatedly conceded that LPTV will “be greatly impacted by repacking” in that “[m]any [LPTV] stations will be displaced from their current operating channel.”<sup>9</sup> Because “[o]nly a limited number of available channels may exist following the repacking process, [thus] limiting the relocation options available to displaced [LPTV] stations,”<sup>10</sup> most of those stations will be forced to cease broadcasting.<sup>11</sup> The Commission believes that the loss of LPTV service is “outweighed by the detrimental impact that protecting LPTV . . . stations would have on the repacking process and on the success of the incentive auction.”<sup>12</sup> Nonetheless, the FCC has never identified, even by mere citation, what Spectrum Act policies or goals would be threatened by including LPTV in the spectrum reorganization, or what constitutes “success” of the auction within the Act’s parameters or mandates.

### **STANDARD OF REVIEW**

11. The Commission has held that it should stay the effectiveness of an order pending judicial review, applying the “the traditional four-factor test” established by the D.C. Circuit in *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir.

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<sup>8</sup> *First Report & Order* ¶ 232-35; accord, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Notice of Proposed Rulemaking ¶¶ 98, 118 (rel. Oct 2, 2012) (“*Incentive Auction NPRM*”).

<sup>9</sup> *Incentive Auction NPRM*, App. B, ¶ 30.

<sup>10</sup> *Id.* ¶ 358.

<sup>11</sup> The Commission admitted that the record “demonstrates the potential for a significant number of LPTV . . . stations to be displaced as a result of the auction and repacking process.” *First Report & Order* ¶ 657.

<sup>12</sup> *First Report & Order* ¶ 237. “[O]ur decision will result in some viewers losing the services of these stations, may strand the investments displaced [LPTV licensees] have made in their existing facilities, and may cause displaced licensees that choose to move to a new channel to incur the cost of doing so.” *Id.*

1977), and *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958), when a petitioner demonstrates: (1) it is likely to prevail on the merits of its petition for review; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest. *See, e.g., Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Order Denying Stay Motion ¶ 5 & n.15 (Media Bur. rel. Feb. 25, 2016) (“*Latina Broad. Stay Order*”). The Commission balances these factors, with no single factor being dispositive. All of the criteria are satisfied in this case.

## ARGUMENT

### **I. Petitioners Are Likely To Prevail On the Merits.**

12. The Spectrum Act prohibits the FCC from reassigning channels or reallocating broadcast spectrum in a manner that would “alter the spectrum usage rights of low-power television stations.” 47 U.S.C. § 1452(b)(5). Yet the Orders will, by the Commission’s own admission, completely extinguish many LPTV stations, *see, e.g., First Report & Order* ¶ 237, while simultaneously giving priority for use of that and other “vacant” television spectrum to unlicensed communications devices and uses that are, by statute and regulation, “secondary” to licensed LPTV services. The FCC’s mistreatment of LPTV stations in its spectrum auction is based on the false premise that LPTV is not “protected” by the Spectrum Act; it is inconsistent with the statute’s plain language and with the long history of Congress’s and the FCC’s efforts to promote significant investment in LPTV broadcasting. *See generally* Opening Brief of Petitioners, *Mako Communications, LLC v. FCC*, No. 15-1264, at 20-26 (D.C. Cir. filed Dec. 4, 2015); Brief For Petitioners, *Free Access & Broadcast Telemedia, LLC v. FCC*, No. 15-1346, at 44-58

(D.C. Cir. filed Jan. 11, 2016); Reply Brief of Petitioners, *Mako Communications, LLC v. FCC*, No. 15-1264, at 3-25 (D.C. Cir. filed Feb. 26, 2016).

13. The Commission’s determinations contradict the Spectrum Act’s explicit, unambiguous language ensuring LPTV licensees’ spectrum usage rights, statutory terms whose meaning is reinforced by the Act’s structure and legislative history. Even if the Spectrum Act’s terms were ambiguous, the FCC’s interpretation would still be unreasonable, because that interpretation renders the provision devoid of substantive meaning and because it raises significant constitutional concerns by depriving LPTV station owners and investors of all economically beneficial or productive use of their licenses.

14. The Orders also violate traditional Administrative Procedure Act (“APA”) prohibitions against arbitrary and capricious rulemaking. 5 U.S.C. § 706(2)(A). The Commission exceeded its administrative discretion by proposing to wipe out LPTV service in many major markets in order to achieve policy goals, repeated as if a mantra, that are rooted not in Congress’s enabling legislation but, rather, in the agency’s prior *National Broadband Plan* proposals which were never voted upon by the Commission and have no force of law.<sup>13</sup> The Commission has decided to sell more spectrum in the forward auction than the reverse auction reclaims, or that is already vacant, without acknowledging that it is in fact changing policies as to LPTV stations’ superior rights relative to unlicensed services. That unilateral FCC policy reversal lacks any reasonable explanation tied to the record because the decision to “repack” LPTV out of existence says literally nothing of the broader legal balance between the rights of *licensed* broadcasters and those of *unlicensed* spectrum usage.

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<sup>13</sup> FCC, *Connecting America: The National Broadband Plan* (2010), available at <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

15. Importantly, the likelihood of prevailing on the merits is neither a dispositive criterion nor one that requires any specific level of certainty. As the D.C. Circuit has held, a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary “level” or “degree” of possibility of success will vary according to the court's assessment of the other factors.

*Holiday Tours, Inc.*, 559 F.2d at 843.

**A. The Spectrum Act protects LPTV's spectrum usage rights against “alteration,” which plainly includes eliminating LPTV stations' licensed channels.**

16. The Commission refused to include LPTV stations in its auction “repacking” process despite the Spectrum Act's express provision that “[n]othing in this subsection”—*i.e.*, the Act's television spectrum reorganization provisions—“shall be construed to alter the spectrum usage rights of low-power television stations.” 47 U.S.C. § 1452(b)(5). The FCC asserted that “[t]his provision simply clarifies the meaning and scope of [the statute]; it does not limit the Commission's spectrum management authority.” *First Report & Order* ¶ 239. The Commission characterized § 1452(b)(5)'s protection of LPTV spectrum rights as merely “a rule of statutory construction, not a limit on the Commission's authority.” *Second Order On Reconsideration* ¶ 68.

17. To the contrary, where “Congress has directly spoken to the precise question at issue,” it is well-settled that “the agency must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Subsection 1452(b) is the source of the Commission's power to “repack” broadcast spectrum following the reverse auction. By providing that this subsection may not be construed

to “alter” LPTV’s spectrum rights, Congress unmistakably limited the scope of the FCC’s powers in connection with that spectrum reorganization. Eliminating the channels on which “many” or even a “significant number” of LPTV stations currently broadcast is the epitome of altering their spectrum usage rights in contravention of this limitation. Since Congress has spoken unambiguously on whether LPTV stations may be “displaced” without alternative channels in the “repack”—under § 1452(b)(5) they plainly may not—the Commission’s refusal to include LPTV in the second phase of the incentive auction is facially unlawful.

**B. The Commission’s purported “interpretation” of section 1452(b)(5) lacks any textual or rational basis and instead represents an unlawful failure to construe the statute at all.**

18. The Commission’s conclusory assertion that § 1452(b)(5) is merely “a rule of statutory construction, not a limit on the Commission’s authority,” *First Order On Reconsideration* ¶ 68, lacks either coherence or any textual basis in the Spectrum Act. First, it cannot be squared with the structure of the Act. As discussed above, by protecting LPTV’s spectrum usage rights in the spectrum reorganization, Congress substantively limited the Commission’s powers and, thus, the scope of its legal “repack” discretion under the statute. The Commission’s explanation that only full-power broadcasters are “protected” by the Act misconstrues the meaning and purpose of § 1452(b)(2); that subsection simply “preserves,” to the extent “reasonabl[y]” possible, a station’s geographic coverage area—its “Grade B contour”—but offers no protection of current (or future) channel assignments during or after the Commission’s “repack.”<sup>14</sup>

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<sup>14</sup> Indeed, § 1452(b)(2) is titled “Factors For Consideration,” while the only reference to “protection” in subsection (b) is § 1452(a)(4), titled “Protection of Carriage Rights of Licensees Sharing a Channel,” which protects must-carry rights applicable under the Communications Act and is otherwise totally irrelevant to spectrum reorganization.

19. Second, where Congress intended not to require inclusion of LPTV stations in a particular phase of the auction, it did so specifically, by extending protection to “broadcast television licensees”—a new statutory term that encompasses only full-power and Class A stations but not small LPTV stations. 47 U.S.C. § 1401(6). When Congress intended to limit a provision to cover only these “broadcast television licensees,” it said so. *See, e.g., id.* § 1452(b)(4) (directing the Commission to reimburse broadcast television licensees’ reasonable costs of relocation). Yet instead of phrasing its provisions in terms of “broadcast television licensees,” the Act’s spectrum reorganization subsection speaks more broadly of reassigning “television *channels*” and reallocating portions of “*spectrum.*” *Id.* § 1452(b)(1) (emphases added). That textual distinction is significant because the FCC’s interpretation improperly reads the more limited scope of subsections (b)(4) into (b)(1) and (b)(5), which contain no such restriction.<sup>15</sup>

20. Nothing in the Spectrum Act or its legislative history supports the Commission’s construction of § 1452(b)(5). It is “virtually inconceivable that Congress would have” enacted such a sharp break from the longstanding legal status of LPTV broadcasters “without any discussion in the legislative history of the Act.” *Finnegan v. Leu*, 456 U.S. 431, 441 n.12 (1982). More broadly, the Commission never addresses what it believes that subsection means. The FCC’s approach is thus not an interpretation so much as the *absence* of any statutory construction, for nowhere has the Commission ever explained how § 1452(b)(5)’s terms actually affect the appropriate construction of the Act. This violates the “cardinal principle of statutory

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<sup>15</sup> Where “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983). Nothing in the Commission’s many decisions or the Spectrum Act offers any basis on which to overcome this presumption.

construction that courts must give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000), quoted in *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013). The LPTV protection provision “cannot be regarded as mere surplusage; it means something.” *Potter v. United States*, 155 U.S. 438, 446 (1894), quoted in *Ratzlaf v. U.S.*, 510 U.S. 135, 141 (1994). The Commission’s assertion to the contrary is irrational and, in fact, represents an impermissible failure to construe the statute at all. Under the FCC’s reasoning, LPTV stations have no spectrum usage rights because they are “secondary” licensees, leaving § 1452(b)(5) with no import whatsoever.

21. If there is any reasoning underlying the Commission’s application of subsection 1452(b)(5), it thus apparently is that LPTV licensees do not, in fact, enjoy spectrum usage rights at all because they are formally classified as “secondary” broadcasters. *E.g.*, *Incentive Auction NPRM*, App. B, ¶ 30; *First Report & Order* ¶ 239. That is a red herring. The Commission has not explained how LPTV’s “secondary” status for *interference* purposes<sup>16</sup> justifies eliminating LPTV licensees’ channels and why the so-called “displacement” of many LPTV stations, for the benefit of unlicensed services, is not an alteration of their spectrum usage rights under §1452(b)(5).

22. There is no conceivable explanation. Extending the “secondary” concept from one that requires an interfering LPTV station to relocate channels into a rule that LPTV stations have no spectrum rights even in the absence of interference is nonsensical and completely inconsistent

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<sup>16</sup> “Secondary status means that low power stations may not create objectionable interference to full service television stations. . . . A low power station causing interference to a full service station . . . must correct the problem or cease operation.” *Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 48 Fed. Reg. 21478, 21479 (1983).

with the Commission’s long-standing policy that licensed services are primary relative to unlicensed services.<sup>17</sup> As Petitioner Mako cogently summarized:

LPTV is secondary only to full power and Class A stations. No statute or rule exists making LPTV secondary to any other service. The FCC never identified broadband use as a “primary service” before 2012. It cannot lawfully do so now because such a new use cannot enjoy primacy over LPTV when Congress unambiguously prohibited any alteration of LPTV broadcasters’ rights. Such retroactive designation of broadband as primary was done solely to disenfranchise LPTV.

Opening Brief of Petitioners, *Mako Communications, LLC v. FCC*, No. 15-1264, at 26 (D.C. Cir. filed Dec. 4, 2015). Since the FCC’s spectrum auction proposals include reserving a full channel solely for such unlicensed uses,<sup>18</sup> it is plain that the secondary licensee argument does not as a legal matter and cannot as a policy matter justify the Commission’s disregard of § 1452(b)(5).

**C. Disregarding § 1452(b)(5) raises serious constitutional issues under the Fifth Amendment’s takings clause which can and should be avoided.**

23. The Commission’s broad view of its own powers, and its correspondingly narrow interpretation of the Act’s restraints on its authority vis-à-vis LPTV stations, vests the agency with power to summarily destroy the entire economic value of any LPTV station’s license—indeed, of the stations themselves—by stripping LPTV broadcasters of their spectrum. It is no answer for to assert that “[t]he Communications Act is clear that there can be no ownership interest in spectrum licensed to broadcast television stations.” *First Report & Order* ¶ 240 & n.743. Whatever the ownership interests in spectrum may or may not be (which is itself a subject of increasing controversy), LPTV stations and investors certainly have ownership interests in their stations and their investments in stations *per se*. *Cf. In re Tracy Broadcasting Corp.*, 696

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<sup>17</sup> As a licensed service, LPTV is primary relative to all unlicensed services, such as WiFi broadband, “white spaces” services and other “Part 15” devices (47 C.F.R. § 15.1 *et seq.*). Unlicensed services are prohibited from causing harmful interference to licensed services. 47 C.F.R. § 15.5(b).

<sup>18</sup> *Vacant Channel NPRM*, *supra* note 6.

F.3d 1051, 1055-56 (10th Cir. 2012). Indeed, as the courts have recognized, Congress and the FCC established the statutory and regulatory framework for LPTV stations precisely to encourage investment in LPTV stations. *See, e.g., Cent. Fla. Enter., Inc. v. FCC*, 683 F.2d 503, 507 (D.C. Cir. 1983).

24. Thus, if the FCC were empowered to summarily shut down an LPTV station as part of its spectrum auction and “repack,” that would deprive the station’s owners and investors of “all economically beneficial or productive use of” the station—raising serious questions under the Fifth Amendment’s prohibition against the taking of private property without just compensation. *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001); *Penn Cent. Transp. Co. v. N.Y.*, 438 U.S. 104, 124 (1978). Asserting such powers also raises equally serious questions under the Fifth Amendment’s due process clause. *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). In *Mathews*, welfare beneficiaries’ well-settled expectations to governmental benefits—the entitlements equivalent of an FCC license—rose to the level of property for Fifth Amendment procedural due process purposes; here, licensees’ benefits and expectations surely are at least as concrete and weighty.

25. It is true that the Supreme Court stated, in 1940, that the “policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license,” *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), and that the D.C. Circuit has followed that precedent, *see Mobile Relay Assoc. v. FCC*, 457 F.3d 1, 12 (D.C. Cir. 2006). But as the leading communications law treatise explains, what may have seemed clear in 1940 is questionable today, especially now that “the ‘renewal expectancy’ [codified in 1996] creates de facto property rights. . . . [I]t seems safe to predict that a

takings case will be prosecuted successfully, sooner or later.” Peter W. Huber *et al.*, 2 FEDERAL TELECOMMUNICATIONS LAW § 10.3.8 (2d ed. 2015).<sup>19</sup>

26. It is unnecessary for the FCC’s administration of the Spectrum Act to implicate such serious constitutional problems. Were the Commission simply to interpret § 1452(b)(5) as substantively preserving LPTV stations’ rights—the statute’s natural meaning—these constitutional infirmities would be avoided. The Commission’s failure to adopt the natural interpretation of the Act is unreasonable and indefensible. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) (“In other words, the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference.”).

27. As the D.C. Circuit has emphasized, FCC Commissioners “are not only bound by the Constitution, they must also take a specific oath to support and defend it,” which obligates them to “explicitly consider” the petitioner’s “claim that [the FCC’s] enforcement of [FCC policy] deprives it of its constitutional rights.” *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987). Rejecting Free Access’s Fifth Amendment argument without any substantive constitutional analysis cannot be squared with that duty, which is most important where, as here, the potential takings problem is easily avoided by an alternative, reasonable interpretation. *Id.* at 872-74.

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<sup>19</sup> With respect to the broadcast “renewal expectancy,” *see, e.g., FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775, 805 (1978) (quoting *Greater Boston Tele. Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970)); 47 U.S.C. § 309(k); 47 C.F.R. § 90.743.

**D. The Orders are based on policy judgments that improperly reflect unilateral Commission priorities inconsistent with the Spectrum Act and that arbitrarily reverse decades of settled FCC precedent on the priority of licensed broadcast services over unlicensed spectrum uses.**

28. The FCC exceeded the scope of its administrative discretion by proposing to wipe out LPTV service in most major markets in order to achieve auction policy goals rooted not in the enabling legislation but, rather, in the its own *National Broadband Plan*—concepts and stratagems that have never been adopted as Commission rules or agency public policies.

29. Administrative agencies have discretion to fashion regulatory policies that further Congress’s statutory objectives and fill interpretive “gaps” in legislation enacted by Congress. *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005). Here the FCC did much more; it claimed authority, unmoored from the Spectrum Act’s terms, to sell more spectrum in the forward auction than it reclaims from broadcasters in the incentive reverse auction. As NAB commented in a related docket, this “turns the Commission’s unlicensed rules on their head.”<sup>20</sup> It “prioritizes unlicensed services over licensed LPTV and translator stations currently providing service to their communities” by “artificially and unnecessarily increasing the scope of repacking following the incentive auction to create contiguous bands of white space channels for unlicensed use.” *Id.* Nevertheless, the FCC specifically rejected Free Access’s parallel objection that the Commission cannot “repurpose more spectrum than is vacant before the reverse auction or than is relinquished in the reverse auction.” *First Report & Order* ¶ 67 n.255. The Commission reached this conclusion not because a statute required it, but instead because matching the reverse auction results to the forward auction

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<sup>20</sup> Reply Comments of the National Association of Broadcasters, MB Docket No. 03-185, at 2 (Feb. 2, 2015).

offering “would require protection of LPTV stations in the repacking process, which we decline to do.” *Id.*

30. This result-driven choice misses the fundamental point regarding agency policymaking. The Spectrum Act’s structure is a series of intertwined steps aimed at achieving voluntary reclamation of television spectrum and its “forward” sale to auction bidders such as 4G wireless carriers. The Commission’s unilateral decision to “repack” LPTV out of existence, in order to advance unlicensed uses (including reserving an entire vacant channel for unlicensed services even before LPTV stations’ fate is determined post-auction),<sup>21</sup> is irrational not only because its reasoning cannot be squared with the Spectrum Act’s express protection of LPTV stations’ spectrum usage rights in reorganization via “repack,” but also because it says nothing of the longstanding priority of *licensed* broadcasters’ spectrum usage rights over *unlicensed* spectrum usage.

31. That errant policy judgment improperly elevates the Commission’s unofficial *National Broadband Plan* to the status of law, which it plainly is not, without providing a reasoned explanation justified by the record.<sup>22</sup> The FCC’s regulatory choices must, under the APA, be supported by substantial record evidence and a rational explanation for reversal of

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<sup>21</sup> See *Vacant Channel NPRM*, *supra* note 6.

<sup>22</sup> This *National Broadband Plan* has been relied on internally within the offices of Commission staff and bureaus, and cited to congressional committees, as if it were official, adopted FCC policy. It is not and, in fact, was never voted on by the Commission itself. As former Commissioner McDowell emphasized at the time, “the Plan offered up today for Congress’s review represents a tremendous amount of hard work and thoughtfulness. However, it does not carry with it the force and effect of law. In other words, the Plan itself contains no rules. Not having a vote has given the Broadband Plan team the flexibility to make their recommendations to Congress and the Commission freely.” *Statement of Commissioner Robert M. McDowell*, DOC-296912A1, at 1 (March 10, 2010); see *Joint Statement on Broadband*, GN Docket No. 10-66, FCC 10-42 (rel. March 10, 2010).

former policies. An agency must at the very least “examine the relevant data and articulate a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And the APA’s requirement that an administrative agency provide “reasoned explanation” for its action compels the agency to “display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (citation omitted; emphasis in original).

32. The Commission contravened all these APA constraints in this case. First, the Commission’s decision to sell more spectrum in the forward auction than it reclaims in the voluntary reverse auction, or is already vacant, does not even “display awareness” that the agency is in fact changing policies as to LPTV stations’ superior legal rights relative to unlicensed services. Fatally, the FCC never cites or acknowledges that, as a licensed service, the Commission’s policy has always been that LPTV enjoys priority as against white space devices.<sup>23</sup> Indeed, while the Commission appears to believe that the Spectrum Act’s primary objective was to repurpose current broadcast spectrum for unlicensed broadband and wireless use, that is explicitly **not** the case. Under § 309(j)(8)(G) of the Communications Act (47 U.S.C. § 309(j)(8)(G)), added by § 6403 of the Spectrum Act, “the Commission may encourage a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights *in order to permit the assignment of new initial licenses subject to flexible-use service rules...*” More pointedly, neither the Spectrum Act nor the relevant congressional conference report contains any provision reciting the Act’s purpose; as in *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4,

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<sup>23</sup> *E.g.*, *Digital Television Distributed Transmission System Technologies*, Report & Order, 23 FCC Rcd. 16731, 16743 (2008) (licensed services “warrant priority over those unlicensed broadband devices”).

11 (1942), “[t]he search for significance in the silence of Congress is too often the pursuit of a mirage.”<sup>24</sup> It is manifest, accordingly, that the Spectrum Act evinces no purpose or objective of reallocating broadcast spectrum for *unlicensed* use, either generally or as the goal of the phase-two spectrum “repack,” and indeed in § 6403 bars the FCC from pursuing such a goal.

33. Second, by reversing the policy that licensed services have priority over unlicensed spectrum uses on the immaterial basis of guard band size<sup>25</sup> and a false presumption that LPTV has no statutory “protection” in the spectrum band plan repack, the Commission has hardly offered any explanation, let alone a reasonable one, for its reversal. Indeed, by placing its policy choice regarding “repack” above the statutory protections that Congress enacted specifically for LPTV stations in the Spectrum Act, the FCC has violated “the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Util. Air Regulatory Group v. EPA*, 143 S. Ct. 2427, 2446 (2014).

34. Third, the FCC cannot even claim to have “examine[d] the relevant data” per *State Farm* because, as the record reveals, the Commission (a) refused to conduct any analysis of the impact of its auction structure on LPTV, and (b) has not incorporated the results of its auction simulations and models into the record.<sup>26</sup> Thus, the Commission admits with no hint of remorse

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<sup>24</sup> Just as the courts “must be wary against interpolating our notions of policy in the interstices of legislative provisions,” *Scripps-Howard Radio*, 316 U.S. at 11, so too must the Commission. Reading the objectives of the *National Broadband Plan* into the Spectrum Act improperly reflects the Commission staff’s policies, not those even of the full Commission itself, let alone of Congress.

<sup>25</sup> The Commission may be correct that it is not “sizing the [channel] guard bands solely to facilitate unlicensed use” under its powers to set “technically reasonable” channel guard bands. *Second Order On Reconsideration* ¶ 14, citing 47 U.S.C. § 1454(b). Yet that technical judgment is immaterial to the FCC’s determination to allocate more spectrum for the forward auction than it reclaims from broadcasters that participate voluntarily in the reverse auction.

<sup>26</sup> See Free Access Mot. to Reopen the Record in the Third Notice of Proposed Rulemaking, MB Docket No. 03-185 (Nov. 11, 2015).

that “many” LPTV stations “will” be displaced without an alternative channel/spectrum choice, while at the same time it refuses to develop or examine data to project the size, geographic dispersion or communications diversity impacts of this so-called “displacement.”<sup>27</sup>

## **II. Petitioners Will Suffer Irreparable Harm Absent a Stay.**

35. Absent a stay, Free Access, WOGF and Mako, along with most other LPTV licensees and parties with substantial investments in LPTV broadcasting, will be excluded from the reverse auction and the resulting spectrum “repack.” The Commission has repeatedly recognized that as a result of the Orders, “many” LPTV stations “will” be “displaced,” in other words will lose the channels on which they currently broadcast, and additionally that there will not be enough available spectrum remaining after the forward auction to which most LPTV stations could relocate.<sup>28</sup> If the Orders are not stayed pending appeal, Petitioners will lose millions of dollars in revenue, along with options for buying controlling interests in many other LPTV stations, and will have no means of recouping this lost revenue, investment value and corporate control from the Commission or any other source even if they ultimately prevail in their appeals. Moreover, LPTV stations, for which the Commission also declined to reimburse relocation expenses, will be unable to recoup the substantial costs of complying with Orders.<sup>29</sup>

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<sup>27</sup> Although the 2010 *National Broadband Plan* explicitly recognized that “reallocate[ing] 120 megahertz from the broadcast television bands” for use by wireless broadband carriers and services would necessitate that the Commission “weigh the impact on consumers, the public interest, and the various services that share this spectrum, *including low-power TV*, wireless microphones and TV white space devices,” *National Broadband Plan* at 88-89 (emphasis added), the FCC has never done so.

<sup>28</sup> See, e.g., *Videohouse Order* ¶ 3, citing *First Report & Order* ¶ 234; *First Report & Order* ¶¶ 232-35; *Incentive Auction NPRM* ¶¶ 98, 118. the Commission has from the start of this proceeding conceded that LPTV will “be greatly impacted by repacking” in that “[m]any [LPTV] stations will be displaced from their current operating channel.” *Incentive Auction NPRM*, App. B, ¶ 30.

<sup>29</sup> See Exh. 1 (Free Access declaration); Exh. 2 (WOGF declaration).

The injury involved here is thus “certain to occur in the near future.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

36. These losses plainly constitute irreparable harm. First, the extinguishment of their broadcasting rights—taking away their assigned channels with no assurance of alternatives—will force large numbers of LPTV licensees to cease broadcasting, *i.e.*, to “go dark.” Hence, “[t]he harm to [either WOGF or Mako] in the absence of a stay would be its destruction in its current form as a provider of [LPTV services].” *Holiday Tours, Inc.*, 559 F.2d at 843. This is qualitatively different from “the necessary expenditure of funds pending appeal and the temporary monetary losses for which ‘adequate compensatory or other corrective relief will be available at a later date.’” *Id.* at 843 n.2 (quoting *Virginia Petroleum Jobbers*, 259 F.2d at 925); *see Wisconsin Gas Co.*, 758 F.2d at 674 (“[r]ecoverable monetary loss” constitutes irreparable harm “where the loss threatens the very existence of the movant's business”). Further, as LPTV licensees, specifically including religious broadcasters such as petitioner WOGF, are exercising important First Amendment rights, their irreparable injury is satisfied under the rule that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury” sufficient for a stay. *Elrod v. Burns*, 427 US 347, 373 (1976).

37. Second, although economic harm generally does not constitute irreparable injury, “th[at] rule is based upon the presumption that ‘adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.’ That presumption does not hold and the general rule does not apply” when, as here, the party seeking a stay cannot recover monetary damages. *Robertson v. Cartinhour*, 429 F. App’x 1, 3 (D.C. Cir. 2011) (internal citation omitted) (quoting *Virginia Petroleum Jobbers*, 259 F.2d at 925). There is no recognized statutory cause of action for monetary relief against a federal administrative agency for the harm

resulting, as here, from its decisions in rulemaking proceedings to extinguish license rights Congress affirmed should not be altered. *See Ranger v. Tenet*, 274 F. Supp. 2d 1, 6 n.2 (D.D.C. 2003) (money damages “unavailable” on “review of a federal agency’s administrative decision”). Accordingly, WOGF, Mako and Free Access are all certain to suffer unrecoverable economic losses putting them out of business as LPTV broadcasters and LPTV investors, respectively, and thus irreparable harm, if a stay is not entered pending decision on the current D.C. Circuit appeals. *Wisconsin Gas Co.*, 758 F.2d at 675 (stay appropriate where petitioner has “shown that the alleged loss is unrecoverable, and ... that in the interim they will be forced out of business by the loss”).

38. The Media Bureau’s recent conclusion that with respect to the incentive spectrum auction, “appropriate [judicial] relief would be available at a later date,” *Latina Broad. Stay Order* ¶ 9 & n.43 (citing *FCC v Radiofone, Inc.*, 516 U.S. 1301 (1995) (single-Justice decision denying stay)), is meritless. Nothing in the Communications Act’s auction-related provisions empowers a court to unwind the results of a spectrum action or call “do-overs.” As Justice Frankfurter memorably observed in the context of staying an FCC broadcasting order, “[n]o court can make time stand still.” *Scripps-Howard Radio*, 316 U.S. at 9. Consequently, while judicial relief should normally be available for auction-related decisions, such as payment deadlines, *that post-date the completion of the auction*, see *US Airwaves, Inc. v. FCC*, 232 F. 3d 227 (D.C. Cir. 2000) (challenge to post-auction, retroactive changes to FCC rules for C-block auction financing), that is plainly not the situation here.

39. The Media Bureau’s *Latina Broad. Stay Order* suggests nothing a federal court could reasonably do to unscramble the eggs once the Commission’s auction omelette starts cooking. *Omnipoint Corp. v. FCC*, 78 F. 3d 620, 627 (D.C. Cir. 1996) (staying C-Block auction

prior to commencement); *Telephone Electronics Corp. v. FCC*, No. 95-1015, 1995 WL 364043 (D.C. Cir. March 15, 1995). As the Commission has repeatedly observed, all three phases of the incentive spectrum auction are integrally related, making the entire process “a vast omelette which cannot be unscrambled” at a later date. *In re Delta Air Lines, Inc.*, 386 B.R. 518, 545 (Bankr. S.D.N.Y. 2008); *FTC v. University Health, Inc.*, 938 F. 2d 1206, 1217 n.3 (11th Cir. 1991) (“once an anticompetitive acquisition is consummated, it is difficult to ‘unscramble the egg’”); *Sonesta Int’l Hotels Corp. v. Wellington Associates*, 483 F. 2d 247, 251 (2d Cir. 1973) (“it becomes difficult, and sometimes virtually impossible, for a court to ‘unscramble the eggs’” once a tender has been consummated).

### **III. The Balance of Hardships And the Public Interest Favor a Stay**

40. The balance of hardships and the public interest also favor a stay. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (“These [two] factors merge when the Government is the opposing party.”) A stay would delay the reverse auction and possibly postpone the “repack,” but would not deprive any full-power, Class A or other broadcaster of the entitlement and ability to sell its spectrum back in the first auction phase. The Spectrum Act passed four years ago gives the Commission more than *six and one-half additional years*—until fiscal year 2022—to complete the incentive auction effectively, so a brief delay of a few months while the D.C. Circuit considers the pending challenges to the Commission’s alleged mistreatment of LPTV stations will not prevent timely completion of the incentive auction. This is not an agency proceeding where there is an “urgent necessity for rapid administrative action under the circumstances,” *Northwest Airlines v. Goldschmidt*, 645 F.2d 1309, 1321 (D.C. Cir. 1981), or an auction that Congress has specifically commanded must be concluded “without administrative or judicial delays.” *Omnipoint Corp. v. FCC*, 78 F. 3d at 629 (citing 47 U.S.C. § 309(j)(3)(A)); *id.*

at 630 (for C-Block auction, “the Commission was under a congressional deadline to act quickly”).

41. The public interest unmistakably favors such a stay. Treating LPTV, a centerpiece for more than 35 years of the Commission’s core diversity and localism broadcasting policies,<sup>30</sup> as if those licensed stations were non-existent is a startling departure from the FCC’s long-standing approach to broadcasting. Beginning the reverse auction before the legality of the Commission’s approach can be reviewed by the federal courts would put in motion a sequence of auction-related events that will imminently and irreparably harm Petitioners—indeed nearly all LPTV licensees—with no practicable financial or other recourse. The established public interest in broadcasting diversity and localism epitomized by LPTV indicate that of all the stay criteria, the public interest factor weighs decisively in favor of a stay in this case.<sup>31</sup> *See, e.g., Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3d Cir. 2004) (staying Commission’s media concentration rule changes in order to preserve diversity and localism); *Prometheus Radio Project v. FCC*, 652 F. 3d 431 (3d Cir. 2011).

42. Finally, the actions required for the Commission to remedy *post haste* the imminent harm to LPTV broadcasters are simple, indeed trivial. All that is necessary is to load

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<sup>30</sup> The Commission established modern LPTV service to meet “large unsatisfied demand for television service” in rural and urban areas alike, and celebrated that step as an “occasion for assuring enhanced diversity of ownership and of viewpoints in television broadcasting.” *An Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System*, 82 F.C.C.2d 47, 48, 77 (1980).

<sup>31</sup> “In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.” *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978). *See also Metro Broadcasting, Inc. v. FCC*, 497 US 547, 600 (1990) (holding that “[t]he Commission’s minority ownership policies bear the *imprimatur* of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity”). The record in this proceeding is uncontested that, while threatened everywhere in broadcasting, minority ownership of LPTV stations vastly exceeds all other mass media outlets.

the FCC’s television database,<sup>32</sup> which presently exists and includes all LPTV stations, their current status and engineering details, into the FCC’s custom-designed auction software, commonly known as TVStudy.<sup>33</sup> This requires no compilation or laborious effort whatever. The publicly available TVStudy software, tested and refined over the last two years, has been proclaimed by the FCC as ready for a live auction and use in the “repack,” which in turn will illuminate the Commission’s options for reorganizing broadcast television spectrum. The comprehensive FCC TV database can be loaded into the TVStudy auction software by the Commission’s Incentive Auction Task Force staff with little incremental effort, an uncontested fact which demonstrates decisively that far from delaying the auction, including LPTV in the “repack” would have no material impact on the Commission’s ability to complete all three phases of the incentive auction within the next six 1/2 years.

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<sup>32</sup> The Commission’s “TV Query Broadcast Station” database, which includes all licensed facilities operating within the spectrum currently used for television broadcasting, can be accessed by anyone (technical or non-technical) at <https://www.fcc.gov/media/television/tv-query>. Entering the call sign of a licensed LPTV station produces the same output results as would be used in any Full Power or Class A facility simulation modeling. For an example, using the generic call sign KQUP produces two separately-licensed stations owned by Petitioner WOGF in Washington state. One is a full-power station KQUP that is auction eligible (FCC Facility ID #78921) and the other is low-power station KQUP-LD (FCC Facility ID # 15635). The two datasets are fully populated, congruent, and robust. See <http://ht.ly/YPndK> and Exh 3.

<sup>33</sup> Public Notice, *Office of Engineering And Technology Releases Final Version of TVStudy And Releases Baseline Coverage Area And Population Served Information Related To Incentive Auction Repacking*, ET Docket No. 13-26, GN Docket No. 12-268, DA 15-768 (OET rel. June 30, 2015), available at <http://ht.ly/YPpki>. See *National Association of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015) (rejecting challenge to Commission’s updates to OET-69 data sets used with the *TVStudy* software). The *TVStudy* software “is designed for making rapid coverage and interference calculations involving many stations and provides highly-detailed outputs” to be used in the “repack” evaluation of television channel allocations. See Public Notice, *Office of Engineering And Technology Releases And Seeks Comment On Updated OET-69 Software*, ET Docket No. 13-26, GN Docket No. 12-268, DA 13-1381 at 3 (OET rel. Feb. 4, 2013), available at <http://ht.ly/YQCRy>; Deborah McAdam, FCC Staff Demos TVStudy, *TVTechnology* (Aug. 2, 2013) (“Repacking ‘is a “map-coloring” problem,’ whereby stations are separated far enough to prevent interference, but close enough together to maximize the use of the spectrum.”), available at <http://ht.ly/YQD7K> (quoting Robert Weller, then OET’s Chief of Technical Analysis).

**CONCLUSION**

For all these reasons, the Commission should immediately stay the Orders well prior to March 29, 2016, and pending the completion of judicial review.

Respectfully submitted,

/s/ Glenn B. Manishin

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Dated: March 1, 2016

**EXHIBIT 1**

**Declaration of David J. Mallof, Free Access & Broadcast**

**Telemedia, LLC (4 pages)**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREE ACCESS & BROADCAST  
TELEMEDIA, LLC, *et al.*,

*Petitioners,*

v.

FEDERAL COMMUNICATIONS  
COMMISSION, *et al.*,

*Respondents.*

Case No. 15-1346

**DECLARATION OF DAVID J. MALLOF,  
FREE ACCESS & BROADCAST TELEMEDIA, LLC**

Under penalty of perjury, I declare the following facts:

1. I am David J. Mallof, and I am the Managing Member of Free Access & Broadcast Telemedia, LLC (hereinafter, "Free Access").
2. Free Access is a privately held company that I founded to compete as a new market entrant in providing innovative wireless telecommunications services.
3. Free Access's business model is to provide free access and broadcast services to the general public, initially in selected metro

markets with revenue generated by limited-but-targeted ad-supported interactivity. These free services will be disruptive to the increasingly oligopolistic wireless marketplace, while benefiting customers who today face high-priced, metered, capped, or constrained mobile wireless services, thereby catalyzing and enlivening competition.

4. Free Access currently has investments solely in low-power television (LPTV) stations operating with FCC-issued LPTV licenses. Each of these stations is in a top-20 major metropolitan Nielsen Designated Market Area, including Chicago (#3), Philadelphia (#4), Washington, DC (#8), and Minneapolis (#15).

5. In consideration of those cash investments, the stations have conveyed to Free Access firm, committed options for Free Access to buy the stations at any time and in Free Access's sole discretion. The investment options themselves also are fully transferable or saleable, as Free Access solely sees fit.

6. As owner of those investment options, and firmly believing in LPTV's fundamental role in American media under longstanding federal law and FCC policy (until the FCC's break with that law and policy in the spectrum auction orders), Free Access intended and still

intends to exercise those options and acquire those stations after the FCC orders have been vacated and the longstanding legal framework and legitimate license expectancy for LPTV stations is restored.

7. Simply put, the FCC's orders materially devalue and impair the investment options, preventing Free Access from exercising, transferring, or selling those options. The FCC's orders strip significant economic value from those operating stations by destroying the legal protections that Congress enacted for LPTV stations operating under FCC licenses. The FCC's directly detrimental economic impact on LPTV stations is evident to me in my experience in such markets. The market for LPTV stations has deteriorated significantly.

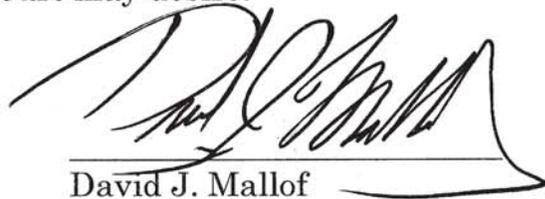
8. The FCC orders' detrimental impact is further evident in a current review of LPTV stations which Free Access has conducted using the most recent LPTV station sales data available from BIA/Kelsey using their Media Access Pro<sup>TM</sup> database.

9. Since the FCC's Notice of Proposed Rulemaking process began in 2012, the FCC's plan for "repacking" the spectrum and summarily "displacing" LPTV licensees has materially impacted LPTV valuations. During this period, recorded LPTV transaction valuations,

as measured on a per population basis, have averaged nearly 40% below similar transactions recorded prior to the rulemaking process. While the database does not include certain factors of value to help normalize unique station-by-station values, such as real estate holdings, revenues, tax incentives, and operating or free cash flows, it nevertheless reflects the loss of rights and expectancies that LPTV licensees and stations have suffered as a result of the FCC's policy, and the shadow of significant financial risk that this policy has cast across LPTV licensees and their stations.

10. After the FCC's orders are vacated and the longstanding legal framework for LPTV stations restored, it would once again be financially prudent (all else being equal) for Free Access to exercise or sell those investment options.

11. If necessary in aid of the Court's jurisdiction, I am willing to declare such further facts as the Court may desire.



David J. Mallof  
*Managing Member*  
Free Access & Broadcast  
Telemedia, LLC

Date: January 11, 2016

**EXHIBIT 2**

**Declaration of Henry Turner, Word of God Fellowship, Inc.**

**(6 pages, including attached table)**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**FREE ACCESS & BROADCAST  
TELEMEDIA, LLC, *et al.*,**

*Petitioners,*

v.

**FEDERAL COMMUNICATIONS  
COMMISSION, *et al.*,**

*Respondents.*

Case No. 15-1346

**DECLARATION OF HENRY TURNER,  
WORD OF GOD FELLOWSHIP, INC.**

Under penalty of perjury, I declare the following facts:

1. I am Henry Turner, and I am the Director of Engineering of Word of God Fellowship, Inc. (hereinafter, "Word of God Fellowship") a Georgia 501(c)(3) non-profit corporation d/b/a The Daystar Television Network ([www.daystar.com](http://www.daystar.com)).

2. Word of God Fellowship and our Daystar Television Network have a singular goal; to reach souls with the Good News of Jesus Christ.

We seek out every available means of distribution to a world in need of hope. With an extensive blend of interdenominational and multi-cultural programming, Daystar is committed to producing and providing quality television that will reach our viewers, refresh their lives and renew their hearts. Our ministry was founded in 1981.

3. Specifically, Word of God Fellowship owns and operates 80 licensed low-power television (LPTV) stations, as set forth in the attached list.

4. As indicated in the attached list, each of Word of God Fellowship's LPTV stations operates pursuant to a license issued by the FCC, pursuant to the Communications Act and the FCC's regulations thereunder. The Word of God Fellowship's 80 LPTV stations across the country reach a combined population of approximately 150 million persons via our over-the-air stations, greater than one-third of our nation. Significantly 41 of our operating LPTVs are in the top 50 TV U.S. markets. While our ministry reaches people over many telemedia including over-the-air, cable, satellite, telco, and via the internet, our over-the-air ministry is vital since viewers pay no cable, satellite, or

other internet carriage fees to hear and see our programming. We have made a substantial investment in converting approximately two-thirds of our LPTV stations to digital transmission.

5. Our duly licensed use of our LPTV's literally has a Providential dimension, helping us to extend the Good News of the Gospel over the air 24 hours per day, 7 days per week to many people who may not otherwise have the opportunity to have access to this type of programming. Our top 20 donation markets, where LPTV is a key outreach component in many cases, are responsible for generating 50% of the charitable contributions we receive to advance our ministry and Christian outreach. These top donation markets include TV markets ranked in the top 10 designated market areas ("DMAs") as well as markets in the 40-50<sup>th</sup> ranked DMAs. These donations are used exclusively for expanding our outreach and infrastructure across the U.S. and around the world and not for salaries and administrative costs.

6. To the best of my knowledge and professional judgment in light of present facts, if the FCC carries out a spectrum auction

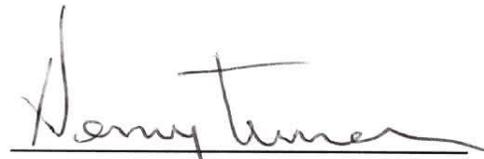
pursuant to the Spectrum Act, then Word of God Fellowship would desire either:

a.) that its stations be included in the so-called “repack;”

b.) or if it were not allowed in the repack, meaning its duly licensed spectrum instead would be treated as somehow “vacant” for purposes of repack after the FCC’s forward auction sells to new for-profit parties, then Word of God Fellowship seeks the opportunity to bid its spectrum into the reverse auction, thus leaving it free to pursue ministry and outreach in other manners and media for those who are unable or unwilling to pay for seeing and hearing our inspirational programming.

7. If the FCC successfully refuses to include LPTV stations in its repack, then many of the Word of God Fellowship’s LPTV stations will be placed at imminent risk of being forced by the FCC to “go dark.” That is, the reverse auction and repack may leave Word of God Fellowship’s FCC-licensed LPTV stations with no available or sufficient spectrum in which to continue to broadcast after new licenses are sold to cellular and wireless operators entering the TV band of spectrum,

with no repack deference paid to us by the FCC as a longstanding licensee. And even then our remaining LPTV stations not forced to shut down and go dark may be forced to incur substantial costs and burdens, and timing uncertainties of relocation at our ministry's sole—and, to date, undetermined and potentially harmful—expense.

A handwritten signature in cursive script that reads "Henry Turner". The signature is written in black ink and is positioned above a solid horizontal line.

Henry Turner  
Director of Engineering  
Word of God Fellowship, Inc.

Date: *January 10, 2016*

**DAYSTAR LOW POWER STATIONS - LICENSE DATES**

Number	State		Location	Legal Listing Call Sign	Community of License, City and State	Most Recent License Date	Expiration Date
1	Alabama	1	Birmingham (Anniston, Tuscaloosa) AL	WBUN-LP	Birmingham, AL	9/13/2013	4/1/2021
		2	Huntsville/ Decatur (Florence) AL	WHVD-LD	Huntsville, AL	1/23/2013	4/1/2021
		3	Montgomery/Selma AL	WETU-LD	Wetumpka, AL	9/13/2013	4/1/2021
2	Arizona	4	Phoenix (Prescott) AZ	KDPH-LD	Phoenix, AZ	8/6/2010	10/1/2022
		5	Tucson (Sierra Vista ) AZ	KPCE-LP	Tucson, AZ	7/7/2008	10/1/2022
3	California	6	Fresno/Visalia CA	KFVD-LP	Porterville, CA	1/31/1990	12/1/2022
		7	Los Angeles CA	KPCD-LP	Big Bear Lake, CA	8/7/2007	12/1/2022
		8	Los Angeles CA	KSCD-LP	Big Bear Lake, CA	8/11/2008	12/1/2022
		9	Sacramento/Stockton/Modesto CA	KACA-LP	Modesto, CA	6/5/2014	12/1/2022
		10	Sacramento/Stockton/Modesto CA	KRJR-LP	Sacramento, CA	12/3/2008	12/1/2022
		11	San Francisco/Oakland/San Jose CA	KDAS-LP	Clarks Crossing, CA	1/11/2007	12/1/2022
		12	San Francisco/Oakland/San Jose CA	KDTS-LD	San Francisco, CA	1/18/2011	12/1/2022
4	Colorado	13	Denver CO	KDNF-LD	Fort Collins, CO	10/18/2011	4/1/2022
		14	Fl. Collins (Denver)	KPXH-LD	Fort Collins, CO	11/29/2011	4/1/2022
5	Delaware	15	Baltimore MD	WWDD-LD	Havre de Grace, MD	2/10/2014	10/1/2020
6	District of Columbia	16	Washington DC (Hagerstown) MD	WDDN-LD	Washington, D.C.	8/20/2012	10/1/2020
7	Florida	17	Jacksonville/Brunswick FL	WUJF-LD	Jacksonville, FL	4/26/2013	2/1/2021
		18	Orlando/Daytona Beach/Melbourne FL	WOCB-LP	Dunnellon, FL	4/16/2009	2/1/2021
		19	Orlando/Daytona Beach/Melbourne FL	WOTO-LD	Orlando, FL	9/13/2013	2/1/2021
		20	Orlando/Daytona Beach	WPXB-LD	Daytona Beach, FL	10/6/2008	2/1/2021
		21	Tampa/St. Petersburg/(Sarasota) FL	WSVT-LD	Tampa, FL	8/10/2011	2/1/2021
8	Georgia	22	West Palm Beach/Fort Pierce FL	WSLF-LD	Port St. Lucie, FL	2/22/2012	2/1/2021
		23	Atlanta GA	WDTA-LD	Atlanta, GA	10/27/2010	4/1/2021
		24	Atlanta GA	WGGD-LD	Gainesville, GA	1/8/2013	4/1/2021
9	Illinois	25	Chattanooga TN	WDDA-LP	Dalton, GA	3/14/2007	4/1/2021
		26	Chicago IL	WDCI-LD	Chicago, IL	2/9/2012	12/1/2021
10	Indiana	27	Indianapolis IN	WIPX-LP	Indianapolis, IN	10/8/2015	8/1/2021
		28	South Bend/Elkhart IN	WEID-LD	Elkhart, IN	12/1/2014	8/1/2021
11	Kansas	29	Wichita/Hutchinson Plus KS	KWKD-LP	Wichita, KS	8/22/2005	6/1/2022
12	Kentucky	30	Louisville KY	WDYL-LD	Louisville, KY	9/26/2013	8/1/2021
		31	Baton Rouge LA	W48DW-D	Baton Rouge, LA	6/19/2012	6/1/2021
13	Louisiana	32	New Orleans LA	KNLD-LD	New Orleans, LA	3/25/2010	6/1/2021
		33	Portland/Port Auburn ME	WLLB-LD	Portland, ME	12/3/2013	4/1/2023
14	Maine	34	Boston MA	W40B0	Boston, MA	2/1/2001	4/1/2023
		35	Dennis (Boston)	WMPX-LP	Dennis, MA	12/6/2004	4/1/2023
15	Massachusetts	36	Detroit MI	WUDT-LD	Buffalo, NY	5/10/2012	10/1/2021
		37	Grand Rapids/Kalamazoo/Battle Creek MI	WUHQ-LD	Grand Rapids, MI	11/29/2011	10/1/2021
16	Michigan	38	Minneapolis/St. Paul MN	WDMI-LD	Minneapolis, MN	9/29/2010	4/1/2022
		39	Kansas City MO	KCDN-LD	Kansas City, MO	5/15/2012	2/1/2022
17	Minnesota	40	St Louis MO	KUMO-LD	St. Louis, MO	6/27/2011	2/1/2022
		41	St. Louis MO	KDSI-LP	Carthage, MO	7/2/1996	2/1/2022
		42	Omaha NE	KOHA-LD	Omaha, NE	8/2/2012	6/1/2022
18	Missouri	43	Las Vegas NV	KLVD-LD	Las Vegas, NV	8/8/2011	10/1/2022
19	Nevada	44	Philadelphia PA	W45CP-D	Atlantic City, NJ	12/4/2014	6/1/2015
		45	Amityville (New York)	WPXU-LD	Amityville, NY	5/17/2011	6/1/2023
20	New Jersey	46	Buffalo NY	WDTB-LD	Hamburg, NY	11/8/1993	6/1/2023
		47	Syracuse NY	WDSS-LD	Syracuse, NY	8/20/2012	6/1/2015
		48	Charlotte NC	WDMC-LD	Charlotte, NC	12/11/2012	12/1/2020
21	New York	49	Charlotte NC	WHWD-LD	Statesville, NC	2/9/2012	12/1/2020
		50	Raleigh/Durham (Fayetteville) NC	WACN-LP	Raleigh, NC	7/19/2006	12/1/2020
		51	Raleigh/Durham (Fayetteville) NC	WWIW-LD	Raleigh, NC	1/18/2011	12/1/2020
		52	Raleigh/Durham (Fayetteville) NC	WDRN-LD	Fayetteville, NC	2/10/2014	12/1/2020
22	North Carolina	53	Cincinnati OH	WDYC-LD	Cincinnati, OH	8/21/2013	10/1/2021
		54	Cleveland/Akron (Canton) OH	WCDN-LD	Cleveland, OH	1/3/2011	10/1/2021
		55	Dayton OH	WLWD-LP	Springfield, OH	1/3/2006	10/1/2021
		56	Toledo OH	WDTJ-LD	Toledo, OH	1/23/2013	10/1/2021
23	Ohio	57	Portland OR	KPXG-LD	Portland, OR	10/7/2009	2/1/2023
		58	Philadelphia (Willow Grove) PA	WELL-LD	Philadelphia, PA	2/18/2010	8/1/2023
24	Pennsylvania	59	Pittsburgh PA	WPDN-LD	Pittsburgh, PA	6/27/2011	8/1/2023
		60	Columbia SC	WKDC-LD	Columbia, SC	4/24/2012	12/1/2020
25	South Carolina	61	Greenville/Spartanburg/Anderson /Ashville SC	WSQY-LP	Spartanburg, SC	12/5/2005	12/1/2020
		62	Chattanooga TN	WCTD-LP	Ducktown, TN	8/7/2007	8/1/2021
		63	Jackson TN	WJTD-LP	Jackson, TN	4/2/2007	8/1/2021
		64	Knoxville TN	WDTI-LD	Knoxville, TN	5/16/2013	8/1/2021
		65	Memphis TN	WDNM-LD	Memphis, TN	1/18/2011	8/1/2021
		66	Nashville TN	WNFX-LP	Nashville, TN	12/20/2002	8/1/2021
		67	Nashville TN	WNTU-LP	Nashville, TN	11/27/2000	8/1/2021
26	Tennessee	68	Amarillo TX	KDAX-LP	Amarillo, TX	4/2/2007	8/1/2022
		69	Dallas/Fort Worth TX	KPTD-LP	Paris, TX	8/7/2007	8/1/2022
		70	Houston TX	KDHU-LD	Houston, TX	12/27/2010	8/1/2022
		71	San Antonio TX	KQVE-LD	San Antonio, TX	11/29/2012	8/1/2022
		72	Austin, TX	KADT-LD	Austin, TX	10/1/2014	8/1/2022
27	Texas	73	Norfolk/Portsmouth/New Port News VA	WVAD-LD	Chesapeake, VA	1/23/2013	10/1/2020
		74	Richmond/Petersburg VA	WRID-LP	Richmond, VA	9/11/1998	10/1/2020
		75	Washington DC	WDWA-LP	Dale City, VA	6/5/2014	10/1/2020
28	Virginia	76	Spokane WA	KDYS-LD	Spokane, WA	5/16/2013	2/1/2023
		77	Spokane WA	KQUP-LD	Spokane, WA	5/16/2013	2/1/2023
29	Washington	78	Green Bay/Appleton WI	WG8D-LD	Green Bay, WI	10/19/2011	12/1/2021
		79	Madison WI	WDMW-LD	Janesville, WI	7/24/2012	12/1/2021
30	Wisconsin	80	Madison WI	WMWD-LD	Madison, WI	8/15/2011	12/1/2021

**EXHIBIT 3**

**TV Query Broadcast Station Database Results**

**for**

**Full-Power Station KQUP (FCC Facility ID # 78921) in Pullman, WA**

**and**

**LPTV Station KQUP-LD (FCC Facility ID # 15635) in Spokane, WA**

**(4 pages)**

**KQUP**

**WA PULLMAN**

**USA**

**DT**

**LIC**

Licensee: WORD OF GOD FELLOWSHIP, INC.

Service Designation: **DT** Digital television station

Transmit Channel: **24** 530 - 536 MHz **Licensed**

Virtual Channel: **24** (viewer sees this channel number)

Network affiliation: DAYSTAR

File No.: BLCDT-20100120ACV Facility ID number: 78921

CDBS Application ID No.: 1624578

47° 15' 30.00" N Latitude

Site in Canadian Border Zone

117° 05' 24.00" W Longitude (NAD 27)

Polarization: Horizontal (H)

Effective Radiated Power (ERP): 57. kw ERP

Antenna Height Above Average Terrain: 419. meters HAAT -- Calculate HAAT

Antenna Height Above Mean Sea Level: 1231. meters AMSL

Antenna Height Above Ground Level: 13. meters AGL

TV Zone: 2

Directional Antenna ID No.: 94587 Pattern Rotation: 260.0

Antenna Make: SWR Antenna Model: SWMP8BF MODIFIED

Relative Field values for directional antenna [Relative Field polar plot](#)

Relative field values do not include any pattern rotation that may be indicated above.

0° 0.330	60° 0.998	120° 0.334	180° 0.452	240° 0.334	300° 0.998
10° 0.351	70° 0.976	130° 0.282	190° 0.426	250° 0.427	310° 0.936
20° 0.434	80° 0.883	140° 0.268	200° 0.361	260° 0.566	320° 0.788
30° 0.595	90° 0.733	150° 0.297	210° 0.297	270° 0.733	330° 0.595
40° 0.788	100° 0.566	160° 0.361	220° 0.268	280° 0.883	340° 0.434
50° 0.936	110° 0.427	170° 0.426	230° 0.282	290° 0.976	350° 0.351

Additional azimuths:

62° 1.000

298° 1.000

Maps: [Service Contour on a Bing map \(41 dBu\)](#)  
[KML file \(41 dBu\)](#) or [Text file \(41 dBu\)](#) for KML-capable browsers

[Station Profiles and Public Inspection Files for KQUP](#) [About this information]

ULS: [Related facilities in ULS](#)  
[ASRNs within 0.5 km radius](#)

[Previous Record](#) -- [Next Record](#)

**KQUP-LD**

**WA SPOKANE**

**USA**

**LD LIC**

Licensee: WORD OF GOD FELLOWSHIP, INC.

Service Designation: **LD** Digital Low Power Television station (Digital LPTV)

Transmit Channel: **47** 668 - 674 MHz **Licensed**

Virtual Channel: (viewer sees this channel number)

Network affiliation: -

File No.: BLDL-20130506ACJ Facility ID number: 15635

CDBS Application ID No.: 1553782

47° 36' 3.00 " N Latitude Site in Canadian Border Zone  
117° 19' 51.00" W Longitude (NAD 27)

Polarization:

Effective Radiated Power (ERP): 0.5 kW ERP  
Antenna Height Above Average Terrain: - meters HAAT -- [Calculate HAAT](#)  
Antenna Height Above Mean Sea Level: 970. meters AMSL  
Antenna Height Above Ground Level: 13. meters AGL

Directional Antenna ID No.: 106427 Pattern Rotation: 340.0  
Antenna Make: - Antenna Model: -

Relative Field values for directional antenna [Relative Field polar plot](#)

Relative field values do not include any pattern rotation that may be indicated above.

0° 0.950	60° 1.000	120° 0.620	180° 0.120	240° 0.620	300° 1.000
10° 0.945	70° 0.980	130° 0.520	190° 0.130	250° 0.700	310° 0.980
20° 0.940	80° 0.940	140° 0.420	200° 0.170	260° 0.780	320° 0.960
30° 0.945	90° 0.870	150° 0.270	210° 0.270	270° 0.870	330° 0.945
40° 0.960	100° 0.780	160° 0.170	220° 0.420	280° 0.940	340° 0.940
50° 0.980	110° 0.700	170° 0.130	230° 0.520	290° 0.980	350° 0.950

Maps: [Service Contour on a Bing map \(51 dBu\)](#)  
[KML file \(51 dBu\)](#) or [Text file \(51 dBu\)](#) for KML-capable browsers

[Station Profiles and Public Inspection Files for KQUP-LD](#) [[About this information](#)]

ULS: [Related facilities in ULS](#)  
[ASRNs within 0.5 km radius](#)

[First Record](#)

\*\*\* 2 Records Retrieved \*\*\*

[Return to TV Query Data Entry screen](#)

