Before the
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF ENGINEERING AND TECHNOLOGY
Washington, D.C. 20554

In the Matter of	)	
	)	
Office of Engineering and Technology Releases and	)	ET Docket No. 13-26
Seeks Comment on Updated OET-69 Software	)	GN Docket No. 12-268

To: The Office of Engineering and Technology

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

April 4, 2014

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Executive Summary

From its inception, OET's proposal to substitute *TVStudy*, a different and novel methodology for the prediction of broadcast television service coverage and interference, for the methodology set forth in OET Bulletin No. 69 ("OET-69"), has been *ultra vires*, arbitrary, capricious, and contrary to established law. First, OET's proposed departure from OET-69 contradicts the plain language of the Spectrum Act. Second, nothing in the original Notice of Proposed Rulemaking ("NPRM") in the incentive auction proceeding, and no construction of OET's delegated authority, authorizes OET to rewrite the OET-69 methodology or replace it with the novel *TVStudy* software for purposes of the auction. Third, OET's procedures for releasing and publicizing new versions of *TVStudy* violate the Administrative Procedure Act ("APA") and deny the public adequate notice of the changes to the OET-69 methodology and the opportunity to provide meaningful comment.

In enacting the Spectrum Act, Congress explicitly sought to eliminate any uncertainty about broadcaster rights in the incentive auction. As the National Association of Broadcasters has repeatedly reminded the Commission, Section 6403(b)(2) of the Spectrum Act requires the Commission to use "all reasonable efforts to preserve" coverage areas and populations served for each broadcast television licensee, as those values were calculated using the "methodology" in effect on February 22, 2012, when the Spectrum Act was enacted.[1] That "methodology" included the contents of OET-69, as well as the software to facilitate its use and generate interference predictions that could be used to calculate coverage area and population served for each broadcast licensee. Under the plain terms of the Spectrum Act, any deviations from the statutorily-prescribed methodology and the values it produced as of February 22, 2012 carry a

[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156, § 6403(b)(2) (Feb. 22, 2012) (codified at 47 U.S.C. § 1452(b)(2)) ("Spectrum Act").

strong presumption of unlawfulness—and if deviations are to be allowed at all, they must be supported by reasoned explanation.

OET has offered no such explanation for its proposed modifications to the OET-69 methodology, and its failure to do so is arbitrary and capricious.[2] Similarly, the Commission's lack of involvement in the release and revision of *TVStudy*, and failure to provide a reasoned explanation for its introduction is arbitrary and capricious. If, in fact, the Commission believes that some deviation from the February 22, 2012 OET-69 methodology can be justified (which NAB does not concede), then the *Commission*, rather than OET, must consider all reasonable alternatives and explain why it rejected those alternatives. The Commission's lack of involvement in the release of *TVStudy* and its failure to provide reasoned explanation for the rejection of alternatives, particularly in light of its statutory obligation to "use all reasonable efforts" to preserve coverage areas and populations served as of February 22, 2012, violate the APA.

OET's proposal to adopt a novel methodology for predicting coverage and interference in the incentive auction proceeding is representative of a troubling trend of misuse of delegated authority within the Commission. Beyond the questions surrounding the legality of OET's development and publication of *TVStudy*, the Commission should not resolve major outstanding issues in the incentive auction proceeding at the Bureau and Office level. Rather, new rules and policies should be adopted by Commission vote, following a rulemaking notice and a reasonable comment period.

OET has not only overstepped the bounds of its delegated authority, it has seriously aggravated the abuses mentioned above through a running series of procedural and substantive errors in its various updates to the *TVStudy* software. Unfortunately, OET's mishandling of

[2] *See* 5 U.S.C. § 706(2)(A).

updates to *TVStudy* has only worsened over the past year. Rather than providing needed clarity and transparency, OET is now releasing new versions of the software and announcing changes and errors through a private "non-FCC e-mail user group (list-serve)" and a website.[3] As of the date of these comments, OET has released two new versions of *TVStudy* since it ceased issuing Public Notices in September 2013. OET has also posted approximately 90 pieces of correspondence from the e-mail user group relating to software implementation, errors and changes, which, to NAB's knowledge, do not constitute part of the record in this proceeding. To make matters worse, for each successive version of *TVStudy*, OET deletes the prior version of the software from the website—thereby depriving the public of a comprehensive record of OET's actions.

OET has also failed to identify how specific changes to the software in each new version of *TVStudy* will affect calculations of coverage areas and populations served for each television broadcaster, and has failed to explain the need and rationale for those changes. The *TVStudy* software contains scores of soft switches, each of which can be set in different ways to generate varying predictions of coverage area and population served—yet OET has failed to tell the public how it ultimately proposes to define those variables, and the Commission has proposed no rules and issued no guidance as to how it will ultimately decide this issue. OET's actions are denying the public fair notice in violation of the APA and the Commission's own regulations, are not a logical outgrowth of the Commission's original NPRM in the incentive auction proceeding, and are flatly inconsistent with the text and purpose of the Spectrum Act.[4]

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[3] *See* Public Notice, Office of Engineering and Technology Releases *TVStudy* Version 1.2.8 and Announces Future Updates Will Be Posted to the Web (Sept. 9, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1872A1.pdf. The website is http://data.fcc.gov/download/incentive-auctions/OET-69.

[4] Spectrum Act, § 6403(b).

OET should cease its updates to *TVStudy* and the Commission should make plain that it will use the longstanding OET-69 methodology and implementing software in the incentive auction, as the Spectrum Act requires. If the Commission insists on defying Congressional intent in the Spectrum Act, the Commission must, at a minimum, publish any proposed changes to the OET-69 methodology via an NPRM. The NPRM must document *all* of the changes to the existing OET-69 methodology—including changes to the parameters and assumptions reflected in the OET-69 implementing software as of February 22, 2012—and allow the public a meaningful opportunity to assess the software, comment on the changes, and plan for the incentive auction. And the NPRM must explain how any proposed changes comply with the Commission's obligations under the Spectrum Act, and why reasonable alternatives have been rejected.

The complexity of the incentive auction is no reason to ignore these basic principles of administrative law. Quite the contrary, that complexity makes it it even more vital for the Commission to observe the requirements of the Spectrum Act and the APA now, before stakeholders commit to participating in a flawed proceeding that will be cumbersome and expensive to unwind.

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NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[5] continues to object to OET's proposal to use a novel methodology, *TVStudy*, in the Commission's upcoming incentive auction. As we have explained previously,[6] the proposed software, as well as the method by which it is being revised and released to the public, directly contravene Section 6403(b)(2) of the Spectrum Act, the APA, and Commission rules. These substantive and procedural infirmities also cast a cloud of uncertainty over the impending incentive auction and unfairly deprive potential participants and bidders of the ability to know how their spectrum rights will be valued. NAB renews and incorporates its prior comments and submissions here, and makes the following additional objections.

[5] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[6] Comments of the National Association of Broadcasters *et al.*, "Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software," ET Docket No. 13-26 and GN Docket No. 12-268 (Mar. 21, 2013) ("NAB Comments"); Reply of the National Association of Broadcasters *et al.*, "Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software," ET Docket No. 13-26 and GN Docket No. 12-268 (April 5, 2013) ("NAB Reply"); *see also* NAB Notice of Ex Parte Communication, ET Docket No. 13-26 and GN Docket No. 12-268 (Feb. 8, 2013) ("NAB Ex Parte Letter").

The proposed changes to the OET-69 methodology defy the Commission's express obligation to use "all reasonable efforts to preserve" broadcasters' coverage areas and populations served, as those values were calculated using the OET-69 methodology in effect as of February 22, 2012.[7] That requirement reflects Congress's decision to remove any uncertainty as to how broadcasters' rights will be treated in the incentive auction and repacking process. OET's release of *TVStudy* unlawfully substitutes Congress's fixed and certain approach with a moving target of uncertain dimensions. Each of the various (and seemingly endless) iterations of *TVStudy* reflects new and untested changes, unsupported by reasoned explanation, that are ultimately likely to harm broadcasters and their viewers.

Indeed, OET's initial announcement that it was "updating" the OET-69 software plainly exceeds any reasonable interpretation of OET's delegated authority. The initial NPRM in the incentive auction proceeding gave no indication that the Commission was considering any departure from the methodology Congress directed the Commission to use in preserving the coverage areas and populations served by broadcast stations.[8] The duties and responsibilities delegated to OET do not include changes of the sort OET has proposed. As with all important policy and rule determinations in the incentive auction proceeding, a decision to depart from OET-69 should be made at the Commission level, not by staff.

In addition, NAB objects to OET's unlawful practice of releasing updates to the *TVStudy* software via a private email distribution and website, rather than through a Commission NPRM that provides the public with notice of all changes to the OET-69 methodology, all variations between the different versions of *TVStudy*, the reasons for all proposed changes, and an explanation of how the proposed modifications satisfy the Commission's obligation to use "all

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[7] Spectrum Act, § 6403(b)(2).

[8] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd. 12357 (2012) ("Auction NPRM").

reasonable efforts" to preserve broadcasters' coverage areas and populations served, as they existed on February 22, 2012.[9] The continuing release of new versions of *TVStudy* does not help interested parties because neither OET nor the Commission has apprised the public of how the many variables embedded in the software will be defined in the incentive auction. Knowing in advance how the numerous soft switches in *TVStudy* will be set is critical in any assessment of whether the proposed software will preserve coverage areas and populations served as of February 22, 2012.

NAB also objects to OET's failure to provide reasoned explanation for its apparent rejection of reasonable alternatives that would avoid changes to coverage areas and populations served for each broadcast television licensee. A hallmark of arbitrary and capricious agency action is the failure to consider reasonable alternatives, and the Spectrum Act's directive to "make all reasonable efforts" to preserve values as of February 22, 2012 reinforces this requirement. Each of these points is addressed in greater detail below.

I. The Spectrum Act Mandates Making All Reasonable Efforts To Preserve Coverage Areas And Populations Served As Calculated Using The OET-69 Methodology In Conjunction With The Commission's Incentive Auction.

Section 6403(b)(2) of the Spectrum Act expressly provides that for purposes of conducting the FCC's incentive auction:

> the Commission shall make all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.[10]

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[9] *See* 5 U.S.C. § 551 *et seq*.

[10] Spectrum Act, § 6403(b)(2); *see also* OET Bulletin No. 69, "Longley-Rice Methodology for Evaluating TV Coverage and Interference," Feb. 6, 2004, *available at* http://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet69/oet69.pdf. OET-69 describes how to use the Longley-Rice methodology to evaluate television coverage and interference in accordance with Sections 73.622, 73.623 and 74.704 of the FCC rules.

As explained in prior comments in this proceeding, several features of this provision sharply limit the Commission's authority to adopt a new methodology like *TVStudy*.

1. Congress did not merely *suggest* that the Commission use the OET-69 methodology; it expressly directed that the Commission "*shall* make *all* reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee," as calculated using the OET-69 methodology in existence on February 22, 2012.[11] The command "shall" reflects Congress's decision to limit the Commission's discretion, while the phrase "all reasonable efforts" underscores the importance Congress placed on the "preserv[ation]" of stations' "coverage area and population served," as well as the Commission's concomitant duties to avoid unnecessary deviations from those values and to provide reasoned explanation where deviations cannot be avoided.[12]

The construction of "all reasonable efforts" as a limit on, rather than an expansion of, the Commission's discretion is consistent with Congress's frequent use of the phrase to underscore legislative commands of special significance or concern.[13] Given the phrase's status as a term of art, its frequent use in federal statutes, and the context in which it appears in Section 6403(b)(2) (specifically, in conjunction with the command "shall" and Congress's emphasis on "preserv[ing]" values for "each" licensee as of a specific date), this phrase is properly interpreted to require that the Commission "do everything feasible" to preserve stations' coverage areas and

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[11] Spectrum Act, § 6403(b)(2) (emphasis added).

[12] *Id.*

[13] "All reasonable efforts" is a term of art. *E.g.*, 10 U.S.C. § 2581(a)(1), (2); 18 U.S.C. §§ 4243(e), 4246(d), 4248(d); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind unless otherwise instructed").

populations served, as they were calculated using the OET-69 methodology as of February 22, 2012.[14]

2. In addition to the command to "preserve" broadcasters' coverage areas and populations served, as they existed on February 22, 2012, the Act's express identification of "the methodology described in OET Bulletin 69" as the means for generating those values demonstrates Congress's intent that the Commission preserve and employ the OET-69 methodology for purposes of the incentive auction. Stated differently, the Spectrum Act restricts the Commission's discretion in at least two, mutually reinforcing respects: Not only is the Commission restricted in the *goal* of preserving each broadcaster's coverage area and population served, but it is also restricted in the *means* for obtaining that goal through the mandated use of the OET-69 methodology.

The use of the term "methodology" is also instructive. That term has been defined as "the processes, techniques, or approaches employed in the solution of a problem or in doing something: a particular procedure or set of procedures."[15] In other words, a "methodology" is inextricably linked with the problem it is designed to solve. Here, the OET-69 methodology is inextricably intertwined with broadcasters' coverage areas and populations served, as of February 22, 2012. "Methodology" is also a term of art that was well established at the time of its incorporation in Section 6403(b)(2) of the Spectrum Act.[16] Indeed, the "methodology described in OET Bulletin 69" is an administratively accepted methodology that has been applied to predict interference levels for many years.[17] Interference levels are, in turn, used to

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[14] *Raicovich v. U.S. Postal Serv.*, 675 F.2d 417, 423-24 (D.C. Cir. 1982) ("all reasonable efforts" expressed Congress's intent "to do everything feasible").
[15] Webster's Third New International Dictionary of the English Language Unabridged 1423 (1976).
[16] *See Morissette*, 342 U.S. at 263.
[17] *See* NAB Comment 4-6 (Mar. 21, 2013).

calculate broadcasters' coverage areas and populations served, as Congress acknowledged in Section 6403(b)(2).[18]

Because the OET-69 "methodology" is a longstanding term with an established meaning, Congress is presumed to have intended the term to have that meaning.[19] Consequently, the methodology referred to in the Spectrum Act must be construed to encompass not just the specific contents of OET-69, but also the features of its implementing software that are integral to the calculations of coverage area and population served for each broadcast station. OET, acting without any public direction from the Commission, has ignored this directive in promulgating the numerous proposed iterations of *TVStudy*. OET's proposed modifications—both to the contents of OET-69 and to the software used to convert those contents into useable calculations—constitute changes to the OET-69 methodology that ultimately will alter predictions of broadcast licensees' coverage areas and populations served.

Congress's careful drafting of Section 6403(b)(2) reflects an unambiguous intent to remove any uncertainty about the manner in which the incentive auction is to be conducted and broadcasters' rights are to be protected. Section 6403(b)(2)'s express and unambiguous statutory language makes clear that the OET-69 methodology provides the standard against which the propriety and legality of the incentive auction and repacking process must be measured: specifically, the Commission must use every reasonable effort to calculate the coverage area and population served of each broadcast licensee using OET-69 and its implementing software, as

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[18] Interference levels directly affect calculations of the populations served by specific television stations. *See, e.g.*, Auction NPRM, at 33 (noting that "interference relationships between stations . . . affect population served"); 47 C.F.R. § 73.616(e) (addressing digital TV station applications and noting that "population served . . . does not include portions of the population within the noise-limited service contour of that station that are predicted to receive interference from the [other stations]"); *id*. § 73.623(c)(2) ("interference to populations served is to be predicted based on the procedure set forth in OET Bulletin No. 69").

[19] *See Sebelius v. Auburn Reg'l Med. Ctr*., 133 S. Ct. 817, 827-28 (2013) (Congress's amendment of statute without expressing "disapproval" of administratively-defined term is persuasive evidence that Congress intended to adopt that definition).

they existed on February 22, 2012. Congress fully understood that a clear and fixed standard was critical to the success of the incentive auction because potential bidders must know the rules of the game and how their rights will be valued before they can make an informed decision about whether and how to participate. *TVStudy* is inconsistent with these unambiguous requirements and thus violates both the Spectrum Act and the Commission's duties under the APA.[20]

II. The Commission Must Explain How *TVStudy* Complies With The Spectrum Act And Provide Reasoned Explanation For Rejecting Alternatives.

As explained above, the Commission's statutory duty to use all reasonable efforts to maintain "coverage area and population served" reflects Congress's intent that those values be preserved at the levels that existed under the OET-69 methodology on February 22, 2012. Under this unambiguous directive, the Commission has a heightened obligation both to identify any deviations in predicted coverage area and population served for each broadcast television licensee and to explain why those deviations do not violate the Commission's duty to use "all reasonable efforts" to retain the prior values. The Commission has failed on both counts.

1. The Commission and its staff are simply ignoring their statutory obligations. To date OET has given no indication that it understands the nature of the obligations under the Spectrum Act to preserve coverage area and population served for each broadcast licensee (as calculated using the February 22, 2012 OET-69 methodology), or that it intends to comply with those obligations. Indeed, OET's actions show the opposite.

For example, OET has argued that its novel *TVStudy* software is merely an update of OET-69 that does not reflect any change in the OET-69 methodology. OET has, however, failed to provide any direct comparisons of *TVStudy* and OET-69 to show that its new methodology

[20] Because the Spectrum Act is unambiguous in its command that the Commission "preserve" coverage and population served as they were calculated using OET-69 "as of" February 22, 2012, any contrary interpretation would not receive *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984).

results in the same coverage areas and populations served as OET-69. In fact, the most recent version of *TVStudy* released by OET through its private email distribution and its website continues to produce calculations of coverage area and population served that are wildly different than values that were calculated under OET-69 as of February 22, 2012. These differences cannot be justified on the theory that their net effect nationwide or across certain markets is small. The Spectrum Act is explicit that coverage area and population served must be preserved for "*each* broadcast television licensee"—on a station-by-station basis—meaning that net effects are irrelevant.[21] Because each change for each broadcaster is a potential instance of statutory noncompliance, the Commission has a heightened duty to explain why each deviation is justified.

OET's unlawful actions have made it impossible for NAB to know with certainty whether the values calculated under the current version of *TVStudy* will reflect the values ultimately used in the incentive auction. The *TVStudy* software contains more than 100 parameters and soft switch settings, many of which can be defined in different ways to produce different results. The values assigned to these variables directly affect the calculated coverage areas and populations served. However, OET has failed to inform the public how it will set these parameters for purposes of the incentive auction and the Commission has provided no guidance as to the purposes of the new methodology, leaving stakeholders to speculate how the software might eventually be put to use. Thus, in attempting to assess the *TVStudy* software, stakeholders (like NAB) have been forced to *assume* a specific setting for each of the soft switches and parameters, a practice that ably demonstrates the general shortcomings of the proposed software (and OET's explanation thereof) but leaves in place the significant uncertainty over the magnitude of harm to broadcasters.

[21] Spectrum Act, § 6403(b)(2) (emphasis added).

2. Given the glaring deficiencies in the *TVStudy* software, it is astounding that neither the Commission nor OET have explained why they have opted for a new methodology in lieu of reasonable alternatives.[22] The Commission must provide reasoned explanation for the rejection of alternatives that would have avoided statutory deviations like those wrought by the current version of *TVStudy*; "[t]he failure of an agency to consider obvious alternatives has led uniformly to reversal."[23] The Commission's obligation to explain why reasonable alternatives are insufficient is particularly serious in this case, given Congress's command to "use all reasonable efforts" to avoid changing coverage areas and populations served (and, by extension, the OET-69 methodology).[24] That command requires, at minimum, that the Commission explain why reasonable alternatives that would have resulted in fewer and less significant changes to coverage area and population served for each television broadcast licensee were not adopted.[25] Because the Commission and OET have made no attempt to entertain other alternatives, explain why deviations in coverage areas and populations served are necessary, or explain why reasonable alternatives are insufficient, OET's actions in proposing *TVStudy* are arbitrary and capricious.

III. The Proposed Replacement Of The OET-69 Methodology Exceeds OET's Delegated Authority.

The proposal to use *TVStudy* in lieu of the OET-69 methodology clearly violates the Spectrum Act. So, too, does the Commission's failure to explain why it is rejecting alternatives

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[22] Of course, the most obvious "alternative" to *TVStudy* is OET-69 and its February 22, 2012 software—the methodology mandated under the Spectrum Act itself.

[23] *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n. 36 (D.C. Cir. 1986); *see, also, Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983) (agency's "failure to consider … alternatives, and to explain why such alternatives were not chosen, was arbitrary and capricious, in violation of section 10(e) of the APA") (footnote omitted); *id*. at 815 n.35 ("an agency's failure to 'cogently explain why it has exercised its discretion in a given manner,' renders its decision arbitrary and capricious") (footnote and citation omitted).

[24] Spectrum Act, § 6403(b)(2).

[25] *See id.*

in favor of a novel methodology that produces substantial deviations from the coverage areas and populations served calculated under the OET-69 methodology on February 22, 2012. But *TVStudy* suffers from yet another fundamental error: OET's initial announcement that it was "updating" the OET-69 software plainly exceeds any reasonable interpretation of OET's limited, delegated authority.

The Auction NPRM specifies the policies to be employed in the incentive auction. That NPRM in no way suggests that the Commission has considered or authorized any departure from the methodology Congress directed the Commission to use in preserving broadcasters' coverage areas and populations served. In fact, the Auction NPRM expressly acknowledged that the Spectrum Act requires the Commission to preserve the coverage area and population served of each broadcast television licensee as determined using the OET-69 methodology as of the date of the Spectrum Act.[26] The Auction NPRM also specifically cited the version of OET-69 in place since February 6, 2004.[27] And the Auction NPRM specifically referred to the computer program described in OET-69 that is used to implement the Longley-Rice propagation model.[28] The only reasonable interpretation of these references is that the Commission intends for OET-69 and its implementing software as of February 22, 2012 to be employed in conjunction with the incentive auction.

Moreover, the Commission's NPRM proposed to interpret "coverage area" to mean a full power television station's "service area" as defined in Section 73.622(e) of the rules, which specifically references OET-69.[29] In discussing this proposal in the NPRM, the Commission stated that such an interpretation "will serve the public interest because that definition is familiar

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[26] Auction NPRM, ¶¶ 30, 79, 92, 98.
[27] *Id.* ¶ 92 n.139.
[28] *Id.* ¶ 95 n.145.
[29] *Id.* ¶ 99; *see* 47 C.F.R. § 73.622(e)(2) ("Guidance for evaluating coverage areas using the Longley-Rice methodology is provided in OET Bulletin No. 69").

to broadcasters and, therefore, will promote transparency in the repacking process."[30] Similarly, in discussing its proposals to interpret "population served," the Commission cited to both the DTV transition and the Third DTV Periodic Review, where OET-69 was used to determine the effect of interference on population served.[31] *TVStudy* was not in existence at the time of the DTV transition or the Third DTV Periodic Review. In short, any interested party reviewing the Auction NPRM, which was voted on by the Commission itself, would have concluded that the Commission did not intend to stray from the statutorily-mandated use of OET-69.

OET's announcement that it was modifying the OET-69 software thus represents an unanticipated and significant departure from the Commission's original proposals.[32] It also plainly exceeds any reasonable interpretation of OET's delegated authority under Commission regulations and substantially prejudices broadcasters.[33] While the Commission has delegated to OET authority to "evaluate evolving technology for interference potential and to suggest ways to facilitate its introduction in response to Bureau initiatives," this authority is limited to *advising* the Commission.[34] Because the incentive auction is a novel and unprecedented proceeding, and the Commission has not articulated an interpretation of Section 6403(b) of the Spectrum Act that

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[30] *Id.* ¶ 99.

[31] *See id.* ¶ 103 & n.160; *see also* 47 C.F.R. § 73.616(e)(1) (requiring use of OET-69); *In re Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Notice of Proposed Rulemaking, 22 FCC Rcd. 9478, 9522-23 (2007) (proposing use of OET-69).

[32] *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (final action must be a "logical outgrowth" of prior notice, and agencies may not "pull a surprise switcheroo on regulated entities").

[33] *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (courts will not "defer to an agency's interpretation of its regulations" where "the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question") (internal quotation marks omitted); *VanderMolen v. Stetson*, 571 F.2d 617, 624 (D.C. Cir. 1977) ("It is, of course, a fundamental tenet of our legal system that the [g]overnment must follow its own regulations. Actions by an agency of the executive branch in violation of its own regulations are illegal and void."); *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1076-78 (D.C. Cir. 1974) (review board created by Atomic Energy Commission could not exceed its delegated authority by reviewing correctness of decisions rather than merely sufficiency of evidence); *cf. Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 655-56 (D.C. Cir. 1983) (agency action inconsistent with congressional intent exceeds the limits of an agency's delegated authority).

[34] 47 C.F.R. § 0.31(a).

would permit an alternative methodology for calculating coverage area and population served for each broadcast television licensee, the Commission itself, not OET, must resolve this matter.[35]

It is crucial that the Commission, not its staff, steer important Commission policies, particularly those like *TVStudy* that reflect matters of industry-wide significance and that depart from past Commission practice, existing regulations, and congressional intent.[36] The rights and investment-backed expectations of broadcast licensees cannot be altered by OET fiat; OET should cease action on *TVStudy* and the Commission should assume responsibility for these proceedings. Whether to use any methodology but OET-69 in the incentive auction is a decision that must be made by the Commission, following a formal notice and comment rulemaking and an adopted order that explains the basis for the perceived need for deviations from the February 22, 2012 values for broadcast licensees' coverage areas and populations served, as well as the Commission's rationales for rejecting reasonable alternatives. In this, as well as all other significant rule and policy changes, the full Commission itself, not staff, should determine the outcome.

IV. OET's Release Of Updates To *TVStudy* Is Procedurally Improper And Violates The APA.

The Commission and its staff have also embarked on a practice of releasing new versions of *TVStudy* through unconventional or private channels, failing to inform the public of what changes are being made, and failing to provide an opportunity for public comment. Indeed, after releasing four successive versions of the *TVStudy* software following the April 5th comment filed by NAB and a group of Joint Broadcasters, OET abruptly announced, on September 9,

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[35] 47 C.F.R. § 0.241.

[36] *See, e.g., In re Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other than Pensions in Part 32, Amendments to Part 65, Interstate Rate of Return Prescription*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 11 FCC Rcd. 2957, 2961 (May 14, 1996) (holding that staff exceeded Bureau's delegated authority to the extent it directed exclusions and additions from rate base for which Part 65 rules did not specifically provide); *In re Revocation of License of Theodore R. Sousa*, 92 FCC.2d 173, 179 (Nov. 4, 1982) (Commission finding that Private Radio Board exceeded its delegated authority).

2013, that it would no longer inform the public of future updates via Public Notice. Instead, OET declared that it would release new versions of the software through a private "non-FCC e-mail user group (list-serve)" and a website.[37] To make matters worse, for each successive version of *TVStudy*, OET deletes the prior version of the software from the website—thereby depriving the public of a comprehensive record of OET's actions. This, too, is arbitrary and capricious.

1. OET's practice of releasing new versions of *TVStudy* has been procedurally infirm from the start. As NAB has explained, changes of this magnitude must be made at the Commission level.[38] The Spectrum Act specifies the methodology that must be used in the incentive auction to determine coverage area and population served for each broadcaster, and the Commission and its staff have used that methodology for many years. Given the Spectrum Act's unambiguous mandate and the Commission's longstanding use of the OET-69 methodology, OET and the Commission lack authority to adopt any substitute that would alter the coverage area and population served for each broadcaster. At minimum, OET's delegated authority does not extend to adopting positions that represent "a change in Commission policy" or considering

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[37] *See* Public Notice, Office of Engineering and Technology Releases *TVStudy* Version 1.2.8 and Announces Future Updates Will Be Posted to the Web (Sept. 9, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1872A1.pdf. The website is http://data.fcc.gov/download/incentive-auctions/OET-69.

[38] *See supra* Section III; NAB Comment 17-19 (Mar. 21, 2013); *see also, e.g.*, *In re Connect Am. Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, 17727 (2011) (Commission introducing methodology for allocating funding support); *In re Misuse of Internet Protocol (IP) Captioned Tel. Serv.*, CG Docket Nos. 13-24, 03-123, 2013 WL 6198935, *2 (F.C.C. Aug. 26, 2013) (Commission issuing further notice of proposed rulemaking for comment "on whether and how to revise the current rate methodology"); *In re Universal Serv. Contribution Methodology A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357, 5360 (Apr. 30, 2012) (Commission's further notice of proposed rulemaking for purposes of acting on contribution methodology reform); *In re Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd. 20140, 20161-63 (2007) (Commission adopting new cost recovery methodology). *See generally* James A. Wilson, *Methodologies As Rules: Computer Models and the APA*, 20 Colum. J.L. & Soc. Probs. 167, 189-90 (1986) (agency adoption of computer methodologies requires notice and comment).

"new or novel arguments not previously considered by the Commission."[39] Thus, the Commission must issue a formal notice and comment rulemaking that documents all of the proposed changes to OET-69 and its software (including those that have already been made), provides reasoned explanation for those changes and the rejection of reasonable alternatives, and affords commenters adequate time to assess and troubleshoot the software. In doing so, the Commission cannot rely on its Auction NPRM; an agency's final rule is a "logical outgrowth" of its NPRM only "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[40] Because the Auction NPRM gave no indication that the Commission contemplated substituting the OET-69 methodology with a new and different methodology for the incentive auction, the Commission must issue a new NPRM.

Instead, OET announced its initial proposal to use *TVStudy* in a Public Notice at the staff level.[41] This Public Notice, which was published on February 3, 2013, was followed by OET's release of Version 1.1.2 of the *TVStudy* software on April 26, 2013,[42] the release of Version 1.2.6 of the *TVStudy* software by the FCC's Incentive Auction Task Force on July 22, 2013,[43] and OET's release of Version 1.2.7 on August 20, 2013[44] and Version 1.2.8 on September 9, 2013 via

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[39] 47 C.F.R. § 0.241; *see also id.* § 0.5(c) (authority delegated to OET only for "matters which are minor or routine or settled in nature and those in which immediate action may be necessary").

[40] *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1076 (D.C. Cir. 2009).

[41] Public Notice, "Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software," ET Docket No. 13-26 and GN Docket No. 12-268, DA 13-138 (Feb. 4, 2013).

[42] *See* Public Notice, Office of Engineering and Technology Releases Updated *TVStudy* Software (Apr. 26, 2013), *available at* http://www.fcc.gov/document/updated-tvstudy-software.

[43] *See* Public Notice, Incentive Auction Task Force Releases Information Related to Incentive Auction Repacking (July 22, 2013), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0722/DA-13-1613A1.pdf. Although the July 22 Public Notice referred to the version being released as "v.1.2," subsequent public notices referred to this version as 1.2.6.

[44] *See* Public Notice, Office of Engineering and Technology Releases Updated *TVStudy* Software (Aug. 20, 2013), *available at* http://www.fcc.gov/document/office-engineering-and-technology-releases-updated-tvstudy-software.

Public Notices.[45] In its final Public Notice, OET adopted a new strategy, under which it would no longer announce future iterations of *TVStudy* via Public Notice, but, instead, would announce and make available updated versions of the software through a private "non-FCC e-mail user group (list-serve)" and website.[46] As of the date of these comments, OET has released two additional versions of *TVStudy* without issuing a Public Notice and is now on Version 1.3 of the software.

The Commission is statutorily required under the APA to provide the public with notice and an opportunity to comment on any proposed changes to the OET-69 methodology.[47] For each round of changes, however, OET has released a new version of the *TVStudy* software to a limited group of email subscribers rather than the public at-large. And because OET deletes prior versions of the software when posting a new version to the website, there is no publicly-available record of OET's many actions and modifications with respect to *TVStudy*. Making matters worse, OET has given no indication as to when it will cease modifying *TVStudy*, choosing instead to maintain an air of ambiguity with respect to the finality of its actions. Rather than ensure that the public has adequate notice of all changes, as required under the APA, OET has instead shifted the burden to interested parties, advising them that "*TVStudy* users may wish to use a website monitoring service to detect when updates or changes are made to the . . . website."[48] This is the essence of arbitrary and capricious agency action.[49]

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[45] *See* Public Notice, Office of Engineering and Technology Releases *TVStudy* Version 1.2.8 and Announces Futures Updates Will Be Posted to the Web (Sept. 9, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1872A1.pdf.

[46] *Id.* The website can be found at http://data.fcc.gov/download/incentive-auctions/OET-69.

[47] *See* 5 U.S.C. § 553(b)(3).

[48] *See* Public Notice, Office of Engineering and Technology Releases *TVStudy* Version 1.2.8 and Announces Futures Updates Will Be Posted to the Web (Sept. 9, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1872A1.pdf.

[49] *See* 5 U.S.C. § 551(4) (broadly defining "rule"); *id.* § 553(b) (specifying form of notice for proposed rulemaking, including publication in Federal Register); *see also, e.g.*, *Batterton v. Marshall*, 648 F.2d 694, 705-

2. Similarly, OET's failure to provide the public with notice of the specific changes that are being proposed to the OET-69 software is arbitrary and capricious.[50] In particular, OET has not specified how the proposed *TVStudy* methodology purports to alter the methodology in place on February 22, 2012—the statutory standard for measuring television stations' coverage areas and populations served. Instead, OET continues to offer only vague and indeterminate signals about the methodological changes it is considering, thereby forestalling any meaningful public input.

Without adequate notice of the effect of and reasoning behind specific proposed changes in each iteration of *TVStudy*, the public cannot meaningfully assess whether these changes are consistent with the methodology described in OET-69 or how they will affect television stations' coverage areas and populations served. The limited information provided in OET's Public Notices suggests that the proposed methodology for predicting potential interference between broadcast television stations is overly and unnecessarily complex and does not advance OET's stated goal of improving accuracy or efficiency.[51] Moreover, the handful of proposed changes to the OET-69 methodology that can be discerned in each iteration of the *TVStudy* software are not logical outgrowths of OET's prior Public Notices (or OET-69 itself), and are arbitrary and capricious for this additional reason.[52]

OET's practice of introducing changes without notice to the public and without specific information on what is being changed, and the reasons for the changes, creates substantial

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06, 711 (D.C. Cir. 1980) (agency methodology was a "rule" under the APA and required notice and opportunity for comment).

[50] *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) ("Enforcing the APA's notice and comment requirements ensures that an agency does not 'fail[] to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary'") (citation omitted); *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (the "opportunity for comment must be a meaningful opportunity").

[51] The flaws in *TVStudy* have been expressed in prior comments in this proceeding. Flaws in subsequent versions of *TVStudy* have been more difficult to detect and analyze for the reasons set forth in this submission.

[52] *See Envtl. Integrity Project*, 425 F.3d at 996; *see also Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

uncertainty for the intended participants in the incentive auction, including broadcasters and the wireless industry. Whereas broadcasters understood how their coverage areas and populations served would be calculated under the OET-69 methodology, the modifications in OET's various iterations of *TVStudy* mean that no broadcaster will know what it is auctioning or preserving if it opts to participate or refrain from participating in the auction. Likewise, broadcasters that forego participation in the reverse auction stand to lose population served and coverage area in the repacking process. These effects violate the Spectrum Act and undermine Congress's express intent.

Ultimately, the attempt to make *sub rosa* changes to the OET-69 methodology via an opaque and iterative proceeding in which the public is not informed of the nature of the changes or given any indication as to when and why new versions of the software are being released, is the *sine qua non* of arbitrary and capricious decisionmaking. Greater transparency is critical to permit the public to evaluate and comment on the proposed changes. OET also must provide the public with more specific information—including information about OET's own studies of the proposed methodology—to allow stakeholders an opportunity to provide meaningful analysis and comments.[53]

V. The Commission Must Provide An Opportunity For Meaningful Comment.

As explained above, the Spectrum Act specifies the methodology that must be used in the incentive auction to determine coverage area and population served for each broadcaster, and neither OET nor the Commission has articulated an interpretation of Section 6403(b)(2) of the Spectrum Act that would justify the use of a different methodology. Moreover, even assuming *arguendo* that the Commission is justified in modifying the OET-69 methodology (a point that

[53] *See, e.g.*, *Am. Radio Relay League*, 524 F.3d at 236; *see also* NAB Comment at 17-23 (Mar. 21, 2013); NAB Reply at 15-16 (Apr. 5, 2013).

NAB does not concede), whether to adopt changes to OET-69 for purposes of the incentive auction is a decision that must be made at the Commission level with an opportunity for meaningful public comment.[54]

First, as noted above, only the full Commission—not the staff—has authority to change Commission policy.[55] Proposed modifications to the OET-69 methodology for use in the incentive auction are entirely unprecedented and reflect a clear change in Commission policy that requires the Commission's input and general notice and comment.

Second, the Commission's own regulations provide that any change to OET Bulletin 69 will be published in the Federal Register. Specifically, current regulations incorporate by reference OET-69 and state that all materials incorporated by reference are incorporated "as they exist on the date of the approval, and notice of any change in these materials will be published in the Federal Register."[56] Thus, notice of any change to OET-69 must be published under the terms of Rule § 73.8000. An agency's failure to comply with its own regulations is arbitrary and capricious.

Third, Commission practice indicates that changes similar to those that can be detected in the various iterations of *TVStudy* have been undertaken at the Commission level, rather than the staff level. For example, when the Commission sought to require use of 2000 Census data for purposes of OET-69, it issued a formal NPRM, collected and considered comments, and adopted a formal regulation. Making any of the other various proposed changes to the OET-69 methodology requires the same procedures.[57]

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[54] *See MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 414 (D.C. Cir. 2011) (quoting Commission statement that "'[w]hether to depart [] substantially from such long-standing and significant Commission precedent . . . is a complex question better suited to a more general rulemaking proceeding'").

[55] *See* 47 C.F.R. § 0.5(c).

[56] 47 C.F.R. § 73.8000(a).

[57] *See* 47 C.F.R. § 0.5(c) (noting that Commission can delegate authority to its staff to act on matters which are "minor or routine or settled in nature" and that actions taken under delegated authority "are subject to review by

Ultimately, the Commission's own regulations and past practice demonstrate that before the Commission may adopt a novel methodology for calculating co-channel interference, it must publish a formal NPRM.[58] That NPRM must explain how the Commission has made "all reasonable efforts" to preserve coverage area and population served for each broadcast television licensee, and must allow the public sufficient time to evaluate the proposed methodology and provide meaningful comment. An APA-compliant proceeding is necessary to enable industry members to test, understand, and comment on the new software and its limitations before they make costly decisions with respect to the incentive auction that may bind them in the future.

CONCLUSION

Congress recognized that an auction in which thousands of bidders are vying for indeterminate rights using different currencies of indeterminate value is doomed to fail. That is why, in enacting the Spectrum Act, Congress spoke with particular precision in requiring that bidders' rights be determined *ex ante*, based on a familiar methodology that allows participants to engage in informed planning and protect their interests. Unfortunately, OET's actions suggest a determination to replace Congress's required methodology (OET-69 and its February 22, 2012 software) with a new and evolving methodology of OET's invention (*TVStudy*). As NAB has said repeatedly, OET's actions in this regard are arbitrary, capricious, and blatantly unlawful.

The Commission must heed Congress's words and intent and use OET-69 and its software in the incentive auction. If the Commission believes that changes to the OET-69 methodology are necessary, then the Commission must use all reasonable efforts to preserve the coverage area and population served for each broadcast television licensee, as calculated using

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the Commission"); *id.* § 0.241(a)(1) (providing that "[n]otices of proposed rulemaking and of inquiry and final orders in rulemaking proceedings, inquiry proceedings and non-editorial orders making changes" "shall be referred to the Commission en banc for disposition").

[58] *See supra* n.45.

OET-69 and its software on February 22, 2012. Any deviations from these statutorily-mandated values must be identified and explained in a formal NPRM published by the full Commission, with meaningful opportunity for the public to assess the changes and provide comment.

Finally, if the Commission is determined to persist with the staff's *TVStudy* experiment, the Commission must promulgate any future modifications to *TVStudy* via a formal NPRM, and must also issue an NPRM that identifies every change made to date. The staff's current practice of making unspecified changes *sub silentio* via email and website is wholly inadequate. The Commission must also explain how any proposed changes comply with its obligations under Section 6403(b)(2) of the Spectrum Act, and why reasonable alternatives have been rejected.

Respectfully submitted,

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