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May 7, 2014

File No. 22841-00200-63

VIA ELECTRONIC FILING
Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, D.C. 20554

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* GN Docket No. 12-268
Notice of *ex parte* presentation

Dear Ms Dortch:

In accordance with FCC Rule 1.1206(b)(2), this letter is submitted to notify you that on May 6, 2014, David Mallof of Free Access and Broadcast Telemedia, LLC ("FAB"), along with Mike Gravino of the LPTV Spectrum Rights Coalition and the undersigned met with Incentive Auction Task Force members Bill Lake, Joyce Bernstein, and Edward Smith to discuss issues related to the above-referenced proceeding. We also had a separate meeting with Erin McGrath, Legal Advisor to Commissioner Michael O'Rielly the same day to discuss the same issues.

Specifically, FAB's discussions focused on asking the FCC to exercise its discretion to allow LPTV licensees to participate in the reverse auction. FAB asked the FCC to undertake a rigorous analysis of the benefits and costs of including LPTV stations in the auction. Information was also presented on observations that Congress failed to undertake the appropriate cost study of the effect the Spectrum Act would have on LPTV station licensees and urged the FCC not to make the same error. FAB also presented arguments that the FCC has the independent agency discretion to authorize inclusion of LPTV in the auction.

The points made in the discussions are more fully set forth in the attached Written *Ex Parte* Comments of FAB filed electronically on May 5, 2014.

Please refer any questions concerning this matter directly to this office.

Respectfully submitted,

Melodie A. Virtue

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

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

To: The Commission

WRITTEN *EX PARTE* COMMENTS OF FREE ACCESS & BROADCAST TELEMEDIA, LLC[1]

Free Access & Broadcast Telemedia, LLC ("FAB"), by counsel, hereby respectfully submits these Written *Ex Parte* Comments in the above-captioned proceeding.[2] FAB urges the Federal Communications Commission ("FCC" or "Commission") to make sure it has conducted the required, robust, quantitative, and financial analysis on the benefits of including LPTV in the incentive auction, which it can do using its existing authority and independent agency discretion, as other commenting parties have requested.[3] In the Spectrum Act, Congress required the FCC to conduct a reverse auction to determine how much to compensate full power and Class A low power

[1] Topics covered in these comments will be the subject of discussion as part of an *ex parte* meeting FAB has scheduled for May 6, 2014 with FCC decisionmaking personnel. These comments are in response to public statements clarifying FCC proposals regarding LPTV stations set forth in the Transcript from the recent 2014 LPTV NAB Show Info-Session with FCC Media Bureau Chief William T. Lake, April 7, 2014, at p. 2 (3rd paragraph), p. 8 (last paragraph) & p. 15 (4th paragraph), which was filed in Docket 12-268 on April 22, 2014, by the LPTV Spectrum Rights Coalition ("Transcript"), to which FAB has not had a prior opportunity to reply. To the extent that these comments are otherwise deemed to be late-filed, FAB respectfully requests a waiver of the official filing deadline so that the Commission can consider these comments. As set forth herein, the FCC can avoid committing egregious errors by undertaking the analysis suggested by FAB. Acceptance of these comments, therefore, would serve the public interest.

[2] FAB previously commented in support of the future of low power television stations ("LPTV") despite an auction policy proposal apparently designed to eliminate many longstanding and legitimate broadcast licensees out of the 600MHz band. FAB is committed to providing America's substantial number of local, underserved, and often overlooked consumers with residential and mobile services, both video and interactive, for free.

[3] *See, generally,* Transcript cited in n. 1, *supra. See also* Comments of Mike Gravino, filed March 12, 2013, at p. 2; Reply Comments of Civic Media Advisors, filed May 20, 2013, at p. 10; Ex Parte Comments of LPTV Spectrum Rights Coalition, filed August 27, 2013, Summary p. 3; LPTV Spectrum Rights Coalition – Spectrum Auction Task Force Presentation on March 18, 2014, filed in Docket 12-268 on March 21, 2014, points 4 and 5 at pp. 4-6.

TV station licensees for voluntarily relinquishing their spectrum usage rights. Full power and Class A low power TV stations were also given special considerations applicable to relocation costs or the option of future regulatory flexibility by foregoing reimbursement for relocation. Even though the Commission is not required to include LPTV licensees in the incentive auction, *Congress did not limit the FCC's discretion to include LPTV participation in the auction.*

I. <u>The FCC has the authority to include LPTV in the reverse auction.</u>

The Commission itself explicitly confirmed its authority to include LPTV licensees in the incentive auction when it presented its Initial Regulatory Flexibility Act Analysis appended to the *Notice of Proposed Rulemaking* in the above-captioned proceeding, Appendix B, at pages 183-84, paragraph 71 (emphasis added):

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

Having acknowledged its authority to "allow LPTV stations to participate in the reverse auction,"[4] the Commission may not now assume there is "no practical use" to include LPTV in the reverse

[4] The *National Broadband Plan* recommended that the FCC "authorize LPTV stations to participate in incentive auctions." *National Broadband Plan,* Chapter 5.8.5, point 5, p. 92, available at http://download.broadband.gov/plan/national-broadband-plan-chapter-5-spectrum.pdf (last visited May 4, 2014). In addition, FCC's *National Broadband Plan* stated that the FCC can add an "overlay auction" if warranted (Chapter 5, Section 5.8.5, point 4), thus acknowledging its authority to conduct auctions creatively to alleviate the anticipated spectrum crunch even before the Spectrum Act subsequently became law. Thomas Hazlett, an endowed chair professor at Clemson University as well as a professor at George Mason University, who is well known to the FCC as a spectrum and telecommunications economist, advocated that LPTV should be included for auction participation in his proposed overlay auction approach for the 600 MHz band. "Comment submitted by Thomas W. Hazlett," GN Docket 09-51, December 18, 2009, p. 15. Chapter 5.8.5 point 4 of the *National Broadband Plan* essentially found that his approach would be a kind of "Plan B" for the FCC to pursue if an incentive auction failed. Early on, the FCC found in Section 5.4 of the

auction without developing a record for that conclusion. The Commission cannot merely dismiss the question of LPTV participation without conducting a substantive, quantitative analysis. The Regulatory Flexibility Act[5] requires that the FCC make that analysis before it adopts rules in order to examine their impact on small businesses such as LPTV operators and to consider less burdensome alternatives.

II. The FCC must consider benefits-costs of including LPTV in the reverse auction.

If ever the Commission had the opportunity to evaluate the financial and policy tradeoffs and benefit-cost of various approaches and scenarios that could enhance the auction results while avoiding trampling LPTV incumbents' rights, then truly this it is. By doing so, FAB submits the Commission will discover that the least costly, most cost-efficient and least burdensome alternative to wiping out small business owners operating LPTV businesses in major markets will be to include them in the reverse auction.

FAB urges the Commission to provide its findings in the Report and Order. The Commission needs to evaluate these outcomes and disclose its analysis in terms of spectrum cleared versus net revenue and debt reduction. Specifically, the analysis should cover three areas of study if LPTV licensees were invited to the auction versus their exclusion:

1) the total MHz and total MHz-pops that could be cleared;

2) the relocation cost savings to LPTV licensees and time-to-market savings to the government; and

3) the net revenue to the US Treasury.

If LPTV licensees are encouraged to participate in the reverse auction, FAB believes many would decide to contribute their spectrum rather than risk the potential for extinction after the

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National Broadband Plan a general pressure to clear spectrum as quickly as possible. Such spectrum clearing must not be achieved on the backs of LPTV licensees, however, as though they have no legitimate spectrum rights.

[5] 5 U.S.C. Sec. 601, *et. seq*.

repacking. More post-auction spectrum would also be available for the forward auction and future unlicensed and licensed use. Because LPTV stations have the right to file displacement applications, the spectrum used by LPTV stations after the repacking will be unavailable to other wireless operators expecting to launch unlicensed services in TV white spaces. If LPTV participates in the auction, however, the demand for displacement channels will not be as high, and those LPTV operators desperate to continue broadcasting their diverse, often religious, ethnic, and community programming would have greater potential to remain on-air serving the public.

Commission officials and others recently have suggested that some of the financial objectives included in the Spectrum Act may be met without reliance on the proceeds from the 600 MHz auction. For instance, FirstNet funding to create a nationwide public safety network apparently can be funded from receipts from the recent H Block auction, the newly-created AWS-3 auction, and the 1695 Band. Thus, for this auction, the Commission should be free to focus on total spectrum cleared (not just paired blocks auctioned off for the big four oligopoly carriers but total spectrum for all applications and all technologies, including licensed and unlicensed use), as well as relocation costs, and the net debt reduction contributed to the US Treasury. FAB urges the Commission to include these considerations, and clearly state the policy priorities and tradeoffs in its quantified analysis of the benefits of including LPTV in the reverse auction. FAB has observed scant consideration thus far by the FCC for the financial and policy tradeoffs – with or without LPTV auction participation – between total spectrum cleared for this generational, "once in a lifetime" opportunity before it, and debt reduction possible now that funding for FirstNet appears to be assured.

FAB submits that any combination of just two of the three following possible benefits of LPTV auction participation is sufficient for the FCC to find the public interest, convenience, and necessity will be best served by including LPTV in the reverse auction:

1. **Would more total spectrum be cleared for sale in the forward auction for licensed use, white space use, or both, by including LPTV in the auction?**

2. **Would band clearing by the FCC, enabling the forward auction of mobile licenses, be achieved more expeditiously by including LPTV licensees in the reverse auction?**

3. **Would total net revenue after the forward auction concludes be nearly the same or higher to the US Government if LPTV is included in the reverse auction?**

These are not questions an entrepreneurial firm such as FAB can answer. But given the FCC's resources, the authority it has to include LPTV in the reverse auction, and its stewardship over tens of billions of dollars-worth of spectrum in question, versus the many thousands of adversely affected LPTV and translator licensees, FAB submits a robust analysis is required in order to avoid making an arbitrary and capricious decision.

FAB believes that the FCC needs to describe the supply and demand curves for this spectrum band, taking into account all relevant policy choices, including a decision to include or exclude LPTV licensees from the reverse auction. That analysis will allow all public stakeholders to see just how answering the three questions above may look as a matter of public telecommunications and debt reduction policy. FAB's view is that after those questions are examined, a decision to include LPTV is a winner for all licensees equitably under the law, for the US Government's coffers, for spectrum clearing for a generation, and for American wireless consumers.

III. Inclusion of LPTV in the auction is consistent with the Spectrum Act.

In recent public appearances, some Commission officials appear to be avoiding the conclusion in the NPRM's Initial Regulatory Flexibility Act Analysis, paragraph 71, that the FCC has authority to include LPTV in the auctions. Instead, they comment that the Spectrum Act somehow does not allow independent FCC thinking on the matter. This is not true. Although Congress specifically incentivized full power TV and low power Class A stations for special treatment for reimbursement of relocation costs, Congress did not limit the FCC's existing authority or expert discretion to allow LPTV participation in the reverse auction.

Indeed, Section 6403(b)(5) of the Spectrum Act is explicit that in implementing the statute, the Commission must not alter the existing incumbent spectrum usage rights of LPTV stations. Congress specifically stated, notwithstanding anything else in the Spectrum Act, that:

> ***LOW-POWER TELEVISION USAGE RIGHTS. — Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.***

The plain language of the statute is that the Commission may not alter the rights of existing LPTV stations to use their licensed spectrum. Thus, even though the Commission is not required by Congress to include LPTV in the reverse auction or to allow LPTV to receive reimbursement of their expenses in changing channels in the repacking, Congress intended that they survive the reorganization of the television band. The FCC can still exercise its discretion to invite LPTV to the auction if the benefits of inclusion outweigh the costs of exclusion.

IV. The FCC must exercise its own independent judgment in adopting auction rules.

In adopting the reverse auction rules, the FCC cannot refuse to exercise its independent judgment to interpret the Spectrum Act in a way that reconciles preferences for TV stations and Class A TV stations while not altering LPTV spectrum usage rights. FAB notes that the Court of

Appeals for the District of Columbia Circuit and Federal District Court have highlighted the need for agencies to engage in rigorous benefit-cost analysis and found that the agency's action was arbitrary and capricious when the agency failed to apprise itself of the economic consequences of its regulations, or to exercise its own independent judgment. This is particularly true when the law or Congressional intent or both are potentially in conflict, and the public interest can be better served by taking such inclusionary action, especially where potentially greater equities can be achieved for all affected parties. *See, e.g., Business Roundtable v. SEC,* 647 F.3d 1144 (D.C. Cir. 2011); *American Petroleum Institute v. SEC*, Civil Action No. 12-1668, slip op. at 9, 22, 25-26 (D.D.C. July 2, 2013). "[A]an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it was not based on the agency's own judgment but rather on the unjustified assumption that it was Congress' judgment that such a regulation is desirable or required." *Arizona v. Thompson*, 281 F.3d 248, 259 (D.C. Cir. 2002).

Congress would have had no reason to include Section 6403(b)(5) of the Spectrum Act regarding no alteration of LPTV spectrum usage rights if it did not want to preserve LPTV service. The Commission's recent view that LPTV stations are secondary to *everyone* flies in the face of the expectations of LPTV licensees who created their small businesses with the understanding that their risks of displacement would be limited solely to other full service TV stations and land mobile radio stations operating on Channels 14 – 20, when the TV band ranged from channels 2 to 68. *Low Power Television Service*, 53 RR2d 1267, 1269 (1983). Congress did not sentence LPTV to extinction when it stated that their spectrum usage rights shall not be altered by the Spectrum Act. Had that been the intent, Congress could have clearly stated that LPTV's use of spectrum shall not be protected in the reverse auction or repacking of the TV band. It did not declare that intent.

V. Congress failed to conduct proper benefit-cost analysis of impact on LPTV.

Regarding the actual passage of the Spectrum Act, FAB has ascertained after multiple discussions with members of the Congressional Budget Office ("CBO") and others that the FCC, Congressional committee staff in both chambers and on both sides of the aisle, and the CBO, in their haste to draft the legislation, erred twice. On the revenue side, CBO was apparently informed by the FCC and Congressional staff that LPTV as secondary had no rights whatsoever and therefore should not be included in any of the auction revenue scenarios. A second harmful error occurred when Congressional staff did not properly follow Congress' own Unfunded Mandate Reform Act of 1995 (UMRA) in estimating and disclosing the massive unfunded private mandate LPTV faces in relocation costs – a set of costs no different whatsoever from the relocation costs faced by full power and Class A low power stations that may need to move. Based on using flawed inputs – on an overly myopic view of LPTV license usage rights, and then applying asymmetric logic on whether a new mandate was being created for full power and Class A low power TV stations, but not for LPTV – CBO wrongly excluded LPTV from consideration on the entire cost side analysis in its Cost Estimate report for S.911. This blatant inconsistency and omission affects thousands of LPTV and translator licensees to the tune of over $1.0 billion, based on one estimate filed by the LPTV Spectrum Rights Coalition in this proceeding. FAB believes these unfunded mandate costs for LPTV are up to 50% percent higher than the cost assumptions in S.911 for full service and Class A stations, amounting to a $1.5 billion unfunded mandate imposed on private sector LPTV licensees that must not continue to fail to be acknowledged and examined substantively in the benefit-cost analysis in the Report and Order.

FAB combines the dual revenue side and cost side estimate failures here because the FCC must independently consider both in its benefit-cost analysis of why certain rules are being adopted,

including the question of whether to invite LPTV to the auction. The FCC may not look the other way and "blame" Congress for these inconsistencies and omissions. Just because the Senate Committee somehow did not catch – or unintentionally contributed to – these twin oversights does not mean the FCC may overlook them now.

As additional clarification, the official CBO Cost Estimate for S.911 was rolled into the official CBO Cost Estimate basis for the Spectrum Act. The only addendum and update for the Spectrum Act was a mere, macro, two-page supplement to the prior S.911 analysis for inclusion into H.R. 3630 for the 112th Congress. This is apparently common where bills come together and evolve into final legislation. CBO specifically did not consider the impact of the explicit, late-added Congressional admonition that the entire Spectrum Act shall not alter LPTV spectrum usage rights. This was a major, regrettable oversight for the Senate and House Committees, and for the CBO, in order to push passage of the Spectrum Act in the much larger bill for Middle Class Tax Relief. If the FCC does not use its own independent agency judgment to clarify and rectify these inconsistencies and omissions, exclusion of LPTV from the auction will cause damage to thousands of licensees with tragic results for these many small businesses.

VI. Conclusion

The public interest would be best served by allowing LPTV licensees to participate on the revenue side of the reverse auction. As it is, they will not be reimbursed for relocating, or made whole if they are permanently displaced. The Commission's Order needs to step up to these issues substantively with rigorous analysis.

After repacking full service and Class A TV stations, there is a looming shortage of relocation opportunities expected for LPTV in the 600 MHz band. By contrast, following the 700 MHz auction, ample spectrum relocation opportunities remained to move nearly all LPTV

incumbent licensees into the "new core" channels. In this new 600MHz proceeding of "musical spectrum chairs," the opportunity for everyone to move again will not exist, and thus a likely dramatic regulatory taking is looming if the FCC does not undertake the benefit-cost analysis which FAB submits will support inclusion of LPTV in the reverse auction. Allowing LPTV into the auction is the seamless way to clear the maximum amount of spectrum expeditiously.

FAB looks forward to reviewing the FCC's analysis of the benefit-cost of including LPTV and minimizing the harmful unfunded private mandate thrust upon thousands of legitimate, bona fide licensees. As it is, they will not be reimbursed for relocating. Nor does there appear to be any intention of making them whole if they are permanently displaced. If the FCC does not release this analysis in the Report and Order, then the only other alternative must be to include these questions explicitly in the new follow-on, LPTV-specific rulemaking which the FCC staff has indicated will likely be launched concurrently with the Report and Order.

FAB asks the Commission to uphold the legitimate incumbent license rights of thousands of community-based broadcasters nationwide – rights which Congress said shall not be altered in the Spectrum Act. FAB respectfully asks the FCC to consider the most free-market and inclusionary approach to treating all broadcast licensees equitably by allowing LPTV and translators in the auction.

Respectfully submitted

FREE ACCESS & BROADCAST TELEMEDIA, LLC

By: /s/
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Proceeding

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12-268	Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions

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