May 7, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions (Docket No. 12-268)

Dear Ms. Dortch:

This letter is to notify you that on May 7, 2014, Patrick Butler, President and Chief Executive Officer, and Lonna Thompson, Executive Vice President, Chief Operating Officer and General Counsel, of the Association of Public Television Stations; and Katherine Lauderdale, Senior Vice President, General Counsel and Corporate Secretary, of the Public Broadcasting Service (collectively, "PTV") met with Commissioner Mignon Clyburn, Adonis Hoffman, Chief of Staff and Senior Legal Advisor, Media and Louis Peraertz, Legal Advisor, Wireless, International, and Public Safety.

PTV requested the meeting in order to discuss issues of importance to the public broadcasting industry in connection with the upcoming spectrum incentive auction and repacking process. PTV expressed appreciation for the Commission's willingness to recommend a number of regulatory safeguards that protect and preserve public television stations across the country. PTV recommended that the Commission take the following additional three steps to further ensure that the communities served by public broadcasting are not negatively impacted by the auction and repack.

First, consistent with longstanding congressional and Commission policy, the FCC should ensure that every community retains access to over-the-air public television service by structuring the incentive auction rules to protect and preserve the congressional mandate for universal service of public television throughout the country. The Commission has consistently worked to support and further this statutory universal service mandate of public television for decades and can continue to do so through prudent design of the upcoming incentive auction.[1]

PTV expressed support for the incentive auction generally, but advised that service to millions of Americans could be lost if the Commission were to accept a license termination bid from the sole or last provider of public television service to a community where the auction is held. While this result may seem unlikely, it is possible and the consequences could be dire and unprecedented. Attached is the April 24, 2014 Resolution of the CPB Board requesting that the FCC ensure that no "white areas" unserved by public television result from the incentive auction.

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[1] *See, e.g.*, In the Matter of Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania, *Memorandum Opinion and Order*, 11 FCC Rcd. 11700, ¶ 17-18 (rel. Aug. 1, 1996); In the Matter of Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania, *Report and Order*, MM Docket No. 01-276, ¶ 42 (rel. July 18, 2002) (granting the exceptional relief of dereservation to WQEX in 2002 due to the fact that it would "not cause a reduction in public television's coverage area" as "every viewer in WQEX(TV)'s coverage area will continue to receive educational service from WQED(TV)").

Universal service to all Americans is a core mission of public broadcasting. This principle is embodied in the Public Broadcasting Act enacted by Congress in 1967 and has been supported by established FCC policies since spectrum was first reserved for noncommercial use.[2] The Commission reaffirmed these longstanding policies in the 2012 Notice of Proposed Rulemaking by continuing to strongly disfavor modification of a station's facilities that would create unserved "white areas" and to strongly disfavor dereservation of noncommercial educational channels.[3]

These FCC policies were reaffirmed in analogous circumstances when the Commission adopted voluntary band-clearing mechanisms to facilitate clearing of the 740-806 MHz band for new wireless services. The Commission's determinations in that prior band clearing reflected its "intent to protect and preserve existing noncommercial educational service by carefully weighing the public interest effects of dereservation proposal[s] even in the context of band clearing."[4]

The FCC first reserved television channels for noncommercial use in 1952, in order to allow for the development of educational television service nationwide.[5] The importance of reserved channels has only grown over the ensuing six decades. The Commission "has historically sought to reserve approximately twenty-five percent of television channels for noncommercial use."[6] Furthermore, the Commission "has repeatedly denied requests to delete reserved channels, citing as a principal reason for doing so the need to preserve the future availability of the channels."[7] Allowing extensive dereservation through the incentive auction would be a dramatic reversal in course, which the FCC should not make without first specifically opening the subject for notice and comment.

A simple method can be used to incorporate this protection into the feasibility checking process planned for the auction through a constraint file that preserves a minimum of one qualified noncommercial educational station in each Designated Market Area.[8] PTV urges the Commission to adopt in the incentive auction Report and Order amended language for § 1.22002(b)(2)(iii) and § 73.3700(a)(9) as proposed in the *ex parte* letter filed by the Association of Public Television Stations on January 23, 2014 (attached hereto).[9] Nothing in this proposal is intended to conflict with the Commission's obligation to ensure that the auction is voluntary. All stations should be able to voluntarily participate in the auction through bids to channel share or relocate to the VHF band, with their participation of course subject to the possibility that a bid may not be accepted due to the bid amount, the

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[2] 47 U.S.C. § 396(a)(7) ("[I]t is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States."); Amendment of Section 3.606 of the Commission's Rules and Regulations et al., *Sixth Report & Order*, 41 F.C.C. 148, 158 (1952).

[3] In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Notice of Proposed Rulemaking*, 27 FCC Rcd. 12357, ¶ 48 n.88, ¶ 370 n.557 (rel. Oct. 2, 2012) [hereinafter "Incentive Auction NPRM"].

[4] In the Matter of Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania, *Memorandum Opinion and Order*, 11 FCC Rcd. 11700, ¶ 30 (rel. Aug. 1, 1996).

[5] Amendment of Section 3.606 of the Commission's Rules and Regulations et al., *Sixth Report & Order*, 41 F.C.C. 148, 158 (1952).

[6] *Id*. at ¶ 17.

[7] *Id*. at ¶ 18. Through 1996 the Commission notes that it had "never dereserved a noncommercial channel without substituting another reserved channel." *Id*.

[8] *See* 47 U.S.C. § 338(k)(6) (defining "qualified noncommercial educational television station").

[9] Incentive Auction NPRM, Docket No. 12-268, *Ex Parte* Letter, Association of Public Television Stations (Jan. 23, 2014).

market congestion, or the public interest considerations that have always informed and guided the Commission's spectrum policy.

Second, PTV expressed appreciation for the Commission's willingness to recommend that the negative impact on television translators be mitigated: (a) by ensuring that spectrum clearing in low occupancy markets not exceed major market recovery; and (b) by permitting out-of-core operation with a cessation mechanism similar to that used following the digital transition.[10] PTV translators serve underserved populations in hard to reach geographic areas as well as many cable and satellite receive facilities.

Given that many translators will be displaced, PTV urged the Commission to provide a selection priority in the displacement application process for public television translators.[11] PTV operates 583 translators licensed to CPB-qualified public television stations.[12] In a recent study commissioned by CPB, under a 120 MHz clearing scenario, 200 of these translators may have to cease broadcasting altogether after the repacking, and as many as 200 to 250 more public broadcasting translators may have to change channels at the stations' expense. It is critical that PTV stations have priority in order to timely receive grants and other funding to pay for the costs of translator relocation and stay on the air serving their communities.

Third, PTV expressed appreciation for the Commission's willingness to recommend that the TV Broadcaster Relocation Fund provide advance reimbursement to noncommercial educational licensees that incur repacking costs following the incentive auction. PTV urged the Commission to consider a greater percentage of advance reimbursement, as well as priority, for noncommercial educational stations. Given that the Widelity Report estimates costs could exceed $2.6 million for a single station in some cases; covering ten percent of such significant expenses could be a significant challenge for many noncommercial stations.[13]

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[10] *See* 47 C.F.R. 74.703(g) (providing a mechanism for wireless licensees to notify translator operators of the likelihood of harmful interference and for translator operators to respond to such notification).

[11] Congress distinguished between CPB-qualified stations and other noncommercial educational television stations when it enacted the Satellite Television Extension and Localism Act of 2010 ("STELA"), in which Congress required that certain satellite television providers accelerate their timetable for carrying CPB-qualified stations in high-definition format. *See* 47 U.S.C. § 338(k)(6) (defining a "qualified noncommercial educational television station" to mean "any full-power television broadcast station that . . . is licensed by the Commission as a noncommercial educational broadcast station and is owned and operated by a public agency, nonprofit foundation, nonprofit corporation, or nonprofit association; and . . . has as its licensee an entity that is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto"). The distinction based on STELA's definition was upheld under First Amendment scrutiny in a case decided by the United States Court of Appeals for the Ninth Circuit. *See DISH Network Corp. v. Fed. Commc'ns Comm'n*, 653 F.3d 771 (9th Cir. 2011), cert. denied 132 S. Ct. 1162 (2012).

[12] Just over 50 percent of these translators are located in the following five states: Utah, Oregon, New Mexico, Idaho, and Wyoming. In New Mexico, for instance, approximately half of public television viewers are served by a translator. In addition, public broadcasting content is carried on numerous other translators that are owned and operated by third parties in communities across the country.

[13] Widelity, Inc., Response to the Federal Communications Commission for the Broadcaster Transition Study Solicitation, FCC 13R0003, at 45, Dec. 30, 2013.

Regards,

/s/_____

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/s/_____

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Attachments

January 23, 2014

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

Re: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions (Docket No. 12-268)

Dear Ms. Dortch:

The Association of Public Television Stations ("APTS") submits this *ex parte* letter in connection with the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking on *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions* (the "Notice").[1] APTS, in collaboration with our colleagues at CPB and PBS, submitted initial comments to the Notice on January 25, 2013 and reply comments on March 12, 2013.[2] In these comments, we recommended that the Commission not accept bids in the reverse auction that would result in "white areas" where no public television station would remain on-air to serve viewers in any given market. We discussed this proposal with Commission staff in *ex parte* meetings on April 30, 2013 and on September 13, 2013.[3] Based on those conversations, we submit this letter to provide additional detail on specifically how the proposal to prevent the creation of "white areas" could be implemented.

The Commission should adopt the following additions to the proposed rules in Appendix A of the Notice:

47 C.F.R. § 1.22002(b)(2)(iii) – Competitive Bidding Design Options.
Procedures to incorporate public interest considerations into the process for assigning winning bids. These procedures will ensure that at least one qualified noncommercial educational television station continues to be licensed in each Designated Market Area as defined by Nielsen Media Research as of February 22, 2012.

47 C.F.R. § 73.3700(a)(9) – Definitions. Qualified Noncommercial Education Television Station.
The term 'qualified noncommercial educational television station' means any full-power television broadcast station that—

[1] *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118, 27 FCC Rcd. 12357 (rel. Oct. 2, 2012) [hereinafter "Incentive Auction NPRM"].

[2] Incentive Auction NPRM, Comments of the Association of Public Television Stations, et al., 15-17 (Jan. 25, 2013); Incentive Auction NPRM, Reply Comments of the Association of Public Television Stations, et al. (Mar. 12, 2013).

[3] Incentive Auction NPRM, *Ex Parte* Letters, Association of Public Television Stations (May 2, 2013; Sept. 17, 2013).

(A) under the rules and regulations of the Commission in effect on February 22, 2012, is licensed by the Commission as a noncommercial educational broadcast station and is owned and operated by a public agency, non-profit foundation, non-profit corporation, or non-profit association; and

(B) has as its licensee an entity that is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in 47 U.S.C. § 396(k)(6)(B).

These additions to the rules are fully warranted pursuant to the Commission's longstanding policies to both strongly disfavor modification of a station's facilities that would create unserved "white areas" and strongly disfavor dereservation of noncommercial educational channels. The Commission reiterated these well-established policies in the latest Notice.[4]

The Commission "has historically sought to reserve approximately twenty-five percent of television channels for noncommercial use."[5] Furthermore, the Commission "has repeatedly denied requests to delete reserved channels, citing as a principal reason for doing so the need to preserve the future availability of the channels."[6] The Commission has consistently worked to support and further the statutory universal service mandate of public television for decades and can continue to do so through prudent design of the upcoming incentive auction.[7]

The procedures for ensuring that at least one qualified noncommercial educational television station continues to be licensed in each Designated Market Area could be implemented through the existing *TVStudy* software. The Commission's Office of Engineering and Technology ("OET") announced the release of the *TVStudy* software on February 4, 2013 to provide analysis of coverage and interference of full-power and Class A television stations.[8] The OET released a Public Notice on July 22, 2013 describing the ability of *TVStudy* to be used during reverse auction bidding to check the feasibility of assigning channels without violating any applicable constraints.[9] The Public Notice highlighted that the software could be used for a "feasibility check" if given sets of reverse auction bids from broadcasters

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[4] Incentive Auction NPRM, ¶ 48 n.88, ¶ 370 n.557.

[5] In the Matter of Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania, *Memorandum Opinion and Order*, 11 FCC Rcd. 11700, ¶ 17 (rel. Aug. 1, 1996).

[6] *Id*. at ¶ 18. Through 1996 the Commission notes that it had "never dereserved a noncommercial channel without substituting another reserved channel." *Id*.

[7] *See, e.g.*, In the Matter of Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania, *Report and Order*, MM Docket No. 01-276, ¶ 42 (rel. July 18, 2002) (granting the exceptional relief of dereservation to WQEX in 2002 due to the fact that it would "not cause a reduction in public television's coverage area" as "every viewer in WQEX(TV)'s coverage area will continue to receive educational service from WQED(TV)").

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

[9] Public Notice, Incentive Auction Task Force Releases Information Related to Incentive Auction Repacking, DA 13-1613, ET Docket No. 13-26, GN Docket No. 12-268 (rel. July 22, 2013).

were to be accepted and that such checks could be "conducted rapidly during the course of bidding."[10] APTS urges the Commission to adopt the preservation of at least one qualified noncommercial educational television station in each Designated Market Area as an applicable constraint. The Commission can use the existing software and the constraint files generation process described in the Technical Appendix of the July 22, 2013 Public Notice to include this important public interest consideration in its procedures for determining acceptable winning bids in the reverse auction.

In the event that the Commission adopts a "descending clock" auction design as proposed in the Notice and all of the qualified noncommercial educational television stations in a given Designated Market Area bid to fully relinquish their spectrum usage rights, the Commission should select among the competing bids based on price. This would ensure that the lowest bids are accepted and the revenues to the interoperable public safety network and U.S. Treasury deficit reduction are maximized. In the unlikely event that the lowest competing bids in a given market are the same price, the Commission should accept the bid from the tied station with the smaller unique population coverage.

APTS notes that Congress distinguished between qualified noncommercial educational television stations and other noncommercial educational television stations in this way when it enacted the Satellite Television Extension and Localism Act of 2010 ("STELA"), in which Congress required that certain satellite television providers accelerate the timetable for carrying such qualified stations in high-definition format.[11] The distinction based on STELA's definition was upheld under First Amendment scrutiny in a case decided by the United States Court of Appeals for the Ninth Circuit.[12]

The proposal described above is not intended to prevent any qualified noncommercial educational television station from participating in the auction through bids to channel share or relocate to the Very High Frequency band. The Commission should certainly permit such stations to voluntarily participate in the incentive auction, but this should be balanced with the longstanding Congressionally-mandated mission of universal service and the Commission's public interest objectives.

Sincerely,

Lonna Thompson
Executive Vice President, Chief Operating Officer and General Counsel
ASSOCIATION OF PUBLIC TELEVISION STATIONS
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[10] *Id*. at 2.

[11] Satellite Television Extension and Localism Act of 2010, Pub. L. 111-175, Sec. 207, 47 U.S.C. § 338(a)(5).

[12] *DISH Network Corp. v. Federal Communications Commission*, 653 F.3d 771 (9th Cir. 2011), cert. denied 132 S. Ct. 1162 (2012).

RESOLUTION
BOARD OF DIRECTORS
CORPORATION FOR PUBLIC BROADCASTING
WASHINGTON, DC
Thursday, April 24, 2014

unanimously

WHEREAS,

Congress has declared that it is in the public interest and furthers the general welfare to encourage the growth and development of public telecommunications services, both locally and nationally, and that it is necessary and appropriate for the Federal Government to assist and support a national policy that makes those services available to all citizens of the United States as a source of alternative telecommunications services;

WHEREAS,

Congress and the Federal Communications Commission have recognized the continuing and essential value of noncommercial educational television services by reserving spectrum for public television service;

WHEREAS,

for over 50 years, the American people have expressed their support for public broadcasting's content and service by investing substantial federal, state, corporate, foundation, and personal resources into the development and growth of public broadcasting;

WHEREAS,

the Federal Communications Commission's spectrum incentive auction and repacking process could jeopardize public broadcasting's ability to address the needs of unserved and underserved audiences, particularly children, minorities, and those living in rural and inner-city communities, through the unintentional creation of "white areas" in which those audiences would be denied access to free noncommercial over-the-air public television service; and

WHEREAS,

the Federal Communications Commission's spectrum incentive auction and repacking process could jeopardize public broadcasting's ability to serve the educational, informational, cultural, and emergency communications needs of communities through the unintentional creation of "white areas," in which citizens would lose all access to free noncommercial over-the-air public television service;

NOW, THEREFORE, BE IT RESOLVED

that the Corporation for Public Broadcasting, as the steward of the federal appropriation, urges the Federal Communications Commission to adopt rules and practices with regard to its spectrum incentive auction and repacking process to ensure that no "white areas" be created and that universal access to free over-the-air public television service be preserved.