Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

PETITION FOR RECONSIDERATION
OF THE DISPATCH PRINTING COMPANY

In its Report and Order adopting rules for the Incentive Auction, the Commission determined that it would not protect the existing coverage areas of stations that operate above the limits on antenna height above average terrain ("HAAT") and/or effective radiated power ("ERP") to the extent such operations exceed the maximum power limits without regard to HAAT.[1] This decision disregards the Congressional mandate to protect "the coverage area and population served of each broadcast television licensee" as of February 22, 2012. It also is contrary to the public interest because it creates a risk that viewers relying on access to free, over-the-air television service will be deprived of such service. Accordingly, the Dispatch Printing Company, d/b/a the Dispatch Broadcast Group ("Dispatch"), owner of television stations including WTHR, Indianapolis, Indiana, files this Petition to urge the Commission to reconsider its decision and protect the complete footprint of stations as of the date of the

[1] *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, GN Dkt. No. 12-268, 79 FCC Rcd 48442 (Aug. 15, 2014) ("Report and Order"), at ¶ 167.

Spectrum Act,[2] regardless of whether they are operating under an ERP waiver without regard to HAAT.

I. BACKGROUND

In its initial and reply comments, Dispatch discussed footnote 157 of the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, in which the Commission stated that it did not propose that it would make all reasonable efforts to preserve the existing coverage areas of stations whose operations exceed the ERP limits.[3] Specifically, in that footnote, the Commission states that "We . . . recognize that not all stations are currently in compliance with maximum effective radiate power (ERP) and antenna height above average terrain limits. . . . We propose to make all reasonable efforts to preserve the existing coverage areas of stations whose operations exceed the antenna height (*but not ERP*) limits."[4] Dispatch and several other commenters filed comments demonstrating that the NPRM's proposal was contrary to both the Spectrum Act and the public interest.

As adopted, the Report and Order indicates that the Commission will make reasonable efforts to protect not only the existing coverage areas of stations that operate under a waiver of the antenna height limits, but also, as a general matter, the existing coverage areas of stations that operate under a waiver of ERP limits.[5] This is a step in the right direction, but it does not go far enough: the Report and Order qualifies this protection and provides that the Commission "will

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[2] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 125 Stat. 156, Title VI (2012) ("Spectrum Act").

[3] Comments of The Dispatch Printing Company, GN Dkt. 12-268 (Jan. 25, 2013), at 1-2; Reply Comments of The Dispatch Printing Company, GN Dkt. 12-268 (March 12, 2013), at 3.

[4] *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, GN Dkt. No. 12-268, 27 FCC Rcd 12357 (Oct. 2, 2012) ("NPRM"), at n.157 (emphasis added).

[5] Report and Order, at ¶ 167.

make all reasonable efforts to preserve the existing coverage areas of stations that operate above the HAAT and/or ERP limits pursuant to section 73.622(f)(5), *except that such operations will not be protected to the extent that they exceed the maximum power limits specified in the Commission's rules without regard to HAAT.*"[6]

Pursuant to section 73.622(f)(7), for a station on a high VHF channel in Zone 1, the maximum power level without regard to HAAT is 30 kW.[7] Dispatch's Indianapolis NBC affiliate, WTHR, is operating at 42.1 kW pursuant to a waiver granted by the FCC in recognition of the problems with VHF reception that have been acknowledged by the Commission on numerous occasions and extensively documented by WTHR in support of its own request for a power waiver. After receiving FCC approval to operate with a waiver of the ERP limits without regard to HAAT, WTHR commenced high powered operations and applied to license these facilities prior to the enactment of the Spectrum Act.[8]

The Report and Order fails to protect the viewers and coverage area served by WTHR with the ERP waiver authorized by the FCC. This decision made in the Report and Order will harm these viewers (and WTHR), and is contrary to the unambiguous mandate that Congress set forth in the Spectrum Act.

II. FAILURE TO PROTECT THE COVERAGE AREAS OF STATIONS TO THE EXTENT THEIR OPERATIONS EXCEED THE POWER LIMITS WITHOUT REGARD TO HAAT IS CONTRARY TO THE PLAIN LANGUAGE OF THE SPECTRUM ACT

By neglecting to preserve the existing coverage areas of stations that operate with waivers of the ERP limits, to the extent such operations exceed the maximum power limits

[6] *Id.* (emphasis added).

[7] 47 C.F.R. § 73.622(f)(7).

[8] *See* BLCDT-20120127AIE.

without regard to HAAT, the Commission has failed to correctly implement section 6403(b)(2) of the Spectrum Act, and its failure to do so is arbitrary and capricious, in violation of the Administrative Procedure Act.[9]

Where Congress "has directly spoken to the precise question at issue," and its intent is "clear" and "unambiguously expressed," the agency must give it effect.[10] In section 6403(b)(2), Congress's intent to require the Commission to make all reasonable efforts to preserve the coverage area and population served of each broadcast television licensee as of February 22, 2012 could not be more clearly and unambiguously expressed:

> (2) FACTORS FOR CONSIDERATION.—In making any reassignments or reallocations under paragraph (1)(B), *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.[11]

The Commission, itself, recognized its responsibility to make all reasonable efforts to preserve a station's "coverage area" as of February 22, 2012 elsewhere in the Report and Order:

> Consistent with our approach to preserving population served, we interpret the statute to direct us to make all reasonable efforts to protect the geographic area that a station actually served as of February 22, 2012. This approach, which is consistent with our efforts to replicate coverage areas during the digital transition, is designed to ensure that after the repacking process, broadcasters will continue to reach the same viewers, and that viewers will continue to have access to the same stations.[12]

However, with respect to efforts to protect the coverage areas and population served for stations that operate above the ERP limits, the Commission erroneously — and with no explanation or

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[9] *See* 5 U.S.C. § 706(2). *See also Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

[10] *Chevron*, 467 U.S. at 842–43.

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

[12] Report and Order, at ¶ 172.

reasoning — builds in an exception based upon whether the station's operations exceed the maximum power limits without regard to HAAT.

Section 6403(b)(2) of the Spectrum Act defines *who* must be protected (each broadcast television licensee), and also *what* must be protected (the coverage area and population served by each such licensee, as of February 22, 2012). These requirements are not conditioned on *how* the broadcast licensee has served the coverage area or population as of February 22, 2012.[13] Therefore, as a statutory matter, Congress clearly has required that the Commission make all reasonable efforts to protect "the coverage area and population served of each broadcast television licensee" as of February 22, 2012, *regardless* of whether the licensee's operations happen to be authorized by a waiver of the power limits that the FCC saw fit to approve.[14] Because WTHR has been operating with a validly-granted waiver of the ERP limits without regard to HAAT and had a license application for such operations on file with the FCC as of February 22, 2012, the Spectrum Act does not permit the Commission to categorically decline to protect its footprint.

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[13] Even if the preservation mandate in the Spectrum Act is ambiguous, which it is not, there is no way to read the statute as explicitly or implicitly delegating to the FCC the authority to decide when not to use all reasonable efforts to preserve a station's coverage area as of February 22, 2012. *See American Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) ("We further recognize that the existence of ambiguity is not enough per se to warrant deference to the agency's interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity."); *AT&T Corp. FCC*, 349 F.3d 692, 698–99 (D.C. Cir. 2003).

[14] The Commission stated in the NPRM that it "propose[d] to make all reasonable efforts to preserve the existing coverage areas of stations whose operations exceed the antenna height (but not ERP) limits." NPRM, at n.157. However, it failed to give notice that its ultimate determination about what coverage areas to protect might be dependent upon the type of ERP limits waiver a station has received from the FCC. Accordingly, the Commission has failed to give parties in this proceeding adequate notice of the "range of alternatives being considered with reasonable specificity" with respect to complying with Congress's mandate to make "all reasonable efforts" to preserve coverage area. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (quoting *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994)).

III. PROTECTING THE COVERAGE AREAS MADE POSSIBLE BY WAIVERS OF THE POWER LIMITS IS IN THE PUBLIC INTEREST

The Commission's failure to preserve the existing coverage areas of stations to the extent the stations' operations exceed the maximum power limits without regard to HAAT is contrary to the FCC's essential policy goal of not depriving viewers of access to free, over-the-air television service. The Commission has a responsibility to preserve a robust broadcast television service for the American public. Viewers rely on WTHR to provide popular NBC network programming, award-winning local news programming, professional and college sports, in-depth weather coverage, emergency information, and a wide range of other programming that is educational, entertaining, and important. WTHR's viewers rely heavily on the availability of free, over-the-air service.

The Commission's Report and Order jeopardizes the service received by WTHR's viewers. WTHR, like other VHF stations, has experienced particular difficulties in serving all of its viewers with a reliable digital signal. Many viewers who had received WTHR's analog signal could no longer access the station's signal after the digital transition. Increasing its power after the digital transition has helped WTHR to restore service lost in connection with the digital transition and alleviate widespread reception issues. WTHR sought a waiver of the power limits applicable to high VHF, zone 1 stations without regard to HAAT in order to help restore service to its formerly analog coverage area, not to expand coverage beyond that area. The FCC agreed with WTHR that this ERP waiver was in the public interest, and granted it. The station's viewers have benefited from the improved, more robust signal that the station has been able to provide. The Commission's failure to protect the station's entire footprint creates risks that existing viewers will lose the station's free, over-the-air public television service, which for so many of them was lost after the digital transition and restored only after WTHR was able to

commence operations under its waiver of the ERP limits. Many of these viewers are elderly and/or low-income households, households that the Commission should seek to protect.

IV. CONCLUSION

The Spectrum Act requires protection for the coverage area and population served as of February 22, 2012 of the maximized facilities authorized by the Commission. Consistent with the Spectrum Act and the public interest, the Commission should reconsider its unexplained determination discussed above, and should instead preserve stations' coverage areas and population served, whether or not such coverage is provided pursuant to a waiver of the power limits without regard to HAAT.

Respectfully submitted,

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