Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

PETITION FOR RECONSIDERATION

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September 15, 2014

SUMMARY

The Affiliates Associations seek reconsideration of limited aspects of the *Order* adopting rules concerning the voluntary incentive auction, repacking, and reimbursement processes. These steps are part of an important and complex undertaking posing many technical and policy issues. In the Spectrum Act, Congress already made many of the key decisions by requiring each of the auction, repacking, and reimbursement processes to comply with certain requirements. The Commission should reconsider those parts of the *Order* that fall short of these requirements, to the detriment of television stations and the viewing public.

First, the Commission should ensure that the repacking does not impose costs in excess of the $1.75 billion to be made available in the TV Broadcaster Relocation Fund. Further, the Commission can and should permit reimbursement of the expenses incurred by stations that are not required to change channels, but are subject to costs as a part of the repacking of the TV band. Congress did not intend for television stations to subsidize the costs of reallocating spectrum to other wireless uses. It provided for broadcasters to be made whole for expenses incurred as part of the involuntary repacking process. Moreover, the Spectrum Act requires participation in the forward auction to be *voluntary*. The *Order* creates uncertainty over whether stations will be fully reimbursed for their repacking costs, which could pressure stations to participate in the auction, even if that participation is not wholly voluntary. If the Commission decides not to treat the $1.75 billion fund as a budget, it has other options that comply with the Spectrum Act's reimbursement requirements, such as requiring winning forward auction bidders to reimburse the expenses of relocated incumbents (as it has done in several previous auctions).

Second, the Commission should reconsider certain of the *Order*'s decisions with respect to timing that impose unnecessary and serious harms on stations and consumers. Certain of the timing decisions, including those concerning the date by which the forward auction will be deemed complete, the adoption of a variable construction deadline process, and the deadline to submit construction permit applications and cost estimates, create risks that stations will not be fully reimbursed for the repacking expenses imposed on them involuntarily, and will not be able to complete the repacking in an efficient manner. Moreover, the *Order* imposes a hard deadline to transition to a new channel — or go dark — without regard to whether a station may be unable to transition for reasons outside of its control. This decision creates a risk of extraordinary harm

to stations and their viewers, and cannot be squared with the Spectrum Act's mandate to make *all reasonable efforts to protect* stations' coverage areas and populations served.

Third, the Spectrum Act requires that the Commission conduct the repacking process subject to international coordination, which means that the coordination must be completed prior to the incentive auction. That is the only way to ensure that the process is concluded in a timely manner and does not create obstacles to full reimbursement of repacking expenses for the numerous stations located in the international border zones.

Fourth, the Affiliates Associations urge the Commission to clarify important issues raised by the *Order*'s adoption of a variable band plan. A variable band plan leads to complex questions with respect to auction priorities and procedures, and creates questions about the post-repacking interference environment. The Commission should consider proceeding instead with the nationwide band plan that so many parties to this proceeding have supported.

Fifth, the Commission should reconsider its decision to impose rigid consumer education requirements on television stations that are assigned to new channels. Stations have every incentive to inform viewers about how to receive their signals, and are in the best position to craft appropriate viewer education campaigns. Of course, the best way to minimize any disruption to consumers would be to minimize the number of stations assigned to new channels in the first place — a goal that the Commission should embrace on reconsideration.

Sixth, and finally, the Commission should reconsider the use of TVStudy, as well as all proposed changes to the inputs used to calculate coverage area and population served. Such changes are inconsistent with the Spectrum Act's requirements concerning use of OET-69.

* * *

The auction and repacking process might not be "win-win-win" for all affected parties, but it need not be a "win-lose" proposition. The Spectrum Act simply requires that stations choosing not to participate in the forward auction be held harmless: they should not be forced to absorb costs in order to help wireless companies obtain more spectrum, and they should have sufficient time to construct new facilities that replicate current footprints. Reconsideration of the *Order* as described above will permit a successful and fair outcome for all parties and for consumers, as Congress intended.

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To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (together, the "Affiliates Associations") respectfully seek reconsideration of limited aspects of the Commission's *Order* in the above-captioned proceeding.[1] The Affiliates Associations have previously filed comments in this proceeding urging the Commission to adopt repacking rules that would hold harmless those broadcast stations (and their viewers) that do not participate in the voluntary incentive auction.[2] The Spectrum Act requires that broadcasters electing to continue broadcasting must be protected in the repacking process and with respect to the spectrum band rules that will affect their operations later, and must not be forced to subsidize the costs associated with reallocating spectrum from television broadcasting to other wireless uses. The Affiliates Associations seek

[1] Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, GN Docket No. 12-268, FCC 14-50 (rel. June 2, 2014) ("*Order*").

[2] *See* Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, GN Docket No. 12-268 (filed Jan. 25, 2013) ("Affiliate Associations Comments"); Reply Comments of the Affiliates Associations, GN Docket No. 12-268 (filed Mar. 12, 2013).

reconsideration here of certain, limited aspects of the *Order* that fail to accomplish these statutory and common-sense requirements.

I. THE $1.75 BILLION TV BROADCASTER RELOCATION FUND PROVIDES A LIMIT ON THE REPACKING, AND THE COMMISSION HAS UNDULY LIMITED THE FUND'S AVAILABILITY TO REIMBURSE EXPENSES INCURRED AS PART OF THE REPACKING.

The Commission should reconsider its decision not to treat the $1.75 billion provided in the TV Broadcaster Relocation Fund as a budget for repacking. Since the release of the *Order*, the Commission has provided new information regarding a number of simulated repacking scenarios based on different spectrum clearing targets and auction participation levels.[3] Release of this previously unavailable information has been helpful, and provides needed clarity on two points concerning reconfiguration.

First, the Commission may need only 200-250 stations to agree to go off the air to clear 84 MHz of spectrum to auction. This means that the great majority of broadcasters have no chance of seeing any benefit whatsoever from the auction. Most broadcast stations are located in markets where the FCC does not need to purchase spectrum (*i.e.*, accept station bids to channel share or go off the air) to conduct a successful auction. Simply put, the great majority of broadcasters, and their viewers, have no chance to "win" under the incentive auction order.

Second, each of the simulated plans for clearing 84 MHz envision relocating approximately 1,300 broadcast television stations. While it is possible that post-auction optimization may reduce somewhat the number of stations that are required to change channels,

[3] Letter from Gary Epstein, Chair, Incentive Auctions Task Force, Federal Communications Commission to Rick Kaplan, Executive Vice President, Strategic Planning, National Association of Broadcasters, GN Docket No. 12-268, ET Docket No. 13-26 (June 30, 2014).

it is highly unlikely that the Commission can repack several hundred or 1,000 stations without requiring stations to incur costs in excess of $1.75 billion.[4]

Taken together, these two facts mean that, absent further Commission action, local broadcasters could be forced to spend tens or hundreds of thousands of dollars each — money that could otherwise be invested in local programming — to change channels for no other reason than to provide wireless carriers more spectrum. Thus, a small local broadcaster in a market where it has *no chance* of benefiting from the auction and where its viewers will not even notice if their wireless carrier has 20 additional MHz of spectrum, might have to spend tens of thousands of dollars to benefit a large multinational wireless company. It is difficult to imagine a clearer example of a regulatory agency imposing costs on one industry for the naked benefit of another industry.

The *Order* erroneously rejects the idea that Congress, in its vision of a truly voluntary auction, intended broadcasters to be held harmless in repacking. The Commission justifies its position by reasoning that, while participation in the reverse auction is voluntary, participation in repacking is not.[5] This is an unrealistic view of the choices a broadcaster confronts with respect to the auction. In the simplest terms, a station has two choices: it can participate in the auction, or it can remain on the air and be relocated if necessary. If the Commission imposes a significant cost on one of those choices, it obviously affects broadcasters' decision-making process. One need only consider an extreme example to understand how plainly repacking costs and participation in the auction are potentially linked: if the Commission

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[4] Industry estimates suggest that the fund is sufficient to repack 400-500 stations. *See* Affiliates Associations Comments at 46-47; *see also* Comments of the National Association of Broadcasters ("NAB"), GN Docket No. 12-268 (filed Jan. 25, 2013) ("NAB Comments"), 6-7 (estimating that the $1.75 billion fund is sufficient to reimburse 400-500 stations for relocation).

[5] *Order* at ¶ 647.

required stations to self-fund their entire costs of relocating to another channel if they wished to remain on the air, no one could seriously claim that the decision to participate in the auction would remain wholly "voluntary." By refusing to take steps to ensure that broadcasters are made whole in the repacking process, the Commission is putting its thumb on the scale as broadcasters weigh their options.

To ensure that broadcasters are made whole during relocation, and thus that the auction remains truly voluntary, the Commission has three choices: (1) it can treat the $1.75 billion fund as a budget for repacking, and not require relocation of more stations than can be fully reimbursed by this sum; (2) it can set aside additional funds beyond the $1.75 billion as part of the auction closing conditions; or (3) it can require winning bidders in the forward auction to reimburse incumbent licensees, as it has in previous auctions. What the Commission should not do, consistent with the voluntary nature of the auction Congress authorized, is force broadcasters to choose between entering the auction and subsidizing the wireless industry's acquisition of additional spectrum.

The Commission also should reconsider its decision not to allow reimbursement of reasonable expenses incurred during repacking by stations that are not required to change channels. The Commission has acknowledged that "many towers used by television stations have multiple occupants, including other television and radio stations as well as non-broadcast facilities. Changes to the facilities of one station may affect other broadcast stations on the tower if, among other things, other station antennas must be moved to accommodate the change."[6] The *Order* states that the Commission will "consider" reimbursement to stations that are not assigned new channels, but only to the extent that a reassigned station has a contractual obligation as of

[6] *Id.* at ¶ 602, n. 1699.

June 2, 2014 (the release date of the *Order*) to pay such expenses.[7] However, stations that are not reassigned and did not have such contractual obligations in place by the date of the *Order* will not be eligible to automatic reimbursement. The *Order* reasons that the Spectrum Act only *requires* reimbursement for reassigned stations.[8] The *Order* goes on to state that, even if the FCC had discretionary authority to allow reimbursement for stations that are not assigned new channels, it would decline to exercise such authority in light of "the limited amount of money Congress made available to reimburse broadcasters and MVPDs."[9]

This conclusion is internally inconsistent with other Commission decisions found on the same page of the *Order*. In discussing reimbursement for MVPDs for costs to continue carrying winning high-VHF-to-low-VHF broadcast bidders, the Commission concludes that, although the Spectrum Act does not expressly *provide* for such reimbursement, it does not *preclude* it.[10] Thus, the *Order* declines to exercise its discretion to reimburse *broadcasters* who are indirectly affected by repacking, but will do so to ensure that *MVPDs* are reimbursed.

Beyond its inconsistency, the decision is unreasonable. The Commission readily acknowledges that broadcasters who are not reassigned to new channels may nevertheless incur costs, involuntarily, during repacking, due to shared towers or other facilities.[11] *All* broadcast stations, whether reassigned or not, forced to incur costs during the repacking of the UHF band are incurring those costs involuntarily solely to provide additional spectrum for wireless carriers.

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[7] *Order* at ¶ 602.
[8] *Id.*
[9] *Id.*
[10] *Id.* at ¶ 603, n. 1705.
[11] *Id.* at ¶ 602, n. 1699.

As a matter of basic fairness, the Commission should ensure that these broadcasters are made whole.

Further, to the extent the Commission is concerned that the language of the Spectrum Act only allows the reimbursement fund to be used for expenses incurred by stations that are actually assigned new channels, that does not foreclose the Commission's ability to require reimbursement of expenses incurred by other stations. One option, which the Commission has routinely used before, is to simply require winning bidders in the forward auction to fund such expenses — as well as any shortfall in stations' reasonable relocation costs, for the incumbent licensees that they are forcing to relocate.[12]

Such a requirement is consistent with past Commission practice, is within the Commission's authority, and will ensure that involuntarily relocated stations (and other stations forced to incur costs in the repacking) are made whole during the transition, even if they are unable to complete the transition within 36 months. While the Spectrum Act restricts reimbursement from the statutorily-created TV Broadcaster Relocation Fund to the three years following the completion of the forward auction, it places no such restrictions on additional funding requirements the FCC may impose under its traditional spectrum licensing authority. At bottom, no broadcaster should be forced to go out of pocket when it is being required to relocate in an auction that has no discernible benefit for it.

[12] As broadcasters argued to the Commission previously, "This proposal is consistent with nearly every other instance where incumbents are forced to relocate (e.g., H block and AWS-3 proceedings)." *See, e.g.*, Letter from Rick Kaplan, NAB, to Marlene H. Dortch, FCC, GN Docket No. 12-268 at 7 (April 28, 2014).

II. THE COMMISSION SHOULD RECONSIDER SEVERAL OF ITS DECISIONS CONCERNING TIMING ISSUES ASSOCIATED WITH REPACKING.

The repacking process will be incredibly challenging and will involve far more stations moving channel locations than in the multi-year DTV transition. Given the myriad facets inherent in repacking several hundred, indeed more than a thousand stations, the process will require as much time as possible to ensure no harm to consumers and broadcasters.

Thus, perhaps most importantly, the FCC should reconsider its decision to consider the forward auction "complete" upon release of a public notice indicating that the auction has ended.[13] Instead, consistent with broadcaster comments in this proceeding, the forward auction should not be considered complete until the FCC issues 600 MHz licenses associated with the forward auction.[14] By deeming the forward auction complete prior to new license issuance, the Commission risks making an already difficult repacking process even more daunting. In particular, the Commission's current course will make it virtually impossible to ensure that broadcasters are fully reimbursed for the costs of their involuntary relocation.

The *Order* itself states that the three-year deadline for reimbursement will be "challenging," but even that acknowledgment significantly understates the case.[15] The FCC-commissioned Widelity Report contemplates a minimum 41-month timeframe for a challenging site, such as those in New York, Chicago and San Francisco. The Widelity Report also expressly qualifies this estimate as one that assumes "no glitches."[16] The reality, of course, is that glitches

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[13] *Order* at ¶ 529.

[14] *See* Affiliates Association Comments at 48; NAB Comments at 49-51.

[15] *Order* at ¶ 530.

[16] Widelity, Inc., Response to the Federal Communications Commission for the Broadcaster Transition Study Solicitation - FCC13R0003, DA 14-389A2 (Dec. 30, 2013) ("Widelity Report"), at 53.

or delays outside the control of each broadcaster are inevitable in projects of this complexity and magnitude.

The *Order*'s main response to the 39-month challenge is:

> Although we recognize that the three-year deadline for reimbursements will be challenging, the rules that we adopt today for administration of the Reimbursement Fund, which provide for payments to broadcasters and MVPDs based on their estimated costs, will help to ameliorate concerns about that deadline.[17]

It is hard, if not impossible, to see how receiving 80% of one's costs through reimbursement is any substitute for receiving all of one's costs. The issue here is whether it is reasonable to believe that all broadcasters, even giving the utmost effort to complete their transition under the FCC's timetable, can accomplish that task. Receiving partial compensation does not address the fact that the established timetable almost certainly is too aggressive for a full transition. The only reimbursement-based solution to this issue would be to reimburse broadcasters *fully* for their estimated expenditures, with a true-up at the end of the process designed to refund money to the U.S. Treasury.[18]

In addition to finding ways in which to make more realistic the length of time permitted for all stations to complete their transitions, the Commission should also reconsider its decision to delegate authority to the Media Bureau to establish variable construction deadlines based on the individual circumstances of each station that is reassigned to a new channel. While we understand that the Commission is attempting to address the complex problem of repacking by instructing the Media Bureau to come up with different deadlines, we believe strongly that this process is best left to the stations and the markets themselves.

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[17] *Order* at ¶ 530.

[18] Even then, however, the Commission would run the risk of not being able to compensate a broadcaster that, in good faith, underestimated its costs to relocate to its new assigned channel.

A market-based approach will be far more effective that the command-and-control regime established by the *Order* for several reasons. First, even relatively straightforward channel changes may be delayed due to resource constraints, weather, zoning delays, acts of God, and other unforeseen events — possibilities that are readily acknowledged by the Widelity Report commissioned by the FCC.[19] By giving each station or market a specific and variable deadline, the Media Bureau would be erecting artificial constraints that will likely have to be reconsidered on the fly. Second, to the extent variable construction deadlines represent an effort to manage repacking schedules and resources by completing "easy" stations first, the Media Bureau likely does not have all of the resources it needs to manage that process. Repacking will be a complex, years-long, nationwide process that will involve at least several hundred stations. The Media Bureau has never been tasked with such a project, which will require the development of an efficient plan for nationwide repacking that takes into account geographic distribution of resources and proper prioritization of work due to weather and other scheduling conflicts. It may well be that relatively "easy" channel changes are not most efficiently completed early in repacking, but are better left until the end. For example, completion of "easy" channel changes may result in serious interference problems that can only be resolved by relocation of "hard" stations. Forcing a limited number of manufacturers, engineers and other vendors to jump from project to project to satisfy arbitrary individual deadlines will not make the process move faster, and, indeed, may only create unnecessary delays and harmful interference.

Our suggestion is consistent with Commission precedent. The Commission has previously left the management and scheduling of complex relocations to industry, rather than

[19] Widelity Report at 8-9.

attempting to micromanage the process.[20] Broadcasters, working with their chosen vendors, are best positioned to make decisions about how to prioritize repacking projects, not the Bureau. To the extent the Commission elects not to take the reasonable step of allowing the industry, rather than the Media Bureau, to manage such a complex process, it should, at a minimum, provide for more than a single six-month extension of a station's individual deadline for completing the transition. The Commission should liberally grant extensions for circumstances deemed outside a station's control.

The Commission also should reconsider the three-month deadline for broadcast stations that are required to relocate to submit construction permit applications[21] and the same deadline for the submission of estimated costs.[22] While the Commission is correct that, in many cases, the amount of engineering work stations will need to do to submit their applications will be limited (given that the Commission will specify technical facilities), stations will, at a minimum, need to confirm that the facilities the Commission specifies are appropriate. Because of the means used by the FCC to select channels for broadcasters remaining on the air following the incentive auction, it is likely that sub-optimal channel arrangements will be created in some markets. There is no reason to believe that the Commission's initial allotment plan will best serve all broadcasters in all markets. Allowing groups of stations in individual markets to submit alternative proposals, as was done during the DTV transition, may well result in a better allotment plan.

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[20] *See, e.g.,* In the Matter of Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶ 253 (directing stakeholders to develop a joint relocation schedule and implementation plan to be submitted to the Commission).

[21] *Order* at ¶ 546.

[22] *Id.* at ¶ 610.

Further, as the *Order* acknowledges, in many cases, stations may need to request different antenna patterns or different locations than those specified by the FCC.[23] Three months is likely to be insufficient for all stations, particularly given the documented constraints on professional broadcast engineering services and the simultaneous demand by as many as 1,000 or more stations.[24] To the extent the Commission established three month deadlines for the submission of applications and estimated costs in an effort to expedite the transition process, the Commission cannot simply make the process go faster by regulatory fiat, and the only likely result of unreasonable expedition is error. Additional qualified consultants and engineers necessary to prepare several hundred applications and cost estimates during the same three-month period will not materialize because the Commission orders them to. In any event, such artificial expedition is unlikely to serve any practical purpose, because the Media Bureau, to which the Commission has delegated significant authority, does not have the resources to process such a flood of applications and cost estimates in only three months.[25]

Apart from the resource issue, the Media Bureau does not have a long history of evaluating cost estimates associated with relocation, and there is no reason to believe the Bureau, with its relative inexperience in this non-regulatory area, can process and approve cost estimates as quickly as the Commission is demanding broadcasters submit them. The Commission's

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[23] *Id.* at ¶ 547.

[24] *See* Widelity Report at 9 ("Manufacturers and RF Consulting, Structural, and Field Engineers may not be in a position to handle the potential onslaught of requests that will occur once the repacking results come out…There are a limited number of RF Engineering resources in the country and these resources will be stretched if many channels require analysis at the same time.")

[25] The *Order* anticipates that the Media Bureau will generally be able to process qualified applications within 10 days after filing. *Order* at ¶ 551. This seems extraordinarily optimistic given the likely volume of applications. For example, during the DTV transition, there was a crushing volume of applications, many of which took considerably more than three months to evaluate and process.

reassurance that, because the auction date will be known in advance, antenna manufacturers, consultants and other third parties involved in the application process can "make any staffing adjustments necessary to handle the resulting increase in business" is pure conjecture and unrealistic.[26] These vendors are unlikely to take on and train new staff only for a three-month window of work — even if qualified personnel were readily available. Accordingly, for both construction permit applications and cost estimates, the Commission should extend the submission deadline to six months, while maintaining the possibility of waivers granted for good cause.

If nothing else, the FCC must reconsider its decision to impose a hard, inflexible and unforgiving cap on the amount of time a station has to transition to its new channel if forced to go through an involuntary repacking. As it stands now, the Commission, in an unprecedented manner, left no room whatsoever for a full power or Class A station to remain on its channel beyond the end of the designated 39-month period ("Broadcast Construction Period"). Not only does that mean that low power stations have *greater* rights than full power or Class A stations, but it also means that, if a station is not fully ready to transition at the end of 39 months — *even if it is through no fault of their own* — it must *go off the air*. This is an untenable result and does not comply with the Spectrum Act.

The *Order* reads in relevant part:

> Regardless of a station's individual construction schedule, no station will be permitted to continue to operate on its pre-auction channel beyond the end of the Broadcast Construction Period. Any station that has not completed construction by the end of the Broadcast Construction Period must go dark on its pre-auction

[26] *Order* at ¶ 546, n. 1500.

> channel and cease operations until it finishes construction of its new facilities.[27]

Thus, the Order provides under any and every circumstance in which a station needs more time, it must vacate its channel after the Broadcast Construction Period.

The Commission takes the position that its rule is not as bad as it seems, because stations in a difficult spot can simply move to temporary facilities.[28] This is not a realistic solution in nearly every case. Most notably, after repacking there will be very few, if any channels available for temporary facilities. Moreover, moving onto such a channel might displace a low power station that is trying itself to stay on the air. The consumer impact would also be substantial. This would mean that consumers would have to try to find their favorite channel *twice* as a result of repacking. One move is difficult enough; two is egregious and not a solution to the problem.

Surprisingly, the Commission did not even provide that stations that cannot complete the transition within 39 months do not have to move if the spectrum from which they are moving is not being built out yet. We are not suggesting that this needs to be a blanket provision. But, at the very least, the Commission should provide some easy process to determine if a station is not able to move due to factors beyond its control. In those instances, and especially where wireless buildout may be years away, there is no reason for the Commission to cause such extraordinary harm to stations and their viewers.

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[27] *Order* at ¶ 564. The Commission even goes as far to apply this to stations that were granted construction permit extensions beyond the Broadcast Construction Period. Para 564 n.1593 (stating that "the station nonetheless must cease operations on its pre-auction channel on or before that deadline").

[28] *Id.* at ¶ 569.

Wholly apart from the policy concerns discussed above, this approach does not comport with the Spectrum Act. By providing no means for stations to remain on their channels in cases where moving within 39 months is infeasible, the Commission is derogating its duty to take "all reasonable efforts" to protect the coverage area and populations served of those stations. If the Commission's rules force stations to go dark, then the Commission has failed to live up to Congress's express mandate under the Act.

III. INTERNATIONAL COORDINATION MUST BE COMPLETED PRIOR TO THE INCENTIVE AUCTION.

For both legal and policy reasons, the Commission should reconsider its decision not to complete international coordination prior to the incentive auction.[29] The Spectrum Act unambiguously permits the FCC to conduct repacking only "subject to international coordination along the border with Mexico and Canada."[30] Coordination, in this case, involves ensuring that stations along the border that must be repacked can be assigned new channels to which they can move without the need for a lengthy and unpredictable international coordination process. Completing coordination prior to the auction to ensure that border stations have a channel to which they can be reassigned will maximize the amount of spectrum the Commission is able to repurpose, prevent broadcast stations from being stranded in bands that are assigned to wireless carriers in the rest of the country, and reduce the potential for harmful interference. To do otherwise is reckless and will seriously harm broadcasting.

The issue of international coordination is not a minor one that can simply be left to another day. Coordination is required for U.S. stations within *400 kilometers* of the Canadian border, and within *275 kilometers* of the Mexican border. These are enormous sections of the

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[29] *Order* at ¶ 253.

[30] Pub. L. No. 112-96, § 6403(b)(1), 126 Stat. 156, 226 (2012).

country. Indeed, of the 1,675 UHF stations potentially subject to repacking, 448 are in the Canadian border region, with an additional 141 in the Mexican border region. It seems patently illogical to plan to charge ahead with an incentive auction and repacking process where *more than a third* of stations potentially subject to repacking will have no guarantee that the channels to which they are provisionally reassigned will actually be approved and available.

Further, beginning the auction, or repacking, prior to completing coordination risks harming broadcasters by limiting their ability to receive full reimbursement for their relocation. When the Commission deems the auction "complete," it triggers a 36-month window during which relocated stations are eligible for reimbursement of reasonable expenses. The *Order* states that "the FCC still has considerable time to coordinate with Canada and Mexico," given the target date of mid-2015 for the auction and the 39-month phased transition thereafter.[31] The reality, however, is that if the Commission fails to complete coordination prior to the auction, stations along the border could well have less, perhaps substantially less, than 36 months to complete reconfiguration if they hope to be eligible for reimbursement. Indeed, the FCC's current definition of "coordination" could see broadcasters along the borders repacked *after* the 36-month period, thus giving them no chance at reimbursement and causing them significant harm that Congress expressly sought to avoid.

IV. THE VARIABLE BAND PLAN ADOPTED IN THE *ORDER* REQUIRES CLARIFICATION, AND THE COMMISSION SHOULD CONSIDER PROCEEDING WITH A NATIONWIDE BAND PLAN.

The Commission adopted a 600 MHz band plan that will allow the FCC to offer different amounts of spectrum in the forward auction in different Partial Economic Areas,

[31] *Order* at ¶ 255, n. 782.

depending on how much is recovered in the reverse auction.[32] The decision to allow market variability injects a number of complexities into the auction as a whole and the post-repacking interference environment in particular, including the significant potential for inter-service interference as well as questions about how the Commission will balance competing priorities. The *Order* indicates that a forthcoming public notice will provide guidance and propose specific rules as to how market variation will work in the *forward* auction.[33] However, the prospect of market variation also raises a number of questions relevant to the *reverse* auction. The Commission should provide guidance and clarification on these issues as well.

Most notably, the question of exactly how the FCC will determine a near-national spectrum clearing target is of paramount importance. The *Order* states that the Commission intends to offer a uniform number of 600 MHz licenses in "most" markets, although it does not offer any indication about how the FCC will choose that number. There are many questions that lie within that determination. For example, how will the FCC determine whether to permit variability at all? How much variability will be permitted before the nationwide clearing target is adjusted downward? How will the FCC weigh the potential costs and risks of inter-service interference in selecting a spectrum clearing target, and how will it target funds in the reverse auction to further that result? If the FCC has a choice between pursuing a truly national 60 MHz plan, or a plan with 84 MHz in most markets and 48 MHz in the most challenging, constrained markets, how will it make a determination as to which outcome to pursue?

This gets to the heart of the assumptions driving the pursuit of a variable plan. The *Order* expresses concern that the most constrained markets, where broadcasters may be least

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[32] *Order* at ¶ 82.

[33] *Id.* at ¶ 83, n. 272.

likely to volunteer to participate in the auction, and it will be most difficult to recover spectrum, pose a "least common denominator" problem, and assumes that the FCC should not "be forced to limit the amount of spectrum offered across the nation" to this least common denominator.[34] But the most constrained markets are not a "least common denominator" problem — they are the primary point of the auction itself.

It is likely the case that the markets likely to experience the lowest levels of broadcaster participation (and with the highest station values) are also the markets where wireless carriers have the highest demand for spectrum. At a minimum, there is likely significant overlap between the two sets of markets. Simply put, many of the markets that the FCC fears will serve as a least common denominator are the most important markets for wireless carriers. Recovering additional spectrum in markets where wireless demand is relatively low serves no purpose.

Variability raises other questions as well. For example, how will the FCC weigh competing broadcaster bids in the same or nearby markets? If broadcaster A submits a lower bid than broadcaster B, but the selection of A's bid results in more stations needing to be reassigned new channels, how will the FCC weigh those competing priorities in selecting a bid given the additional costs associated with repacking additional stations? Proceeding solely on the basis of price could result in an extraordinarily inefficient repacking that needlessly reassigns stations that could have remained on channel with the selection of a different bid.

The FCC should reconsider and at least still keep open its decision of whether to proceed with a variable band plan. In our view, the FCC should consider focusing resources on

[34] *Id.* at ¶ 82.

recovering sufficient spectrum in the most constrained markets to allow a truly national plan, even if that means accepting a lower spectrum clearing target.

If the FCC's central assumption underlying the incentive auction, namely that 600 MHz spectrum may be worth significantly more to wireless carriers than to broadcasters, is correct, wireless demand should prove sufficient to secure spectrum, even if at a high cost, in these most constrained markets. The only reason the FCC would face a least common denominator problem is if its underlying assumption of the relative value of spectrum to wireless carriers and broadcasters proves incorrect. If the FCC is truly interested in a voluntary, market-based auction, the Commission should be prepared for the reality that wireless carriers may turn out not to be willing to pay broadcasters enough to convince them to relinquish spectrum.

Finally, these questions concerning variability underscore the lack of substantial information as to how repacking will actually work in practice. The FCC continues to hold to a target of mid-2015 for conducing the incentive auction, yet it has not released, or provided any timeline for the release, of auction software so that it can be thoroughly vetted well in advance of the auction. Chairman Wheeler has stated that, "Only when our software and systems are technically ready, user friendly, and thoroughly tested, will we start the auction."[35] Testing the software, collecting feedback from stakeholders, and making any necessary revisions to the software will all take time — and the clock is ticking. The Commission should promptly issue an update on the status of its software development, as well as a timeline for the release, testing and public comment on its proposed repacking software. If the software is not going to be

[35] Tom Wheeler, The Path to a Successful Incentive Auction (Dec. 6, 2013) available at: http://www.fcc.gov/blog/path-successful-incentive-auction-0.

completed and tested in time for a mid-2015 auction, stakeholders have an interest in knowing that now.

V. STATIONS HAVE EVERY INCENTIVE TO EDUCATE VIEWERS ABOUT IMPENDING CHANNEL CHANGES, AND THERE IS NO NEED TO IMPOSE RIGID CONSUMER EDUCATION REQUIREMENTS.

The Commission should reconsider its decision to impose, at this time, specific consumer education requirements on television stations that are assigned new channels. While the *Order* asserts that the requirements provide affected stations with "flexibility to target their messages to their specific situations," in practice the *Order* prescribes a rather rigid schedule of transition Public Service Announcements and transition crawls.[36]

These specific requirements are unnecessary. Television stations that are forced to relocate as a result of auction repacking have every incentive to inform their viewers — down to the last viewer — how to find them post-transition. More prescriptive regulations, like the ones adopted by the Commission, are necessary only in circumstances where consumers must be protected from corporate incentives that may not be in their best interests. But here, the interests of television stations and consumers align perfectly, as viewers are the lifeblood of each and every station. At the very least, before imposing specific notification regulations on each station, the Commission should undertake a serious cost-benefit analysis to determine whether the costs of imposing these additional regulations are necessary.

Moreover, imposing consumer regulations of this sort may also serve to undermine consumer education goals. One common refrain from viewers during the DTV transition was that there were *too many* crawls and the information became confusing or ultimately misleading. But when stations are forced to comply with federal regulations, they

[36] *Order* at ¶ 588.

cannot adjust their consumer approach to meet the needs of their viewers without risking a fine from the Commission. Stations may also have their own innovative ways of informing their viewers about their relocation that are more effective that the Commission's. Having additional mandates, however, may dissuade them from employing these methods for fear of inundating consumers with too much information.

At a minimum, the *Order*'s consumer education requirements are likely premature. On reconsideration, the Commission should rescind these requirements, and consider re-examining appropriate measures, including expanding FCC call center capabilities and seeking additional funding to support additional outreach, to minimize viewer confusion at a later date, closer to the actual transition. At that point, we will have far more information on the size and scope of the consumer education project.

Finally, on reconsideration, the Commission should acknowledge that one of the most effective ways to limit consumer disruption is to minimize broadcaster repacking. Unfortunately, the Commission did not take any steps in the *Order* to minimize the number of broadcasters repacked. The equation is simple: the more repacking, the greater the consumer disruption. No amount of crawls can substitute for leaving as many stations as possible where they are today. We strongly recommend that the Commission reassess its approach to repacking, and not wait until after the auction to optimize repacking results, but to find better solutions earlier in the process to ensure that fewer stations are relocated and fewer consumers are negatively impacted by the auction transition.

VI. THE COMMISSION SHOULD RECONSIDER ITS ADOPTION OF THE TVSTUDY METHODOLOGY AND CHANGES TO RELATED INPUTS.

The Commission should reconsider its decision to adopt its new methodology, TVStudy, for the purpose of preserving coverage area and population served during repacking.[37] Commenters have raised questions in the record of this proceeding as to whether TVStudy impermissibly modifies the methodology Congress specifically directed the FCC to use in preserving coverage area and population served by changing numerous inputs, altering the software, and resulting in significantly different results. On reconsideration, the Commission should reconsider its use of TVStudy in the auction, as well as all proposed changes to inputs and data.

First, the Spectrum Act specifies the methodology to be used in preserving the coverage area and population served of broadcast television stations in repacking.[38] The *Order* seeks to address this requirement by attempting to differentiate between the "methodology" described in OET Bulletin 69 and the software and inputs used in accordance with that methodology, asserting that it can make changes as long as they are consistent with what the FCC now defines as the methodology described in OET-69. However, in this case, Congress told the Commission to use a particular tool. Accordingly, the FCC should not make changes to the well-understood, widely-used methodology Congress selected to ensure that broadcasters were protected during repacking.

Second, the Commission's election to change the inputs used to determine coverage area and population served alters the methodology itself. If a cook changes all of the ingredients in a recipe but otherwise follows the instructions, no reasonable person would say the

[37] *Order* at ¶ 588.

[38] Pub. L. 112-96, 126 Stat. 156, § 6403(b)(2) (Feb. 22, 2012) (requiring the FCC to use "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.")

cook followed the recipe. Similarly, changes to the inputs used in the current OET-69 methodology produce outcomes inconsistent with the current methodology. The *Order* makes changes to several inputs, including: the use of different Census data; the use of one arc-second terrain elevation data; antenna beam tilt values; depression angle; and coordinate data. Each of these changes has an effect on the population served and coverage area served by broadcast television licensees.

Third, TVStudy produces different results than OET-69.[39] The *Order* states that, under its calculations, which have not been made publicly available, "88 percent of full stations will experience an increase in population served, while only 12 percent show some decrease."[40] However, the Spectrum Act clearly requires the Commission to preserve the coverage area and population served of *each* broadcast television licensee, not merely a majority. If 12 percent of full power stations will suffer reductions in their population served, that translates to well over a hunder stations losing viewers — an outcome which is not consistent with the requirements of the Spectrum Act. Further, the *Order* fails to address losses in *coverage area*, the preservation of which is a requirement independent of population served. The disparities between OET's analysis and NAB's analysis merit additional careful study and a dedicated effort to resolve differences. At a minimum, interested parties should be able to agree on what the effects of using TVStudy actually are.

The Commission also claims that NAB's analysis is flawed because NAB did not specify which computer program it used, and that the Commission uses different computer

[39] *See* NAB Comments, ET Docket No. 13-26, GN Docket No. 12-268 (filed May 8, 2014).
[40] *Order* at ¶ 140.

programs to implement OET-69.[41] This statement, while true, is not ultimately helpful to the FCC's argument. The fact is that these different computer programs do produce the same results when they are provided with the same inputs. TVStudy, by contrast, produces different results. The *Order* itself acknowledges this, stating that "TVStudy is not designed to produce the identical results produced by earlier software," and adding that there are differences between TVStudy and previous software "that would be expected to produce different results even when the input parameters are set consistently."[42] The *Order* does not explain how use of a methodology that produces significantly different results can possibly be consistent with Congressional intent.

On reconsideration, the Commission should abandon the use of TVStudy, as well as all proposed changes to the inputs used to calculate coverage area and population served.

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For the reasons discussed herein, the Television Station Group respectfully request that the Commission reconsider and clarify the *Order*.

Respectfully submitted,

ABC TELEVISION AFFILIATES ASSOCIATION
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[41] *Id.* at ¶ 161.

[42] *Id.* at ¶ 161, n. 541.

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September 15, 2014