

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

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

To: The Commission

PETITION FOR RECONSIDERATION

**FREE ACCESS & BROADCAST
TELEMEDIA, LLC**

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Summary

Free Access & Broadcast Telemedia, LLC (“FAB”), seeks reconsideration of the Commission’s failure to evaluate the benefit of including low power television (“LPTV”) stations in the incentive auction. The Commission failed to conduct a benefit-cost analysis of including LPTV in the auction and ignored FAB’s request in the *Report and Order* adopted in this proceeding.

The Commission needs to clarify that it will sell in the forward auction (and use as guard bands) only as much spectrum as is sold in the reverse auction, plus that amount of spectrum that already is vacant today. It should not consider spectrum occupied by LPTV stations as vacant and available for sale in the forward auction.

In the *Report and Order*, the Commission creates “remainder spectrum” and sets aside an additional six MHz of spectrum in each market for unlicensed use, above and beyond what is technically necessary for guard bands. These set asides exceed the authority granted to the Commission in the Spectrum Act. Such set asides will have a life-threatening impact on LPTV stations in spectrum-congested markets since that spectrum would not be available for displaced LPTV stations to use in the repacking of the TV band.

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PETITION FOR RECONSIDERATION

Free Access & Broadcast Telemedia, LLC (“FAB”),¹ by counsel, pursuant to FCC Rule 1.429, hereby respectfully submits this Petition for Reconsideration of the *Report and Order*² in the above-captioned proceeding with respect to three issues. The first is in connection with the FCC’s failure to examine the net alternative lower costs and increased benefits of including low power television (LPTV) stations in the incentive auction. The second is the FCC’s determination of how much spectrum is to be sold in the forward auction. The third is related to ensuring that LPTV is repacked before the Commission sets aside remainder spectrum or guarantees unlicensed users an extra six-MHz channel in every market.

A. Benefit-Cost Analysis Sought on LPTV Participation in the Reverse Auction

After the formal comment and reply period expired, at the LPTV Info-Session at the National Association of Broadcasters’ annual convention held in Las Vegas, Nevada, April 7,

¹ FAB is an investor in LPTV stations around the country. As such, its investments will be hurt by FCC action that proposes to displace LPTV stations in the upcoming repacking of the television band. It is already harmed by the ongoing rulemaking that has placed a chill on investment in improvement and values of existing LPTV stations. FAB participated in this proceeding by timely filing reply comments.

² 29 FCC Rcd 6567 (2014).

2014, during a presentation by FCC Media Bureau Chief William T. Lake regarding LPTV stations and the incentive auctions, FAB discovered facts about which FAB did not previously have an opportunity to address formally because the LPTV Info-Session post-dated the deadline for filing reply comments in this proceeding. As a result and after further inquiries prompted by those remarks, FAB submitted written *ex parte* comments less than a month later on May 5, 2014 (“FAB Ex Parte Comments”), prior to the adoption of the *Report and Order* in this proceeding. Nowhere in the *Report and Order* did the Commission address the substantive issues raised in FAB’s Ex Parte Comments.³ FAB made clear in those Comments that the Commission has the authority to include LPTV stations in the incentive auction, and that FAB believes the Commission would do so if it examined the benefits of including LPTV stations in the auction. A copy of FAB’s Ex Parte Comments is attached for convenience as Exhibit 1.

Arguments and facts presented in FAB’s Ex Parte Comments were unknown to FAB prior to the Reply Comment deadline on March 12, 2013. Information regarding the failure of the Congressional Budget Office (“CBO”) to include LPTV in both the revenue and cost analysis of the Spectrum Act was not publicly available. Those facts could not have become known through the exercise of ordinary diligence – instead, FAB had to conduct personal interviews of staff from the CBO to find out that the proper analysis, directed and influenced by both Congressional and FCC staff, had not been provided to members of Congress when they voted on the Spectrum Act.⁴ That failure to understand the revenue and cost impacts the incentive auctions would have on LPTV stations – by their exclusion from participation in the auction or in

³ “An agency’s ‘failure to respond meaningfully’ to objections raised by a party renders its decision arbitrary and capricious.” *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005), quoting *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001).

⁴ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§6402, 6403, 126 Stat. 156 (2012) (“Spectrum Act” or “Incentive Auction Act”).

obtaining reimbursement for displacement, let alone the prospect of a complete taking of their stations – could have altered their votes. Upon discovering this failure, FAB acted promptly to submit its Ex Parte Comments. Like Congress, and despite FAB’s diligently-filed Ex Parte Comments, the FCC failed to address the benefit-cost analysis at all in the *Report and Order*.

The Commission specifically acknowledged it had the authority to include LPTV in the reverse auction in its Initial Regulatory Flexibility Act analysis. The *Report and Order*, however, utterly failed to analyze that as an alternative, declaring the secondary nature of LPTV licenses for day-to-day television interference mitigation meant they had no rights whatsoever.⁵

Under the Regulatory Flexibility Act, federal agencies are required to provide:

“...a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.”⁶

The Commission needs to examine inclusion of LPTV in the incentive auction as an alternative on reconsideration to see if it would minimize the significant economic impact on admittedly small LPTV entities.⁷

Moreover, the ongoing, existing auction authority granted to the Commission in the Communications Act, Section 309(j)(3), which the Spectrum Act does not replace, requires the Commission to “seek to design and test multiple alternative methodologies.”⁸ It must also

⁵ 29 FCC Rcd at 6576, 6674, 6676 & 6948. Contrary to the conclusion of the *Report and Order*, there is no “balance” struck for low power television. 29 FCC Rcd at 6684.

⁶ Regulatory Flexibility Act, 5 USC Sec. 604(a)(5).

⁷ 29 FCC Rcd at 6951.

⁸ 47 U.S.C. Sec. 309(j)(3).

consider rapid deployment of new services without administrative or judicial delays.⁹ FAB's Ex Parte Comments explained how allowing LPTV to participate in the incentive auction would speed up the repacking process, and make available more spectrum for the forward auction and future unlicensed and licensed use. The Commission cannot ignore its obligation to consider viable alternatives to dismantlement of LPTV businesses.¹⁰

Summary Reconsideration Request #1:

FAB can appreciate that consideration of its Ex Parte Comments ten days before adoption of the *Report and Order* may have been difficult, but urges the Commission to rectify its oversight through reconsideration now. FAB submits that the logical outgrowth of conducting a benefit-cost analysis of including LPTV in the reverse auction will result in a determination to invite LPTV licensees to the incentive auction. Inclusion will be a better alternative to exclusion and will, therefore, limit the wholly adverse impact on these small business entities. The Commission cannot simply conclude that it does not need to conduct the analysis because they are secondary, or because Congress was silent in not explicitly inviting, nor in explicitly denying, auction participation to LPTV licensees.

⁹ 47 U.S.C. Sec. 309(j)(3)(A).

¹⁰ See *Walter O. Boswell Mem'l Hosp. v. Heckler*, [749 F.2d 788](#), 797 (D.C.Cir.1984) (“[A]n agency must consider ‘reasonably obvious alternative ... rules and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review.’ *NAACP v. FCC*, [682 F.2d 993](#), 998 (D.C.Cir.1982); see also *Home Box Office, Inc. v. FCC*, [567 F.2d 9](#), 35 (D.C.Cir.1977) (opportunity to comment should not be ‘meaningless’), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977)”).

B. Clarification Requested on Forward Auction Spectrum to be Sold

Nowhere in the *Report and Order* does the Commission confirm that only as much total spectrum as is already vacant or offered to the Commission in the reverse auction will be sold in the forward auction or used as necessary guard bands for a given Partial Economic Area (“PEA”). During the LPTV Info-Session held at the NAB Show on April 7, 2014, after the comment period had closed, Media Bureau Chief William Lake appeared to explain that no more spectrum would be sold than is offered in the reverse auction or which is already vacant. This is a pivotal clarification the Commission should provide now to avoid the appearance or actual taking of bona fide licensees via repack. Early in his comments, Mr. Lake stated that only as much spectrum as is purchased will be sold, except for added vacant channels. Yet at the end, Mr. Lake implies channels that are not vacant but which are already held by legitimate and bona fide LPTV and translators licensees may also be sold outright:

GRAVINO: Will channels 50-38 be cleared (sic) no matter what?

LAKE: No. Again the number of channels and will be cleared will be strictly a matter of what people are selling and what people are buying.

GRAVINO: So I am a low power on channel 49, and you need 49 for the National Band Plan I get displaced?

LAKE: What we propose for the 6-MHz wireless band is a band plan that starts on channel 51 goes down, so if you're in high 40's, and we have a very successful auction, your chance of being displaced is very high. Then as you go down into the 30's or whatever, your risk of being displaced is less as you get lower, except of course, when we regret (sic – repack) some of the full power stations we may repack full power station into an interfering frequency.

GRAVINO: So it just to be clear, you're in the 51-38 area, if that's considered the National Band Plan, you pretty much know you're being displaced, even if no full-power jumps into the auction?

LAKE: Oh no. If no full-power jumps into the auction, then we will not sell anything. So we are only selling what we are buying here.

GRAVINO: So in a specific market, no full-powers enter the auction, or only a couple of them enter to the auction, a variable amount, so you can clear the rest of

that spectrum. you (sic) could take it from us though.

LAKE: If you are talking about a specific market it all depends on whether we need spectrum in that market. For example, in New York City, we know that there are no available frequencies, if we want to transfer some of those stations into wireless use, we need full-power stations that are selling. There may be other markets in which we can sell spectrum without having to buy it, because there are vacate (sic -- vacant) channels.

GRAVINO: Or our channels?

LAKE: Yes.

GRAVINO: Right. And again from 36-32, hat (sic) is variable depending upon what happens> (sic)

LAKE: That all depends on how much spectrum changes hands in the auction.¹¹

The Commission decided that the PEAs are the optimal market size for spectrum to be sold in the forward auction.¹² FAB seeks the following clarification since the PEA decision in turn impacts the reverse auction and repacking dynamics: For a given PEA, will spectrum – other than that bought in the reverse auction – be considered “vacant” and made available for use as guard bands and for sale in the forward auction? FAB maintains that for a given PEA no more spectrum can be sold in the forward auction than is already vacant before the reverse auction began or that is purchased by the FCC in the reverse auction until all LPTV and translator stations are relocated.¹³ If any LPTV or translator in a given PEA is stranded with no relocation home due to the FCC selling in the forward auction (and using as guard bands) more spectrum than was already vacant before the reverse began and more than was purchased by the

¹¹ Transcript, pages 10 -11:

<http://apps.fcc.gov/ecfs/document/view?id=7521098954>

For the video, go to timeframe 1:02:00 to 1:03:20 at:

https://www.youtube.com/watch?v=pCA_ksTCDak

¹² 29 FCC Rcd. at 6575.

¹³ To do otherwise will violate their right of displacement and relocation. 47 C.F.R. Sec. 73.3572.

Commission for resale, then a Constitutional taking is looming in violation of the Fifth Amendment. FAB calls upon the FCC to remove this lingering risk of possible extinction of LPTV and translator licensees.

Summary Reconsideration Request #2: FAB therefore requests clarification that the FCC will sell in the forward auction and use as guard bands only what is already vacant plus that spectrum purchased in the reverse auction from full power and Class A license holders in a given PEA, and that no more than that amount of spectrum within the PEA will be sold in the forward auction or used as guard bands unless and until all LPTVs and translators are first successfully repacked. Only then will any added amount of spectrum be sold at auction beyond what is offered in the reverse for a given PEA.

C. Clarification and Reconsideration Sought on “Remainder Spectrum”

The Commission tips the scale in favor of unlicensed use over all other licensed uses when it added extra unlicensed spectrum at the expense of preexisting, longstanding rights of bona fide incumbent LPTV and translator licensees in order to create even more unlicensed spectrum beyond the statutory authority granted by the Spectrum Act. In the *Report and Order*,¹⁴ the Commission fashions the concept of “remainder spectrum” which is not divisible by two five-MHz pieces (*i.e.*, for a total of 10 MHz sold as a pair) for auctioning to wireless carriers.¹⁵ The Commission further decides to rename the remainders as guard band spectrum to be added to the seven MHz it finds to be sufficient as a buffer between wireless and television

¹⁴ 29 FCC Rcd at 6592-94, 6607-11, and 6683-84.

¹⁵ 29 FCC Rcd at 6592 & 6608-09.

operations, thereby inflating the guard band up to as much as 11 MHz.¹⁶ Removing four MHz (or more) of valuable spectrum from the public larder and making it available for unlicensed use overreaches the authority granted in the Spectrum Act.¹⁷ Spectrum not sold in the forward auction which is equal to or greater than six MHz must first be used for repacking all preexisting FCC licensees. After repack, that “remainder” must be sold in a future public auction if less than six MHz in size.

In addition, the Commission further anticipates that an additional six MHz for unlicensed use will be made available: “there will be at least one channel in the UHF band in all areas that is not assigned to a television station in the repacking process.”¹⁸ This new spectrum block cannot possibly be construed as a guard band. It is a new reserve for special uses – and possibly for preferred parties.

Thus, the FCC has seized up to four MHz (or more) via a remainder rationale, and sequestered yet another six MHz of spectrum for unlicensed use beyond the 20 MHz of guard bands it finds are technically necessary. This additional 10 MHz is comparable to the recent H block which was less desirable spectrum, though paired. That auction raised 1.5 Billion Dollars.¹⁹ The FCC is not authorized to add \$1.5 billion in unlicensed spectrum in this manner in this proceeding.

Guard bands are to be minimally sufficient. Those slices of spectrum have been organized as the 11 MHz Duplex Gap, three MHz elsewhere, and seven MHz between television

¹⁶ 29 FCC Rcd at 6612.

¹⁷ Spectrum Act, 126 Stat. at 231-32, Section 6407(b)(“guard bands shall be no larger than is technically reasonable to prevent harmful interference between licensed services outside the guard bands.”).

¹⁸ 29 FCC Rcd. at 6683-84.

¹⁹ Go to http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=96 (last visited September 14, 2014).

and wireless. Additional spectrum the Commission designates beyond those minimally sufficient protections is outside the FCC's statutory authority in the Spectrum Act. To reiterate, Congress was clear that unlicensed must be only in guard bands that are a part of an official band plan and that those predefined guard bands must be limited:

(a) In General.--**Nothing** in subparagraph (G) of section 309(j)(8) of the Communications Act of 1934, as added by section 6402, or in section 6403 **shall be construed to prevent the Commission from using relinquished or other spectrum to implement band plans with guard bands.**

(b) **Size of Guard Bands.--Such guard bands shall be no larger than is technically reasonable to prevent harmful interference between licensed services outside the guard bands.**

(c) Unlicensed Use in Guard Bands.--The Commission may permit the use of such guard bands for unlicensed use.²⁰

The Commission mentions its agreement “with Google and Microsoft that ‘[s]oliciting separate bids for the remaining small spectrum slivers in the simultaneous forward and reverse auction will introduce needless complexity to the auction process.’”²¹ An average of four MHz “remainder” across the US using 300 million pops useable for potentially innovative TDD services is roughly \$600 million forsaken by the FCC's approach. The added new block of six MHz could generate another \$900 million or more in auction revenues to the extent not needed for repacking LPTV and translators, which is a substantial amount for FirstNet and potential debt reduction.²²

²⁰ Spectrum Act, 126 Stat. at 231-32, Section 6407 (emphasis added).

²¹ 29 FCC Rcd at 6594 (para. 65).

²² Some of the largest corporations arguing for more unlicensed spectrum have it within their financial ability to purchase the remainder and gift it to the US people for unlicensed use in perpetuity to enhance their spectrum strategies. Recall that John R. Rockefeller bought parts of Jackson Hole, Wyoming, and the Maine coastline and gifted them back to the American people in perpetuity to create a larger Grand Teton and Acadia national parks. These stories make for good Wiki reading, and FAB suggests the FCC rededicate itself to protecting precious spectrum

The Spectrum Act did not authorize the creation of a wholly new dedicated use of unlicensed TV White Space. Nor did it authorize the Commission to place valuable spectrum in guard bands larger than the “technically reasonable” seven MHz between services which the Commission found to be sufficient in the *Report and Order*.

Summary Reconsideration Request #3: FAB requests specific clarification that any “remainder spectrum” equal to or in excess of 6 MHz (but less than 10 MHz slated for paired-block forward auction sale) shall first be used to ensure a successful repack of existing licensed and bona fide full power, Class A, translator, and low power licensees *before* any “remainder spectrum” is allotted or sold for any new purpose.

Summary Reconsideration Request #4: FAB requests that all resulting “remainder spectrum” after repack shall be auctioned in the forward auction or held for auction at a later date (as was done with the H block). Such spectrum should not be classified as “guard band” to be utilized as unlicensed in addition to the seven MHz for the guard band between TV and wireless operations.

by not rewriting the Spectrum Act and neglecting its auction authority. The Incentive Auction Act of 2012 is not the Unlicensed Spectrum Act of 2012.

Summary Reconsideration Request #5: FAB asks the FCC to rescind immediately and hold in abeyance its creation of the separate, added six MHz unlicensed block and seek out further direction from Congress on this matter, but only after a successful and full repack of all LPTV and translator licenses.

Respectfully submitted,

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September 15, 2014

Written Ex Parte Comments of Free Access and Broadcast Telemedia, LLC

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To: The Commission

WRITTEN EX PARTE COMMENTS
OF FREE ACCESS & BROADCAST TELEMEDIA, LLC¹

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. The FCC has the authority to include LPTV in the reverse auction.

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 Act⁵ 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

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]n 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

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