RECORD NOS. 15-1264(L); 15-1280

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

MAKO COMMUNICATIONS, LLC; BEACH TV PROPERTIES, INC., formerly known as The Atlanta Channel, Inc.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

FREE ACCESS & BROADCAST TELEMEDIA, LLC,

Intervenor for Petitioner.

ON PETITION FOR REVIEW FROM THE FEDERAL COMMUNICATIONS COMMISSION

PAGE PROOF BRIEF OF PETITIONERS

William H. Shawn
SHAWNCOULSON, LLP
1850 M. Street, NW, Suite 280
Washington, DC 20036
(202) 331-2300

Counsel for Petitioner Mako Communications, LLC

Aaron P. Shainis
Lee J. Peltzman
SHAINIS & PELTZMAN, CHARTERED
1850 M. Street, NW, Suite 240
Washington, DC 20036
(202) 293-0011

Counsel for Petitioner Mako Communications, LLC

W. James Mac Naughton
ATTORNEY AT LAW
7 Fredon Marksboro Road
Newton, NJ 07860
(732) 634-3700

Counsel for Petitioner Beach TV Properties, Inc.

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Mako Communications, LLC, and Beach TV Properties, Inc. (formerly known as The Atlanta Channel) certify the following under D.C. Circuit Rule 28(a)(1):

Parties. Mako Communications LLC ("Mako"), is the lead Petitioner to this Court of Appeals, on its Petition for Review of Final Agency Report and Order in No. 15-1264, filed August 6, 2015. **Beach TV Properties, Inc. ("Beach TV" formerly known as The Atlanta Channel, Inc.)** is a Petitioner to this Court of Appeals, through its Petition for Review filed August 14, 2015, of the same R&O, in No. 15-1280. This Court consolidated the Mako and Beach TV appeals in its Order filed October 20, 2015, in which this Court also granted the Motion to Intervene of **Free Access & Broadcast Telemedia, LLC.** ("Free Access").

The **Federal Communications Commission** ("FCC") is the agency that promulgated its Second Order on Reconsideration, Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, GN Docket No. 12–268 ("R&O"). The **United States**, through the Department of Justice, also represents the FCC.

A. Rulings. The FCC, in its R&O, addresses petitions for reconsideration of its Report and Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 29 FCC Rcd 6567 (2014), *affirmed*, *National Association of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015) ("Incentive Auction R&O"), adopting rules to implement the broadcast television spectrum incentive auctions, as part of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12–268. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions* (Second Order on Reconsideration), 30 FCC Rcd 6746 (2015).

B. Related Cases. This Court has previously considered a related matter in *National Association of Broadcasters v. FCC*; however, that case considered issues unrelated to this matter. Counsel is aware of the Free Access pending appeal filed in this Court on October 20, 2015, in No. 15-1346, and an unopposed motion filed November 4, 2015 by the FCC in that proceeding to consolidate No. 15-1346 with the earlier consolidated appeals filed by Petitioners Mako and Beach TV. By Order entered November 30, 2015, this Court set a different briefing schedule in No. 15-1346, and provided that appeal would be argued on the same

day and before the same panel as these consolidated Mako and Beach TV appeals in Nos. 15-1264 and 15-1280, respectively.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

**Chief authorities are designated by an asterisk*

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

GLOSSARY

APA-Administrative Procedure Act.

CFR-Code of Federal Regulations.

Class A-an LPTV station accorded primary status as a licensee.

Commission-Federal Communications Commission.

FCC-Federal Communications Commission.

Full Power-a primary status television station licensee.

LPTV-Low Power Television Station.

MHz-Megahertz radio spectrum frequency.

NAB-National Association of Broadcasters.

Repack- The act or result of Repacking.

Repacking- Reorganizing and consolidating broadcast television stations remaining on air following the broadcast television spectrum incentive auction so they occupy a smaller part of the UHF band, thereby directly or indirectly freeing UHF band space to create blocks of spectrum for broadband use.

Spectrum Act-Pub. L. No. 112-96, §§6402, 6403, (codified at 47 USC §1254) 125 Stat. 156 (2012).

CSA-Channel Sharing Agreement.

TV translator stations-authorized facilities retransmitting full power television stations' signals in terrain-obstructed areas within a full-service station's service area.

UHF-The ultra-high frequency spectrum television broadcasting band at 470-512 MHz occupying television channels 14 through 20, and 512-698 MHz occupying television channels 21-51, except 37.

VHF-The very high frequency spectrum broadcasting band at 54-216 MHz occupying television channels 2 through 13.

COME NOW Petitioners Mako and Beach TV, (collectively "Petitioners") by counsel, and respectfully submit their Joint Brief. In support of their position, Petitioners aver:

1. JURISDICTIONAL STATEMENT

Petitioners respectfully submit the following under Federal Rules of Appellate Procedure 28(a)(4):

1.1. The FCC had subject-matter jurisdiction to issue the final order on appeal under 47 U.S.C. § 402(a), because the matter below involved jurisdiction over the radio spectrum.

1.2. The Hobbs Act, 28 U.S.C. § 2342(3), in turn, governs judicial review of rules, regulations, or final orders of the FCC.

1.3. The FCC adopted its final R&O now on appeal on June 17, 2015, and released the Order June 19, 2015. (JA __).

1.4. Petitioners Mako and Beach TV timely appealed, under 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a), that final R&O to this Court on August 6 and 14, 2015, respectively, under the Hobbs Act's 60-day appeal requirement.

1.5. Petitioners seek review of the Second Order on Reconsideration of the Federal Communication Commission, in GN Docket No. 12-268, *Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*,

30 FCC Rcd. 6746 (2015). A full version of the R&O appears in the Federal Register on August 6, 2015, 80 Fed. Reg. 46824. JA___.

1.6. This consolidated action concerns a final agency rule that disposes of all parties' claims, and is therefore properly before this Court.

2. STATEMENT OF THE ISSUES FOR REVIEW

2.1. Whether Respondent FCC acted illegally, by promulgating spectrum auction rules subordinating low power television ("LPTV") licenses to spectrum users well beyond full power and Class A television.

2.2. Whether Respondent FCC acted illegally, when it promulgated its spectrum auction rules that effectively revoke Petitioners' broadcast licenses and terminate LPTV broadcasters' licenses en masse without providing Petitioner administrative due process through adjudication under Section 558(c) of the Administrative Procedure Act?

3. STATUTES AND REGULATIONS

APA

COMMUNICATIONS ACT OF 1934

HOBBS ACT

SPECTRUM ACT

47 C.F.R. § 74.702(b)

4. STATEMENT OF THE CASE

4.1. THE LPTV INDUSTRY-ITS ORIGINS AND PURPOSE

The Commission best summarized the origins and purpose of LPTV in an earlier Report and Order entitled *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations* (Report and Order), 19 FCC Rcd. 19331 (2004), by explaining:

> [T]he Commission created low power television stations to bring television service, including local service, to viewers otherwise unserved or underserved' by existing service providers. LPTV stations may originate programming and retransmit the programs of full-service television stations. Currently, there are approximately 2,128 licensed LPTV stations. These stations operate in all 50 states and serve both rural and urban audiences. Because they operate at reduced power levels, LPTV stations serve much smaller geographic regions than full-service stations, and they can provide service to areas where a higher power station cannot be accommodated in the TV and DTV Tables of Allotments.
>
> An LPTV station may be the only television station in an area providing local news, weather, and public affairs programming. Even in some well-served markets, LPTV stations may provide the only local services to residents of discrete geographical communities within those markets. Many LPTV stations air 'niche' programming, often locally produced, to residents of specific ethnic, racial, or special interest communities.

19 FCC 19331, at 19334 (footnotes omitted).

LPTV represents the culmination of an innovative diversity initiative which began in 1980 as, "...the first new broadcast service considered by the FCC in 20 years..." that, "...offers a chance to add new TV services for our citizens, primarily over UHF channels that today go wanting because, due to the construction and operating costs of full power operations,...cannot be viable as full service UHF channels. *An Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System*, 82 F.C.C.2d 47 (1980) (Separate Statement of Chairman Charles D. Ferris). As former FCC Chairman Ferris observed in 1980:

> We have already received applications for Spanish language service and other minority-owned networks, which we today have authorized our staff to process expeditiously, and many other potential commercial and noncommercial applications have made their interests known. Citizens in Alaska are already receiving additional service through low-power TV operations we have previously granted through waiver of our translator rules. Other entrepreneurs should find this new marketplace a welcome opportunity, and citizens in other areas, both rural and urban, can likewise benefit from adding new television services to meet their specialized interests.

Id., at 26.

Today, several thousand LPTV stations provide a broad array of programming nationwide, from the largest to the smallest markets, much of it targeted at niche foreign language viewers and distinct cultural communities.

4.2. MAKO COMMUNICATIONS' LPTV OPERATIONS

Of the nation's 5,500 or more LPTV stations,[1] Mako is an industry leader with 31 LPTV stations, the majority of which are in the top 30 U.S. markets. Mako recently invested millions of dollars complying with the FCC's former mandate requiring conversion of analog to digital transmission and related repacking of frequencies in *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator and Television Booster Stations and to Amend Rules for Digital Class A Television Stations* (Second Report and Order), 26 FCC Rcd 10732, 10733 (2011).

The proposed auction, as confirmed by the Commission's auction simulations, would require widespread confiscation by the FCC of Mako's most valuable market spectrum, without compensation and with no replacement channels available for Mako to relocate its most valuable LPTV broadcast operations. The FCC would sell Mako's spectrum to the highest cell phone company bidder.

4.3. BEACH TV'S LPTV OPERATIONS

Beach TV is a licensee of an LPTV station. It sought protection below in repacking and participation in the reverse auction. The Commission dismissed Beach TV's Petition on procedural grounds because it failed to raise its argument

[1] Full Power and Class A licensees number 1,700.

before adoption of the *Incentive Auction R&O* and, as an alternative and independent ground, denied its Petition on the merits. R&O, 30 FCC Rcd. at 6782-84.

4.4. THE SPECTRUM ACT AND ITS SPECTRUM AUCTION

Congress passed the Spectrum Act in 2012. The Act required the FCC to hold a spectrum auction by reclaiming spectrum from existing broadcast television licensees, and then reselling such spectrum to companies providing wireless communications services (such as cellular telephone). The mandated auction process has three components:

1. A "reverse" auction to reacquire the television spectrum in use by existing TV broadcasters;

2. A "forward" auction to resell the reclaimed spectrum; and

3. A "repacking" of the remaining television broadcasters into a smaller spectrum band.

In the reverse auction, existing broadcast television licensees may, but are not required, to offer to sell their existing license rights back to the government at prices acceptable to them. The reverse auction procedure is extremely complex, but in simplified terms, the prices the existing licensees may receive for their spectrum rights are progressively reduced during the course of the auction until there are enough remaining willing sellers to satisfy the FCC's spectrum reacquisition and

resale revenue goals. LPTV licensees, such as Mako and Beach TV, are excluded from the reverse auction. *Only* full power and Class A television broadcasters are eligible to participate.

The spectrum being vacated in the reverse auction, and as a result of displacing LPTVs, is to be sold in the forward auction. Although the forward auction procedure is also quite complex, in essence it is a familiar ascending bid auction. Significantly, the reclaimed television spectrum being resold is to be licensed *exclusively* for wireless communications, not television, purposes.

The repacking process reassigns the television broadcasters that remain after the reverse and forward auctions into the reduced spectrum band that continues to be dedicated to television. The end result of the entire incentive auction would be to reduce substantially the amount of spectrum dedicated to television, and squeeze the remaining broadcast television licensees into a narrower spectrum band, to make room for the wireless operators that acquire the television spectrum reclaimed in the auction.

To implement the Spectrum Act, the FCC issued proposed rules governing the incentive auction and its related reassignment or "repacking" process. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 29 FCC Rcd. 6567 (2014), *affirmed*, *National Association of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015)

("Incentive Auction R&O"). The FCC's proposed rules, however, specifically excluded one type of television broadcaster, LPTV,[2] from participating in the auction. Instead, the FCC concluded that it could disregard LPTV broadcasters' licensed spectrum usage rights in the entire auction process. Spectrum would be cleared for sale to wireless companies as though no LPTV broadcasters existed. The reacquired spectrum would be resold to wireless companies unburdened by LPTV broadcasters' rights. An LPTV broadcaster would only be permitted to continue to operate, if any available spectrum in its market area remained after the high power and Class A licensees were relocated to different spectrum in the repacking process; if not, the LPTV station would have to go off the air. Unlike the high power and Class A licensees that sold their spectrum rights, LPTV broadcasters that are put off the air would not be compensated for their lost spectrum. Unlike the remaining high power and Class A licensees, LPTV broadcasters able to relocate would not be compensated for the relocation expenses incurred.

4.5. THE PROCEEDINGS BELOW

4.5.1. *The Incentive Auction R&O.*

Mako and Beach TV each participated in the proceedings below. Mako advanced two principal arguments now on appeal: (1) The Incentive Auction R&O

[2] The proceeding also included TV translator stations; however such interests are not involved in this appeal.

must be reversed as an arbitrary and capricious agency action in violation of Section 1452(b)(5) of the Spectrum Act because the FCC improperly subordinated LPTV licensees' spectrum usage rights to wireless communications service; and (2) The FCC's destruction of such LPTV broadcasting rights authorized by issued and outstanding broadcast licenses further violated statutory LPTV licensees' rights because the auction procedure the FCC adopted would effectively revoke such outstanding licenses *en masse* by rulemaking, in violation of the Spectrum Act and the APA.

Beach TV challenged the Incentive Auction R&O by arguing the unlawfulness of the Commission's repack procedures, and the exclusion of LPTV from the reverse auction's voluntary participation provisions. The Commission ruled Beach TV's arguments were procedurally and substantively deficient.

The FCC summarily dismissed Mako's arguments. It first addressed Mako's statutory argument resting upon Section 1452(b)(5)'s mandate to protect LPTV, which provides that: "Nothing in this subsection ["Reorganization of broadcast TV spectrum"] shall be construed to alter the spectrum usage rights of low-power television stations." In essence, the Commission took the position that, because LPTV is a "secondary service", LPTV licensees' rights are subordinate to all "primary services", and may be taken away to accommodate the transfer of the spectrum vacated by television broadcasters to wireless communications service.

R&O, 30 FCC Rcd. at 6778. The Commission dismissed Congress's LPTV savings provision quoted above with the statement that "...we interpret section 1452(b)(5)[3] as a rule of statutory construction, not a limit on the Commission's authority." *Id.* (footnote omitted).

Mako had argued that LPTV service was only "secondary" to full power and Class A television, and not wireless communications. The FCC rejected Mako's position by asserting that LPTV was subordinate to all "primary" services, not just full power and Class A television.

The FCC addressed Mako's mass revocation argument by claiming that LPTV licensees' forced cessation of operations would not be a revocation because, "...LPTV stations have always operated in an environment where they could be displaced from their operating channel by a primary user and, if no new channel assignment is available, forced to go silent..." and "[d]isplacement does not 'revoke' LPTV or TV translator licenses for purposes of section 312 of the Act because it does not require termination of operations or relinquishment of spectrum usage rights; displacement requires only that LPTV and TV translator stations vacate the channel on which they are operating." *Id.*, *at* 6778-79.

[3]Spectrum Act, Section 6403(b)(5), 47 U.S.C. § 1452(b)(5), 126 Stat. 227.

4.5.2. *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations,* MB Docket No. 03-185 Third Notice of Proposed Rulemaking, 29 FCC Rcd 12536 (2014) ("Third Notice").

The FCC recognized, in its *Incentive Auction R&O* that its Spectrum Auction rules would decimate the LPTV industry it had created just decades earlier. Given a choice between confiscating LPTV spectrum for free, and without any responsibility for paying the relocation expenses of those LPTV stations sufficiently fortunate to find relocatable spectrum, against paying up to $800,000,000 for top Full Power stations in major markets, the FCC decided it would merely placate LPTV by proposing new measures, in its *Third Notice*, including Channel Sharing Agreements, repacking simulation software, and others ostensibly to help displaced LPTV stations survive.

Mako filed comments in the *Third Notice* proceeding addressing the FCC's proposed solution by observing:

> While the proposals advanced in the *Third Notice* sound good in theory, in practice they are all suspect and none will materially help those displaced LPTV stations in securing available spectrum on which to broadcast. Instead, the Commission's own simulations show that the FCC intends to confiscate all available UHF channels from LPTV stations in many markets, so that it will not be necessary to accept spectrum offers at the auction from full power and Class A television stations. Consequently, there will be no available usable UHF spectrum available to LPTV stations for displacement use. Such LPTV stations will need either to move to the VHF band, from which full power television stations have fled, or, alternatively, cease

> broadcasting altogether. This, in effect, is the choice between slow death and a quicker one.

J.A. __, at ii and iii.

The FCC has not issued a Report and Order in response to the proposals offered in the *Third Notice*; rather, in a press release dated April 24, 2015, facially involving a postponement of mandatory LPTV and other interests' expensive transition requirements from analog to digital, it indefinitely postponed the September 1, 2015 digital transition deadline, as well as final action on the Third Notice, until after, "...completion of the auction and repacking process." J.A. __, *Suspension of September 1, 2015 Digital Transition Date for Low Power Television and Translator Stations*, 30 FCC Rcd. 3741 (2015), *citing Incentive Auction R&O*, 29 FCC Rcd at 6834-35, paras. 656-57 (2014). (JA __)

5. SUMMARY OF THE ARGUMENT

The FCC's confiscation and sale of Petitioners' spectrum violate the unambiguous command of Congress in Section 1452(b)(5) of the Spectrum Act to preserve LPTV licenses in Section 1452(b)(5) of the Spectrum Act. The Commission cannot seize and sell licensees' spectrum to other more favored interests by basing its actions on unrelated spectrum uses and triggering circumstances violative of its own rules and regulations.

There is no statutory or regulatory justification for confiscating such spectrum, however. The FCC's mass revocation of LPTV licenses is *ultra vires* of

the Spectrum Act, the very legislation on which the Commission must rely to implement its rulemaking.

LPTV is secondary only to full power and Class A stations. No statute or rule exists making LPTV secondary to any other service. The FCC never identified broadband use as a "primary service" before 2012. It cannot lawfully do so now because such a new use cannot enjoy primacy over LPTV when Congress unambiguously prohibited any alteration of LPTV broadcasters' rights. Such retroactive designation of broadband as primary was done solely to disenfranchise LPTV.

The spectrum usage rights of LPTV preserved by Congress also include protection against the summary revocation of licenses the FCC would perpetrate in violation of Administrative Procedure Act's administrative due process guarantees, which override all statutory provisions to the contrary. The Commission cannot effectively revoke such issued and outstanding licenses at its whim by rulemaking especially where, as here, its own primary user justification is inexplicably inconsistent with FCC practice and policy.

Nothing propounded below can minimize or excuse the mass destruction of LPTV broadcasting, a favored medium. The Commission's own simulations establish that its confiscation of LPTV spectrum is no mere "displacement", since

repacking will terminate LPTV licensee's broadcasting where, as will often occur, no replacement spectrum remains available.

The FCC's rule must be vacated and remanded with instructions to rescind the rule. No manner of administrative engineering can cure the rule's fatal defects.

6. STANDING

Petitioners' Article III standing under *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000), surpasses that which this Court addressed in the consolidated Sinclair Broadcasting appeal in *National Association of Broadcasters v. Federal Communications Commission, et al.*, 789 F.3d 165 (D.C. Cir. 2015), this Court's earlier resolution of a challenge, on different grounds, to the Spectrum Auction rules by full-power broadcaster interests.

In *National Association of Broadcasters*, this Court articulated *Friends of the Earth's* three-part standing test requiring a petitioner to show: '...(1) an injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) [that] the injury is fairly traceable to the challenged action of the defendant; and (3) [that] it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'.... *National Association of Broadcasters*, 789 F.3d 165 at 180 (citation omitted). There, as here, the petitioner claimed a future harm, for which this Court required Sinclair to show a

"substantial probability of injury" or a "substantial risk that the harm will occur," respectively. *Id.*, *at* 181 (citations omitted).

In this appeal, there is injury in fact and future injury Petitioners are and will suffer, respectively, as exemplified by the FCC's own repack simulations disseminated publicly. In press releases and other publications, Respondent has made clear it will inflict concrete and particularized injury by confiscating a majority of Petitioners' spectrum for sale to cell phone companies.

The foregoing injury is also imminent. Respondent insists it will proceed with its auction starting March 29, 2016.[4] The only certain means by which Respondent can acquire sufficient spectrum for sale is by confiscating Petitioners' and others' LPTV licenses, since under the voluntary participation afforded to full power and Class A broadcasters, many may decline to sell their spectrum in favor of remaining broadcasters and being compensated for their repacking expenses. LPTV licensees, by contrast, will receive no such payment for their seized spectrum and no compensation for their forced relocation, assuming spectrum, however undesirable, remains to which they can relocate. The Commission's simulations, however, show such LPTV stations will often have no relocatable spectrum. They will invariably go dark, especially in the more valuable urban markets, like New York, Los Angeles, Washington, Dallas, and Miami, where Full

[4] Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016, FCC DA 15-1183 (October 15, 2015)

Power and Class A licensees will demand up to $800,000,000 to sell their spectrum rights while adjacent LPTV broadcasters' spectrum serving thriving minority and ethnic communities can be taken for free and sold to broadband companies at staggering prices. For example, the FCC reverse auction opening bid for channel 24 in Chicago is $410,469,300, while Mako's adjacent channel 25, with an equal 6 MHz of spectrum, is $0.

There is also no reasonable dispute about the origins of Petitioners' injury. But for the impending auction, Petitioners would continue to operate their licenses in the public interest. The planned seizure of Petitioners' stations confers standing on Petitioners because such injuries are "[o]bviously traceable to the alleged illegality in [the auction] and are redressable by any remedy that eliminates the alleged illegality." *DIRECTV v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997).

Under the third present harm standard, this Court can stop the harm and prevent Petitioners' injury by reversing and vacating Respondent's rule. Such a reversal and vacature simply entails requiring Respondent to honor the protection afforded LPTV interests in the Spectrum and Administrative Procedure Acts by vacating the rule and halting the auction on which the rule is based.

If Petitioners' harm were somehow considered prospective, just as in *National Association of Broadcasters*, where this Court found Sinclair's future harm, even a favored full power broadcasters faces "...a 'substantial risk' that one

of its stations will miss the go-dark deadline imposed upon repacked stations. Of course, less-enfranchised LPTV interests like Petitioners have no control over their spectrum subject to confiscation through a cancellation of their licenses.

Unlike its deferential treatment of Full-Power and Class A broadcasters objecting to the damage and disruption of repacking, the Commission has offered to LPTV broadcasters possible displacement as a consolation prize and alternative to going dark, assuming spectrum's availability. Accordingly, just as this Court recognized full-power licensees are entitled to voluntary participation and substantial compensation, unlike LPTV licensees, "...if the Commission is able to acquire more relinquished spectrum in the reverse auction...the Commission then would repack more stations against their will....", there is a "...link between the Commission's reverse-auction clearing targets and the amount of spectrum it will subsequently repack...." *Id.*, *at* 181.

7. ARGUMENT

7.1. THE STANDARD OF REVIEW

Administrative agencies like the Commission, "must give effect to the unambiguously-expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). As such, the courts review issues of statutory construction *de novo. United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997).

Deference under *Chevron* to any agency's administration of a statute, "is premised on the theory that an ambiguous statute's construction, "...constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 159 (2000). Accordingly, an agency's interpretation of a statute can only survive if it is not contrary to the statutory text, and the agency reasonably fills any interpretive gaps. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

If there is no ambiguity in a statute, no deference to the agency lies. *Ry. Labor Execs' Ass'n v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994). Where, as here, an agency wrongly believes a statute compelled action, that action, "...must...be set aside and the case remanded. *PDK Labs, Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004).

Where an agency's interpretation of a statute involves rulemaking, such agencies, "...may issue regulations only pursuant to authority delegated to them by Congress." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005). If done otherwise, the Commission's "regulations cannot survive judicial review. *Id.*, at 699.

This Court applies the judicial review standards of the APA. Under Section 706(2)(A) & (C) of that statute, this Court will invalidate Commission action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law [or] in excess of statutory jurisdiction." Agency action is arbitrary and capricious when it "entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or [if it] is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.'" *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014) (quoting *Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

In rulemaking, an agency "must respond in a reasoned manner to [comments] that raise significant problems." *Covad Comm'ns Co., v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (internal quotation marks omitted). Further, agencies must "consider significant alternatives to the course it ultimately chooses." *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000). The FCC's failure to consider obvious alternatives, "...has led uniformly to reversal." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987). In fact, under the APA, this Court "shall" vacate agency action that is arbitrary, capricious, an abuse of discretion, or not in accordance with law. *NRDC v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007).

7.2. THE RULE MUST BE INVALIDATED BECAUSE IT EVISCERATES THE PROTECTION AFFORDED LPTV LICENSES BY STATUTE.

The foundation of FCC's attempted justifications for its disregard of LPTV's spectrum rights is its contention that because LPTV is a "secondary service", An LPTV license grants the licensee the right to broadcast on a specified channel in a geographical area for a specified term. As noted, the limitations on an LPTV licensee's rights relative to other licensed spectrum users are in the FCC's rules at 47 C.F.R. 74.701 et seq. The Commission's rules provide an LPTV station's signal must not interfere with, and is subject to interference from, Full Power and Class A broadcast television service in the area as well as land mobile users and other licensees operating on channels ranging from Channel 52 to Channel 69. LPTV is 'secondary' to these other specified services only in that sense. See 47 C.F.R. 74.703 and 47 C.F.R. 74.793.

Nothing in the Communications Act or the FCC's rules subordinate or make an LPTV licensee's rights 'secondary' to wireless communications service.[5] An LPTV license grants the licensee the right to broadcast on a specified channel in a defined geographic area for a specified term. The limitations on an LPTV licensee's rights relative to other licensed spectrum users are contained in the

[5] Section 534(h)(2)(C) and (F) of the Communications Act, 47 U.S.C. § 534(h)(2)(C) and (F) also recognizes LPTV's status as secondary to Full Power when it comes to obtaining cable carriage rights.

FCC's Rules, at 47 C.F.R. § 74.701 *et seq*. The Commission's Rules provide that an LPTV station's signal must not interfere with, and is subject to interference from, full power or Class A broadcast television service in the area, making LPTV "secondary" in that sense. *See* 47 C.F.R. § 74.703. Nothing in the Communications Act or the FCC's Rules subordinate or make an LPTV licensee's rights "secondary" to wireless communications service.

As previously noted, Congress reaffirmed LPTV licensees' existing rights in Section 6403(b)(5) of the Spectrum Act. That section reads "(5) LOW-POWER TELEVISION USAGE RIGHTS. Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations."[6]

In its R&O, the FCC made two arguments in an attempt to evade the consequences of this provision. It first confusingly asserted that "[W]e interpret Section 1452(b)(5) as a rule of statutory construction, not a limit on the Commission's authority....". R&O, 30 FCC Rcd. at 6778. This is a meaningless distinction, since the Spectrum Act is the source of the Commission's authority. In the statute establishing the spectrum auction process, Congress expressly negated any interpretation of the Act that would authorize the FCC "to alter the spectrum usage rights of low-power television stations". This Congressional preservation of LPTV rights in clear statutory text means something and is not mere surplusage. *Ki*

[6] 47 U.S.C. § 1452(b)(5); 26 Stat. 227.

Se Lee v. Ashcroft, 368 F.3d 218, 223 (3d Cir. 2004), *citing Acceptance Ins. Co. v. Sloan*, 263 F.3d 278, 283 (3d Cir. 2001). Therefore, unless there is some extrinsic legal authority to the contrary, the Spectrum Act bars the FCC from implementing the incentive auction in a way that would take away LPTV licensees' spectrum usage rights. No such authority exists.

The Commission then argued:

> [L]PTV and TV translator stations have always operated on a secondary basis with respect to ***primary licensees***, which may be authorized and operated without regard to existing or proposed LPTV and TV translators. Any LPTV displacement as a result of the incentive auction, therefore, does not 'alter the spectrum usage rights of low power television stations'...LPTV stations have always operated in an environment where they could be displaced from their operating channel by a ***primary user*** and, if no new channel assignment is available, forced to go silent. The potential impact of the repacking process is no different.

30 FCC Rcd. at 6778-79 (emphasis added). It fails to cite any authority for that assertion, however, other than its own characterizations to that effect.

The flaws in the FCC's reasoning are profound. After rejecting Mako's argument that its Spectrum Rules alter the rights of LPTV users, nowhere in that R&O or elsewhere in the proceedings below did the FCC ever cite any pre-2012 Spectrum Act decision elevating cell phone broadband to "primary spectrum user" status, despite a string of administrative decisions the Commission cited The FCC proffered its *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low-Power Television, Television Translators and*

Television Booster Stations and to Amend the Rules for Digital Class A Television Stations, Report and Order, 19 FCC Rcd 19331, 19333 (2004), where it found LPTV stations "may not cause interference to, and must accept interference from, full-service television stations, including land mobile radio operations and other primary services."

The FCC's reference to "other primary services" is without meaning because "land mobile operations and other primary services (the latter of which the FCC left undefined)" are not a subset of full-service television stations as the Commission's subordinate clause announced. Of course, cell phone company broadband use is neither a land mobile radio operation nor some other, unspecified "primary service", so even the Commission's earlier attempts to further subordinate LPTV fell flat and could not avoid Congress's express savings provision in Section 6403(b)(5) of the Spectrum Act.

In its *Incentive Auction R&O*, the Commission rejected Mako's position by creating an LPTV subordination scenario of unlimited elasticity where "primary spectrum user" can mean anything, and where its rule below represents a naked spectrum grab from LPTV community broadcasters to powerful cell phone companies willing to pay billions for Petitioners' seized spectrum. The FCC effectively disclaimed Section 6403(b)(5)'s LPTV savings provision by insisting LPTV service fell lower than any conceivable prior, present, or future "primary"

service the agency might recognize.[7] It insisted Section 6403(b)(5) merely clarified the meaning and scope of Section 6403 but somehow, "it does not limit the Commission's spectrum management authority."[8]

The Commission's interpretation of Section 6403(b)(5) renders that statutory directive a nullity. Its pronouncement, however, squarely conflicts with and would otherwise render surplusage Congress's statutory command that the Spectrum Act should be construed not to "alter the spectrum usage rights" of LPTV stations. Where as here, LPTV stations like Mako's channel 25 in Chicago is worth nothing in the FCC's confiscation scheme, while the FCC would pay $410,469,300[9] for the adjacent channel 24 with identical 6 MHz of spectrum, the FCC has clearly and dramatically altered LPTV specifications in violation of the statute.

The definition of "alter," the term used in Section 6403(b)(5) of the Spectrum Act, is "to change" or "to make different."[10] Where, as here, the Commission would now further subordinate LPTV rights to an entirely new industry, wireless communications companies, it has flaunted Congress's express admonition against such alteration or change. To think otherwise renders Congress's command meaningless in a graphic contradiction of basic statutory

[7] *Incentive Auction R&O*, 29 FCC Rcd. at 6672.
[8] *Id.* at 6673-6674.
[9] *Infra, at n.*17.
[10] http://dictionary.reference.com/browse/alter.

construction that, "whenever possible each word in a statutory provision is to be given meaning and not to be treated as surplusage…." [11]

Only Mako's interpretation of Section 6403(b)(5) gives that section of the Spectrum Act meaning -- Section 6403(b)(5) maintains LPTV's secondary rights against those specific services set in earlier Commission actions before enactment of the Spectrum Act in 2012. The FCC clearly had an opportunity to convince Congress to eliminate its 2012 directive to include broadband companies as a favored "primary user," but it failed to do so. It cannot now ignore the statutory limits imposed upon its LPTV jurisdiction by inventing *ex post facto* changes to the Spectrum Act. Absent a reversal and remand by this Court, the Commission's action will change the spectrum usage rights of LPTV broadcasters in violation of statutory text and in excess of the FCC's statutory jurisdiction.[12] The Commission's earlier rationale for ignoring the plain language of the statute is unavailing, and its failure to respond to Petitioners' comments in a reasoned manner merit reversal.

The Commission's belated recognition of the wholesale decimation its new rule would visit upon the LPTV industry,[13] perhaps best demonstrates its

[11] *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 223 (3d Cir. 2004), *citing Acceptance Ins. Co. v. Sloan*, 263 F.3d 278, 283 (3d Cir. 2001).
[12] *Incentive Auction R&O 29 FCC Rcd 6834*
[13] *Id.* at 6672-737 (The Commission acknowledges that, as a result of its decision, LPTV viewers will lose "the service of these stations.")

acknowledgement of statutory and regulatory error. Even its stalled remedial rulemaking proposed in its *Third Notice* cannot cure its violation of the Spectrum and Administrative Procedure Acts or stand to justify revocation under Section 312 of the Communications Act. That stalled remedial rulemaking to mitigate the LPTV industry's impending damages only proves the incentive auction and repacking will irreparably harm LPTV and TV translator stations."[14]

7.3 THE RULE MUST BE INVALIDATED BECAUSE IT VIOLATED THE SPECTRUM ACT BY UNLAWFULLY REQUIRING THE EN MASSE REVOCATION OF OUTSTANDING BROADCAST LICENSES WITHOUT ADMINISTRATIVE DUE PROCESS OF LAW.

The record in the proceeding below is devoid of the slightest Commission hint the LPTV industry was somehow in violation of any law or Commission regulation or had violated the public interest to justify its ruination and the Commission's violation of the LPTV savings provision in the Spectrum Act. Nothing in the record below thus stands as a justification for mass revocation under Section 312 of the Communications Act.

[14] *Report and Order, Appendix B, Final Regulatory Flexibility Analyses*, para. 9. *See also* Note 7, *infra.* The Commission has not issued any R&O on the Third Notice. Its consideration of alternatives to its Second Notice represent "the choice between slow death and a quicker one."

7.3.1 The Commission *Report and Order* Violates the Spectrum, Communications, and Administrative Procedure Acts by Engineering the Revocation of Outstanding LPTV Licenses *En Masse*.

The *Report and Order* would revoke existing LPTV licenses *en masse*, without providing any adjudicatory notice and hearing, and without a scintilla of evidence supporting such revocation.[15] That *en masse* revocation by rulemaking squarely violates the adjudicatory notice and hearing requirements contained in the Communications Act of 1934, as amended (the "Communications Act") and the Administrative Procedure Act (the "APA"), each of which Congress reinforced in Section 1452(b)(5) of the Spectrum Act's LPTV savings provision.

The FCC's insistence that displacement and going dark are not tantamount to revocation is a distinction without a difference. Under to the FCC's own repack analysis, there will be no alternate channels for hundreds, if not more than a thousand, LPTVs. As this Court previously held in invalidating an FCC license revocation in an earlier auction, assigning a licensee's spectrum to successful bidders is an effective revocation. *NextWave Personal Communications, Inc., v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001). As such, the rule promulgated by the Commission must be invalidated as arbitrary and capricious agency action

[15] For example, Mako holds licenses for five LPTV stations in the Dallas, Texas market. Staff simulations released by the FCC show the lack of available spectrum to cover all of these stations which would be displaced to substitute channels. *Incentive Auction Task Force Releases Initial Clearing Target Optimization Simulations*, 30 FCC Rcd 4854 (2015).

representing an abuse of discretion, in excess of the Commission's statutory authority, and in violation of the Spectrum, Communications and Administrative Procedure Acts.

7.3.2 The Commission Can Only Revoke Licenses For Actions Violative of Section 312(a) of the Communications Act.

Section 312(c) of the Communications Act, as reinforced by Congress's LPTV saving provision in Section 1452(b)(5) of the Spectrum Act provides the only lawful bases for revocation of outstanding station licenses issued by the Commission. It provides licenses can only be revoked for those actions specified in Section 312(a)[16] after the following administrative due process:

---

[16] Section 312(a) of the Communications Act, 47 U.S.C. § 312(a), specifies the following:

"The Commission may revoke any station license or construction permit—

> (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;
>
> (2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
>
> (3) for willful or repeated failure to operate substantially as set forth in the license;
>
> (4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;
>
> (5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;
>
> (6) for violation of section 1304, 1343, or 1464 of title 18; or

> Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing or waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefore and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.[17]

By contrast, the Commission's actions below promulgate revocations *en masse*. Without observing the foregoing administrative due process safeguards, however, an impossibility through rulemaking, the FCC's rule must fail as an arbitrary and capricious exercise violative of the Spectrum Act's LPTV savings provision in Section 1452(b)(5).

> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[17] Section 312(c) of the Communications Act, 47 U.S.C. § 312(c).

7.4 The Commission Must Follow Administrative Due Process Requirements in Revoking Licenses.

Congress further specified, in Section 312(d) of the Communications Act, the burden of proof and persuasion in revocation proceedings would rest upon the Commission.[18] The Act embedded its adjudicatory safeguards in Section 312 by specifically incorporating Section 9(b) of the APA,[19] 5 U.S.C. § 558(c). Section 312(e) declares "[t]he provisions of Section 558(c) of Title 5 [shall] apply with respect to the institution of any proceeding for the revocation of a license or permit…"[20]

Section 558(c) of Title 5, in turn, provides, in applicable part:

> [e]xcept in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements."

This Court specifically applied 5 U.S.C. § 558(c) in *Miami MDS Co. v. FCC*,[21] when it explained the section conditioned "an agency's 'withdrawal,

[18] Section 312(d) of the Communications Act, 47 U.S.C. § 312(d).
[19] APA, Section 9(b).
[20] Section 312(e) of the Communications Act, 47 U.S.C. § 312 (e).
[21] 14 F.3d 658 (D.C. Cir. 1994).

suspension, revocation, or annulment' of a license on its provision of notice and an opportunity to be heard."[22]

The Commission never before attempted an *en masse* revocation of an untold amount of FCC licenses by rulemaking, and the FCC's seeming nonchalance below, in devastating the LPTV industry, hardly establishes such a mass revocation of licenses is lawful. The Commission may not ignore the express language of its promulgating statute merely because such ignoring serves its present purposes in selling at no cost its licensees' spectrum.

Although courts have permitted the Commission to enact rules forcing licensees to divest stations without an evidentiary hearing to achieve compliance with FCC adopted rules. *See e.g. Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *rev'd in part on other ground*, 436 U.S. 775 (1978), as the *Citizens Committee* court noted, divestiture is not nearly as harsh as denial of license renewal. "A licensee facing divestiture is compensated for its loss. A licensee that fails of renewal [or incurs revocation by a Commission rulemaking] is not." *Id.* at 955.

Revocation is yet a more serious sanction than non-renewal, since revocation occurs during the middle of an authorized station license period and cancels an existing authorization. If the FCC decides not to renew an application or to revoke

[22] *Id. at* 659.

a station's license, it therefore cannot reach those decisions without providing the licensee an opportunity to meet its charges at a hearing. Due process and the statute call for nothing less.

The Commission failed below meaningfully to address the foregoing revocation concerns. Its only response was displacement and even going dark through such displacement is not a revocation because the licensee presumably still holds a paper entitling it to broadcast on channels which are unavailable to the licensee.

8. CONCLUSION

The Commission's R&O repeatedly violates LPTV rights confirmed by Congress in the very statute the Commission must administer to run its auctions. The Commission has neither discretion nor flexibility to affront the clear command of Congress, and its rule must be vacated unless and until the agency honors its statutory obligations to Petitioners and the LPTV industry.

Dated: December 4, 2015.

/s/ William H. Shawn
William H. Shawn
ShawnCoulson, LLP
1850 M Street, N.W., Suite 280
Washington, DC 20036
202-331-2300 (Telephone)
202-403-3747 (Facsimile)
wshawn@shawncoulson.com

/s/ Aaron P. Shainis
Aaron P. Shainis, Esq.
Lee J. Peltzman, Esq.
Shainis & Peltzman Chartered
1850 M Street, N.W., Suite 240
Washington, DC 20036
202-293-0011 (Telephone)
202-293-0810 (Facsimile)
aaron@s-plaw.com
lee@s-plaw.com

Attorneys for Petitioner Mako Communications, LLC

/s/ W. James Mac Naughton
W. James Mac Naughton, Esq.
7 Fredon Marksboro Road
Newton, NJ 07860
732-634-3700 (Telephone)
wjm@wjmesq.com

Attorneys for Petitioner Beach TV Properties, Inc.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains [*7,084*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: December 4, 2015

/s/ William H. Shawn
Counsel for Petitioner
Mako Communications, LLC

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of December, 2015, I caused this Page-Proof Brief of Petitioners to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Jacob M. Lewis
Richard K. Welch
Thaila Sundaresan
FEDERAL COMMUNICATIONS COMMISSION
(FCC) Office of General Counsel
445 12th Street, SW, Room 8-A765
Washington, DC 20554
(202) 418-1720

Counsel for Respondent
Federal Communications Commission

Robert J. Wiggers
Kristen C. Limarzi
U.S. DEPARTMENT OF JUSTICE
(DOJ) Antitrust Division,
Appellate Section
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530
(202) 514-2413

Counsel for Respondent
United States of America

Glenn B. Manishin
PARADIGMSHIFT LAW LLP
3920 8th Street S.
Arlington, Virginia 22004
(202) 256-4600

Counsel for Intervenor for Petitioner

Adam J. White
BOYDEN GRAY & ASSOCIATES, PLLC
1627 I Street, NW, Suite 950
Washington, DC 20006

Counsel for Intervenor for Petitioner

/s/ William H. Shawn
Counsel for Petitioner
Mako Communications, LLC