ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1346

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREE ACCESS & BROADCAST TELEMEDIA, LLC, *et al.,*

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*

Respondents.

On Petition for Review from
the Federal Communications Commission

REPLY BRIEF FOR PETITIONERS

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REGULATORY MATERIALS

MISCELLANEOUS

GLOSSARY

Commission	Federal Communications Commission
FCC	Federal Communications Commission
LPTV	Low-Power Television
MHz	Megahertz
RFA	Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq*.
Spectrum Act (or "Act")	Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified at 47 U.S.C. §§ 1451-57
UHF	Ultra High Frequency
White Spaces	Frequencies in the television spectrum bands in locations not used by licensed broadcast services on which the FCC in 2008 authorized use by unlicensed digital devices under Subpart H of its Part 15 Rules. 47 C.F.R. §§ 15.701 through 15.717.

INTRODUCTION AND SUMMARY OF ARGUMENT

FCC Commissioner Michael O'Rielly recently testified to Congress that the FCC's "creative license in regard to statutory interpretation is beyond measure." Statement of Michael O'Rielly, FCC Commissioner, Before the Senate Committee on Commerce, Science, and Transportation, at 3 (Mar. 2, 2016).[1] The "FCC has been known to set aside the intent of Congress, deals struck at the time, reams of its own precedent, and sometimes even the English language itself to 'reinterpret' a statute, all in a single-minded pursuit of a particular outcome." *Id.*

The FCC's actions in this case exemplify what Commissioner O'Rielly excoriated. The Spectrum Act authorized the FCC to conduct a three-part auction framework, to obtain spectrum voluntarily from existing broadcast television licensees and reallocate it to new licensed

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[1] Available at https://www.fcc.gov/document/commissioner-orielly-testimony-senate-commerce-committee.

[2] In a July 28, 2015 hearing, FCC Chairman Wheeler suggested to Subcommittee Chairman Walden that Congress intended the Spectrum Act to "encourag[e]" unlicensed uses and to give no "priority" to LPTV. But Rep. Walden disagreed in the strongest possible terms: "My recollection of the statute, which we together helped write here . . . was that *unlicensed was never set aside as a priority* that would create a nationwide band. In fact we had a lot of discussion about that very fact,

uses, but the Act expressly prohibited the FCC from reorganizing licensees in a way that would "alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5). Yet the FCC ignored Congress's restriction, choosing instead to construct a process that may shutter hundreds upon hundreds of low-power television (LPTV) stations. The FCC replies that this will not actually "alter" the LPTV stations' "spectrum usage rights," because the stations have no right to be protected from the FCC's reallocation of spectrum for new unlicensed purposes—a position justified neither in the Spectrum Act nor the precedents that the FCC cites.

Meanwhile, the Regulatory Flexibility Act requires the FCC to document the steps that it "has taken" to minimize harmful impacts of its orders on small businesses. 5 U.S.C. § 604(a)(6). LPTV stations undoubtedly qualify as small businesses, but instead of pointing to steps that it *has* taken to mitigate its impacts on them, the FCC points instead to steps that it *will* take, or *may* take, with respect to some of the displaced LPTV stations.

The agency is not interpreting Congress's statutes; it is writing them anew, and continues to do so in subsequent rulemaking

proceedings. The Court should not "stand on the dock and wave goodbye" as the FCC "embarks on this multiyear voyage of discovery." *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014). The Court should "reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Id.*

COUNTERSTATEMENT

Before replying to the FCC's legal arguments, three points made in its "Counterstatement," characterizing the regulatory background and facts of the case, require immediate response.

I. The FCC mischaracterizes Congress's "purpose" in the Act.

The FCC characterizes the Spectrum Act's "purpose" in effectively open-ended terms. Congress enacted the law, it asserts, for an "overarching goal of repurposing spectrum for uses other than broadcast television." FCC Br. 3; *see also id.* at 12 ("the underlying purpose of the Spectrum Act" was "to recover spectrum"); *id.* at 5 ("Congress hopes to free up spectrum").

By such an extremely broad characterization of Congress's "overarching goal" or "underlying purpose," the FCC attempts to cast

Petitioners as standing athwart Congress, as asserting a position "squarely at odds with the statute's primary objective of repurposing spectrum for new uses." *Id.* at 18.

But the FCC's characterizations of Congress's objective are oversimplistic to a point of misrepresentation. With the Spectrum Act, Congress did not pursue a vague, unqualified "purpose" or "goal" of spectrum reallocation to new licensed and unlicensed uses to the exclusion of all other rights and interests. Quite the contrary: the Spectrum Act coupled its grant of power to the FCC with express limits on the FCC's power to reallocate spectrum through the incentive auction framework, and with other caveats to the pursuit of spectrum reallocation.

For example, Congress made clear that the purpose of the Spectrum Auction is not to maximize the amount of spectrum to reallocate for new services such as wireless broadband and white spaces devices, as the FCC presupposes. Rather, Congress's objective is to "encourage a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights in order to permit the assignment of *new initial licenses* subject to flexible-use service rules." 47 U.S.C. § 309(j)(8)(G)

(emphasis added); *id.* § 1452(a)(1) (relinquished spectrum then will be made "available for assignment through a system of competitive bidding" in the subsequent forward auction).

And Congress also made clear that the purpose of the Act is *not* to alter LPTV stations' spectrum usage rights. Congress included in the Act a specific prohibition against the FCC doing so. *Id.* § 1452(b)(5).

Therefore, when the FCC characterizes the Act's "purpose" or goal" in such broad terms, it is actually describing not Congress's goals, but the FCC's own. This distinction between Congress's goals and the FCC's was highlighted last year in a colloquy between the FCC's Chairman and the Chairman of the House Energy and Commerce Committee's Communications and Technology Subcommittee.[2]

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[2] In a July 28, 2015 hearing, FCC Chairman Wheeler suggested to Subcommittee Chairman Walden that Congress intended the Spectrum Act to "encourag[e]" unlicensed uses and to give no "priority" to LPTV. But Rep. Walden disagreed in the strongest possible terms: "My recollection of the statute, which we together helped write here . . . was that *unlicensed was never set aside as a priority* that would create a nationwide band. In fact we had a lot of discussion about that very fact, that *you don't go clear all this and give it away to, in effect, some pretty major operators*." Hearing of the U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology (July 28, 2015) (emphasis added), *at* https://energycommerce.house.gov/hearings-and-

(*footnote continued on next page*)

That misapprehension of the Act's underlying "purposes" lays a deeply flawed foundation for the arguments that the FCC ultimately builds upon it.

II. The FCC mischaracterizes LPTV's "secondary" status.

The FCC's "Counterstatement" contains another mistaken premise, a second mischaracterization of the relevant regulatory structure that ultimately pulls the FCC's argument in the wrong direction: the notion of LPTV stations' "secondary" status.

According to the FCC, "[t]he rights of LPTV stations have always been secondary to those of licensed primary users of the spectrum." FCC Br. 3. But much like its characterization of the Act's "purpose," the FCC's characterization of LPTV's "secondary" status is a caricature.

As explained in the "Statutory and Regulatory Background" portion of Petitioners' opening brief, LPTV's "secondary" status pertains only to the narrow, specific matter of *interference*: "low power stations may not create objectionable interference to full service television

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votes/hearings/continued-oversight-federal-communications-commission (discussion from 2:26:53-2:29:03). Rep. Walden urged FCC Chairman Wheeler to "commit to LPTV and translators having priority then over unlicensed." *Id.*

stations." *The Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 48 Fed. Reg. 21478, 21478 (1983), *see generally* Opening Br. 9-12.[3] Except for that narrow question of interference, LPTV's "*rights*" are not "secondary" to other licensed services—let alone to *unlicensed* services and the rest of the wireless universe at large. Opening Br. 11-12; *In re Digital Television Distributed Transmission System Technologies*, 23 FCC Rcd. 16731, 16743 (2008) ("The TV services for which this spectrum is allocated on primary and secondary bases . . . warrant priority over those unlicensed broadband devices.").

The FCC's brief attempts to defend its much broader conception of LPTV's "secondary" status with quotes from other FCC orders; none of these supports the weight that the FCC places upon that regulatory concept.

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[3] *See also* 47 C.F.R. § 74.703(b) ("It shall be the responsibility of the licensee" of an LPTV station "to correct at its expense any condition of interference to the direct reception of the signal of any other TV broadcast analog station and [digital television] station operating on the same channel as that used by the [LPTV station] or an adjacent channel which occurs as a result of the operation of the [LPTV station]").

For example, the FCC quotes the 1982 LPTV order as having made "clear its intention 'to maintain the secondary spectrum priority of low power stations'" to the same extent now claimed by the Commission. FCC Br. 8 (quoting *An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 47 Fed. Reg. 21468, 21471 ¶ 17 (1982)). But the FCC brief's selective quotation obscures the much more limited, precise notion of "secondary" status that the 1982 order actually described: "Secondary spectrum priority has two aspects: Low power stations may not cause objectionable interference to *existing full service stations*, and low power stations must yield to facilitate increases of *existing full service stations* or to *new full service stations* where interference occurs. A similar policy holds true where land mobile services currently share primary use of some UHF spectrum with full service television." 47 Fed. Reg. at 21471 ¶ 17 (emphasis added).

In other words, the 1982 LPTV order stated that LPTV would have "secondary" interference status relative to existing and new full-power television broadcasters and "land mobile" service. *Id.* The 1982

order did not suggest that LPTV stations would have "secondary" status relative to *all other services*, and certainly not to the unlicensed services that the FCC today seeks to prioritize.

As with the FCC's exaggerated description of the Spectrum Act's "purpose," its portrayal of LPTV's secondary interference status is a caricature, a mistaken premise to the FCC's broader argument. Indeed, the "Argument" section of its brief makes similar attempts to justify the FCC's exaggerated notion of "secondary" status, and each effort displays the same tendency toward truncation and exaggeration. When the FCC quotes its 1988 statement that "we have emphasized repeatedly that low power television and television translator stations are a secondary service and, as such, subject to displacement without any attendant right to operate on other channels," FCC Br. 30 (quoting *In re Low Power Television and Television Translator Service*, 3 FCC Rcd. 4470, 4472 ¶ 14 (1988)), the brief fails to recognize that the 1988 order is once again speaking in terms of LPTV's secondary *interference* status, not LPTV's secondary "rights" *across the board*. *Id.* at 4471 ¶ 24.

The FCC also quotes its 2004 Digital Television Order, where the agency explained that "a primary wireless licensee maintains the right

to require that a secondary broadcast licensee immediately cease operations that cause actual interference to its operations." FCC Br. 29-30 (quoting *In re Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television*, 19 FCC Rcd. 19331, 19356 ¶ 75 (2004)). Again, this 2004 Order reflects LPTV's secondary *interference* status during migration to new channels, not secondary license "rights" in any broader sense; and the order makes clear that even with respect to interference, LPTV is "secondary" only to primary licensed services, not to unlicensed services. *Id.*[4]

[4] In the 2004 Order, when the Commission exercised discretion to auction then-TV Channels 52-59 in the so-called lower 700 MHz band, the FCC took care to ensure that ample spectrum would remain available to which LPTV stations could relocate, in channels 14-51 and lower. 19 FCC Rcd. at 19354 ¶ 68. It did so precisely in order to allow LPTV stations to continue operations as long as possible before moving while avoiding interference with new licensed wireless services: "We seek a balance for the resolution of the potential for interference conflicts that will neither unduly delay the rendering of 700 MHz wireless service, *nor result in the premature disruption or cessation of digital LPTV or TV translator service*." *Id.* at 19356 ¶ 74 (emphasis added). Congress in the Spectrum Act for this Incentive Auction did not authorize the FCC to do any differently now in auctioning a portion of the 600 MHz band, and indeed Congress instead codified an additional *safeguard* of LPTV spectrum rights with its Section 1452(b)(5) proviso.

In sum, LPTV's "secondary" status has always been limited to a specific set of obligations relative to specific licensees: LPTV is "secondary" to other "primary" licensees, but not to everything else, and only when interference conditions exist between the LPTV station and a primary licensee. By ascribing much broader significance to LPTV's "secondary" status, the FCC Brief's "Counterstatement" lays the second mistaken foundation to its merits argument: that LPTV's "secondary" status empowers the FCC to construct and execute the spectrum auction "reorganization" in such a way as to terminate LPTV station operations *en masse*, in order to make room for new unlicensed services—despite the Spectrum Act's express protection of LPTV's "spectrum usage rights." 47 U.S.C. § 1452(b)(5).

III. The FCC mischaracterizes Free Access's participation before the agency.

In addition to those two mischaracterizations of the legal and regulatory framework undergirding this case, the Counterstatement includes an outright falsehood regarding Petitioner Free Access's participation in the rulemaking proceedings. The FCC asserts that "Free Access submitted its reply comments more than one year past the comment deadline and a mere 10 days before the Commission adopted

the *Order*." FCC Br. 13 n.4 (citing Written *Ex Parte* Comments of Free Access & Broadcast Telemedia, LLC (May 5, 2014)).

This is demonstrably wrong. Free Access submitted its first, timely comments on the notice of proposed rulemaking more than a year before the *ex parte* letter the FCC cites. It filed comments on March 12, 2013 (JA ____), the deadline the FCC set for reply comments, JA ____ (FCC Order Expanding Comment Deadlines) (Nov. 29, 2012). Free Access filed these comments 15 months before the Commission released its order. JA ____ (Report & Order), not "one year past the comment deadline" as the agency now asserts. FCC Br. 13 n.4. Free Access followed these comments with a timely petition for reconsideration and nearly 30 submissions in the record.[5] In every respect, Free Access was not dilatory; it was an active participant throughout the FCC's proceedings.

[5] Free Access's 28 filings before the FCC are listed here, in the FCC's electronic docket: http://bit.ly/1TVQ1rN. It filed five timely comments and conforming *ex parte* documents in the record before the FCC adopted its First Report and Order on May 15, 2014.

ARGUMENT

I. The Court has jurisdiction to hear this case.

Free Access meets the statutory and constitutional requirements to invoke this Court's jurisdiction. The FCC does not dispute that Free Access meets the statutory requirement: it is a "party aggrieved" by the FCC orders under review. 28 U.S.C. § 2344. Nor does the FCC dispute the legal arguments and facts that Free Access presented in its opening brief to demonstrate constitutional standing.

Free Access offers two bases for its Article III standing, each of which is supported by the record and a declaration filed in this Court. Free Access invests in LPTV stations—specifically, it holds "firm, committed options for Free Access to buy the stations outright at any time and in Free Access's sole discretion." *See* Opening Br. 42 & Mallof Decl. ¶¶ 4-5.[6] Thus, as Free Access explains, the FCC orders' negative treatment of LPTV stations directly impairs the value of those purchase options, a direct economic injury that satisfies the requirement for

[6] The FCC asserts that "Free Access does not for the most part describe the nature of its investments," FCC Br. 23, but in fact Free Access's brief and the declaration attached to it explain plainly and specifically the nature of those options. *See* Opening Br. 42 & Mallof Decl. ¶¶ 4-5.

constitutional standing. Opening Br. 42-43 (citing *CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994)). The orders' harmful impact on LPTV stations also constrains Free Access's business decisions—specifically, its decisions whether and when to exercise those options to purchase stations—a second, independent injury sufficient for standing. *Id.* at 43 (citing *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518-19 (D.C. Cir. 2009)).[7]

The FCC does not challenge those factual statements, nor does it respond directly to either theory of standing—the economic impact injury, or the business decision injury. Instead of challenging Free Access's Article III standing, the FCC invokes the shareholder standing doctrine, a prudential doctrine which "prohibits shareholders from initiating actions to enforce the rights of the corporation" when the

[7] The FCC also states that Free Access "nowhere asserts that it has exercised any of those options." FCC Br. 24 n.6 (citing Maloof [*sic*] Decl. ¶ 5). In fact, the Mallof Declaration attached to the opening brief states that Free Access has *not* exercised the options, *see* Mallof Decl. ¶¶ 6-7, precisely because the FCC's orders render the exercise of those options uneconomical and imprudent, *id.* ¶¶ 7, 10, thus constraining Free Access's available business decisions.

corporation itself declines to do so. FCC Br. 23 (citing, *e.g.*, *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)).

The shareholder standing doctrine mentioned in *Franchise Tax* does not undercut Free Access's standing. Even setting aside this Court's observation that *Franchise Tax* evidently has never been applied to defeat a plaintiff's standing,[8] the FCC's invocation of "shareholder standing" faces a more fundamental problem: *Free Access is not a shareholder*. Petitioners' opening brief and declaration could not have been clearer on this point: Free Access holds direct *purchase options*, which it received in return for cash that Free Access paid to those stations. Opening Br. 42 & Mallof Decl. ¶¶ 4-5.

Because it is not a shareholder, Free Access's standing is not affected by a rule that "prohibits *shareholders* from initiating actions to enforce the rights of the corporation." *Franchise Tax*, 493 U.S. at 336 (emphasis added). A shareholder may well be an unsuitable plaintiff to

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[8] "We can find no Supreme Court decision applying the shareholder standing rule to uphold the dismissal of a party's law suit for want of 'prudential standing,' nor can we find a decision citing *Franchise Tax* for this general idea." *Gilardi v. HHS*, 733 F.3d 1208, 1230 (D.C. Cir. 2013), *rev'd on other grounds*, 134 S. Ct. 2902 (2014).

pursue a corporation's rights in a given case, when the law already trusts the corporate board of directors to ascertain and protect the corporation's interests. *See id.* (citing *Alcan Alum. Ltd. v. Tax Bd. of State of Cal.*, 860 F.2d 688, 693 (7th Cir. 1988)). But here, by contrast, Free Access's investments are not protected by boards of directors, which owe no fiduciary duties to non-shareholder Free Access. Instead, Free Access is left to defend its own independent interests, and to decide for itself whether and when to exercise its options to buy those stations. Opening Br. 42 & Mallof Decl. ¶¶ 4-6; *see also* Opening Br. 5-6, 13-14, 55-56.

Free Access has a direct interest in this case. It is not litigating simply to vindicate a third party's interests. It suffers actual injuries caused by the FCC's orders, and it must act on its own initiative to seek a judicial remedy for those injuries. It is not a shareholder. In other words, it has standing.[9]

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[9] Because Free Access has standing and the FCC cannot dispute that Free Access is a "party aggrieved" by the FCC's orders for purposes of the Hobbs Act, this Court has no need to consider whether Petitioner Word of God Fellowship, Inc. ("Word of God") separately satisfies applicable jurisdictional requirements. *Am. Library Ass'n v. FCC*, 406 F.3d 689, 697 (D.C. Cir. 2005). The FCC does not challenge Word of

(*footnote continued on next page*)

II. The FCC's orders unlawfully "alter the spectrum usage rights of low-power television stations."

A. The FCC's interpretation of the Spectrum Act renders Section 1452(b)(5) devoid of any substantive meaning, and suffers from still other fundamental flaws.

Section 1452(b)(5) of the Spectrum Act expressly and unambiguously prohibits the FCC from administering the spectrum auction's "reorganization" phase to "alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5). The FCC forthrightly concedes the devastating impact that its orders will have on myriad LPTV licensees—namely, that its refusal to include LPTV stations in the reorganization will force many LPTV stations to shut down, "result[ing] in some viewers losing the services of these stations," "strand[ing] the investments displaced [LPTV licensees] made in their existing facilities," and "caus[ing] displaced licensees that choose to move to a new channel to incur the cost of doing so." JA ____ [Report &

God's standing, but argues that Word of God is not a "party aggrieved" within the meaning of the Hobbs Act, because it did not file its own individualized comments in the agency proceedings. *See* FCC Br. 20 (citing *Simmons v. ICC*, 716 F.2d 40 (D.C. Cir. 1983)). Petitioners recognize that *Simmons* is binding precedent, but they reserve the right to challenge its construction of "party" aggrieved for purposes of 28 U.S.C. § 2344 and to urge this Court *en banc* to overrule that precedent.

Order ¶ 237], *quoted in* Opening Br. 28; *see also* Opening Br. 23-25, 28-32 (quoting FCC orders' descriptions of impact on LPTV). Yet the FCC argues that this would "not 'alter' the rights of LPTV stations because they "continue to have the same secondary status under the Spectrum Act as they have had for at least three decades." FCC Br. 17.

In these statements and others, the FCC presents its view of what LPTV licensees' rights are *not*. But nowhere does the FCC explain what LPTV licensees' rights *are*. Indeed, the FCC never actually concedes the existence of *any* rights held by LPTV stations, despite the fact that Section 1452(b)(5)—the statute at the center of this case—expressly protects "the spectrum usage rights of low-power television stations." Whatever "rights" LPTV stations might have, the FCC argues, they are inherently and categorically "secondary" to the other licensed and unlicensed services that are displacing the LPTV stations. FCC Br. 17.

This is a breathtaking distortion of "secondary" status, which is merely (i) a regulatory concept for *interference* purposes only, and (ii) applies only when an LPTV station is actually interfering with another licensed communications service. *See supra* at 6-11. And it is an excruciatingly narrow reading of Section 1452(b)(5)'s protection of LPTV

stations' "spectrum usage rights." The Commission is not interpreting Section 1452(b)(5) so much as refusing to interpret it, rendering the provision meaningless.

But the Spectrum Act's explicit, specific protection of LPTV licensees' "spectrum usage rights" must mean *something*. The Court should not allow the FCC to assume that Section 1452(b)(5) is simply "a tale [t]old by an idiot, full of sound and fury, signifying nothing." William Shakespeare, *Macbeth*, act V, sc. 5. By refusing to impute substantive content to Section 1452(b)(5), the FCC violates "the 'endlessly reiterated principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.'" *Murphy Exploration and Production Co. v. DOI*, 252 F.3d 473, 481 (D.C. Cir. 2001) (citations omitted); Opening Br. 53-54.

Petitioners, by contrast, have identified a panoply of spectrum usage rights retained by LPTV stations under federal law—both procedural rights (Opening Br. 46-47) and substantive rights (*id.* at 46), including LPTV licensees' well-established "renewal expectancy" (*id.* at 13-14). All of these rights are extinguished by the FCC's wholesale

liquidation of countless LPTV stations in the "reorganization" phase of the spectrum auction framework—which treats LPTV channel assignments as vacant, leaving LPTV stations to pursue whatever scarce spectrum remains (if any) *after* the forward auction closes and money changes hands.

And unlike the FCC's reading of the Spectrum Act, Petitioners' interpretation comports not only with the antisurplusage canon, but other core canons of construction as well. These were highlighted in the opening brief. Opening Br. 46-47 (plain language), 48-51 (structure), 51 (legislative history), 51-52 (elephants in mouseholes), 54-55 (constitutional avoidance).

As to the last on that list, constitutional avoidance, the FCC's brief responds only to a straw man, not to Petitioners' actual argument. The FCC states that its orders do not implicate LPTV stations' Fifth Amendment rights to just compensation for the taking of property because *licenses* are not property. FCC Br. 41. But that is not Petitioners' argument. *See* Opening Br. 55 & n.9. Rather, Petitioners argue that the FCC's orders implicate the Fifth Amendment by summarily extinguishing all economically beneficial or productive use of

the stations themselves, in which significant investments have been made at Congress's and the FCC's own encouragement. *Id.* at 55-56. LPTV licensees certainly have a property interest in the economic value of their *stations*, as do Free Access and others in the economic value of their options to purchase such stations outright, at Free Access's own unilateral discretion. The FCC's brief contains no response at all to Petitioners' argument that the FCC's uncompensated extinction of those property interests raises Fifth Amendment questions avoidable by an interpretation of the Spectrum Act that imputes substantive content to Section 1452(b)(5).

In sum, the Court must reject the FCC's view of the Spectrum Act, an approach that categorically denies *any* substantive meaning to Section 1452(b)(5). When Congress wrote into the Spectrum Act a provision forbidding the FCC from "alter[ing] the spectrum usage rights of low-power television stations," 47 U.S.C. § 1452(b)(5), Congress meant *something*. Yet the FCC is treating it as dead letter.

B. The FCC's misinterpretation of the Spectrum Act is rooted in the FCC's wildly overbroad view of the Act's "purpose."

The FCC's refusal to accord substantive meaning to Section 1452(b)(5) flows directly from its mischaracterization of Congress's "purpose" or "objective" in legislating the Spectrum Act. *See supra* at 3-6. Despite the FCC's assertions to the contrary (*e.g.*, FCC Br. 38-40), Congress nowhere directed the FCC to clear *as much spectrum as possible* for new licensed *and unlicensed* uses. Nor did Congress direct the FCC to "repack" the remaining full-power stations, after the reverse auction and before the forward auction, as tightly as possible.[10] These efforts to promote new licensed and unlicensed uses over licensed LPTV stations in the currently defined broadcast television band reflect the FCC's objectives, not Congress's. *See* Opening Br. 18-20 (describing the pre-Spectrum-Act *National Broadband Plan*).

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[10] "Repack" is a term employed not by Congress but by the FCC itself, in the notice and orders below. The term also appeared in the *National Broadband Plan* document prepared by FCC staff. *See* Remarks of Robert McDowell, FCC Commissioner, Before the Virginia Association of Broadcasters, 2010 WL 2547080 (June 25, 2010) ("Keep in mind that the commissioners did not vote on the Plan. Instead, it was the work product of a special team of staffers who toiled for an intense but relatively short period of time.").

The FCC's orders explicitly aim to clear spectrum for not just licensed uses, but also *unlicensed* uses. While the FCC's brief asserts that "the incentive auction provides a means for repurposing spectrum for *licensed* use," FCC Br. 34-35 (emphasis in original), the Order states to the contrary that "[i]n addition to repurposing UHF [*i.e.*, ultra high frequency] spectrum for new licensed uses, the rules we adopt in this Order will make a significant amount of spectrum available for *unlicensed* use, a large portion of it on a nationwide basis." JA ____ [Report & Order ¶ 8] (emphasis added); *see also id.* at ____, [¶¶ 22, 271]. The Commission reiterates this point, contradicting its brief, in other proceedings before this Court and elsewhere.[11] The order takes this

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[11] In another case pending before the Court, the FCC states that the Act "authorizes the FCC to conduct an incentive auction to encourage television broadcasters 'to relinquish . . . some or all of [their] licensed spectrum usage rights' and then reallocate that spectrum for other uses, *such as mobile broadband service*." FCC Opp. to Mot. for Stay Pending Review, *Latina Broadcasters of Daytona Beach, LLC v. FCC*, No. 16-1069, at 2-3 (D.C. Cir. filed Mar. 4, 2016) (emphasis added) (citing 47 U.S.C. §§ 309(j)(8)(G)(i) and 1452(a)(1)) [Doc. # 1602401].

The FCC also urges the Court to ignore the fact that the agency has proposed rules governing the choices available to LPTV stations displaced by the FCC's auction, explicitly prioritizing unlicensed uses over LPTV with respect to "vacant" channels. FCC Br. 36-38; JA ____ [Report & Order ¶ 269] (announcing the FCC's "inten[t]" to propose

(*footnote continued on next page*)

additional step not simply to preserve the viability of "guard bands" around licensed uses, but rather to promote unlicensed uses *per se*, which the FCC sees as serving "a wide range of consumer needs." *Id.* at ____ [¶ 8]. This, too, reflects not Congress's purposes but the FCC's, as originally outlined in the FCC staff's *National Broadband Plan*. *See*, *e.g.*, JA ____ [*National Broadband Plan* at 79]; *supra* at 5 n.2 (Rep. Walden's explanation that Congress did not authorize the FCC to prioritize unlicensed services over LPTV).

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such rules, to give "wireless microphones and unlicensed devices" priority over LPTV for a vacant channel). But even though that pending rulemaking is not under challenge in this case, the Court can take judicial notice of the FCC's proposed rules, especially when the FCC itself alluded to that proposal in the orders under review. *See* JA ____ [Report & Order ¶ 269].

To accept the FCC's insistence that the Court ignore its statements in other related rulemakings—which reiterate and exemplify the FCC's statements in the orders at issue on the central question before this Court—would condone an "administrative law shell game." *Cf. AT&T v. FCC*, 978 F.2d 727, 723 (D.C. Cir. 1992); Opening Br. at 73-74 ("The Commission played a shell game [which] means no appellate panel may review, in a single case, the full scope of the Commission's spectrum auction decisions and policies.").

C. The FCC's remaining efforts to justify its refusal to honor Section 1452(b)(5)'s limit on its authority are unavailing.

The FCC argues that this Court's decision in *NAB* justifies its mistreatment of LPTV stations. FCC Br. 28 (citing *Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165, 180 (D.C. Cir. 2015). But *NAB* does not justify, let alone command, the FCC's crabbed construction of the Act's LPTV spectrum usage rights provision. In fact, *NAB* did not involve Section 1452(b)(5) at all. In *NAB*, this Court observed that fill-in translators—a service entirely distinct from licensed LPTV service—are not "broadcast television licensees" as defined by 47 U.S.C. § 1401(6), and thus do not enjoy the statutory protection of their coverage areas as afforded to broadcast television licensees per 47 U.S.C. § 1452(b)(2). But the Court in *NAB* had no occasion to consider the question in *this* case: namely, the effect of the Act's separate, express protection of LPTV stations' "spectrum usage rights" by an altogether different statutory provision, 47 U.S.C. § 1452(b)(5).[12]

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[12] Similarly, the FCC asserts that if "Congress intended to preserve LPTV stations in the repacking process, it could have simply included them in the Act's preservation mandate." FCC Br. 39. This is a reference to 47 U.S.C. § 1452(b)(2), the subsection involved in *NAB*,

(*footnote continued on next page*)

The FCC also attempts to justify its policy by describing the protection of LPTV spectrum usage rights as impracticable, asserting that merely including LPTV stations in the reorganization stage would "increase the constraints on the repacking process and significantly curtail the Commission's ability to recover spectrum." FCC Br. 11. But the FCC offers no factual basis for such concerns. Instead of running an iteration of its repacking methodology (*see* JA ____-____ [Report & Order ¶¶ 113-119]) with LPTV stations included, to determine the precise extent to which including LPTV stations would decrease spectrum available for other uses, and then the impact of that change on the results of the subsequent forward auction, the FCC simply expects the Court and affected parties to accept its uncorroborated assertion at face value. The FCC, like other agencies, "has undoubted power to use predictive models but only so long as it explains the assumptions and methodology used in preparing the model and

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which gives full-power stations a right to "reasonable" preservation of "the coverage area and population served of each broadcast television licensee." But this is a red herring. While Congress did not give LPTV stations that same geographic coverage protection, it did give LPTV stations the altogether different protection as to "spectrum usage rights," in 47 U.S.C. § 1452(b)(5).

provides a complete analytic defense should the model be challenged." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1054 (D.C. Cir. 2001) (alterations and quotation marks omitted).

Similarly, the FCC overstates wildly the relief that Petitioners seek. Nowhere do Petitioners demand an "interpretation of the statute as *requiring* the Commission to protect LPTV stations from displacement." FCC Br. 17 (emphasis in original). LPTV stations may well be "displaced" under Section 1452(b), but they cannot be displaced simply to accommodate unlicensed uses. Nor can they be displaced and left without any new channel to call home, terminating the stations' right to use the broadcast spectrum on a basis other than harmful interference to a primary licensed service.

III. The FCC fails to identify any "steps the agency *has taken* to minimize the significant economic impact on small entities."

The Regulatory Flexibility Act (RFA) requires the FCC to do one of two things. It must certify that its order "will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). Or it must describe "the steps the agency has taken to minimize the significant impact on small entities

consistent with the stated objectives of applicable statutes." *Id.* § 604(a)(6); *see* Opening Br. 58-59.

The FCC declined the first choice; it could not certify that the order will not have a significant impact on a substantial number of small entities, precisely because it necessarily will have such impacts. FCC Br. 44; Opening Br. 60. And so the RFA required the FCC to describe the steps that it "has taken" to minimize those impacts. But the agency refused to do this, too.

The FCC (at 46-48) argues that it has satisfied this second requirement, but like the underlying orders themselves the FCC's brief cites no steps that the FCC "*has* taken" to minimize its impact on LPTV and other small businesses. Opening Br. 63-66. Instead, it alludes only to steps that the agency *may* take in the *future*, after refusing even to attempt to quantify the magnitude of the impact of its orders on LPTV and other small businesses.

For example, the Commission's brief states that it "established a procedure to allow LPTV stations that are displaced by reason of the auction the opportunity to submit a displacement application and propose a new operating channel," and to "explore engineering solutions

or agree on a settlement to resolve mutually exclusive displacement applications." FCC Br. 47. But this "procedure" merely alludes to steps that the FCC may undertake in the future, *after* the auction is complete, after funds have been distributed and new licensees lay claim to spectrum that long had been allocated to TV stations, with no indication of how much spectrum will be left available for LPTV, and thus how many stations might actually receive a post-auction reprieve from the FCC. JA ____-____ [Report & Order ¶¶ 656-67].

The FCC brief's list of steps it "has taken" includes yet another rulemaking that was only pending when the Commission undertook its Regulatory Flexibility Act analysis: the "Third Report & Order," which states the FCC's intention to "allow channel sharing among LPTV and TV translator stations"; to "extend[] the deadline for LPTV stations to transition from analog to digital"; and to "use special repacking software to help displaced LPTV stations identify new channels" in whatever remains of the now reduced broadcast television spectrum band. FCC Br. 47-48. But again, these were not steps that the FCC *had taken* at the time of its RFA analysis—they are steps the FCC *may* allow LPTV stations to take *in the future*.

Finally, the FCC failed either to provide "a quantifiable or numerical description of the effects of [its] proposed rule" or, alternatively, make a finding that "quantification is not practicable or reliable." *See* Opening Br. 62-63 (citing 5 U.S.C. § 607). The Commission's brief does not cite to any quantification, because none was conducted, as the FCC Chairman conceded. Opening Br. at 32 n.7 & 60-63. Consequently, the FCC "did not obtain data or analyze available data on the impact of the final rule on small entities, nor did [it] properly assess the impact the final rule would have on small entities." *Nat'l Ass'n of Psychiatric Health Sys. v. Shalala,* 120 F. Supp. 2d 33, 43 (D.D.C. 2000). Nor does the FCC explain why such quantification was impracticable. 5 U.S.C. § 607. Instead, its brief merely insists that quantification would "serve no purpose." FCC Br. 46. That is a far cry from actual impracticability. 5 U.S.C. § 607.

The Regulatory Flexibility Act's requirements are, indeed, "purely procedural." FCC Br. 42. But the FCC still must make a "reasonable, good-faith effort to carry out" the RFA's "mandate." *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001). The FCC's attempt to invoke steps it "will take" or "may take," instead of actions that it actually "has

taken" at the time of the orders' promulgation, falls far short of any reasonable view of the RFA's procedural requirements.

Even if the RFA had been written in terms of future mitigation, the Court and the public would have little reason to put stock in the FCC's assurances here. At every turn, the FCC has sought to construe LPTV stations' rights as narrowly as possible, to de-prioritize them beneath even *unlicensed* services, and to allow all other stakeholders in the auction framework to organize their own affairs and protect their own interests. Yet the FCC refuses to ascertain the number or geographic dispersion of LPTV licensees affected or the magnitude of financial or other harms imposed on the LPTV stations that will be forced to "go dark." Opening Br. 61. Given the FCC's approach, the Court and the public should take its assurances of future mitigation with at least a grain of salt.

CONCLUSION

The Court should vacate the FCC's orders, stay the auction, and remand with instructions to administer the Spectrum Act in a manner consistent with the Act's express protection for LPTV stations.

Respectfully submitted,

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March 7, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief contains 6,329 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

/s/ Adam J. White
March 7, 2016 Adam J. White

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

/s/ Adam J. White
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