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

BRIEF FOR PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1) and Fed. R. App. P. 26.1, the undersigned counsel certifies as follows:

(A) Parties and Amici. Petitioners are Free Access & Broadcast Telemedia, LLC, and Word of God Fellowship, Inc.

Respondents are the Federal Communications Commission ("FCC") and the United States of America.

(B) Rulings Under Review. The rulings under review are:

1. Report and Order, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 29 FCC Rcd. 6567 (rel. June 2, 2014), 79 Fed. Reg. 48442 (Aug. 15, 2014);

2. Second Order On Reconsideration, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* GN Docket No. 12-268 (rel. June 19, 2015), 80 Fed. Reg. 46824 (Aug. 6, 2015); and

3. All prior final orders and rules issued by the FCC in the proceeding captioned *In the Matter of Expanding the Economic and*

Innovative Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268.

(C) Related Cases. In *National Association of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015), this Court heard a petition for review challenging other aspects of one of the FCC orders at issue in this case. While the Court's opinion describes the general structure of the incentive spectrum auction challenged in this case, *NAB* did not involve the specific issues and subsequent FCC order and proceedings at issue here.

On December 22, 2015, three companies filed an emergency petition for writ of mandamus, asking this Court to require the FCC to act on the companies' petition for reconsideration of the FCC's "Second Order on Reconsideration." In an order issued December 30, 2015, the Court denied that relief, based on its expectation that the Commission would "rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016." Order, *In re The Videohouse, Inc., et al.*, No. 15-486 (D.C. Cir.).

Also pending before this Court are the consolidated petitions for review in *Mako Communications, LLC v. FCC*, Nos. 15-1264 & 15-1280. The FCC moved for consolidation of those two petitions and the current petition; on November 30, 2015, the Court issued an order that, in lieu of consolidation, directed all the petitions to "be argued on the same day and before the same panel[.]" *See* Order, Nov. 30, 2015 [Doc. 1585730].

/s/ Adam J White
January 11, 2016 Adam J. White

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rules 26.1 and 28(a)(1), Petitioners make the following disclosures:

Free Access & Broadcast Telemedia, LLC ("Free Access") has no parent companies, and no publicly-held company has a 10% or greater ownership interest (such as stock or partnership shares) in Free Access.

Word of God Fellowship, Inc. ("WOGF") has no parent companies, and no publicly-held company has a 10% or greater ownership interest (such as stock or partnership shares) in WOGF.

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REGULATORY MATERIALS

MISCELLANEOUS

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq*.
Commission	Federal Communications Commission
Communications Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*.
FCC	Federal Communications Commission
FRFA	Final Regulatory Flexibility Analysis
IRFA	Initial Regulatory Flexibility Analysis
LPTV	Low-Power Television
MHz	Megahertz
NPRM	Notice of Proposed Rulemaking
RFA	Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq*.
Spectrum 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
VHF	Very 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 15.7127. White spaces devices are

	formally known "as unlicensed Television Band Devices." *Id.* § 15.701.
WiFi	A digital communications service and associated devices operating in the unlicensed 2.4 GHz and 5 GHz spectrum bands in accordance with Part 15 of the FCC's Rules and the Institute of Electrical and Electronics Engineers' (IEEE) 802.11x suite of technical standards, often referred to as "wireless broadband"

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this challenge to orders of the Federal Communications Commission ("FCC" or "Commission") pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The final orders under review are the FCC's June 19, 2015 Second Order On Reconsideration [JA ____] and the underlying June 2, 2014 Report and Order [JA ____], both from GN Docket No. 12-268, *In the Matter of Expanding the Economic and Innovation Opportunities Spectrum Through Incentive Auctions*; *see* Rulings Under Review, *supra,* at i. Petitioners timely filed their petition for review. 28 U.S.C. § 2344.

STATEMENT OF THE ISSUES FOR REVIEW

1. The FCC's spectrum auction orders "repacking" television broadcast spectrum will eliminate the channels currently used by most LPTV stations and force a substantial number of LPTV licensees to shut down—a fact the FCC itself concedes. The issue presented is whether this contravenes the Spectrum Act, 47 U.S.C. § 1452(b)(5), which explicitly prohibits the FCC from reorganizing the spectrum in a way that would "alter the spectrum usage rights of low-power television stations."

2. Whether the FCC's initial and final regulatory flexibility determinations improperly failed to (a) analyze the orders' adverse economic impacts on low-power television stations as small entities, or (b) demonstrate that the Commission "has taken" steps to "minimize the significant economic impact" of its incentive auction rules on low-power television stations. 5 U.S.C. §§ 604(a), 605(b).

3. Whether the FCC's orders violate the APA as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), by exceeding "the scope of [the Commission's] lawful authority," or lacking "consideration of the relevant factors," including the significant costs of its action on LPTV stations.

STATUTES AND REGULATIONS

The FCC orders are reprinted in the Joint Appendix. Other applicable statutes and regulations are contained in Addendum B per Circuit Rule 28(a)(5).

STATEMENT OF THE CASE

This is a petition for review of a series of FCC orders from 2014 and 2015 that single out LPTV broadcasters for the unprecedented penalty of being summarily extinguished—losing their channels and

thus being forced to cease operations, perhaps permanently. These alarming consequences arise not from Congress's directives in the Spectrum Act of 2012, 47 U.S.C. § 1451 *et seq*. Rather, they stem from the Commission's own policy judgments in structuring the Act's mandatory spectrum auction and, indeed, in spite of the Act's express terms to the contrary.

The FCC authorized LPTV service more than 30 years ago as a key element of satisfying the Communications Act of 1934's long-standing broadcasting goals of diversity, localism and minority ownership. Consistent with that history, in the Spectrum Act Congress explicitly directed that the FCC's three-phase spectrum auction, currently scheduled to begin in late March of this year, must not "alter the spectrum usage rights of low-power television stations." *Id.* § 1452(b)(5).

In its orders the FCC determined, with only conclusory reasoning, that licensed LPTV stations have inferior legal rights to newer, unlicensed spectrum uses the agency now wants to promote as a policy matter, and that LPTV licensees' regulatory requirement not to cause interference with traditional, full-power broadcasters justified leaving

LPTV stations' channels and spectrum unprotected throughout the auction process. The Commission recognized repeatedly that this will result in so-called "displacement" of "many" LPTV stations and that few, if any, vacant channels will be available to LPTV stations once the auction concludes. Nonetheless, the Commission embraced the proposition—inconsistent with both the Spectrum Act and the basic principles of the Communications Act—that it may as a policy matter give preference over LPTV broadcast licensees to unlicensed services such as WiFi broadband and "white spaces" devices.

Petitioners Free Access Telemedia, LLC ("Free Access") and Word of God Fellowship, Inc. ("WOGF") own or have substantial investments in more than 80 LPTV stations, licensed by the FCC in markets nationwide, that will be materially impaired or destroyed altogether by the Commission's proposed actions. Free Access in particular urged the FCC to include LPTV in the auction, to quantify the adverse economic impact of the FCC's spectrum auction processes on LPTV owners (which the FCC concedes are small businesses), and to take concrete steps to minimize or mitigate the potentially fatal impact of the auction on LPTV service.

The FCC denied Free Access's petition for reconsideration in its *Second Order on Reconsideration*, 30 FCC Rcd. at 6746 [JA ____]. Joined by WOGF, Free Access now asks the Court to vacate and remand the FCC's orders establishing the agency's spectrum auction.

STATEMENT OF FACTS

This case challenges the FCC's mistreatment of LPTV stations in the spectrum auction and reorganization framework promulgated by the Commission. Thus, before describing the FCC's spectrum reorganization process, we begin with a basic description of LPTV stations, the well-established standards for their licensing under the Communications Act and precedent, and then the Spectrum Act.

I. Low-Power Television (LPTV) Stations: An Overview

Low-power television is a broadcast service that provides an important "source of diverse and local television programming . . . in rural and remote locations." JA ____ [NPRM ¶ 358]. In both "rural areas [and] individual communities within larger urban areas," LPTV "offers programming tailored to the interests of viewers in small localized areas in a less expensive and more flexible way than traditional full-service/power TV stations." FCC, *Consumer Guide: Low-Power*

Television (LPTV) Service (Nov. 7, 2015).[1] LPTV service "has created opportunities for new entry into television broadcasting, provided a means of local self-expression, and permitted fuller use of the broadcast spectrum." *Id.*

The FCC established modern LPTV service to meet "large unsatisfied demand for television service" in rural and urban areas alike, and celebrated that step as an "occasion for assuring enhanced diversity of ownership and of viewpoints in television broadcasting." *In re 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, 48, 77 (1980) ("1980 NPRM").

The FCC estimates there currently are more than 1,900 licensed LPTV stations. FCC, News Release, *Broadcast Station Totals as of September 30, 2015* (Oct. 9, 2015).[2] The stations are typically small businesses, "provid[ing] substantial first-time ownership oppor-

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[1] Available at https://www.fcc.gov/consumers/guides/low-power-television-lptv-service.

[2] Available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-335798A1.pdf.

tunities[.]" *In re Review of the Commission's Rules Governing the Low Power Television Service*, 9 FCC Rcd. 2555, 2555 (1994).

LPTV service represents more than just additional channels for consumers. "In many cases, LPTV stations may be the *only* television station in an area providing local news, weather, and public affairs programming." *In re Establishment of a Class A Television Service*, 15 FCC Rcd. 6355, 6357-58 (2000) (emphasis added). And "[e]ven in some well-served markets, LPTV stations may provide the only local service," offering "niche" programming, "often locally produced, to residents of specific ethnic, racial, or special interest communities." *Id.* at 6358.

The FCC has often acknowledged that "LPTV stations are operated by diverse groups, high school[s] and colleges, churches and religious groups, local governments, large and small businesses and individual citizens." FCC, *Fact Sheet: Low Power Television* (Nov. 2001).[3] The FCC estimates that 10 percent of LPTV stations are owned by persons of Hispanic or Latino ethnicity, and nearly 3½ percent are owned by members of other racial and ethnic minorities. *In re 2014*

[3] Available at http://transition.fcc.gov/mb/video/files/LPTVFactSheet.html.

Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 29 FCC Rcd. 7835, 7844 (2014).

As their name suggests, LPTV stations transmit at lower power levels than full-power stations. As a result, LPTV stations typically serve smaller geographic regions than full-power broadcasters. That may seem like a curse, but in fact is a blessing: because LPTV stations "serve much smaller geographic regions than full-service stations," they "can provide service to areas where a higher power station cannot be accommodated." *In re 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*, 19 FCC Rcd. 19331, 19333 (2004). In short, LPTV fills "gaps" in a geographic region's spectrum that are too small to accommodate full-power stations' larger broadcast footprints. *Salzer v. FCC*, 778 F.2d 869, 872 (D.C. Cir. 1985).

II. Statutory and Regulatory Background

A. LPTV Licenses—Regulatory and Legislative History

Initially, low-power broadcasters "were permitted only to retransmit the signals of high power stations." *Salzer*, 778 F.2d at 872. But in 1982 "the FCC created a new service and authorized LPTV licensees to originate their own programming." *Id.*

The Commission established LPTV as a "secondary" communications service. LPTV licensees are secondary to full-power broadcasters in the same geographic region in that LPTV stations must not cause interference with full-power broadcasts. "Secondary status means that low power stations may not create objectionable interference to full service television stations. . . . A low power station causing interference to a full service station . . . must correct the problem or cease operation." *In re Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 48 Fed. Reg. 21478, 21479 (1983).

By the same token, LPTV stations' relatively fewer rights (compared with full-power stations) were matched with relatively lighter regulatory and technical requirements in order to encourage

LPTV stations to quickly begin service and to operate affordably. *See* 1980 NPRM, 82 F.C.C.2d at 490-50.

Over the years, the Commission took further steps to simplify the licensing process and incentivize LPTV deployment. For instance, in 1994 it lowered the standard governing LPTV license applications; instead of requiring applications to be "letter perfect," the FCC would require only that applications be "substantially complete" in order to begin agency processing. *In re Review of the Commission's Rules Governing the Low Power Television Service*, 9 FCC Rcd. 2555, 2555-57 (1994).

Congress, too, has encouraged the development of (and thus investment in) LPTV stations. For example, the Cable Television Consumer Protection and Competition Act of 1992 (commonly known as the "Cable Act") imposed "must carry" obligations for LPTV stations upon cable television systems. Pub. L. No. 102-385 § 4, 106 Stat. 1460, 1471 (1992). And in 2005, Congress amended a "firm deadline" for television broadcasters moving to digital technology to cover only "full-power" stations instead of all stations (full-power and low-power alike) with "television broadcast license[s]." Pub. L. No. 109-171 § 3002(a), 120

Stat. 4, 21 (2006). The same Act appropriated $10 million to compensate LPTV stations and other non-full-power broadcasters for the costs of transitioning from analog to digital transmission, and another $65 million to upgrade LPTV stations in rural communities. *Id.* §§ 3008-09.

B. LPTV Stations—Current Regulatory Framework

The FCC regulates LPTV stations through Subpart G of its Part 74 regulations. 47 C.F.R. §§ 74.701-74.798; *see id.* § 74.701(f) (defining "Low power TV station").

The FCC's rules direct LPTV license applicants to "endeavor to select a channel on which its operation is not likely to cause interference" and currently prohibit multiple stations from sharing channels. *Id.* § 74.702(a). They authorize the LPTV station to select "[a]ny one of the 12 standard VHF Channels (2 to 13 inclusive)" or "[a]ny one of the UHF Channels, from 14 to 69 inclusive," except channel 37. *Id.* §§ 74.702(a)(1)-(2); *see id.* § 74.786 (more limited range of channel assignments for digital broadcasting).

But while LPTV licenses are "secondary" to full-power stations and other specifically defined services for interference purposes, they are not "secondary" to the rest of the broadcasting universe at large.

"The TV services for which this spectrum is allocated on primary and secondary bases are important media for the provision of news, information, and entertainment that *warrant priority over those unlicensed broadband devices*." *In re Digital Television Distributed Transmission System Technologies*, 23 FCC Rcd. 16731, 16743 (2008) (emphasis added). As a licensed service, LPTV is primary relative to all unlicensed services, such as WiFi broadband, "white spaces" services and other "Part 15" devices (47 C.F.R. § 15.1 *et seq.*). Unlicensed services are prohibited from causing harmful interference to licensed services. 47 C.F.R. § 15.5(b).

C. The Communications Act of 1934 and Telecommunications Act of 1996

The Communications Act authorizes the FCC to issue licenses in the public interest—*i.e.*, for "public convenience, interest, or necessity." 47 U.S.C. § 307. When a licensee applies to renew its license, the prior license remains in effect while the renewal application is pending. *Id.* § 307(c)(3). A license protects the service's operator from harmful interference by unlicensed services: the Act prohibits any person from "willfully or maliciously interfere[ing] with or caus[ing] interference to

any radio communications of any station licensed or authorized by or under this chapter." *Id.* § 333.

Crucially, while the FCC can revoke licenses, it may do so only pursuant to the procedures set by Congress in the Act, which safeguard the licensee's rights and assign the burden of proof to the agency. *Id.* § 312. Congress left the FCC some discretion to fashion its proceedings, but only "so long, of course, as [the Commission] observes the basic requirements designed for the protection of private as well as public interest." *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 283 (1949) (quotation mark omitted).

In light of this legal structure and the FCC's practical approach to broadcast license termination—an exceptional and extremely rare sanction—licensees have a well-established "renewal expectancy." Peter W. Huber *et al.*, 2 FEDERAL TELECOMMUNICATIONS LAW § 10.3.1 (2d ed. 2015). Licenses are routinely renewed "upon a largely pro forma demonstration that the renewal applicant (1) has provided 'substantial' service during the past license term and (2) has substantially complied with applicable FCC rules and policies and the Communications Act, as amended." *Id.* As the Supreme Court explained, "both the Commission

and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectancy' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause." *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 805 (1978) (alterations omitted) (quoting *Greater Boston Tele. Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970)).

This renewal expectancy is in the public interest precisely because it dispels regulatory uncertainty that would impede investment in broadcasting. "Licensees should be encouraged through the likelihood of renewal to make investments to ensure quality service." *Cent. Fla. Enter., Inc. v. FCC*, 683 F.2d 503, 507 (D.C. Cir. 1982). Congress recodified that broadcasting renewal expectancy in the Telecommunications Act of 1996. 47 U.S.C. § 309(k); *see* Huber, *supra*, at § 10.3.1.

D. The Spectrum Act of 2012

In 2012 Congress passed the Spectrum Act, specifying a three-phase process for the FCC to reclaim spectrum voluntarily from broadcasters and make it available for new uses. Pub. L. No. 112-96, Tit. VI §§ 6401-6414, 126 Stat. 156, 222-237 (2012). Congress prescribed an approach comprising (i) a "reverse auction" to incentivize broadcast

television licensees to sell their spectrum rights back to the FCC; (ii) a "reorganization" of broadcast TV spectrum to reassign channels and reallocate portions of the spectrum; and (iii) a "forward auction" to assign new licenses within the newly reorganized broadcast bands. *See Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165, 168-69 (D.C. Cir. 2015) ("*NAB*").

1. Reverse Auction

Congress directed the FCC to conduct a "reverse auction" to "determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights[.]" 47 U.S.C. § 1452(a)(1).

In this provision, "broadcast television licensee" is a new term: the Spectrum Act defines "broadcast television licensee" as either "a full-power television station" or a "low-power television station that has been accorded primary status as a Class A television licensee under [FCC regulations]." *Id.* § 1401(6). Participation by these stations is entirely "voluntary." *Id.* § 1452(a)(1).

2. Reorganization

Next, "for purposes of making available spectrum to carry out the forward auction," the Spectrum Act directs the FCC to "evaluate the broadcast television spectrum (including spectrum made available through the reverse auction . . .)." *Id.* § 1452(b)(1)(A). It further empowers the FCC to "make such reassignments of television channels as the Commission considers appropriate" and "reallocate such portions of the spectrum as the Commission determines are available for reallocation." *Id.* § 1452(b)(1)(B)(i)-(ii). Notably, those directives are stated in the broader terms of "television channels" and "spectrum," not the newly defined, narrower phrase "broadcast television licensee." *Id.* § 1452(b)(1).

In undertaking this reorganization, the FCC is subject to specific limits. Several pertain only to "broadcast television licensees," but another applies expressly to LPTV stations.

As to broadcast television, the Spectrum Act prescribes several protections. First, in determining channel reassignments or spectrum reallocations, the FCC "shall make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television

licensee . . . " *Id.* § 1452(b)(2); *see NAB*, 789 F.3d at 170-76. Second, the Act forbids the FCC from "involuntarily reassign[ing]" a broadcast television licensee from, *inter alia*, a UHF channel to a VHF channel. 47 U.S.C. § 1452(b)(3). And third, the Act directs the FCC to "reimburse costs reasonably incurred by" broadcast television licensees reassigned to new channels. *Id.* § 1452(b)(4)(A).

But LPTV stations did not go unprotected. Quite the contrary: Congress gave LPTV stations their own specific, express protection in the reorganization process:

> LOW-POWER TELEVISION USAGE RIGHTS.—Nothing in this subsection [*i.e.*, 47 U.S.C. § 1452(b)] shall be construed to alter the spectrum usage rights of low-power television stations.

Id. § 1452(b)(5). That statutory protection gives rise to the primary legal issue in this case.

3. Forward Auction

As its third phase, the Spectrum Act directs the FCC to "conduct a forward auction" in which the Commission "assigns licenses for the use of the spectrum that the Commission reallocates under [the reorganization subsection]." *Id.* § 1452(c)(1)(A) (citing *id.* § 1452(b)(1)(B)(ii)). If the proceeds from this auction do not cover the money owed to the

licensees who relinquished their spectrum rights in the reverse auction, plus administrative costs and the channel relocation reimbursements owed to broadcast television licensees, then the forward auction is cancelled and no spectrum reorganization may occur. *Id.* § 1452(c)(2).

4. Timing

Congress provided that the FCC "may" conduct the reverse auction, reorganization, and forward auction "on a contemporaneous basis." *Id.* § 1452(f)(1). But it required the FCC to give effect to the results of all three parts as simultaneously as possible: "no reassignments or reallocations . . . shall become effective until the completion of the reverse auction . . . and the forward auction . . . and, to the extent practicable, all such reassignments and reallocations shall become effective simultaneously." *Id.* § 1452(f)(2). The FCC has until the end of fiscal year 2022 to carry out the forward auction. *Id.* § 1452(f)(3).

III. The FCC's "National Broadband Plan" and Spectrum Auction Orders

A. *National Broadband Plan*

In 2010, the FCC published its "*National Broadband Plan*," a set of wide-ranging policy recommendations on subjects from "Maximizing

Health IT Utilization" to "Closing the Broadband Availability Gap." FCC, *Connecting America: The National Broadband Plan* (2010).[4]

The plan announced the FCC's goal of "mak[ing] 500 megahertz newly available for broadband use within the next 10 years[.]" *Id.* at 84. But it recognized that this would be easier said than done: "It means working within the authority of the FCC or [National Telecommunications and Information Administration] to remove legacy constraints that limit the usefulness of a band for appropriate broadband services." *Id.* at 85. The FCC proposed that "the most expedient path to repurposing spectrum to broadband may be to use incentive auctions," *id.*, recommending that it "initiate a rulemaking proceeding to reallocate 120 megahertz from the broadcast television (TV) bands[.]" *Id.* at 88.

Yet the Commission recognized that reallocating TV broadcasting would implicate many services, including LPTV: this policy shift would require it to "weigh the impact on consumers, the public interest, and the various services that share this spectrum, *including low-power TV*,

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[4] Available at https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

wireless microphones and TV white space devices." *Id.* at 88-89 (emphasis added).

Ultimately, the FCC recommended that it could "repack" channel assignments "more efficiently to fit current stations with existing 6 megahertz licenses into fewer total channels, thus freeing spectrum for reallocation to broadband use." *Id.* at 89. Acknowledging that the Communications Act as amended through 2010 did not empower the FCC to conduct such an auction, the *National Broadband Plan* called upon Congress to "expan[d] the FCC's authority to enable it to conduct incentive auctions in which incumbent licensees may relinquish rights in spectrum assignments to other parties or to the FCC." *Id.* at 81.

B. Notice of Proposed Rulemaking

Six months after the Spectrum Act, the FCC issued a notice of proposed rulemaking (or "NPRM") to carry out the incentive spectrum auction. JA ___.

1. Reverse Auction

At the outset, the NPRM suggested that "[t]he Spectrum Act makes full power and Class A broadcast television licensees eligible to participate in the reverse auction, but not low power television

stations." JA ____ (footnotes omitted) [NPRM ¶ 73]. Yet near the end of its analysis, the Commission noted that, "[a]lternatively, the Commission *could* allow low power television stations to participate in the reverse auction," but indicated that such an approach "would have no practical use" in light of the Commission's further view (described *infra* at 23-26) that "low power television stations do not have to be protected in" the subsequent reorganization process. JA ____ [NPRM Appx. B ¶ 71] (emphasis added).

Ultimately, the Commission elected not to include LPTV stations in the reverse auction, reasoning that their exclusion "is consistent with our rules" that make full-power and Class A stations "primary" to LPTV stations, and also consistent with the Commission's characterization of the Spectrum Act as "neither mandat[ing] protection of low power television stations during the repacking process nor [mandating] eligibility for reimbursement [of channel reassignment costs]." JA ____ [NPRM ¶ 74].

2. "Repacking"

Next, the FCC's proposed rules characterized as "repacking" the Spectrum Act's framework for "reorganizing the broadcast television

bands so that the television stations that remain on the air following the broadcast television spectrum incentive auctions occupy a smaller portion of the UHF band, allowing the Commission to reconfigure a portion of the UHF band into contiguous blocks of spectrum for flexible use." JA ____ [NPRM ¶ 91]. The FCC explained that this so-called "repacking" process would need to satisfy the Spectrum Act's requirement to "make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee." JA ____ [NPRM ¶ 98] (citing 47 U.S.C. § 1452(b)(2)).

But the FCC also concluded that the Spectrum Act allowed the Commission to exclude LPTV stations from its "repacking" process. JA ____ [NPRM ¶ 98] ("As an initial matter, we interpret [47 U.S.C. § 1452(b)(2)] to apply to full-power and Class A television stations only."); JA ____ [NPRM ¶ 118] ("[W]e do not propose to extend protection in the repacking process to low power and translator stations.").

3. Forward Auction

The FCC proposed to create "a band plan from relinquished broadcast spectrum usage rights," which it called the "600 MHz band,"

and to repurpose this new spectrum band for fixed and mobile broadband uses. JA ____ [NPRM ¶ 123]. The Commission believed it would be difficult to describe such a band in advance of the reverse auction and repack because it "will not know in advance the amount of spectrum we can make available in the forward auction, the specific frequencies that will be available and, perhaps, the geographic locations of such frequencies." *Id.* Thus, the FCC proposed a broadband downlink band that would be consistent nationwide, "while allowing variations in the amount of uplink spectrum available in any geographic area." JA ____ [NPRM ¶ 124]. The NPRM explained the technical parameters of this band plan in greater detail, but for purposes of this appeal the material point is that the proposed plan would repurpose a large swath of spectrum from licensed television (including LPTV) usage to wireless broadband and unlicensed services, beginning with channel 51 and moving downward to lower channel numbers. *See*, *e.g.*, JA ____, ____ [NPRM ¶¶ 126, 175].

4. Treatment of LPTV

In a section of the proposal titled "Post Auction Issues," JA ____ [NPRM ¶ 307], the FCC reiterated its determination that LPTV

stations would be excluded not just from the voluntary reverse auction but also the "repacking" process, thereby exposing LPTV stations to the risk of losing their channels. Many LPTV stations are likely to find, after the incentive auction and "repack," that their existing channels have been eliminated and there is no space in the limited amount of remaining spectrum allocated to television broadcasting for the stations.

The Commission's reasoning, set forth in full below, was based on its revised view of LPTV's "secondary" status:

> We recognize that low power television and translator stations will be impacted by the broadcast television spectrum incentive auction. Because low power television and translator facilities have only secondary interference protection, we propose in [the "repacking" framework] that full power and Class A television stations will be assigned new channels in the broadcast television spectrum reorganization without regard to whether such channel assignments, or the modified facilities required to implement service on them, would interfere with existing low power television and translator facilities. Where such interference exists, or where an existing low power television or translator station would cause interference to a repacked "primary" status station, *the low power television or translator station will be "displaced" and will either have to relocate to a new channel that does not cause interference or else discontinue operations altogether*. Only a limited number of available channels may exist following the repacking process, limiting the relocation

> options available to displaced low power television . . . stations.

JA ____ [NPRM ¶ 358] (emphasis added).[5]

Having proposed to bar LPTV stations from the "repack" and auctions, the FCC stated that such stations would be left to seek a remedy only after the forward auction, in what it calls a "displacement" process. *E.g.*, JA ____-____ [NPRM ¶¶ 358-61]. While Congress had not used this term—"displace," or "displacement"—in the Spectrum Act, the FCC employed it to describe the situation in which many LPTV stations, forced to vacate their licensed channels due to the FCC's "repack" and forward auction, would need either to obtain new channel assignments or shut down.

The Commission invited comment on alternatives to offer "displaced" LPTV stations (including "voluntary channel sharing"), and the circumstances in which LPTV stations could file post-auction "displacement applications" to move to new channels. JA ____ [NPRM

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[5] *Accord,* JA ____ [NPRM Appx. B ¶ 30] ("[L]ow power television . . . may be greatly impacted by repacking. Because they have only secondary interference protection rights, LPTVs will . . . not be protected during repacking. *Many stations will be displaced from their current operating channel.*" (emphasis added)).

¶ 359]. Further recognizing that scarce post-auction spectrum may leave too many LPTV stations vying for too few remaining channels, the FCC also invited comment on how to choose among "displaced" LPTV stations. JA ____ [NPRM ¶ 361].

C. Report and Order

In June 2014, the Commission issued a Report and Order promulgating its incentive spectrum auction rules. 29 FCC Rcd. 6567 (2014) [JA ____] ("Report & Order"). The Report and Order reaffirmed the FCC's basic legal interpretations and policy judgments set forth in the NPRM. The Report and Order also included the FCC's required Final Regulatory Flexibility Analysis ("FRFA"), and was accompanied by the dissents of Commissioners Pai and O'Rielly. While the FCC stated, at a high level of generality, that its approach embodies the "three major pieces" specified by Congress—the reverse auction, reorganization, and forward auction, *see* JA ____ [Report & Order Appx. B ¶ 3]—the details of the FCC's final rule reflected the same problems found in its proposal.

1. Spectrum Auction Structure

The FCC adopted a 600 MHz Band Plan, in which spectrum for wireless broadband and other unlicensed uses would begin at channel 51 (698 MHz) and range to lower channel numbers, toward channel 37, as necessary. JA ____ [Report & Order ¶ 45]. The FCC will use this plan nationwide wherever sufficient spectrum is available; where spectrum is insufficient the FCC will offer "fewer blocks, or impaired blocks." *Id.*

Second, with respect to so-called "repacking," the Commission identified "which broadcast facilities we must make all reasonable efforts to preserve in the repacking process, as well as those we elect to protect as a matter of discretion." JA ____ [Report & Order ¶ 183]. The FCC chose to include LPTV stations in neither category, asserting simply that "the scope of mandatory protection under [47 U.S.C. § 1452(b)(2)], which is limited to 'broadcast televisions licensees,' defined by the Spectrum Act as full power and Class A stations only, excludes LPTV" stations. JA ____ [Report & Order ¶ 185]. The Commission "decline[d] to extend repacking protection to these stations," because it deemed the loss of LPTV stations to be "outweighed by the detrimental impact that protecting LPTV . . . stations would have on

the repacking process and on the success of the incentive auction." JA ____ [Report & Order ¶ 237].

With respect to the costs of this approach, the FCC conceded that "our decision will result in some viewers losing the services of these stations, may strand the investments displaced [LPTV licensees] have made in their existing facilities, and may cause displaced licensees that choose to move to a new channel to incur the cost of doing so." *Id.*; *see* JA ____ [Report & Order Appx. B ¶ 9] ("[LPTV] stations have only secondary interference protection rights and will not be protected during repacking. Many of these stations may be displaced from their current operating channel.").

The FCC attempted again to justify its negative treatment of LPTV stations by arguing that to include them in the so-called repack "would increase the number of constraints on the repacking process significantly, and severely limit our recovery of spectrum to carry out the forward auction, thereby frustrating the purposes of the Spectrum Act." JA ____ [Report & Order ¶ 241]. The FCC further asserted that although LPTV station operators "have made investments in their facilities, they have done so with 'explicit, full and clear prior notice

that operation in [the LPTV service] entails the risk of displacement.'" *Id.* The FCC summarily rejected the argument that its actions constituted a "taking" of spectrum usage rights or the value of LPTV licenses under the Fifth Amendment. JA ____ [Report & Order ¶ 240 & n.743].

As in the underlying NPRM, the Report & Order refused to include LPTV stations in its "repacking" process despite the Spectrum Act's express provision that "[n]othing in this subsection"—*i.e.*, the Spectrum Act's "reorganization" provisions—"shall be construed to alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5). Responding to comments, the FCC stated that "[t]his provision simply clarifies the meaning and scope of [47 U.S.C. § 1452]; *it does not limit the Commission's spectrum management authority*." JA ____ (Report & Order ¶ 239) (emphasis added).

"In any case," the FCC added, "our decision not to protect LPTV . . . stations when we repack full power television stations does not 'alter' their spectrum usage rights," because LPTV stations "are secondary to full power television stations." *Id.* The Commission did not explain how LPTV's "secondary" status for *interference* purposes

justified the FCC eliminating LPTV licensees' channels and why the so-called "displacement" of many LPTV stations, for the benefit of unlicensed services, was not an alteration of their spectrum rights under Section 1452(b)(5).

The Report and Order also described how LPTV stations frozen out of the voluntary reverse auction and "repack" would eventually be treated in the so-called "displacement" process. The FCC recognized again that the administrative record "demonstrates the potential for a significant number of LPTV . . . stations to be displaced as a result of the auction and repacking process." JA ____ [Report & Order ¶ 657] (emphasis added); JA ____ [Report & Order App. B ¶¶ 48-50].

Instead of including LPTV stations in its repacking process, the FCC's Report and Order declared that it would "open a filing window allowing displaced LPTV . . . stations to submit displacement applications after the repacking process becomes effective." JA ____ [Report & Order ¶ 656]. But the "displacement" process would not begin until after the forward auction and the repack are concluded: the FCC will open this window only "*after* primary stations relocating to new channels have submitted their construction permit applications and

have had an opportunity to request alternate channels or expanded facilities." JA ____-____ [Report & Order ¶¶ 656-57] (emphasis added).

The Report & Order announced the FCC's intention to initiate a separate rulemaking "to consider additional measures that may help alleviate the consequences of LPTV . . . station displacements resulting from the incentive auction and the repacking process[.]" JA ____ [Report & Order ¶ 664].

2. Regulatory Flexibility Analysis

The 2014 Report and Order included, as Appendix B, the Commission's Final Regulatory Flexibility Analysis, or "FRFA," pursuant to 5 U.S.C. § 603. The FRFA likewise recognized that LPTV stations "may be impacted by repacking" and that "[m]any of these stations may be displaced from their current operating channel." JA ____ (Appx. B ¶ 9). Yet neither the FCC's Initial Regulatory Flexibility Analysis nor its Final Regulatory Flexibility Analysis included any systematic modeling or data analysis of the financial, regulatory and administrative impact of "displacement" on LPTV stations.[6] The FCC

[6] The FCC incorrectly stated that "[n]o commenters directly responded to the [Initial Regulatory Flexibility Analysis ('IFRA')]." JA ____ (Appx.

(*footnote continued on next page*)

disregarded these impacts even after it presumed that all LPTV stations "qualify as small entities" for Regulatory Flexibility Act purposes. JA ___ (App. B ¶ 18). Indeed, FCC Chairman Wheeler conceded that "we have not systematically analyzed the potential displacement impact on [LPTV] stations" and that LPTV stations have not been included in the FCC's "auction simulations or repacking analyses."[7]

The FRFA not only failed to quantify the adverse impact of the spectrum auction rules on LPTV licensees as small entities, but also steps the agency "has taken" to "minimize the significant economic impact" of its incentive auction rules, including the "repack," on LPTV stations as required by 5 U.S.C. § 604(a)(6). Instead, the Commission stated that it "understands the potential impact of the incentive auction on LPTV . . . stations, among others, and *will* take steps to mitigate

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B ¶ 13). In fact, Free Access responded directly to the IRFA, and has repeatedly urged that the FCC correct the record. *E.g.,* JA ____ [Mot. to Reopen the Record in the Third Notice of Proposed Rulemaking, MB Docket No. 03-185, at 8 (Nov. 11, 2015)].

[7] JA ____ [Notice of *Ex Parte* Presentations, MB Docket No. 03-185, at 2 & Attach. C (Nov. 25, 2015) (reprinting letter of Chairman Wheeler to Congress)].

such impact." JA ____ (App. B, ¶ 56) (emphasis added). Those proposals were released several months later in a new notice of proposed rulemaking, and another final order (not directly at issue in this petition for review), which we further describe below.

3. Commissioner Pai's and O'Rielly's Dissents

Commissioner Pai dissented. He criticized the FCC's treatment of LPTV stations (and TV translator stations, a similar secondary-licensed service) for failing to do "more to mitigate [the rules'] impact," failing even to "give a preference to [LPTV and TV translator] applicants providing a community with its only local, over-the-air television service." JA ____ [Pai Dissent at Part II.C].

"As a result," he concluded, "there is a greater risk that some Americans will be left without *any* over-the-air television service after the incentive auction. This is wrong. As is too often the case, rural Americans will be left behind." *Id.* (emphasis in original).

Commissioner O'Rielly's dissent did not refer to LPTV. JA ____.

D. Second Order on Reconsideration

In June 2015, in response to petitions for reconsideration by Free Access and others, the FCC adopted the *Second Order on Recon-*

sideration, 30 FCC Rcd. 6746 (2015) [JA ____] ("Second Order"). The FCC reiterated that LPTV stations would not be included in the reverse auction, and rejected arguments that its Regulatory Flexibility Act analysis should have included "an independent analysis of the potential economic impact on LPTV stations of either granting or denying them eligibility to participate." JA ____-____ [Second Order ¶¶ 145-46].

Similarly, the FCC once again refused to include LPTV stations in the so-called "repacking" process, asserting that 47 U.S.C. §1452(b)(5)'s protection of LPTV spectrum usage rights is merely "a rule of statutory construction, not a limit on the Commission's authority." JA ____ [Second Order ¶ 68].

E. Subsequent FCC Developments

Three days before the Second Order, the FCC issued a notice of proposed rulemaking in the same docket (GN Docket No. 12-268) and in a new docket, regarding the preservation of "vacant channels" for use by unlicensed devices. The FCC proposed that LPTV stations applying for a new license must "demonstrate that their proposed new, displacement, or modified facilities would not eliminate the last vacant UHF television channel for use by white space devices and wireless

microphones in an area." *In re Amendment of Parts 15, 73, and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel In the UHF Television Band for Use by White Space Devices and Wireless Microphones*, 30 FCC Rcd. 6711, 6712 (2015) ("*Vacant Channel NPRM*"); *see id.* at 6717. Neither the *Vacant Channel NPRM* nor the *Second Order On Reconsideration* attempted to reconcile its policy with LPTV stations' priority over unlicensed services such as white space devices and wireless microphones. 47 C.F.R. § 15.5(b)-(c).

Finally, shortly before this brief was filed, the FCC announced its adoption of a "Third Channel Sharing Report & Order," for post-auction "channel sharing" among LPTV and TV translator licensees to share a single 6 megahertz-wide TV channel each licensee previously held exclusively, and to extend again the deadline for LPTV stations' transition from analog to digital, only if there is spectrum for the licensee to utilize. The FCC also included a "Fourth Notice of Proposed Rulemaking" that would similarly allow "channel sharing" between one or more LPTV licensees and a full-power or Class A station on a single 6 megahertz-wide channel. *Third Report and Order and Fourth Notice of Proposed Rulemaking*, MB Docket No. 03-185, GN Docket No. 12-268,

ET Docket No. 14-175 (Dec. 17, 2015).[8] This latest Order and NPRM do not modify the FCC positions challenged in this appeal. But they do recognize yet again the ruinous impact the Commission's spectrum auction rules will have on LPTV: "the auction will potentially displace a significant number of LPTV . . . stations," *id.* ¶ 2; many displaced stations will "have difficulty finding available channels," *id.* ¶ 21. Yet the FCC stands by its decision to leave LPTV stations out of the incentive auction and reorganization, *id.* ¶ 20.

SUMMARY OF ARGUMENT

The FCC's spectrum auction orders violate the plain language of the Spectrum Act. They also violate the Regulatory Flexibility Act by failing to quantify or take concrete steps to mitigate the wholesale destruction of today's LPTV service in the Commission's forthcoming "repack" of broadcast television spectrum.

First, the Spectrum Act prohibits the FCC from reassigning channels or reallocating broadcast spectrum in a manner that would

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[8] Available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1217/FCC-15-175A1.pdf.

"alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5). Yet the FCC's orders will, by the Commission's own admission, completely extinguish many LPTV stations, *see*, *e.g.*, JA ____ [Report & Order ¶ 237], while simultaneously giving priority for use of "vacant" television spectrum to unlicensed communications devices and uses that are, by statute and regulation, "secondary" to licensed LPTV services. The FCC's mistreatment of LPTV stations in its spectrum auction is based on the false premise that LPTV is not "protected" by the Spectrum Act; it is inconsistent with the statute's plain language and with the long history of Congress's and the FCC's efforts to promote significant investment in LPTV broadcasting.

The FCC's policy contradicts the Spectrum Act's explicit, unambiguous language ensuring LPTV licensees' spectrum usage rights, statutory terms whose meaning is reinforced by the Act's structure and legislative history. Even if the Spectrum Act's terms were ambiguous, the FCC's interpretation would still be unreasonable, because that interpretation renders the provision devoid of substantive meaning and because it raises significant constitutional concerns by

depriving LPTV station owners and investors of all economically beneficial or productive use of their licenses.

Second, the Commission unlawfully disregarded its obligations under the Regulatory Flexibility Act of 1980, which obliges all federal agencies to assess the impact of their regulations on small businesses. Here, the FCC acknowledges that "many" LPTV stations will be left without broadcast channels. The RFA provides agencies with two options: either (i) certify that proposed rules "will not, if promulgated, have a significant economic impact on a substantial number of small entities," or (ii) describe "the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." 5 U.S.C. §§ 604, 605.

Having recognized that many LPTV stations will lose their channels under its auction and spectrum reallocation decisions, the FCC could not provide the requisite certification that small businesses will not suffer significant economic harms; yet the agency failed to satisfy the alternative standard by neither quantifying the adverse economic impact on LPTV owners as small entities nor describing the steps that it "has taken" to minimize those harm. An agency's nominal

promise of future steps to ameliorate such harms cannot satisfy its legal obligation under the RFA to explain the actions it has already taken to compensate for that statutorily prohibited injury. Consequently, under the terms of the RFA and precedent, this Court must reverse or remand the FCC's spectrum auction rules or defer their implementation.

Third, the Commission's orders violate traditional APA prohibitions against arbitrary and capricious rulemaking. 5 U.S.C. § 706(2)(A). The FCC exceeded its administrative discretion by proposing to wipe out LPTV service in many major markets in order to achieve policy goals rooted not in Congress's enabling legislation but, rather, in the agency's own *National Broadband Plan* proposals. The Commission's decision to sell more spectrum in the forward auction than the reverse auction reclaims does not even display awareness that the agency is in fact changing policies as to LPTV stations' superior rights relative to unlicensed services. That unilateral FCC policy choice also lacks any reasonable explanation tied to the record because the decision to "repack" LPTV out of existence says literally nothing of the broader legal balance between the rights of *licensed* broadcasters and those of *unlicensed* spectrum usage.

STANDING

To demonstrate constitutional standing, a petitioner "must show injury in fact that was caused by the conduct of the defendants and that can be redressed by judicial relief." *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1289 (D.C. Cir. 2007). "Injury in fact" is the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 1292 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To carry their burden of proof on these points, petitioners can rely on evidence in the administrative record, or in evidence newly filed in this Court. *Id.* at 1289.

"[D]irectly regulated parties," such as LPTV stations, "are the most natural challengers for" the rules that govern their conduct. *Shays v. FEC*, 414 F.3d 76, 94 (D.C. Cir. 2005). Such parties generally have standing, for when a party "is himself an object of the action" at issue, "there is ordinarily little question that the action" has "caused him injury, and that a judgment preventing" the action "will redress it." *Lujan*, 504 U.S. at 561-62.

This case is no exception. The challenged orders directly regulate the licensed LPTV stations owned and operated by Petitioner Word of God Fellowship, Inc. (WOGF). *See* Turner Decl. ¶¶ 6-7, *in* Addendum A. The FCC's orders expose all LPTV stations to the threat of imminent "displacement," in which case the LPTV station must shoulder the costs of moving to a new channel, to share a channel using less spectrum, or shut down altogether. *See*, *e.g.*, JA ____ [Report & Order ¶ 237]. As the FCC concedes, "our decision will result in some viewers losing the services of these stations, may strand the investments of displaced LPTV . . . licensees have made in their existing facilities, and may cause displaced licensees that choose to move to a new channel to incur the cost of doing so." *Id.*; *see*, *e.g.*, JA ____ [NPRM Appx. B ¶ 30].

Moreover, the FCC's disparate treatment of LPTV stations vis-à-vis full-power and Class A stations—*e.g.*, including only full-power and Class A stations in the reverse auction and repack, even reimbursing their costs of channel reassignment (JA __ [Report & Order ¶ 601])—puts WOGF at an injurious new competitive disadvantage, giving it standing. *See*, *e.g.*, *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010).

To remedy these injuries, WOGF turns to this Court to vindicate its rights under the Spectrum Act, Communications Act, Regulatory Flexibility Act, and Administrative Procedure Act. Remedies granted by this Court pursuant to those laws, including vacating or enjoining the FCC's enforcement of its orders, or requiring the FCC to include and protect LPTV stations in its so-called "repack," would redress WOGF's imminent injury.

Petitioner Free Access also faces actual and imminent injuries caused by the FCC's orders. Free Access invests only in LPTV stations, including stations in the top 20 markets. *See* Mallof Decl. ¶ 4, *in* Addendum A. The value of those investments is materially impaired by the FCC ordering that LPTV stations be placed in imminent danger of displacement or outright shutdown; indeed, since the FCC issued its NPRM the market for LPTV stations has deteriorated significantly. *Id.* ¶¶ 7-9. This detrimental impact is particularly acute for LPTV stations in major markets, where the high number of remaining full-power broadcasters, after the FCC's auctions and "repack," will leave little or no room for LPTV stations to fit in; in those markets, the FCC recognizes, LPTV stations are at the highest risk of being completely

shut out in the aftermath of the FCC's auction and "repack" because "post-auction few if any vacant channels may be available." JA ____ [Report & Order ¶ 266]. These financial impacts are a "concrete and non-speculative injury." *CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994).

Free Access is also injured by the orders' impacts on its business decisions. As Free Access's managing member explains in his declaration, the FCC's orders prevent Free Access from exercising its options, by existentially imperiling the stations' license renewal expectancies and other spectrum usage rights and thus rendering its options uneconomical. *See* Mallof Decl. ¶¶ 5-7, *in* Addendum A. By directly affecting Free Access's core business decisions, the FCC's orders injure Free Access and give it standing. *See*, *e.g.*, *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518-19 (D.C. Cir. 2009).

And like WOGF, Free Access's injuries would be redressed by this Court granting the requested relief.

ARGUMENT

I. The FCC's orders violate the Spectrum Act's express prohibition against "alter[ing] the spectrum usage rights of low-power television stations."

The Spectrum Act prohibits the FCC, in carrying the broadcast spectrum auction, from reassigning channels or reallocating spectrum in a manner that would "alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5). Yet the challenged FCC orders will, by the Commission's own admission, completely extinguish many LPTV stations. *See*, *e.g.*, JA ____ [Report & Order ¶ 237].

To adopt such a policy despite the Act's express prohibition requires the FCC to ignore the Act's unambiguous meaning and adopt instead an unreasonable statutory construction—one that that renders the statute devoid of any substantive content; that ignores the specific structure that Congress established for each of the spectrum auction's three distinct steps; that raises grave constitutional questions; and that presents other fundamental legal problems.

The Court should apply *Chevron*'s familiar framework, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), and give the statute its unambiguous, natural meaning. It

should require the FCC to include LPTV stations in the reorganization process before the existing spectrum is sold in the forward auction to wholly new licensees. The FCC should not be allowed to simply declare LPTV stations' spectrum "vacant" and reallocate it for new unlicensed uses which, under established rules and precedent, enjoy no priority over licensed LPTV services.

A. The FCC's orders violate the Spectrum Act's unambiguous prohibition.

The Spectrum Act's explicit protection of LPTV stations' spectrum usage rights forecloses the FCC's action. Because "Congress has directly spoken to the precise question at issue . . . that is the end of the matter," for "the court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

"In this first analytical step, the courts use traditional tools of statutory interpretation—text, structure, purpose, and legislative history." *Citizens Coal Council v. Norton*, 330 F.3d 478, 481 (D.C. Cir. 2003) (quotation marks omitted). "And, of course," the Court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision to an administrative

agency." *Am. Bankers Ass'n v. NCUA*, 271 F.3d 262, 267 (D.C. Cir. 2001) (quotation marks and ellipses omitted). But above all else, the Court must "begin, as always, with the plain language of the statute in question." *Citizens Coal*, 330 F.3d at 481.

1. Plain Language

The "spectrum usage rights" protected by Section 1452(b)(5) of the Spectrum Act are the substantive and procedural rights accorded LPTV stations under the Communications Act. As to their substantive rights, all licensed services, including LPTV, are guaranteed protection against harmful interference from unlicensed uses. 47 U.S.C. § 333; 47 C.F.R. § 15.5(b)-(c). This includes the unlicensed services for whose benefit the FCC now seeks to displace LPTV licensees.

As to their procedural rights, LPTV stations are entitled by statute to continue operations so long as their licenses are in effect; and although the FCC assuredly does have power to revoke a license, it may make such revocations only pursuant to the procedures prescribed by Congress. 47 U.S.C. § 312. Congress has specified the grounds on which a license can be revoked. *Id.* § 312(a). Congress requires the Commission to allow the licensee a pre-revocation opportunity to "show

cause" why the license should not be revoked. *Id.* § 312(c). Congress expressly requires that the Commission, not the licensee, bear "the burden of proceeding with the introduction of evidence and the burden of proof." *Id.* § 312(d). And Congress expressly subjects the Commission's revocation actions to the Administrative Procedure Act's requirements. *Id.* § 312 (incorporating by reference 5 U.S.C. § 558).

On their face, the FCC's orders abridge all of these rights. While the law unambiguously gives LPTV stations priority over unlicensed services, 47 C.F.R. § 15.5(b)-(c), the FCC's auction framework reverses this system, forcing LPTV stations to shut down in order to make room for unlicensed uses that the FCC now desires to promote—namely, "making more spectrum available for mobile broadband use[.]" JA ____ [Report & Order ¶ 1]; *see* JA ____ [Report & Order App. B ¶ 11] ("In addition to repurposing UHF spectrum for new licensed uses, the Commission makes a significant amount of spectrum available for unlicensed uses[.]"). And it summarily extinguishes LPTV licenses without the process set by Congress in the Communications Act, which the Spectrum Act did not alter.

2. Structure

The Spectrum Act's structure reinforces its plain meaning. Specifically, in the parts of the Act where Congress intended not to require inclusion of LPTV stations in a particular provision of the auction processes, it did so specifically, by extending protection only to "broadcast television licensees"—a new statutory term that encompasses only full-power and Class A stations but not small LPTV stations. 47 U.S.C. § 1401(6). When Congress intended to limit a provision to cover only these "broadcast television licensees," it said so. *See*, *e.g.*, *id.* § 1452(b)(4) (directing the Commission to reimburse broadcast television licensees' reasonable costs of relocation).

But the Act's general reorganization provision, 47 U.S.C. § 1452(b)(1), is not written in similarly limited terms. It does not single LPTV stations out for disfavored treatment. Instead of phrasing its provisions in terms of "broadcast television licensees," it speaks more broadly of reassigning "television *channels*" or reallocating portions of "*spectrum*." *Id.* (emphases added). And Congress stressed that in exercising those powers the FCC must not "alter the spectrum usage rights of low-power television stations." *Id.* § 1452(b)(5).

Had Congress actually intended to categorically exclude LPTV stations from Section 1452(b)'s reorganization process, it could easily have done so by phrasing that clause not in terms of reassigning "television channels" and reallocating "spectrum" generally, but rather in terms of "making such reassignments of television channels *to broadcast television licensees*." Congress chose not to confine the Section 1452(b) reorganization provisions so narrowly. And where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted).

More generally, the Act's plain intent to protect LPTV stations by including them fully in the spectrum auction's reorganization process is consistent with the Act's structure. Congress fashioned the auction process with three components: the reverse auction, the reorganization, and the forward auction. The first step, the reverse auction, is Congress's means for "determin[ing] the amount of compensation that each broadcast television licensee would accept in return for voluntarily

relinquishing some or all of its broadcast spectrum usage rights[.]" 47 U.S.C. § 1452(a)(1). The second step directs the FCC "evaluate the broadcast television spectrum," including "spectrum made available through the reverse auction," in order to conduct a "reorganization of broadcast TV spectrum," while not "alter[ing] the spectrum usage rights of low-power television stations." *Id.* § 1452(b). Then, only in light of the reverse auction and reorganization, may the FCC carry out the third step: the forward auction of new licenses for the use of newly available spectrum. *Id.* § 1453(c).

The FCC nominally recognizes that "[e]ach of the three pieces presents a distinct policy, auction design, implementation and other issues, and the statute in a number of cases imposes specific requirements for each piece." JA ____ [NPRM ¶ 5]. But here the FCC ignored that point, assuming that the absence of LPTV from Congress's mandatory inclusion in the reverse auction implies that LPTV must *also* be excluded from the reorganization (or, as the FCC calls it, the "repack"). JA ____ [Report & Order ¶ 238]. But Section 1452(a)'s reverse auction and Section 1452(b)'s reorganization are separate statutory provisions with distinct terms, structures, and purposes. Congress gave

LPTV stations few protections in the reverse auction but express, emphatic protection in the reorganization.

3. Legislative History (and the Absence Thereof)

As indicated above, Congress's protection of LPTV is consistent with Congress's history of encouraging LPTV service and the significant capital investments required by LPTV broadcasters.

Congress's express protection of LPTV stations in 47 U.S.C. § 1452(b)(5) was not further elaborated in the legislative history of the Act. But the absence of such legislative history weighs in favor of the clause's plain meaning, not against it. For it is "virtually inconceivable that Congress would have" enacted such a sharp break from the longstanding legal protection of LPTV broadcaster rights "without *any* discussion in the legislative history of the Act." *Finnegan v. Leu*, 456 U.S. 431, 441 n.12 (1982) (emphasis added).

4. No Elephants in Mouseholes

Finally, the Court's statutory interpretation "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision to an administrative agency." *Am. Bankers Ass'n*, 271 F.3d at 267 (quotation marks and ellipses omitted) (quoting

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)). To that end, both this Court and the Supreme Court emphasize that "Congress does not hide elephants in mouseholes." *ABA v. FTC*, 430 F.3d 457, 467 (D.C. Cir. 2005) (alterations omitted).

The wholesale elimination of hundreds or more LPTV stations would be such an elephant. For all of the benefits that LPTV stations bring to the public, benefits long extolled by Congress and the FCC alike, *supra* at 5-8, it would be truly extraordinary for Congress to authorize the FCC to summarily terminate countless LPTV stations without specifically commanding the FCC to do so.

Congress gave the FCC no such mandate. Instead, it directed the opposite: the Spectrum Act authorized the FCC to undertake a reassignment of channels and reallocation of spectrum but not "alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5).

To achieve Congress's statutory objectives requires the FCC to include LPTV stations, and not just "broadcast television licensees," in the Section 1452(b) reorganization process. The FCC's orders to the contrary violate the Spectrum Act's unambiguous terms.

B. Even if the Spectrum Act's prohibition were ambiguous, the FCC's interpretation would be unreasonable.

Even if the Court were to hold that the Spectrum Act's LPTV provision is ambiguous, the FCC's interpretation would still be unreasonable, and therefore unlawful under *Chevron*'s step two, because it is "arbitrary, capricious," and "manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

First, the FCC's interpretation is unreasonable for the same reasons set forth in the preceding argument—it flouts the LPTV protection provision's natural reading; it disregards Congress's specific choices as to when (and when not) to use narrowly defined terms; it is at odds with the prior arc of legislative history; and it assumes that Congress placed the elephant of wholesale LPTV license nullification in the mousehole of 47 U.S.C. § 1452(b)(1), the Spectrum Act's general reorganization provision.

Second, the FCC's interpretation is unreasonable because it renders the LPTV protection provision meaningless. The FCC declares, without explanation, that 47 U.S.C. § 1452(b)(5) is nothing more than a mere "rule of statutory construction, not a limit on the Commission's

authority." JA ____ [Second Order ¶ 68]; *see also* JA ____ [Report & Order ¶ 239] ("This provision simply clarifies the meaning and scope of [47 U.S.C. § 1452]; it does not limit the Commission's spectrum management authority."). The FCC's approach is not an interpretation so much as the *absence* of an interpretation, for it never explains how Section 1452(b)(5)'s terms actually affect the Commission's construction of the Act.

This violates the "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000), *quoted in CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013). The LPTV protection provision "cannot be regarded as mere surplusage; it means something." *Potter v. U.S.*, 155 U.S. 438, 446 (1894), *quoted in Ratzlaf v. U.S.*, 510 U.S. 135, 141 (1994). The FCC's assertion to the contrary is unreasonable.

Finally, the FCC's interpretation is unreasonable because it unnecessarily raises serious constitutional questions. The FCC's extremely broad interpretation of its own power, and its correspondingly narrow interpretation of the Act's restraints on its authority

vis-à-vis LPTV stations, vests the FCC with power to summarily destroy the entire economic value of an LPTV station license—indeed, of the station itself—by stripping it of its spectrum.

It is no answer for the FCC to assert that "[t]he Communications Act is clear that there can be no ownership interest in spectrum licensed to broadcast television stations," JA ____ [Report & Order ¶ 240]. Whatever the ownership interests in spectrum may or may not be (which is itself a subject of increasing controversy),[9] LPTV stations and investors certainly have ownership interests in their stations and their investments in stations *per se*. *Cf. In re Tracy Broadcasting Corp.*, 696 F.3d 1051, 1055-56 (10th Cir. 2012). Indeed, as this Court recognized,

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[9] Petitioners concede that the Supreme Court stated, in 1940, that the "policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license," *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), and that this Court has followed that precedent, *see Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 12 (D.C. Cir. 2006). But Petitioners also recognize—as does the leading treatise on the subject—that what may have seemed clear in 1940 is questionable today, especially now that "the 'renewal expectancy' [codified in 1996] creates de facto property rights. . . . [I]t seems safe to predict that a takings case will be prosecuted successfully, sooner or later." Huber *et al.,* 2 FEDERAL TELECOMMUNICATIONS LAW § 10.3.8. Petitioners preserve the issue in this appeal for *en banc* or Supreme Court reconsideration or clarification.

Congress and the FCC established the statutory and regulatory framework for LPTV stations precisely to encourage investments in LPTV stations. *See*, *e.g.*, *supra* at 5-6, and 14 (quoting *Cent. Fla. Enter., Inc. v. FCC*, 683 F.2d 503, 507 (D.C. Cir. 1983)).

Thus, if the FCC were empowered to summarily shut down an LPTV station as part of its spectrum auction and "repack," that would deprive the station's owners and investors of "all economically beneficial or productive use of" the station—raising serious questions under the Fifth Amendment's prohibition against the taking of private property without just compensation. *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001); *Penn Cent. Transp. Co. v. N.Y.*, 438 U.S. 104, 124 (1978).

Vesting the FCC with such powers would also raise serious questions under the Fifth Amendment's right against the deprivation of property without due process. *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). In *Mathews*, welfare beneficiaries' well-settled expectations rose to the level of "property" for Fifth Amendment procedural due process purposes; here, licensees' benefits and expectations are at least as concrete and weighty.

It is unnecessary for the FCC's administration of the Spectrum Act, or this Court, to implicate such serious constitutional problems. Were the FCC simply to interpret 47 U.S.C. § 1452(b)(5) as substantively preserving LPTV stations' rights—the statute's natural meaning—then these constitutional infirmities would be avoided. The FCC's failure to adopt the natural interpretation is unreasonable and should be struck down. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) ("In other words, the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference.").

At the very least, the Commission's order should be vacated and remanded, so that the Commissioners will grapple meaningfully with these constitutional problems instead of simply describing them broadly and dismissing them out of hand in a single paragraph. *See* JA ____ [Report & Order ¶ 240]. As this Court has stressed, FCC Commissioners "are not only bound by the Constitution, they must also take a specific oath to support and defend it," which obligates them to "explicitly conside[r]" the petitioner's "claim that [the FCC's] enforcement of [FCC policy] deprives it of its constitutional rights." *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987). In so doing,

the Commission must consider not just the broad question of licensees' Fifth Amendment interests in licenses generally, but the precisely defined constitutional issue actually raised by the petitioners (namely, a taking of the station's economic value and rights). *Id.* at 874 n.12. And the Commission's obligation to undertake this constitutional analysis is most important where, as here, the constitutional problems are avoided by an alternative reasonable interpretation. *Id.* at 872-74.

II. The FCC violated the Regulatory Flexibility Act by refusing to analyze the spectrum auction rules' impact on LPTV licensees as "small entities," and by failing to describe steps the Commission "has taken" to minimize the orders' devastating impact on LPTV service.

The Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq.* ("RFA"), is a congressionally mandated process designed to prevent administrative overreach. *Associated Fisheries v. Daley,* 127 F.3d 104, 111 (1st Cir. 1997). It obliges all federal agencies to assess the impact of their regulations on small businesses, to ensure that administrative rules do not "unduly inhibit the ability of small entities to compete,

innovate, or to comply with the regulation[s]."[10] The RFA accordingly compels administrative agencies to analyze the impact of new regulations on small entities and to describe (and solicit public comment on) cognizable steps the agency "has taken" to "minimize," or mitigate, resulting financial, regulatory and compliance costs on small businesses.

The RFA provides agencies with two options: either (i) "certify" that proposed rules "will not, if promulgated, have a significant economic impact on a substantial number of small entities," 5 U.S.C. § 605(b), or (ii) describe "the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." *Id.* § 604(a)(6). The FCC did not comply with either of those obligations below; thus, the Court must remand the FCC's spectrum auction rules or defer their implementation as to LPTV licensees. *Id.* §§ 611(a)(4)-(5).[11]

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[10] JA __ [Ex Parte Comments of U.S. Small Business Administration, at 2 (June 12, 2015) (citing Pub. L. No. 96-354, Findings and Purposes, § 2(a)(4)-(5))].

[11] This issue was squarely preserved by Free Access for appellate review. *Supra* at 31-32 & n.6.

A. The FCC refused to analyze the auction rules' significant adverse economic impact on LPTV stations as small entities.

There is no question that the incentive spectrum auction will adversely impact small entities, as the FCC conceded that all or nearly all LPTV licensees qualify as small entities for RFA purposes (JA ___ [Report & Order, App. B ¶ 18] and that the administrative record "demonstrates the potential for a significant number of LPTV . . . stations to be displaced as a result of the auction and repacking process." JA ____ [Report & Order ¶ 657]. The FCC therefore was factually unable to certify under § 605(b) that its auction rules will "not have a significant economic impact on a substantial number of small entities."

As a result, the FCC was required by law to evaluate the adverse economic impact of its auction rules—and the related exemption of low-power stations from both reverse auction and "repack" participation—on LPTV licensees. An agency by definition cannot determine how to minimize adverse impacts of proposed rules on small entities if, as here,

it concededly refuses to conduct any "systematic analysis" of the effect of its proposals on affected small businesses like LPTV stations.[12]

Remarkably, while admitting that the sale of spectrum in the incentive auction and associated "repack" of broadcast television spectrum will necessarily eliminate (or "displace," to use the FCC's euphemism) a "significant number" of LPTV broadcasters, the Commission's IRFA and FRFA do not even purport to measure or quantify (a) the proportion, total number or geographic dispersion of LPTV stations potentially affected, or (b) the adverse financial and related harms imposed on LPTV stations that will lose the channels on which they are currently licensed to broadcast—that is, "go dark." The agency simply refused to do so, having already refused to include LPTV stations in the Section 1452(b) reorganization process despite Congress's express protection of LPTV stations' spectrum usage rights.

Because the FCC's truncated RFA analysis "constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, 5 U.S.C. § 706(2)(A), the rule cannot stand." *Thompson*

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[12] *See supra* at 32 & n.7.

v. Clark, 741 F. 2d 401, 405 (D.C. Cir. 1984). "Moreover," this Court explains, "a reviewing court should consider the regulatory flexibility analysis *as part of its overall judgment* whether a rule is reasonable and *may, in an appropriate case,* strike down a rule because of a defect in the flexibility analysis." *Id.* at 405 (emphasis in original).

On the record in this appeal, it is uncontested that the FCC failed to compile any data on the impact of its auction rules and repack procedures on LPTV. The Commission assumed that all LPTV licensees are small entities for purposes of Section 603(b)(3), yet failed to (a) "provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule" or, alternatively, (b) make a finding that "quantification is not practicable or reliable," the statutory predicate to relying on "more general descriptive statements." 5 U.S.C. § 607.

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). These failures violate the express commands of the RFA and, as

set forth in *Thompson, supra*, show that the FCC's regulatory flexibility analysis constitutes "such an unreasonable assessment of social costs and benefits" as to be arbitrary and capricious for APA judicial review purposes. Quite independently of its failure to describe steps the agency "has taken" to mitigate the adverse impact on LPTV, addressed in Section II.B below, the FCC's failure to assess or quantify the economic effects of its spectrum auction rules on LPTV licensees is a straightforward violation of the agency's core RFA obligations warranting reversal or remand.[13]

B. The FCC failed to take steps to minimize adverse economic impact on LPTV stations as small entities.

As noted, the RFA requires a federal agency, where it cannot certify the absence of adverse impact on small businesses, to explain

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[13] The Commission also declined to respond to formal *ex parte* comments on the FRFA submitted in June 2015 by the U.S. Small Business Administration. JA ____. Although this was not a breach of the requirement that every agency's final regulatory flexibility analysis "shall contain . . . the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result," 5 U.S.C. § 604(a)(3), it does illustrate the FCC's disregard of its RFA responsibilities relative to LPTV.

"the steps the agency *has taken* to minimize the significant economic impact on small entities." 5 U.S.C. § 604(a)(6) (emphasis added). The Commission did not and could not do so because it has not yet taken any steps to mitigate the unprecedented, and conceded, adverse impact of the incentive spectrum auction on LPTV.

What the FCC did here is, at best, promise *future* steps the agency says it plans to take. The filing windows it intends to open in the future and the more recent "Fourth NPRM" proposals designed to establish "channel sharing" rules for LPTV essentially punt the mitigation issue to later post-auction proceedings. *Third Report and Order and Fourth Notice of Proposed Rulemaking*, MB Docket No. 03-185, *et al.* (Dec. 17, 2015).[14] None of the Commission's "steps" that it claims represent mitigation are effective today save one, namely a delay in the deadline for digital transition by LPTV stations still transmitting analog signals. That, of course, does nothing to minimize adverse economic impact of the loss of broadcast channels on LPTV stations already using digital

[14] Available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1217/FCC-15-175A1.pdf.

signals and, more importantly, cannot be linked to "the significant economic impact" on LPTV broadcasters as small entities because the Commission declined to quantify either the scope of those economic effects or the offsetting financial benefits, if any, flowing from a delayed digital transition deadline when there may not be any post-auction spectrum available to a displaced LPTV station at all.

Nor did the FCC consider alternatives. 5 U.S.C. § 604(a)(6). As the Small Business Administration emphasized, the FCC "may not prioritize unlicensed use of spectrum over the rights of LPTV broadcasters to relocate post-auction," and thus "vacant channels should be available [post-auction] for displaced LPTV and translator stations before expanding unlicensed white spaces." JA ___ [June 2015 SBA *ex parte* comments].

Eliminating the channels on which a "significant" number of the nearly two thousand LPTV stations currently broadcast is the epitome of a significant economic impact on small entities. The RFA's requirements are, of course, "[p]urely procedural." *U.S. Cellular Corp. v. FCC,* 254 F.3d 78, 88 (D.C. Cir. 2001). Yet before the Commission can legitimately describe the "steps [it] has taken" to minimize a rule's

impact, the Commission must actually take such steps. "Has taken" cannot mean "plans to take in the future" if the RFA's premise of minimizing regulatory harms to small businesses is to be anything other than a dead letter.

The fact that the FCC "understands the potential impact of the incentive auction on LPTV and TV translator stations, among others, and *will take steps to mitigate such impact,*" JA ____ [Report & Order, App. B, ¶ 56] (emphasis added), demonstrates that the Commission did not quantify the economic impact on actions it says it "will take" later. Both of these are facial violations of the RFA and epitomize settled APA law that an agency decision is to be set aside as irrational where, as here, it lacks "consideration of the relevant factors," including the significant costs of its action on regulated entities. *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

On their merits, the agency's future mitigation proposals—principally delayed digital conversion obligations and "channel sharing" for LPTV—would do nothing to preserve licensed LPTV broadcasters' spectrum. When it is conceded that the *certain* harm is the elimination of a licensee's channel, any appropriate remedy must provide an

alternative home to which the station can move. By placing the interests of unlicensed spectrum uses, such as WiFi, above those of licensed LPTV stations, the FCC not only radically transformed the Communications Act's concept of "secondary" licensees, but also created a situation in which its minimization scheme by definition fails to achieve the statutory criteria and objectives established by the RFA.

* * *

Judicial review of agency compliance with the RFA, like the APA, is available to any adversely affected or aggrieved small entity. *Id.* § 611. The Court cannot find on the present record that the FCC has made a "reasonable, good-faith effort" to carry out the mandate of the RFA. *Associated Fisheries,* 127 F.3d at 114. When the agency fails to comply with its RFA obligations, the statutory remedy is to order the agency to take corrective action, including, but not limited to (1) remanding the rule to the agency, and (2) deferring the enforcement of the rule unless the court finds that continued enforcement of the rule is in the public interest. Both remedies are appropriate and fully supported by the record in this case. *See US Telecom Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005) ("A combination of the two specified

remedies—remand coupled with a stay of enforcement against small entities—is appropriate here.").

III. The FCC's orders are arbitrary and capricious because they elevate the agency's new policy preferences over Congress's statutory safeguards, and do not supply any reasoned explanation for the Commission's blatant policy reversal.

This Court has recognized that the Spectrum Act "authorizes the FCC to shift a portion of the licensed airwaves from over-the-air television broadcasters to mobile broadband providers." *NAB,* 789 F.3d at 168. But that authorization, like all legislative delegations to agencies, is not unlimited. In this case, the FCC exceeded the scope of its administrative discretion by proposing to wipe out LPTV service in many if not most major markets in order to achieve policy goals rooted not in Congress's enabling legislation but, rather, in the agency's own *National Broadband Plan* proposals.

Administrative agencies have settled discretion to fashion regulatory policies that further Congress's statutory objectives and fill interpretive "gaps" in legislation enacted by Congress. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980 (2005). Here the FCC did much more; it claimed authority, unmoored from the

Spectrum Act's terms, to sell more spectrum in the forward auction than it reclaims from broadcasters in the incentive reverse auction.

As NAB commented in a related docket, this "turns the Commission's unlicensed rules on their head."[15] It "prioritizes unlicensed services over licensed LPTV and translator stations currently providing service to their communities[,]" by "artificially and unnecessarily increasing the scope of repacking following the incentive auction to create contiguous bands of white space channels for unlicensed use." *Id.*

Nevertheless, the agency specifically rejected Free Access's parallel objection that the Commission cannot "repurpose more spectrum than is vacant before the reverse auction or than is relinquished in the reverse auction." JA ____ [Second Order ¶ 67 n.255]. The FCC reached this conclusion not because a statute required it, but instead because matching the reverse auction results to the forward auction offering "would require protection of LPTV stations in the repacking process, which we decline to do[.]" *Id.*

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[15] JA ____ [Reply Comments of the National Association of Broadcasters, MB Docket No. 03-185, at 2 (Feb. 2, 2015)].

This policy-driven choice misses the fundamental point regarding agency policymaking. The Spectrum Act's structure is a series of intertwined steps aimed at achieving voluntary reclamation of television spectrum and its "forward" sale to auction bidders such as 4G wireless carriers, as well as new allocations for unlicensed services like WiFi and white spaces. The FCC's unilateral decision to "repack" LPTV out of existence, in order to advance unlicensed uses (including reserving an entire "vacant channel" for unlicensed services even before LPTV stations' fate is determined post-auction),[16] is irrational not only because its reasoning cannot be squared with the Spectrum Act's express protection of LPTV stations' spectrum usage rights in reorganization via "repack" (*see supra* Argument I), but also because it says nothing of the longstanding priority of *licensed* broadcasters' spectrum usage rights over *unlicensed* spectrum usage.

The FCC may be correct that it is not "sizing the [channel] guard bands solely to facilitate unlicensed use" under its powers to set "technically reasonable" channel guard bands. JA ___ [Second Order

[16] *See Vacant Channel NPRM, supra*, 30 FCC Rcd. at 6712.

¶ 14] (citing 47 U.S.C. § 1454(b)). Yet that technical judgment, which petitioners do not challenge in this appeal, is immaterial to the FCC's determination to allocate more spectrum for the forward auction than it reclaims from broadcasters that participate voluntarily in the reverse auction.

That policy judgment improperly elevates the Commission's *National Broadband Plan* to the status of law, which it plainly is not, without providing a reasoned explanation justified by the record. The FCC's regulatory choices must, under the APA, be supported by substantial record evidence and a rational explanation for reversal of former policies. An agency must at the very least "examine the relevant data and articulate a satisfactory explanation for its action[.]" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

And while a federal court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," the APA's "requirement that an agency provide reasoned explanation for its action" compels the agency to "display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub*

silentio or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (citation omitted; emphasis in original).

The FCC contravened all these APA constraints in this case. *First*, the Commission's decision to sell more spectrum in the forward auction than it reclaims in the voluntary reverse auction does not even "display awareness" that the agency is in fact changing policies as to LPTV stations' superior legal rights relative to unlicensed services. Fatally, the Commission never cites or acknowledges that, as a licensed service, the Commission's policy has always been that LPTV enjoys priority as against white space devices. *See* 23 FCC Rcd. at 16743 (licensed services "warrant priority over those unlicensed broadband devices").

Second, by reversing this policy on the immaterial basis of guard band size and a false presumption that LPTV has no statutory "protection" in the spectrum band plan repack, the Commission has hardly offered any explanation, let alone a reasonable one, for its reversal. Indeed, by placing its policy choice regarding "repack" above the statutory protections that Congress enacted specifically for LPTV stations in the Spectrum Act, the FCC has violated "the core admin-

istrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Group v. EPA*, 143 S. Ct. 2427, 2446 (2014).

Third, the FCC cannot even claim to have "examine[d] the relevant data" per *State Farm* because, as the record reveals, the Commission (a) refused to conduct any analysis of the impact of its auction structure on LPTV, and (b) has not incorporated the results of its auction models into the record below.[17] Thus, the FCC admits with no hint of remorse that "many" LPTV stations "will" be displaced without an alternative channel/spectrum choice, while at the same time it refuses to develop or examine data to project the size, geographic dispersion or communications diversity impacts of this so-called "displacement."

In sum, the FCC's approach to LPTV is a perverse combination of two inappropriate regulatory agency actions. The Commission played a shell game by deferring consideration of LPTV mitigation options to a later proceeding, one not yet final and thus not before this Court. That

[17] JA ____ [Mot. to Reopen the Record in the Third Notice of Proposed Rulemaking, MB Docket No. 03-185 (Nov. 11, 2015)].

means no appellate panel may review, in a single case, the full scope of the Commission's spectrum auction decisions and policies. The FCC likewise decided, without explicitly saying so, that in order to "clear" enough spectrum to meet its self-selected policy objective of contiguous, nationwide bands for unlicensed uses, it must displace "many" LPTV stations out of existence, otherwise there could or would be insufficient spectrum available to achieve its post-forward auction unlicensed objectives. This approach, lacking a reasoned explanation mooring the agency's policy in the legal factors prescribed by Congress, is arbitrary and capricious.

CONCLUSION

If the FCC is allowed to summarily strip LPTV stations of their spectrum usage rights, destroying the significant economic resources invested in those stations to serve their communities, then the stations and their communities will suffer not because of Congress's laws, but in spite of them.

The Court should grant this petition for review, vacating the challenged FCC orders or remanding and staying their enforcement.

Respectfully submitted,

/s/ Adam J. White

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January 11, 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 13,823 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
January 11, 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
Adam J. White

January 11, 2016

Addendum A: Declarations

1. David J. Mallof
   Free Access & Broadcast Telemedia, LLC
   (4 pages)

2. Henry Turner
   Word of God Fellowship, Inc.
   (6 pages, including attached table)

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*.	Case No. 15-1346

DECLARATION OF DAVID J. MALLOF,
FREE ACCESS & BROADCAST TELEMEDIA, LLC

Under penalty of perjury, I declare the following facts:

1. I am David J. Mallof, and I am the Managing Member of Free Access & Broadcast Telemedia, LLC (hereinafter, "Free Access").

2. Free Access is a privately held company that I founded to compete as a new market entrant in providing innovative wireless telecommunications services.

3. Free Access's business model is to provide free access and broadcast services to the general public, initially in selected metro

markets with revenue generated by limited-but-targeted ad-supported interactivity. These free services will be disruptive to the increasingly oligopolistic wireless marketplace, while benefiting customers who today face high-priced, metered, capped, or constrained mobile wireless services, thereby catalyzing and enlivening competition.

4. Free Access currently has investments solely in low-power television (LPTV) stations operating with FCC-issued LPTV licenses. Each of these stations is in a top-20 major metropolitan Nielsen Designated Market Area, including Chicago (#3), Philadelphia (#4), Washington, DC (#8), and Minneapolis (#15).

5. In consideration of those cash investments, the stations have conveyed to Free Access firm, committed options for Free Access to buy the stations at any time and in Free Access's sole discretion. The investment options themselves also are fully transferable or saleable, as Free Access solely sees fit.

6. As owner of those investment options, and firmly believing in LPTV's fundamental role in American media under longstanding federal law and FCC policy (until the FCC's break with that law and policy in the spectrum auction orders), Free Access intended and still

intends to exercise those options and acquire those stations after the FCC orders have been vacated and the longstanding legal framework and legitimate license expectancy for LPTV stations is restored.

7. Simply put, the FCC's orders materially devalue and impair the investment options, preventing Free Access from exercising, transferring, or selling those options. The FCC's orders strip significant economic value from those operating stations by destroying the legal protections that Congress enacted for LPTV stations operating under FCC licenses. The FCC's directly detrimental economic impact on LPTV stations is evident to me in my experience in such markets. The market for LPTV stations has deteriorated significantly.

8. The FCC orders' detrimental impact is further evident in a current review of LPTV stations which Free Access has conducted using the most recent LPTV station sales data available from BIA/Kelsey using their Media Access Pro™ database.

9. Since the FCC's Notice of Proposed Rulemaking process began in 2012, the FCC's plan for "repacking" the spectrum and summarily "displacing" LPTV licensees has materially impacted LPTV valuations. During this period, recorded LPTV transaction valuations,

as measured on a per population basis, have averaged nearly 40% below similar transactions recorded prior to the rulemaking process. While the database does not include certain factors of value to help normalize unique station-by-station values, such as real estate holdings, revenues, tax incentives, and operating or free cash flows, it nevertheless reflects the loss of rights and expectancies that LPTV licensees and stations have suffered as a result of the FCC's policy, and the shadow of significant financial risk that this policy has cast across LPTV licensees and their stations.

10. After the FCC's orders are vacated and the longstanding legal framework for LPTV stations restored, it would once again be financially prudent (all else being equal) for Free Access to exercise or sell those investment options.

11. If necessary in aid of the Court's jurisdiction, I am willing to declare such further facts as the Court may desire.

David J. Mallof
Managing Member
Free Access & Broadcast
Telemedia, LLC

Date: January 11, 2016

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*.	Case No. 15-1346

DECLARATION OF HENRY TURNER,
WORD OF GOD FELLOWSHIP, INC.

Under penalty of perjury, I declare the following facts:

1. I am Henry Turner, and I am the Director of Engineering of Word of God Fellowship, Inc. (hereinafter, "Word of God Fellowship") a Georgia 501(c)(3) non-profit corporation d/b/a The Daystar Television Network (www.daystar.com).

2. Word of God Fellowship and our Daystar Television Network have a singular goal; to reach souls with the Good News of Jesus Christ.

We seek out every available means of distribution to a world in need of hope. With an extensive blend of interdenominational and multi-cultural programming, Daystar is committed to producing and providing quality television that will reach our viewers, refresh their lives and renew their hearts. Our ministry was founded in 1981.

3. Specifically, Word of God Fellowship owns and operates 80 licensed low-power television (LPTV) stations, as set forth in the attached list.

4. As indicated in the attached list, each of Word of God Fellowship's LPTV stations operates pursuant to a license issued by the FCC, pursuant to the Communications Act and the FCC's regulations thereunder. The Word of God Fellowship's 80 LPTV stations across the country reach a combined population of approximately 150 million persons via our over-the-air stations, greater than one-third of our nation. Significantly 41 of our operating LPTVs are in the top 50 TV U.S. markets. While our ministry reaches people over many telemedia including over-the-air, cable, satellite, telco, and via the internet, our over-the-air ministry is vital since viewers pay no cable, satellite, or

other internet carriage fees to hear and see our programming. We have made a substantial investment in converting approximately two-thirds of our LPTV stations to digital transmission.

5. Our duly licensed use of our LPTV's literally has a Providential dimension, helping us to extend the Good News of the Gospel over the air 24 hours per day, 7 days per week to many people who may not otherwise have the opportunity to have access to this type of programming. Our top 20 donation markets, where LPTV is a key outreach component in many cases, are responsible for generating 50% of the charitable contributions we receive to advance our ministry and Christian outreach. These top donation markets include TV markets ranked in the top 10 designated market areas ("DMAs") as well as markets in the 40-50th ranked DMAs. These donations are used exclusively for expanding our outreach and infrastructure across the U.S. and around the world and not for salaries and administrative costs.

6. To the best of my knowledge and professional judgment in light of present facts, if the FCC carries out a spectrum auction

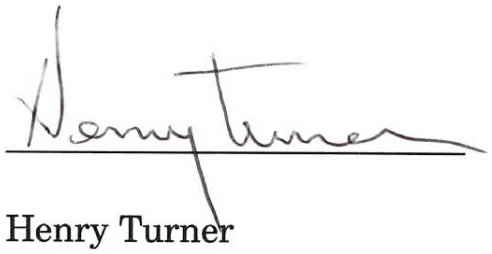
pursuant to the Spectrum Act, then Word of God Fellowship would desire either:

a.) that its stations be included in the so-called "repack;"

b.) or if it were not allowed in the repack, meaning its duly licensed spectrum instead would be treated as somehow "vacant" for purposes of repack after the FCC's forward auction sells to new for-profit parties, then Word of God Fellowship seeks the opportunity to bid its spectrum into the reverse auction, thus leaving it free to pursue ministry and outreach in other manners and media for those who are unable or unwilling to pay for seeing and hearing our inspirational programming.

7. If the FCC successfully refuses to include LPTV stations in its repack, then many of the Word of God Fellowship's LPTV stations will be placed at imminent risk of being forced by the FCC to "go dark." That is, the reverse auction and repack may leave Word of God Fellowship's FCC-licensed LPTV stations with no available or sufficient spectrum in which to continue to broadcast after new licenses are sold to cellular and wireless operators entering the TV band of spectrum,

with no repack deference paid to us by the FCC as a longstanding licensee. And even then our remaining LPTV stations not forced to shut down and go dark may be forced to incur substantial costs and burdens, and timing uncertainties of relocation at our ministry's sole—and, to date, undetermined and potentially harmful—expense.



Henry Turner
Director of Engineering
Word of God Fellowship, Inc.

Date: January 10, 2016

DAYSTAR LOW POWER STATIONS - LICENSE DATES

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Number	State		Location	Legal Listing Call Sign	Community of License, City and State	Most Recent License Date	Expiration Date
1	Alabama	1	Birmingham (Anniston, Tuscaloosa) AL	WBUN-LP	Birmingham, AL	9/13/2013	4/1/2021
		2	Huntsville/ Decatur (Florence) AL	WHVD-LD	Huntsville, AL	1/23/2013	4/1/2021
		3	Montgomery/Selma AL	WETU-LD	Wetumpka, AL	9/13/2013	4/1/2021
2	Arizona	4	Phoenix (Prescott) AZ	KDPH-LD	Phoenix, AZ	8/6/2010	10/1/2022
		5	Tucson (Sierra Vista) AZ	KPCE-LP	Tucson, AZ	7/7/2008	10/1/2022
3	California	6	Fresno/Visalia CA	KFVD-LP	Porterville, CA	1/31/1990	12/1/2022
		7	Los Angeles CA	KPCD-LP	Big Bear Lake, CA	8/7/2007	12/1/2022
		8	Los Angeles CA	KSCD-LP	Big Bear Lake, CA	8/11/2008	12/1/2022
		9	Sacramento/Stockton/Modesto CA	KACA-LP	Modesto, CA	6/5/2014	12/1/2022
		10	Sacramento/Stockton/Modesto CA	KRJR-LP	Sacramento, CA	12/3/2008	12/1/2022
		11	San Francisco/Oakland/San Jose CA	KDAS-LP	Clarks Crossing, CA	1/11/2007	12/1/2022
		12	San Francisco/Oakland/San Jose CA	KDTS-LD	San Francisco, CA	1/18/2011	12/1/2022
4	Colorado	13	Denver CO	KDNF-LD	Fort Collins, CO	10/18/2011	4/1/2022
		14	Ft. Collins (Denver)	KPXH-LD	Fort Collins, CO	11/29/2011	4/1/2022
5	Delaware	15	Baltimore MD	WWDD-LD	Havre de Grace, MD	2/10/2014	10/1/2020
6	District of Columbia	16	Washington DC (Hagerstown) MD	WDDN-LD	Washington, D.C.	8/20/2012	10/1/2020
7	Florida	17	Jacksonville/Brunswick FL	WUJF-LD	Jacksonville, FL	4/26/2013	2/1/2021
		18	Orlando/Daytona Beach/Melbourne FL	WOCD-LP	Dunnellon, FL	4/16/2009	2/1/2021
		19	Orlando/Daytona Beach/Melbourne FL	WDTO-LD	Orlando, FL	9/13/2013	2/1/2021
		20	Orlando/Daytona Beach	WPXB-LD	Daytona Beach, FL	10/6/2008	2/1/2021
		21	Tampa/St. Petersburg/(Sarasota) FL	WSVT-LD	Tampa, FL	8/10/2011	2/1/2021
		22	West Palm Beach/Fort Pierce FL	WSLF-LD	Port St. Lucie, FL	2/22/2012	2/1/2021
8	Georgia	23	Atlanta GA	WDTA-LD	Atlanta, GA	10/27/2010	4/1/2021
		24	Atlanta GA	WGGD-LD	Gainesville, GA	1/8/2013	4/1/2021
		25	Chattanooga TN	WDDA-LP	Dalton, GA	3/14/2007	4/1/2021
9	Illinois	26	Chicago IL	WDCI-LD	Chicago, IL	2/9/2012	12/1/2021
10	Indiana	27	Indianapolis IN	WIPX-LP	Indianapolis, IN	10/8/2015	8/1/2021
		28	South Bend/Elkhart IN	WEID-LD	Elkhart, IN	12/1/2014	8/1/2021
11	Kansas	29	Wichita/Hutchinson Plus KS	KWKD-LP	Wichita, KS	8/22/2005	6/1/2022
12	Kentucky	30	Louisville KY	WDYL-LD	Louisville, KY	9/26/2013	8/1/2021
13	Louisiana	31	Baton Rouge LA	W48DW-D	Baton Rouge, LA	6/19/2012	6/1/2021
		32	New Orleans LA	KNLD-LD	New Orleans, LA	3/25/2010	6/1/2021
14	Maine	33	Portland/Port Auburn ME	WLLB-LD	Portland, ME	12/3/2013	4/1/2023
15	Massachusetts	34	Boston MA	W40BO	Boston, MA	2/1/2001	4/1/2023
		35	Dennis (Boston)	WMPX-LP	Dennis, MA	12/6/2004	4/1/2023
16	Michigan	36	Detroit MI	WUDT-LD	Buffalo, NY	5/10/2012	10/1/2021
		37	Grand Rapids/Kalamazoo/Battle Creek MI	WUHQ-LD	Grand Rapids, MI	11/29/2011	10/1/2021
17	Minnesota	38	Minneapolis/St. Paul MN	WDMI-LD	Minneapolis, MN	9/29/2010	4/1/2022
18	Missouri	39	Kansas City MO	KCDN-LD	Kansas City, MO	5/15/2012	2/1/2022
		40	St Louis MO	KUMO-LD	St. Louis. MO	6/27/2011	2/1/2022
		41	St. Louis MO	KDSI-LP	Carthage, MO	7/2/1996	2/1/2022
19	Nebraska	42	Omaha NE	KOHA-LD	Omaha, NE	8/2/2012	6/1/2022
20	Nevada	43	Las Vegas NV	KLVD-LD	Las Vegas, NV	8/8/2011	10/1/2022
21	New Jersey	44	Philadelphia PA	W45CP-D	Atlantic City, NJ	12/4/2014	6/1/2015
22	New York	45	Amityville (New York)	WPXU-LD	Amityville, NY	5/17/2011	6/1/2023
		46	Buffalo NY	WDTB-LD	Hamburg, NY	11/8/1993	6/1/2023
		47	Syracuse NY	WDSS-LD	Syracuse, NY	8/20/2012	6/1/2015
23	North Carolina	48	Charlotte NC	WDMC-LD	Charlotte, NC	12/11/2012	12/1/2020
		49	Charlotte NC	WHWD-LD	Statesville, NC	2/9/2012	12/1/2020
		50	Raleigh/Durham (Fayeteville) NC	WACN-LP	Raleigh, NC	7/19/2006	12/1/2020
		51	Raleigh/Durham (Fayeteville) NC	WWIW-LD	Raleigh, NC	1/18/2011	12/1/2020
		52	Raleigh/Durham (Fayetteville) NC	WDRN-LD	Fayetteville, NC	2/10/2014	12/1/2020
24	Ohio	53	Cincinnati OH	WDYC-LD	Cincinnati, OH	8/21/2013	10/1/2021
		54	Cleveland/Akron (Canton) OH	WCDN-LD	Cleveland, OH	1/3/2011	10/1/2021
		55	Dayton OH	WLWD-LP	Springfield, OH	1/3/2006	10/1/2021
		56	Toledo OH	WDTJ-LD	Toledo, OH	1/23/2013	10/1/2021
25	Oregon	57	Portland OR	KPXG-LD	Portland, OR	10/7/2009	2/1/2023
26	Pennsylvania	58	Philadelphia (Willow Grove) PA	WELL-LD	Philadelphia, PA	2/18/2010	8/1/2023
		59	Pittsburgh PA	WPDN-LD	Pittsburgh, PA	6/27/2011	8/1/2023
27	South Carolina	60	Columbia SC	WKDC-LD	Columbia, SC	4/24/2012	12/1/2020
		61	Greenville/Spartanburg/Anderson /Ashville SC	WSQY-LP	Spartanburg, SC	12/5/2005	12/1/2020
28	Tennessee	62	Chattanooga TN	WCTD-LP	Ducktown, TN	8/7/2007	8/1/2021
		63	Jackson TN	WJTD-LP	Jackson, TN	4/2/2007	8/1/2021
		64	Knoxville TN	WDTT-LD	Knoxville, TN	5/16/2013	8/1/2021
		65	Memphis TN	WDNM-LD	Memphis, TN	1/18/2011	8/1/2021
		66	Nashville TN	WNPX-LP	Nashville, TN	12/20/2002	8/1/2021
		67	Nashville TN	WNTU-LP	Nashville, TN	11/27/2000	8/1/2021
29	Texas	68	Amarillo TX	KDAX-LP	Amarillo, TX	4/2/2007	8/1/2022
		69	Dallas/Fort Worth TX	KPTD-LP	Paris, TX	8/7/2007	8/1/2022
		70	Houston TX	KDHU-LD	Houston, TX	12/27/2010	8/1/2022
		71	San Antonio TX	KQVE-LD	San Antonio, TX	11/29/2012	8/1/2022
		72	Austin, TX	KADT-LD	Austin, TX	10/1/2014	8/1/2022
30	Virginia	73	Norfolk/Portsmouth/New Port News VA	WVAD-LD	Chesapeake, VA	1/23/2013	10/1/2020
		74	Richmond/Petersburg VA	WRID-LP	Richmond, VA	9/11/1998	10/1/2020
		75	Washington DC	WDWA-LP	Dale City, VA	6/5/2014	10/1/2020
31	Washington	76	Spokane WA	KDYS-LD	Spokane, WA	5/16/2013	2/1/2023
		77	Spokane WA	KQUP-LD	Spokane, WA	5/16/2013	2/1/2023
32	Wisconsin	78	Green Bay/Appleton WI	WGBD-LD	Green Bay, WI	10/19/2011	12/1/2021
		79	Madison WI	WDMW-LD	Janesville, WI	7/24/2012	12/1/2021
		80	Madison WI	WMWD-LD	Madison, WI	8/15/2011	12/1/2021

Addendum B: Statutes

1. The Spectrum Act of 2012
   47 U.S.C. §§ 1451-1457

2. The Regulatory Flexibility Act
   5 U.S.C. §§ 601-612

Note: Statutes are presented as codified in the U.S. Code, with lengthy supplemental notes omitted for space purposes.

The Spectrum Act of 2012
47 U.S.C. §§ 1451-1457

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maintenance, operation, and improvements of the network within the State shall proceed in accordance with the plan proposed by the First Responder Network Authority.

(D) Funding requirements

In order to obtain grant funds and spectrum capacity leasing rights under subparagraph (C)(iii), a State shall demonstrate—

(i) that the State has—

(I) the technical capabilities to operate, and the funding to support, the State radio access network;

(II) has the ability to maintain ongoing interoperability with the nationwide public safety broadband network; and

(III) the ability to complete the project within specified comparable timelines specific to the State;

(ii) the cost-effectiveness of the State plan submitted under subparagraph (C)(i); and

(iii) comparable security, coverage, and quality of service to that of the nationwide public safety broadband network.

(f) User fees

If a State chooses to build its own radio access network, the State shall pay any user fees associated with State use of elements of the core network.

(g) Prohibition

(1) In general

A State that chooses to build its own radio access network shall not provide commercial service to consumers or offer wholesale leasing capacity of the network within the State except directly through public-private partnerships for construction, maintenance, operation, and improvement of the network within the State.

(2) Rule of construction

Nothing in this subsection shall be construed to prohibit the State and a secondary user from entering into a covered leasing agreement. Any revenue gained by the State from such a leasing agreement shall be used only for constructing, maintaining, operating, or improving the radio access network of the State.

(h) Judicial review

(1) In general

The United States District Court for the District of Columbia shall have exclusive jurisdiction to review a decision of the Commission made under subsection (e)(3)(C)(iv).

(2) Standard of review

The court shall affirm the decision of the Commission unless—

(A) the decision was procured by corruption, fraud, or undue means;

(B) there was actual partiality or corruption in the Commission; or

(C) the Commission was guilty of misconduct in refusing to hear evidence pertinent and material to the decision or of any other misbehavior by which the rights of any party have been prejudiced.

(Pub. L. 112–96, title VI, §6302, Feb. 22, 2012, 126 Stat. 219.)

§ 1443. Public safety wireless communications research and development

(a) NIST directed research and development program

From amounts made available from the Public Safety Trust Fund, the Director of NIST, in consultation with the Commission, the Secretary of Homeland Security, and the National Institute of Justice of the Department of Justice, as appropriate, shall conduct research and assist with the development of standards, technologies, and applications to advance wireless public safety communications.

(b) Required activities

In carrying out the requirement under subsection (a), the Director of NIST, in consultation with the First Responder Network Authority and the public safety advisory committee established under section 1425(a) of this title, shall—

(1) document public safety wireless communications technical requirements;

(2) accelerate the development of the capability for communications between currently deployed public safety narrowband systems and the nationwide public safety broadband network;

(3) establish a research plan, and direct research, that addresses the wireless communications needs of public safety entities beyond what can be provided by the current generation of broadband technology;

(4) accelerate the development of mission critical voice, including device-to-device ''talkaround'' capability over broadband networks, public safety prioritization, authentication capabilities, and standard application programing interfaces for the nationwide public safety broadband network, if necessary and practical;

(5) accelerate the development of communications technology and equipment that can facilitate the eventual migration of public safety narrowband communications to the nationwide public safety broadband network; and

(6) convene working groups of relevant government and commercial parties to achieve the requirements in paragraphs (1) through (5).

(Pub. L. 112–96, title VI, §6303, Feb. 22, 2012, 126 Stat. 221.)

SUBCHAPTER IV—SPECTRUM AUCTION AUTHORITY

§ 1451. Deadlines for auction of certain spectrum

(a) Clearing certain Federal spectrum

(1) In general

The President shall—

(A) not later than 3 years after February 22, 2012, begin the process of withdrawing or modifying the assignment to a Federal Government station of the electromagnetic spectrum described in paragraph (2); and

(B) not later than 30 days after completing the withdrawal or modification, notify the Commission that the withdrawal or modification is complete.

(2) Spectrum described

The electromagnetic spectrum described in this paragraph is the 15 megahertz of spectrum between 1675 megahertz and 1710 megahertz identified under paragraph (3).

(3) Identification by Secretary of Commerce

Not later than 1 year after February 22, 2012, the Secretary of Commerce shall submit to the President a report identifying 15 megahertz of spectrum between 1675 megahertz and 1710 megahertz for reallocation from Federal use to non-Federal use.

(b) Reallocation and auction

(1) In general

Notwithstanding paragraph (15)(A) of section 309(j) of this title, not later than 3 years after February 22, 2012, the Commission shall, except as provided in paragraph (4)—

(A) allocate the spectrum described in paragraph (2) for commercial use; and

(B) through a system of competitive bidding under such section, grant new initial licenses for the use of such spectrum, subject to flexible-use service rules.

(2) Spectrum described

The spectrum described in this paragraph is the following:

(A) The frequencies between 1915 megahertz and 1920 megahertz.

(B) The frequencies between 1995 megahertz and 2000 megahertz.

(C) The frequencies described in subsection (a)(2).

(D) The frequencies between 2155 megahertz and 2180 megahertz.

(E) Fifteen megahertz of contiguous spectrum to be identified by the Commission.

(3) Proceeds to cover 110 percent of Federal relocation or sharing costs

Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of section 309(j)(16)(B) of this title.

(4) Determination by Commission

If the Commission determines that the band of frequencies described in paragraph (2)(A) or the band of frequencies described in paragraph (2)(B) cannot be used without causing harmful interference to commercial mobile service licensees in the frequencies between 1930 megahertz and 1995 megahertz, the Commission may not—

(A) allocate such band for commercial use under paragraph (1)(A); or

(B) grant licenses under paragraph (1)(B) for the use of such band.

(c) Omitted

(Pub. L. 112–96, title VI, § 6401, Feb. 22, 2012, 126 Stat. 222.)

CODIFICATION

Section is comprised of section 6401 of Pub. L. 112–96. Subsec. (c) of section 6401 of Pub. L. 112–96 amended section 309 of this title.

§ 1452. Special requirements for incentive auction of broadcast TV spectrum

(a) Reverse auction to identify incentive amount

(1) In general

The Commission shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights in order to make spectrum available for assignment through a system of competitive bidding under subparagraph (G) of section 309(j)(8) of this title.

(2) Eligible relinquishments

A relinquishment of usage rights for purposes of paragraph (1) shall include the following:

(A) Relinquishing all usage rights with respect to a particular television channel without receiving in return any usage rights with respect to another television channel.

(B) Relinquishing all usage rights with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel.

(C) Relinquishing usage rights in order to share a television channel with another licensee.

(3) Confidentiality

The Commission shall take all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the reverse auction under paragraph (1), including withholding the identity of such licensee until the reassignments and reallocations (if any) under subsection (b)(1)(B) become effective, as described in subsection (f)(2).

(4) Protection of carriage rights of licensees sharing a channel

A broadcast television station that voluntarily relinquishes spectrum usage rights under this subsection in order to share a television channel and that possessed carriage rights under section 338, 534, or 535 of this title on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

(b) Reorganization of broadcast TV spectrum

(1) In general

For purposes of making available spectrum to carry out the forward auction under subsection (c)(1), the Commission—

(A) shall evaluate the broadcast television spectrum (including spectrum made available through the reverse auction under subsection (a)(1)); and

(B) may, subject to international coordination along the border with Mexico and Canada—

(i) make such reassignments of television channels as the Commission considers appropriate; and

(ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation.

(2) Factors for consideration

In making any reassignments or reallocations under paragraph (1)(B), the Commission shall make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.

(3) No involuntary relocation from UHF to VHF

In making any reassignments under paragraph (1)(B)(i), the Commission may not involuntarily reassign a broadcast television licensee—

(A) from an ultra high frequency television channel to a very high frequency television channel; or

(B) from a television channel between the frequencies from 174 megahertz to 216 megahertz to a television channel between the frequencies from 54 megahertz to 88 megahertz.

(4) Payment of relocation costs

(A) In general

Except as provided in subparagraph (B), from amounts made available under subsection (d)(2), the Commission shall reimburse costs reasonably incurred by—

(i) a broadcast television licensee that was reassigned under paragraph (1)(B)(i) from one ultra high frequency television channel to a different ultra high frequency television channel, from one very high frequency television channel to a different very high frequency television channel, or, in accordance with subsection (g)(1)(B), from a very high frequency television channel to an ultra high frequency television channel, in order for the licensee to relocate its television service from one channel to the other;

(ii) a multichannel video programming distributor in order to continue to carry the signal of a broadcast television licensee that—

(I) is described in clause (i);

(II) voluntarily relinquishes spectrum usage rights under subsection (a) with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel; or

(III) voluntarily relinquishes spectrum usage rights under subsection (a) to share a television channel with another licensee; or

(iii) a channel 37 incumbent user, in order to relocate to other suitable spectrum, provided that all such users can be relocated and that the total relocation costs of such users do not exceed $300,000,000. For the purpose of this section, the spectrum made available through relocation of channel 37 incumbent users shall be deemed as spectrum reclaimed through a reverse auction under subsection (a).

(B) Regulatory relief

In lieu of reimbursement for relocation costs under subparagraph (A), a broadcast television licensee may accept, and the Commission may grant as it considers appropriate, a waiver of the service rules of the Commission to permit the licensee, subject to interference protections, to make flexible use of the spectrum assigned to the licensee to provide services other than broadcast television services. Such waiver shall only remain in effect while the licensee provides at least 1 broadcast television program stream on such spectrum at no charge to the public.

(C) Limitation

The Commission may not make reimbursements under subparagraph (A) for lost revenues.

(D) Deadline

The Commission shall make all reimbursements required by subparagraph (A) not later than the date that is 3 years after the completion of the forward auction under subsection (c)(1).

(5) Low-power television usage rights

Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.

(c) Forward auction

(1) Auction required

The Commission shall conduct a forward auction in which—

(A) the Commission assigns licenses for the use of the spectrum that the Commission reallocates under subsection (b)(1)(B)(ii); and

(B) the amount of the proceeds that the Commission shares under clause (i) of section 309(j)(8)(G) of this title with each licensee whose bid the Commission accepts in the reverse auction under subsection (a)(1) is not less than the amount of such bid.

(2) Minimum proceeds

(A) In general

If the amount of the proceeds from the forward auction under paragraph (1) is not greater than the sum described in subparagraph (B), no licenses shall be assigned through such forward auction, no reassignments or reallocations under subsection (b)(1)(B) shall become effective, and the Commission may not revoke any spectrum usage rights by reason of a bid that the Commission accepts in the reverse auction under subsection (a)(1).

(B) Sum described

The sum described in this subparagraph is the sum of—

(i) the total amount of compensation that the Commission must pay successful bidders in the reverse auction under subsection (a)(1);

(ii) the costs of conducting such forward auction that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title; and

(iii) the estimated costs for which the Commission is required to make reimbursements under subsection (b)(4)(A).

(C) Administrative costs

The amount of the proceeds from the forward auction under paragraph (1) that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title shall be sufficient to cover the costs incurred by the Commission in conducting the reverse auction under subsection (a)(1), conducting the evaluation of the broadcast television spectrum under subparagraph (A) of subsection (b)(1), and making any reassignments or reallocations under subparagraph (B) of such subsection, in addition to the costs incurred by the Commission in conducting such forward auction.

(3) Factor for consideration

In conducting the forward auction under paragraph (1), the Commission shall consider assigning licenses that cover geographic areas of a variety of different sizes.

(d) TV Broadcaster Relocation Fund

(1) Establishment

There is established in the Treasury of the United States a fund to be known as the TV Broadcaster Relocation Fund.

(2) Payment of relocation costs

Any amounts borrowed under paragraph (3)(A) and any amounts in the TV Broadcaster Relocation Fund that are not necessary for reimbursement of the general fund of the Treasury for such borrowed amounts shall be available to the Commission to make the payments required by subsection (b)(4)(A).

(3) Borrowing authority

(A) In general

Beginning on the date when any reassignments or reallocations under subsection (b)(1)(B) become effective, as provided in subsection (f)(2), and ending when $1,000,000,000 has been deposited in the TV Broadcaster Relocation Fund, the Commission may borrow from the Treasury of the United States an amount not to exceed $1,000,000,000 to use toward the payments required by subsection (b)(4)(A).

(B) Reimbursement

The Commission shall reimburse the general fund of the Treasury, without interest, for any amounts borrowed under subparagraph (A) as funds are deposited into the TV Broadcaster Relocation Fund.

(4) Transfer of unused funds

If any amounts remain in the TV Broadcaster Relocation Fund after the date that is 3 years after the completion of the forward auction under subsection (c)(1), the Secretary of the Treasury shall—

(A) prior to the end of fiscal year 2022, transfer such amounts to the Public Safety Trust Fund established by section 1457(a)(1) of this title; and

(B) after the end of fiscal year 2022, transfer such amounts to the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction.

(e) Numerical limitation on auctions and reorganization

The Commission may not complete more than one reverse auction under subsection (a)(1) or more than one reorganization of the broadcast television spectrum under subsection (b).

(f) Timing

(1) Contemporaneous auctions and reorganization permitted

The Commission may conduct the reverse auction under subsection (a)(1), any reassignments or reallocations under subsection (b)(1)(B), and the forward auction under subsection (c)(1) on a contemporaneous basis.

(2) Effectiveness of reassignments and reallocations

Notwithstanding paragraph (1), no reassignments or reallocations under subsection (b)(1)(B) shall become effective until the completion of the reverse auction under subsection (a)(1) and the forward auction under subsection (c)(1), and, to the extent practicable, all such reassignments and reallocations shall become effective simultaneously.

(3) Deadline

The Commission may not conduct the reverse auction under subsection (a)(1) or the forward auction under subsection (c)(1) after the end of fiscal year 2022.

(4) Limit on discretion regarding auction timing

Section 309(j)(15)(A) of this title shall not apply in the case of an auction conducted under this section.

(g) Limitation on reorganization authority

(1) In general

During the period described in paragraph (2), the Commission may not—

(A) involuntarily modify the spectrum usage rights of a broadcast television licensee or reassign such a licensee to another television channel except—

(i) in accordance with this section; or

(ii) in the case of a violation by such licensee of the terms of its license or a specific provision of a statute administered by the Commission, or a regulation of the Commission promulgated under any such provision; or

(B) reassign a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel, unless—

(i) such a reassignment will not decrease the total amount of ultra high frequency spectrum made available for reallocation under this section; or

(ii) a request from such licensee for the reassignment was pending at the Commission on May 31, 2011.

(2) Period described

The period described in this paragraph is the period beginning on February 22, 2012, and ending on the earliest of—

(A) the first date when the reverse auction under subsection (a)(1), the reassignments and reallocations (if any) under subsection (b)(1)(B), and the forward auction under subsection (c)(1) have been completed;

(B) the date of a determination by the Commission that the amount of the proceeds from the forward auction under subsection (c)(1) is not greater than the sum described in subsection (c)(2)(B); or

(C) September 30, 2022.

(h) Protest right inapplicable

The right of a licensee to protest a proposed order of modification of its license under section 316 of this title shall not apply in the case of a modification made under this section.

(i) Commission authority

Nothing in subsection (b) shall be construed to—

(1) expand or contract the authority of the Commission, except as otherwise expressly provided; or

(2) prevent the implementation of the Commission's ''White Spaces'' Second Report and Order and Memorandum Opinion and Order (FCC 08–260, adopted November 4, 2008) in the spectrum that remains allocated for broadcast television use after the reorganization required by such subsection.

(Pub. L. 112–96, title VI, §6403, Feb. 22, 2012, 126 Stat. 225.)

§ 1453. Unlicensed use in the 5 GHZ band

(a) Modification of Commission regulations to allow certain unlicensed use

(1) In general

Subject to paragraph (2), not later than 1 year after February 22, 2012, the Commission shall begin a proceeding to modify part 15 of title 47, Code of Federal Regulations, to allow unlicensed U–NII devices to operate in the 5350–5470 MHz band.

(2) Required determinations

The Commission may make the modification described in paragraph (1) only if the Commission, in consultation with the Assistant Secretary, determines that—

(A) licensed users will be protected by technical solutions, including use of existing, modified, or new spectrum-sharing technologies and solutions, such as dynamic frequency selection; and

(B) the primary mission of Federal spectrum users in the 5350–5470 MHz band will not be compromised by the introduction of unlicensed devices.

(b) Study by NTIA

(1) In general

The Assistant Secretary, in consultation with the Department of Defense and other impacted agencies, shall conduct a study evaluating known and proposed spectrum-sharing technologies and the risk to Federal users if unlicensed U–NII devices were allowed to operate in the 5350–5470 MHz band and in the 5850–5925 MHz band.

(2) Submission

The Assistant Secretary shall submit to the Commission and the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate—

(A) not later than 8 months after February 22, 2012, a report on the portion of the study required by paragraph (1) with respect to the 5350–5470 MHz band; and

(B) not later than 18 months after February 22, 2012, a report on the portion of the study required by paragraph (1) with respect to the 5850–5925 MHz band.

(c) Definitions

In this section:

(1) 5350–5470 MHz band

The term ''5350–5470 MHz band'' means the portion of the electromagnetic spectrum between the frequencies from 5350 megahertz to 5470 megahertz.

(2) 5850–5925 MHz band

The term ''5850–5925 MHz band'' means the portion of the electromagnetic spectrum between the frequencies from 5850 megahertz to 5925 megahertz.

(Pub. L. 112–96, title VI, §6406, Feb. 22, 2012, 126 Stat. 231.)

§ 1454. Guard bands and unlicensed use

(a) In general

Nothing in subparagraph (G) of section 309(j)(8) of this title or in section 1452 of this title shall be construed to prevent the Commission from using relinquished or other spectrum to implement band plans with guard bands.

(b) Size of guard bands

Such guard bands shall be no larger than is technically reasonable to prevent harmful interference between licensed services outside the guard bands.

(c) Unlicensed use in guard bands

The Commission may permit the use of such guard bands for unlicensed use.

(d) Database

Unlicensed use shall rely on a database or subsequent methodology as determined by the Commission.

(e) Protections against harmful interference

The Commission may not permit any use of a guard band that the Commission determines would cause harmful interference to licensed services.

(Pub. L. 112–96, title VI, §6407, Feb. 22, 2012, 126 Stat. 231.)

§ 1455. Wireless facilities deployment

(a) Facility modifications

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request

For purposes of this subsection, the term ''eligible facilities request'' means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) Applicability of environmental laws

Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

(b) Federal easements and rights-of-way

(1) Grant

If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) Application

The Administrator of General Services shall develop a common form for applications for easements and rights-of-way under paragraph (1) for all executive agencies that shall be used by applicants with respect to the buildings or other property of each such agency.

(3) Fee

(A) In general

Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) Exceptions

The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)—

(i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and

(ii) in the interest of expanding wireless and broadband coverage.

(4) Use of fees collected

Any fee amounts collected by an executive agency pursuant to paragraph (3) may be made available, as provided in appropriations Acts, to such agency to cover the costs of granting the easement or right-of-way.

(c) Master contracts for wireless facility sitings

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, and not later than 60 days after February 22, 2012, the Administrator of General Services shall—

(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on rooftops or inside buildings, the technology used in connection with wireless service antenna structures or equipment placed on Federal buildings and other property, and any other key issues the Administrator of General Services considers appropriate.

(2) Applicability

The master contract or contracts developed by the Administrator of General Services under paragraph (1) shall apply to all publicly accessible buildings and other property owned by the Federal Government, unless the Administrator of General Services decides that issues with respect to the siting of a wireless service antenna structure on a specific building or other property warrant nonstandard treatment of such building or other property.

(3) Application

The Administrator of General Services shall develop a common form or set of forms for wireless service antenna structure siting applications under this subsection for all executive agencies that shall be used by applicants with respect to the buildings and other property of each such agency.

(d) Executive agency defined

In this section, the term ''executive agency'' has the meaning given such term in section 102 of title 40.

(Pub. L. 112–96, title VI, § 6409, Feb. 22, 2012, 126 Stat. 232.)

REFERENCES IN TEXT

Section 704 of the Telecommunications Act of 1996, referred to in subsecs. (a)(1) and (c)(1), is section 704 of Pub. L. 104–104, title VII, Feb. 8, 1996, 110 Stat. 151. Subsec. (a) of section 704 of Pub. L. 104–104 amended section 332 of this title. Subsec. (b) of section 704 of Pub. L. 104–104 is not classified to the Code. Subsec. (c) of section 704 of Pub. L. 104–104 is set out as a note under section 332 of this title.

The National Historic Preservation Act, referred to in subsec. (a)(3), is Pub. L. 89–665, Oct. 15, 1966, 80 Stat. 915, which is classified generally to subchapter II (§ 470 et seq.) of chapter 1A of Title 16, Conservation. For complete classification of this Act to the Code, see section 470(a) of Title 16 and Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (a)(3), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 1456. System certification

Not later than 6 months after February 22, 2012, the Director of the Office of Management

and Budget shall update and revise section 33.4 of OMB Circular A–11 to reflect the recommendations regarding such Circular made in the Commerce Spectrum Management Advisory Committee Incentive Subcommittee report, adopted January 11, 2011.

(Pub. L. 112–96, title VI, §6411, Feb. 22, 2012, 126 Stat. 234.)

§ 1457. Public Safety Trust Fund

(a) Establishment of Public Safety Trust Fund

(1) In general

There is established in the Treasury of the United States a trust fund to be known as the Public Safety Trust Fund.

(2) Availability

Amounts deposited in the Public Safety Trust Fund shall remain available through fiscal year 2022. Any amounts remaining in the Fund after the end of such fiscal year shall be deposited in the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction.

(b) Use of Fund

As amounts are deposited in the Public Safety Trust Fund, such amounts shall be used to make the following deposits or payments in the following order of priority:

(1) Repayment of amount borrowed for First Responder Network Authority

An amount not to exceed $2,000,000,000 shall be available to the NTIA to reimburse the general fund of the Treasury for any amounts borrowed under section 1427 of this title.

(2) State and Local Implementation Fund

$135,000,000 shall be deposited in the State and Local Implementation Fund established by section 1441 of this title.

(3) Buildout by First Responder Network Authority

$7,000,000,000, reduced by the amount borrowed under section 1427 of this title, shall be deposited in the Network Construction Fund established by section 1426 of this title.

(4) Public safety research

$100,000,000 shall be available to the Director of NIST to carry out section 1443 of this title.

(5) Deficit reduction

$20,400,000,000 shall be deposited in the general fund of the Treasury, where such amount shall be dedicated for the sole purpose of deficit reduction.

(6) 9–1–1, E9–1–1, and Next Generation 9–1–1 implementation grants

$115,000,000 shall be available to the Assistant Secretary and the Administrator of the National Highway Traffic Safety Administration to carry out the grant program under section 942 of this title.

(7) Additional public safety research

$200,000,000 shall be available to the Director of NIST to carry out section 1443 of this title.

(8) Additional deficit reduction

Any remaining amounts deposited in the Public Safety Trust Fund shall be deposited in the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction.

(c) Investment

Amounts in the Public Safety Trust Fund shall be invested in accordance with section 9702 of title 31, and any interest on, and proceeds from, any such investment shall be credited to, and become a part of, the Fund.

(Pub. L. 112–96, title VI, §6413, Feb. 22, 2012, 126 Stat. 235.)

SUBCHAPTER V—NEXT GENERATION 9–1–1 ADVANCEMENT ACT OF 2012

§ 1471. Definitions

In this subchapter, the following definitions shall apply:

(1) 9–1–1 services and E9–1–1 services

The terms ''9–1–1 services'' and ''E9–1–1 services'' shall have the meaning given those terms in section 942 of this title.

(2) Multi-line telephone system

The term ''multi-line telephone system'' or ''MLTS'' means a system comprised of common control units, telephone sets, control hardware and software and adjunct systems, including network and premises based systems, such as Centrex and VoIP, as well as PBX, Hybrid, and Key Telephone Systems (as classified by the Commission under part 68 of title 47, Code of Federal Regulations), and includes systems owned or leased by governmental agencies and non-profit entities, as well as for profit businesses.

(3) Office

The term ''Office'' means the 9–1–1 Implementation Coordination Office established under section 942 of this title.

(Pub. L. 112–96, title VI, §6502, Feb. 22, 2012, 126 Stat. 237.)

§ 1472. Parity of protection for provision or use of Next Generation 9–1–1 services

(a) Immunity

A provider or user of Next Generation 9–1–1 services, a public safety answering point, and the officers, directors, employees, vendors, agents, and authorizing government entity (if any) of such provider, user, or public safety answering point, shall have immunity and protection from liability under Federal and State law to the extent provided in subsection (b) with respect to—

(1) the release of subscriber information related to emergency calls or emergency services;

(2) the use or provision of 9–1–1 services, E9–1–1 services, or Next Generation 9–1–1 services; and

(3) other matters related to 9–1–1 services, E9–1–1 services, or Next Generation 9–1–1 services.

(b) Scope of immunity and protection from liability

The scope and extent of the immunity and protection from liability afforded under sub-

The Regulatory Flexibility Act
5 U.S.C. §§ 601-612

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TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see note set out preceding section 591 of this title.

§ 596. Authorization of appropriations

There are authorized to be appropriated to carry out this subchapter not more than $3,200,000 for fiscal year 2009, $3,200,000 for fiscal year 2010, and $3,200,000 for fiscal year 2011. Of any amounts appropriated under this section, not more than $2,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 391, § 576; Pub. L. 91–164, Dec. 24, 1969, 83 Stat. 446; Pub. L. 92–526, § 2, Oct. 21, 1972, 86 Stat. 1048; Pub. L. 95–293, § 1(a), June 13, 1978, 92 Stat. 317; Pub. L. 97–330, Oct. 15, 1982, 96 Stat. 1618; Pub. L. 99–470, § 2(a), Oct. 14, 1986, 100 Stat. 1198; Pub. L. 101–422, § 1, Oct. 12, 1990, 104 Stat. 910; renumbered § 596, Pub. L. 102–354, § 2(2), Aug. 26, 1992, 106 Stat. 944; Pub. L. 108–401, § 3, Oct. 30, 2004, 118 Stat. 2255; Pub. L. 110–290, § 2, July 30, 2008, 122 Stat. 2914.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1045e.	Aug. 30, 1964, Pub. L. 88–499, § 7, 78 Stat. 618.

The word ''hereby'' is omitted as unnecessary.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

2008—Pub. L. 110–290 amended section generally. Prior to amendment, text read as follows: ''There are authorized to be appropriated to carry out this subchapter not more than $3,000,000 for fiscal year 2005, $3,100,000 for fiscal year 2006, and $3,200,000 for fiscal year 2007. Of any amounts appropriated under this section, not more than $2,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.''

2004—Pub. L. 108–401 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows: ''There are authorized to be appropriated to carry out the purposes of this subchapter not more than $2,000,000 for fiscal year 1990, $2,100,000 for fiscal year 1991, $2,200,000 for fiscal year 1992, $2,300,000 for fiscal year 1993, and $2,400,000 for fiscal year 1994. Of any amounts appropriated under this section, not more than $1,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.''

1992—Pub. L. 102–354 renumbered section 576 of this title as this section.

1990—Pub. L. 101–422 amended section generally. Prior to amendment, section read as follows: ''There are authorized to be appropriated to carry out the purposes of this subchapter not more than $1,600,000 for fiscal year 1986 and not more than $2,000,000 for each fiscal year thereafter up to and including fiscal year 1990. Of any amounts appropriated under this section, not more than $1,000 may be made available in each fiscal year for official reception and entertainment expenses for foreign dignitaries.''

1986—Pub. L. 99–470 substituted ''Authorization of appropriations'' for ''Appropriations'' in section catchline and amended text generally. Prior to amendment, text read as follows: ''There are authorized to be appropriated to carry out the purposes of this subchapter sums not to exceed $2,300,000 for the fiscal year ending September 30, 1982, and not to exceed $2,300,000 for each fiscal year thereafter up to and including the fiscal year ending September 30, 1986.''

1982—Pub. L. 97–330 substituted provisions authorizing appropriations of not to exceed $2,300,000 for fiscal year ending Sept. 30, 1982, and not to exceed $2,300,000 for each fiscal year thereafter up to and including fiscal year ending Sept. 30, 1986, for provisions that had authorized appropriations of not to exceed $1,700,000 for fiscal year ending Sept. 30, 1979, $2,000,000 for fiscal year ending Sept. 30, 1980, $2,300,000 for fiscal year ending Sept. 30, 1981, and $2,300,000 for fiscal year ending Sept. 30, 1982.

1978—Pub. L. 95–293 substituted provisions authorizing appropriations for fiscal years ending Sept. 30, 1979, Sept. 30, 1980, Sept. 30, 1981, and Sept. 30, 1982, of $1,700,000, $2,000,000, $2,300,000, and $2,300,000, respectively, for provisions authorizing appropriations for fiscal years ending June 30, 1974, June 30, 1975, June 30, 1976, June 30, 1977, and June 30, 1978, of $760,000, $805,000, $850,000, $900,000, and $950,000, respectively, and provisions authorizing for each fiscal year thereafter such sums as may be necessary.

1972—Pub. L. 92–526 substituted provisions authorizing to be appropriated necessary sums not in excess of $760,000 for fiscal year ending June 30, 1974, $805,000 for fiscal year ending June 30, 1975, $850,000 for fiscal year ending June 30, 1976, $900,000 for fiscal year ending June 30, 1977, and $950,000 for fiscal year ending June 30, 1978, and each fiscal year thereafter, for provisions authorizing to be appropriated necessary sums, not in excess of $450,000 per annum.

1969—Pub. L. 91–164 substituted ''$450,000 per annum'' for ''$250,000''.

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95–293, § 1(b), June 13, 1978, 92 Stat. 317, provided that: ''The amendment made by subsection (a) [amending this section] shall take effect October 1, 1977.''

CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS

§ 601. Definitions

For purposes of this chapter—

(1) the term ''agency'' means an agency as defined in section 551(1) of this title;

(2) the term ''rule'' means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term ''rule'' does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valu-

ations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term ''small business'' has the same meaning as the term ''small business concern'' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term ''small organization'' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term ''small governmental jurisdiction'' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

(6) the term ''small entity'' shall have the same meaning as the terms ''small business'', ''small organization'' and ''small governmental jurisdiction'' defined in paragraphs (3), (4) and (5) of this section; and

(7) the term ''collection of information''—

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

(8) RECORDKEEPING REQUIREMENT.—The term ''recordkeeping requirement'' means a requirement imposed by an agency on persons to maintain specified records.

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1165; amended Pub. L. 104–121, title II, §241(a)(2), Mar. 29, 1996, 110 Stat. 864.)

REFERENCES IN TEXT

Section 3 of the Small Business Act, referred to in par. (3), is classified to section 632 of Title 15, Commerce and Trade.

AMENDMENTS

1996—Pars. (7), (8). Pub. L. 104–121 added pars. (7) and (8).

EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104–121, title II, §245, Mar. 29, 1996, 110 Stat. 868, provided that: ''This subtitle [subtitle D (§§241–245) of title II of Pub. L. 104–121, amending this section and sections 603 to 605, 609, 611, and 612 of this title and enacting provisions set out as a note under section 609 of this title] shall become effective on the expiration of 90 days after the date of enactment of this subtitle [Mar. 29, 1996], except that such amendments shall not apply to interpretative rules for which a notice of proposed rulemaking was published prior to the date of enactment.''

EFFECTIVE DATE

Pub. L. 96–354, §4, Sept. 19, 1980, 94 Stat. 1170, provided that: ''The provisions of this Act [enacting this chapter] shall take effect January 1, 1981, except that the requirements of sections 603 and 604 of title 5, United States Code (as added by section 3 of this Act) shall apply only to rules for which a notice of proposed rulemaking is issued on or after January 1, 1981.''

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–121, §1, Mar. 29, 1996, 110 Stat. 847, provided that: ''This Act [enacting sections 801 to 808 of this title, section 657 of Title 15, Commerce and Trade, and sections 1320b–15 and 1383e of Title 42, The Public Health and Welfare, amending this section and sections 504, 603 to 605, 609, 611, and 612 of this title, sections 665e and 901 of Title 2, The Congress, section 648 of Title 15, section 2412 of Title 28, Judiciary and Judicial Procedure, section 3101 of Title 31, Money and Finance, and sections 401, 402, 403, 405, 422, 423, 425, 902, 903, 1382, 1382c, 1383, and 1383c of Title 42, enacting provisions set out as notes under this section and sections 504, 609, and 801 of this title and sections 401, 402, 403, 405, 902, 1305, 1320b–15, and 1382 of Title 42, amending provisions set out as a note under section 631 of Title 15, and repealing provisions set out as a note under section 425 of Title 42] may be cited as the 'Contract with America Advancement Act of 1996'.''

SHORT TITLE

Pub. L. 96–354, §1, Sept. 19, 1980, 94 Stat. 1164, provided: ''That this Act [enacting this chapter] may be cited as the 'Regulatory Flexibility Act'.''

REGULATORY ENFORCEMENT REPORTS

Pub. L. 107–198, §4, June 28, 2002, 116 Stat. 732, provided that:

''(a) DEFINITION.—In this section, the term 'agency' has the meaning given that term under section 551 of title 5, United States Code.

''(b) IN GENERAL.—

''(1) INITIAL REPORT.—Not later than December 31, 2003, each agency shall submit an initial report to—

''(A) the chairpersons and ranking minority members of—

''(i) the Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] and the Committee on Small Business and Entrepreneurship of the Senate; and

''(ii) the Committee on Government Reform [now Committee on Oversight and Government Reform] and the Committee on Small Business of the House of Representatives; and

''(B) the Small Business and Agriculture Regulatory Enforcement Ombudsman designated under section 30(b) of the Small Business Act (15 U.S.C. 657(b)).

''(2) FINAL REPORT.—Not later than December 31, 2004, each agency shall submit a final report to the members and officer described under paragraph (1)(A) and (B).

SEC. 2. *General Provisions*. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals, or the regulatory review process.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum shall be implemented consistent with Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), Executive Order 13175 of November 6, 2000 (Consultation and Coordination with Indian Tribal Governments), and my memorandum of November 5, 2009 (Tribal Consultation).

(d) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(e) The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

§ 602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain—

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking,[1] and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1166.)

[1] So in original. The comma probably should be a semicolon.

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain—

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(d)(1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

(A) any projected increase in the cost of credit for small entities;

(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—

(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1166; amended Pub. L. 104–121, title II, §241(a)(1), Mar. 29, 1996, 110 Stat. 864; Pub. L. 111–203, title X, §1100G(b), July 21, 2010, 124 Stat. 2112.)

AMENDMENTS

2010—Subsec. (d). Pub. L. 111–203 added subsec. (d).

1996—Subsec. (a). Pub. L. 104–121, §241(a)(1)(B), inserted at end ''In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.''

Pub. L. 104–121, §241(a)(1)(A), which directed the insertion of '', or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States'' after ''proposed rule'' was executed by making the insertion where those words appeared in first sentence to reflect the probable intent of Congress.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6)[1] a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and

(6)[1] for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1167; amended Pub. L. 104–121, title II, §241(b), Mar. 29, 1996, 110 Stat. 864; Pub. L. 111–203, title X, §1100G(c), July 21, 2010, 124 Stat. 2113; Pub. L. 111–240, title I, §1601, Sept. 27, 2010, 124 Stat. 2551.)

AMENDMENTS

2010—Subsec. (a)(1). Pub. L. 111–240, §1601(1), struck out ''succinct'' before ''statement''.

Subsec. (a)(2). Pub. L. 111–240, §1601(2), substituted ''statement'' for ''summary'' before ''of the significant issues'' and ''of the assessment''.

Subsec. (a)(3), (4). Pub. L. 111–240, §1601(3), (4), added par. (3) and redesignated former par. (3) as (4). Former par. (4) redesignated (5).

Subsec. (a)(5). Pub. L. 111–240, §1601(3), redesignated par. (4) as (5). Former par. (5), relating to description of steps taken to minimize the significant economic impact on small entities, redesignated (6).

Pub. L. 111–203, §1100G(c)(1), which directed amendment of par. (4) by striking ''and'' at the end, was executed to par. (5) to reflect the probable intent of Congress and the intervening redesignation of par. (4) as (5) by Pub. L. 111–240, §1601(3). See above.

Subsec. (a)(6). Pub. L. 111–240, §1601(3), redesignated par. (5), relating to description of steps taken to mini-

[1] So in original. Two pars. (6) have been enacted.

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mize the significant economic impact on small entities, as (6).

Pub. L. 111–203, § 1100G(c)(3), added par. (6) relating to description of steps taken to minimize any additional cost of credit for small entities.

Pub. L. 111–203, § 1100G(c)(2), which directed amendment of par. (5) by substituting ''; and'' for period at end, was executed to par. (6), relating to description of steps taken to minimize the significant economic impact on small entities, to reflect the probable intent of Congress and the intervening redesignation of par. (5) as (6) by Pub. L. 111–240, § 1601(3). See above.

1996—Subsec. (a). Pub. L. 104–121, § 241(b)(1), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

''(1) a succinct statement of the need for, and the objectives of, the rule;

''(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and

''(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.''

Subsec. (b). Pub. L. 104–121, § 241(b)(2), substituted ''such analysis or a summary thereof.'' for ''at the time of publication of the final rule under section 553 of this title a statement describing how the public may obtain such copies.''

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1167; amended Pub. L. 104–121, title II, § 243(a), Mar. 29, 1996, 110 Stat. 866.)

AMENDMENTS

1996—Subsec. (b). Pub. L. 104–121 amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: ''Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.''

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

§ 606. Effect on other law

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

§ 607. Preparation of analyses

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

§ 608. Procedure for waiver or delay of completion

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date

of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1168.)

§ 609. Procedures for gathering comments

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term ''covered agency'' means—

(1) the Environmental Protection Agency;

(2) the Consumer Financial Protection Bureau of the Federal Reserve System; and

(3) the Occupational Safety and Health Administration of the Department of Labor.

(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

(2) Special circumstances requiring prompt issuance of the rule.

(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1168; amended Pub. L. 104–121, title II, §244(a), Mar. 29, 1996, 110 Stat. 867; Pub. L. 111–203, title X, §1100G(a), July 21, 2010, 124 Stat. 2112.)

AMENDMENTS

2010—Subsec. (d). Pub. L. 111–203 substituted ''means—'' for ''means the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor.'' and added pars. (1) to (3).

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1996—Pub. L. 104–121, § 244(a)(2), (3), designated existing provisions as subsec. (a) and inserted ''including soliciting and receiving comments over computer networks'' after ''entities'' in par. (4).

Pub. L. 104–121, § 244(a)(1), which directed insertion of ''the reasonable use of'' before ''techniques,'' in introductory provisions, was executed by making the insertion in text which did not contain a comma after the word ''techniques'' to reflect the probable intent of Congress.

Subsecs. (b) to (e). Pub. L. 104–121, § 244(a)(4), added subsecs. (b) to (e).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

SMALL BUSINESS ADVOCACY CHAIRPERSONS

Pub. L. 104–121, title II, § 244(b), Mar. 29, 1996, 110 Stat. 868, provided that: ''Not later than 30 days after the date of enactment of this Act [Mar. 29, 1996], the head of each covered agency that has conducted a final regulatory flexibility analysis shall designate a small business advocacy chairperson using existing personnel to the extent possible, to be responsible for implementing this section and to act as permanent chair of the agency's review panels established pursuant to this section.''

§ 610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1169.)

REFERENCES IN TEXT

The effective date of this chapter, referred to in subsec. (a), is Jan. 1, 1981. See Effective Date note set out under section 601 of this title.

§ 611. Judicial review

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to

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take corrective action consistent with this chapter and chapter 7, including, but not limited to—

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1169; amended Pub. L. 104–121, title II, §242, Mar. 29, 1996, 110 Stat. 865.)

AMENDMENTS

1996—Pub. L. 104–121 amended section generally. Prior to amendment, section read as follows:

''(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.

''(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

''(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.''

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1170; amended Pub. L. 104–121, title II, §243(b), Mar. 29, 1996, 110 Stat. 866.)

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–121, §243(b)(1), which directed substitution of ''the Committees on the Judiciary and Small Business of the Senate and House of Representatives'' for ''the committees on the Judiciary of the Senate and the House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives'', was executed by making the substitution for ''the Committees on the Judiciary of the Senate and House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives'' to reflect the probable intent of Congress.

Subsec. (b). Pub. L. 104–121, §243(b)(2), substituted ''his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the'' for ''his views with respect to the''.

CHANGE OF NAME

Committee on Small Business of Senate changed to Committee on Small Business and Entrepreneurship of Senate. See Senate Resolution No. 123, One Hundred Seventh Congress, June 29, 2001.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of reporting provisions in subsec. (a) of this section, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 191 of House Document No. 103–7.

CHAPTER 7—JUDICIAL REVIEW

SHORT TITLE

The provisions of sections 551 to 559 of this title and this chapter were originally enacted by act June 11, 1946, ch. 423, 60 Stat. 237, popularly known as the ''Administrative Procedure Act''. That Act was repealed as part of the general revision of this title by Pub. L. 89–554 and its provisions incorporated into sections 551 to 559 of this title and this chapter.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—