BRIEF FOR RESPONDENTS

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

NO. 15-1346

FREE ACCESS & BROADCAST TELEMEDIA, LLC, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties and intervenors appearing in this Court are listed in the brief for petitioners.

2. Rulings under review.

The rulings at issue are: (1) *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (JA __) (*Order*); and (2) *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Second Order on Reconsideration, 30 FCC Rcd 6746 (2015) (JA __) (*Reconsideration Order*).

3. Related cases.

The consolidated petitions for review in *Mako Communications, LLC* and *Beach TV Properties*, Nos. 15-1264; 15-1280, involve a separate challenge to the same set of FCC rulings as in this case. On November 30, 2015, the Court ordered that this case and the *Mako/Beach TV* appeal be argued on the same day before the same panel.

Different challenges to the *Order* under review in this case were raised—and rejected—in *National Association of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015).

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GLOSSARY

FRFA	Final Regulatory Flexibility Analysis
LPTV	low-power television
MHz	megahertz – a measurement of radio waves equivalent to one million cycles per second
NPRM	*Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 27 FCC Rcd 12357 (2012)
Order	*Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567 (2014)
Reconsideration Order	*Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Second Order on Reconsideration, 30 FCC Rcd 6746 (2015)
Spectrum Act	Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 125 Stat. 156 (2012)
UHF	ultra high frequency band

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BRIEF FOR RESPONDENTS

INTRODUCTION

This case arises from a rulemaking initiated by the Federal Communications Commission in 2012 to implement legislation—commonly referred to as the Spectrum Act—that authorizes the FCC to conduct an incentive auction to make spectrum currently being used by television broadcasters available for wireless broadband and for other purposes. *See* Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 125 Stat. 156 (2012); 47 U.S.C. §§ 1401, *et seq*.

By means of the incentive auction, certain television broadcasters may relinquish their spectrum rights voluntarily in exchange for a payment determined in a "reverse" auction. The Commission will then reorganize or "repack" spectrum currently used for television broadcasting by reducing the portion of the Ultra High Frequency (UHF) band allocated for broadcasting and thereby clearing contiguous spectrum in this band for new, flexible uses, including wireless broadband. Wireless carriers and other bidders will participate in a "forward" auction to acquire licenses to use the repurposed spectrum made available through this reorganization.

The Spectrum Act mandates that the Commission preserve the coverage area and population served of two classes of broadcast television stations in the repacking process: (1) full-power television stations and (2) Class A television stations. The Commission determined that the Act does not require the protection of low-power television stations that do not have a Class A license (hereafter referred to as "LPTV stations") and declined to exercise its discretion to protect such stations.

Free Access & Broadcast Telemedia, LLC, an investor in LPTV stations, and Word of God Fellowship, an LPTV licensee, filed a petition for review challenging the Commission's decision. Petitioners argue that the decision (1) violates a provision of the Spectrum Act assertedly constraining

the FCC's ability "to alter the spectrum usage rights of low-power television stations," 47 U.S.C. § 1452(b)(5); (2) is otherwise unreasonable; and (3) violates the Regulatory Flexibility Act.

As a threshold matter, the Court lacks jurisdiction over the petition for review because petitioners have not demonstrated standing. On the merits, the Commission's interpretation of the Spectrum Act is consistent with the statute's language, structure and purpose. Section 1452(b)(5) looks only to the existing rights of LPTV stations; it does not grant such stations additional rights in the incentive auction repacking. The rights of LPTV stations have always been secondary to those of licensed primary users of the spectrum. Their rights are therefore not altered by their potential displacement to accommodate new users in the repurposed spectrum. In addition, the Spectrum Act's overarching goal of repurposing spectrum for uses other than broadcast television would be substantially impaired if LPTV stations could not be displaced where necessary to accommodate new uses for spectrum vacated by full-power and Class A broadcasters. Lastly, the Commission fully complied with the Regulatory Flexibility Act by explaining, in its Final Regulatory Flexibility analysis, the agency's efforts to evaluate and minimize the impact of its incentive auction rules on LPTV stations.

JURISDICTION

The *Order* (JA __) was released on June 2, 2014. The *Reconsideration Order* (JA __) was released on June 19, 2015 and published in the Federal Register on August 6, 2015. Petitioners timely filed their petition for review of the *Order* and the *Reconsideration Order* on October 5, 2015, within the sixty-day filing period prescribed by 28 U.S.C. § 2344. Although this Court generally has jurisdiction to review FCC rulemaking orders pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), as explained below, the Court lacks jurisdiction over the petition for review in this case because petitioners do not have standing.

QUESTIONS PRESENTED

1a. Whether Word of God Fellowship is a "party aggrieved" so as to seek judicial review under the Hobbs Act when it did not participate in the proceedings before the Commission, which resulted in the orders under review.

1b. Whether Free Access has demonstrated standing to challenge the orders it seeks to review when it claims only that it is an investor in LPTV stations, and is not a licensee of any such station.

2. Whether the Commission's decision not to protect LPTV stations in the repacking phase of the incentive auction was reasonable and consistent

with the Spectrum Act's provision that nothing in 47 U.S.C § 1452(b) shall "alter" the rights of LPTV stations.

3. Whether the *Order* complied with the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*.

STATUTES AND REGULATIONS

An addendum to this brief sets forth the relevant statutes and rules.

COUNTERSTATEMENT

A. The Spectrum Act and the Upcoming Incentive Auction

The Spectrum Act, 47 U.S.C. §§ 1451-1457, authorizes the FCC to hold an incentive auction to encourage broadcasters to relinquish their spectrum usage rights in exchange for incentive payments. By means of the auction, Congress hopes to free up spectrum that is currently occupied by broadcast television for other licensed, flexible uses, including wireless telecommunications services, for which demand has skyrocketed in recent years. *See Nat'l Ass'n of Broadcasters v. FCC (NAB)*, 789 F.3d 165, 169 (D.C. Cir. 2015).

The auction is to be comprised of three key parts: (1) a reverse auction encouraging television broadcasters to relinquish their spectrum usage rights; (2) a repacking process by which the remaining broadcasters are efficiently consolidated into a smaller amount of spectrum; and (3) a forward auction by which the repurposed spectrum is licensed for other uses. *Expanding the*

Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, 29 FCC Rcd 6567 ¶¶ 1, 13 (2014) (JA __) (*Order*).

First, in the reverse auction, certain television broadcasters will submit confidential bids to the FCC with the amount of compensation they will accept in order to relinquish their spectrum rights. *Id.* ¶¶ 28, 30 (JA __); 47 U.S.C. § 1452(a)(1). The "winners" of the reverse auction are the broadcasters whose bids to voluntarily relinquish rights are accepted.

The "repacking" will reorganize the broadcast television spectrum so that the television stations that remain on the air after the incentive auction occupy less spectrum, freeing a portion for other uses. 47 U.S.C. § 1452(b). The Spectrum Act authorizes the FCC to "make such reassignments of television channels as the Commission considers appropriate" and to "reallocate such portions of such spectrum as the Commission determines are available for reallocation." *Id.* § 1452(b)(1)(B). Through the repacking, the Commission will reconfigure a portion of the UHF band into contiguous blocks of spectrum suitable for flexible use, including, for example, for wireless telecommunications. *Order* ¶¶ 1, 5 (JA __). *See* 47 U.S.C. § 1451(b) (granting incentive auction authority to permit the assignment of "new initial licenses . . . subject to flexible-use service rules"). Whereas reverse auction participation is voluntary, broadcasters may be involuntarily

assigned to new channels in the repacking in order to free spectrum for other uses.

Finally, in the forward auction, the Commission will assign licenses for use of repurposed broadcast television spectrum to wireless carriers and other bidders. 47 U.S.C. § 1452(c). The proceeds of the forward auction will be used to compensate broadcasters who voluntarily relinquish their spectrum rights and pay the relocation expenses of broadcasters reassigned to new channels, among other things. *Order* ¶ 35 (JA __).

The success of the incentive auction requires that each of the three components work together. The reverse auction depends on the willingness of forward auction bidders to pay. The forward auction depends on the willingness of reverse auctions bidders to relinquish spectrum rights in exchange for payments. In addition, both the reverse and forward auctions depend on an efficient repacking of the spectrum used by broadcasters to clear a portion of the UHF band for new uses.

In repacking spectrum in the course of the incentive auction, the Spectrum Act requires the Commission to "make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee . . . " 47 U.S.C. § 1452(b)(2). The statute defines the term "broadcast television licensee" to mean "a full-power

television station" or "a low-power television station that has been accorded primary status as a Class A television licensee under [47 C.F.R.] section 73.6001." 47 U.S.C. § 1401(6).[1]

B. LPTV Stations

LPTV stations are television stations that transmit their signal at a low power, so that the signal reaches a smaller service area than "full-power" stations. The FCC created LPTV service in 1982 as a less expensive and more flexible way for television stations to provide local programming in rural and other smaller communities. *Low Power Television Service*, 51 Rad. Reg. 2d (P&F) 476 (1982) (*LPTV Service Order*).

In establishing LPTV service, the Commission made clear its intention "to maintain the secondary spectrum priority of low power stations." *Id.* ¶ 17. Secondary status means that an LPTV station cannot cause interference to full service stations and other primary services, including new wireless

[1] Class A television licenses were established and made available under the Community Broadcasters Protection Act of 1999, 47 U.S.C. § 336(f), to licensees of certain "qualifying low-power television stations." To qualify, among other things, "during the 90 days preceding November 29, 1999," a low-power television station had to have "broadcast a minimum of 18 hours per day," and "an average of at least 3 hours a week" of locally produced programming. 47 U.S.C. § 336(f)(2). A Class A television licensee that complies with the rules governing such stations is "accorded primary status as a television broadcaster." 47 U.S.C. § 336(f)(1)(ii). *Accord* 47 C.F.R. § 73.6001(c).

services. *Id*. ¶ 17; *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*, 19 FCC Rcd 19331, 19372 ¶ 118 (2004) (*Digital LPTV Order*). The Commission explained that their "inherently limited coverage potential" warranted a "distinction in regulatory treatment" between low power stations and primary services. *LPTV Service Order* ¶ 109. Due to their secondary status, LPTV stations are subject to the "possibility that they might be required to alter facilities or cease operation at any time" if their operation interferes with a primary service. *Id.* ¶ 95.

C. The Orders on Review

1. Order

The Commission adopted rules and policies for the incentive auction in June 2014, in the *Order* under review. In doing so, the Commission "decline[d] to extend repacking protection" to LPTV and TV translator stations.[2] *Order* ¶ 237 (JA__). The Commission explained that protection of LPTV stations in the repacking process is not mandated by the Spectrum Act because the statute provides for such protection only to "each broadcast

[2] A TV translator station is a type of low-power television station that retransmits the programming of a full-power television station in situations where direct reception of the full-power broadcast station is unsatisfactory because of distance or intervening terrain obstructions. *See NAB*, 789 F.3d at 179.

television licensee," a defined term that includes only full-power and Class A television licensees. *Id*. ¶ 238 (JA__). Therefore, the Commission determined, there is no basis in the text of the statute "to conclude that low power stations that have not been accorded Class A status are entitled to the protections afforded by" the requirement imposed on the Commission to preserve the coverage area and population served of each broadcast television licensee. *Id*. (JA __); *see* 47 U.S.C. § 1452(b)(2).

The Commission determined that 47 U.S.C. § 1452(b)(5)'s language that nothing in that subsection should "alter" the spectrum usage rights of LPTV stations did not require the agency to protect these stations in the incentive auction repacking. *Id*. ¶ 239 (JA__). The Commission stated that the provision "clarifies the meaning and scope" of the statute's protections, and "does not limit the Commission's spectrum management authority." *Id*. (JA__). "In any case," the Commission explained, its decision not to protect LPTV stations in the incentive auction repacking does not "'alter' the spectrum usage rights of [such stations]", which have always been afforded "secondary" status. *Id*. (JA __). Under that status, LPTV stations are prohibited from "caus[ing] interference to," and have been required to "accept interference from," "full service television stations, certain land mobile radio operations and other primary services." *Id*. & n.741 (JA ___)

(citation omitted). The Commission pointed out that LPTV stations that have made investments in their facilities have done so with "explicit, full and clear prior notice that operation in the LPTV [service] entails the risk of displacement." *Id*. ¶ 241 (JA__).

The Commission recognized the "valuable services" provided by many LPTV and TV translator stations, and acknowledged that its decision could "result in some viewers losing the services of these stations," "strand . . . investments . . . made in . . . existing facilities," and "may cause displaced licensees that choose to move to a new channel to incur the cost of doing so." *Id*. ¶ 237 (JA ___). "On balance," the Commission concluded, "these concerns are outweighed by the detrimental impact that protecting LPTV and TV translator stations would have on the repacking process and on the success of the incentive auction." *Id*. (JA __). The Commission pointed out that there are more than 5,500 licensed LPTV and TV translator stations.[3] *Id*. ¶ 241 (JA__). Protecting LPTV stations would thus increase the number of constraints on the repacking process and significantly curtail the

[3] Approximately 1,900 are licensed LPTV stations. FCC, News Release, Broadcast Station Totals as of September 30, 2015 (Oct. 9, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-335798A1.pdf.

Commission's ability to recover spectrum—thereby frustrating the underlying purpose of the Spectrum Act. *Id*. (JA__).

The *Order* also included a Final Regulatory Flexibility Analysis (*FRFA*) as required by the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612. *See Order*, Appendix B. (JA__-___). The Commission explained in the *FRFA* that there was no statutory mandate to protect LPTV stations—which are secondary services—in the repacking, and that doing so would "severely limit recovery of spectrum and frustrate the purpose of the Spectrum Act." *Id*. ¶ 56 (JA __). The agency acknowledged that in the absence of protection, "[m]any of these stations may be displaced from their current channel." *Id*. ¶ 9 (JA__).

To mitigate the impact, the Commission explained that displaced LPTV stations will have the opportunity to "submit a displacement application and propose a new operating channel" after the auction. *Id*. (JA__). In addition, the Commission stated, it will permit LPTV stations to explore engineering solutions or agree on a settlement to resolve mutually exclusive displacement applications. *Id*. (JA__). Finally, the agency noted that it would conduct a rulemaking proceeding, which has now been completed, to consider "additional means to mitigate the potential impact of

the incentive auction and the repacking process on LPTV and TV translator stations." *Id*. (JA__).

2. **Order on Reconsideration**

Petitioner Free Access & Broadcast Telemedia, LLC (Free Access), which had filed belated comments in the proceeding that led to the *Order*,[4] filed a petition for reconsideration. *Free Access Petition For Reconsideration* (Sept. 15, 2014) (JA__). It argued that the Commission had failed to evaluate the benefit of allowing LPTV stations to participate in the reverse action. *Id*. at 3. Free Access pointed out that the Commission acknowledged that it had the discretion to allow LPTV stations to participate, and that in light of this discretion, it should have examined "inclusion of LPTV in the incentive auction as an alternative on reconsideration to see if it would minimize the significant economic impact on admittedly small LPTV entities." *Id*. Free Access argued that the Commission's failure to perform a cost-benefit analysis violated the Regulatory Flexibility Act, which required the agency to describe the steps it has taken to minimize the significant economic impact on LPTV stations. *Id*.

[4] Free Access submitted its reply comments more than one year past the comment deadline and a mere 10 days before the Commission adopted the *Order*. *See* Written *Ex Parte* Comments of Free Access & Broadcast Telemedia, LLC (May 5, 2014).

The Commission denied the petition. *Reconsideration Order* ¶ 145 (JA __). The agency explained that the Spectrum Act mandates a reverse auction to determine the amount of compensation that each "broadcast television licensee"—i.e. a full power or Class A station—would accept in return for relinquishing its spectrum usage rights. *Id*. (JA__). Because this definition excludes LPTV stations, the Commission determined that LPTV stations were not eligible to participate in the reverse auction. *Id*. (JA__). The agency went on explain that even if it had the discretion to permit LPTV stations to participate in the reverse action—notwithstanding the statutory mandate—granting LPTV stations eligibility would be inappropriate. *Id*. (JA__). Because LPTV stations are not eligible for protection in the repacking and can be displaced by primary services, encouraging them to relinquish their spectrum usage rights through incentive payments is not necessary "in order to make spectrum available for assignment" in the forward auction. *Id*. (JA__). Therefore, allowing LPTV stations to participate in the reverse auction "would not further the goals of the Spectrum Act; instead, it would undercut Congress's funding priorities, including public-safety related priorities and deficit reduction." *Id*. (JA__).

In addition, the agency determined that it did not violate the Regulatory Flexibility Act by failing to conduct an independent analysis of the economic

impact on LPTV stations of not allowing them to participate in the reverse auction. *Id*. ¶ 146 (JA__). The Act, the Commission explained, does not require cost-benefit analysis or economic modeling, but rather, a "statement of the factual, policy and legal reasons" for selecting the final rule. *Id*. (JA__). In addition, because Congress had already determined that LPTV stations are ineligible to participate in the reverse auction, the Commission reasoned that performing such an economic analysis would be superfluous. *Id*. (JA__). In the *Order*, the agency had fully explained the reasons for not protecting LPTV stations in the repacking or including them in the reverse auction, adopted rules to mitigate the potential impact of the incentive auction on LPTV stations, and initiated a separate proceeding to consider additional measures. *Id*. (JA__). Thus, the Commission concluded, it demonstrated a "reasonable, good-faith effort to carry out [the statute's] mandate." *Id*. (JA__).

D. Third Report & Order

On December 17, 2015, the Commission released a Third Report & Order adopting additional measures to help LPTV stations that may be displaced as a result of the incentive auction repacking process. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, MB Docket No. 03-185, GN Docket No. 12-268, ET Docket No.

14-175, 2015 WL 9260876 (Dec. 17, 2015) (*Third Report & Order*). These measures include assisting displaced LPTV stations to identify new channels through the use of special software, extending the deadline for LPTV stations to transition from analog to digital broadcasting operations, and allowing LPTV and TV translator stations to share channels.

On October 5, 2015, Free Access filed a petition for review of the *Order* and the *Reconsideration Order*. In doing so, Free Access was joined by Word of God Fellowship, which had never filed comments or otherwise participated in the proceedings before the Commission.

SUMMARY OF ARGUMENT

1. The petition for review should be dismissed for lack of jurisdiction. Petitioner Word of God Fellowship did not file comments with the agency, petition for reconsideration, or otherwise participate in proceedings before the Commission. Therefore, under the Hobbs Act, it is not a "party aggrieved" by the Commission's orders and is precluded from petitioning for review of those orders.

As for Free Access, it lacks standing to challenge the orders under review here because it is merely an investor in LPTV stations, and is not itself a licensee of any LPTV station. Free Access' rights are thus merely derivative of the rights of LPTV licensees. As such, its rights are by

themselves insufficient to demonstrate a sufficient stake in the outcome of this case to overcome the well-settled rule against the standing of shareholders to assert claims that properly belong to the companies in which they hold shares.

2. On the merits, the Commission's interpretation of the Spectrum Act is reasonable. Because 47 U.S.C. § 1452(b)(2) requires the Commission to preserve the population served and coverage area of full power and Class A stations, *see* 47 U.S.C. § 1401(6); *NAB*, 789 F.3d 179-80—not LPTV stations—the Commission reasonably interpreted the Spectrum Act as not requiring the protection of LPTV stations in the repacking process. And 47 U.S.C. § 1452(b)(5), which provides that "[n]othing in this subsection shall be construed to alter the spectrum usage rights" of LPTV stations, does not require the Commission to protect LPTV stations. That provision looks only to LPTV stations' existing rights, which have long been recognized as secondary to those of other licensed users of the spectrum. The Commission did not "alter" the rights of LPTV stations because they continue to have the same secondary status under the Spectrum Act as they have had for the last three decades.

Petitioners' proffered interpretation of the statute as *requiring* the Commission to protect LPTV stations from displacement rewrites the

language of the statute, which imposes no such requirements in Section 1452(b)(5), and is squarely at odds with the statute's primary objective of repurposing spectrum for new uses. This objective would be impossible to fulfill if LPTV stations could not be displaced where necessary to accommodate new uses for spectrum vacated by full-power and Class A broadcasters.

Nor does the Commission's interpretation raise constitutional concerns. Both the Supreme Court and this Court have consistently held that broadcast licenses are not protected property interests that could support claims under the just compensation or due process clauses of the Fifth Amendment.

4. Lastly, the Commission's *Order* fully complied with the Regulatory Flexibility Act. The agency explained the "factual, legal, and policy" reasons for why it declined to protect LPTV stations in the repacking. In addition, it took steps to mitigate the economic impact of the incentive auction on LPTV stations by adopting several measures to increase the likelihood that LPTV stations remain on the air. The Commission clearly made a reasonable, good-faith effort to carry out the Regulatory Flexibility Act's mandate, which is all that the statute requires.

STANDARD OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act and the Spectrum Act is governed by *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, unless the statute "unambiguously forecloses the agency's interpretation," a reviewing court must "defer to that interpretation so long as it is reasonable." *Nat'l Cable & Tel. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009).

In addition, there is a heavy burden to establish that an FCC order is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the order is entitled to a presumption of validity. *E.g.*, *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). A court is not to ask "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Instead, the court must uphold a rule if the Commission "examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Id*. The order must be affirmed unless the agency failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

ARGUMENT

I. THE PETITION FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION

As a threshold matter, the petition for review should be dismissed because neither petitioner has the right to challenge the *Order* or the *Reconsideration Order*. Word of God Fellowship is not a "party aggrieved" under the relevant provision for judicial review, and Free Access lacks standing as merely an investor in LPTV stations.

A. Word of God Fellowship Is Not A Party Aggrieved Because It Did Not Participate In The Proceedings Before The Commission

Appellate review of the orders in this case is governed by the Hobbs Administrative Orders Review Act. 28 U.S.C. §§ 2341–2351. Section 2344 of the Act provides that any "party aggrieved" by a final order of the FCC may file a petition for review of that order. This Court has interpreted the term "party aggrieved" to require that a petitioner have participated in the proceedings before the agency. *See Simmons v. ICC*, 716 F.2d 40, 42-43 (D.C. Cir. 1983); *Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973); *Easton Util. Comm'n v. AEC*, 424 F.2d 847, 853 (D.C. Cir. 1970). *See also, e.g., Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1246 (11th Cir. 2006); *Am. Civil Liberties Union v. FCC*, 774 F.2d 24, 26 (1st Cir. 1985).

As this Court explained, when Congress drafted the judicial review provision of the Hobbs Act, it did not adopt the "person aggrieved" standard used in the APA's general judicial review provision, notwithstanding "the features of that legislation . . . were prominently in mind, as reflected in both the House and the Senate Reports." *Simmons*, 716 F.2d at 43. Instead, Congress chose the term "party aggrieved." *Id*. Therefore, "[t]o give meaning to that apparently intentional variation, we must read 'party' as referring to a party before the agency, not a party to the judicial proceeding." *Id*.

Word of God Fellowship did not file comments with the agency, nor did it petition for reconsideration of the Commission's underlying *Order*. Because it did not participate in proceedings before the FCC, it cannot be a "party aggrieved" by the Commission's orders and is precluded from petitioning for review of those orders.

B. Free Access Lacks Standing Because It Is An Investor Whose Injury Is Wholly Derivative Of Non-Party LPTV Stations.

Unlike Word of God Fellowship, Free Access did participate (albeit belatedly) in the proceedings that led to the adoption of the *Order* and the *Reconsideration Order*. But Free Access lacks standing to challenge those decisions because, by its own admission, it is merely an investor in LPTV

stations; it does not itself own any LPTV licenses. Pet. Br. at 42; Addendum A (Maloof Decl. ¶ 4).[5]

Standing involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy the "irreducible constitutional minimum of standing," petitioners must show: (1) an injury that is actual or imminent; (2) that the injury is fairly traceable to the challenged action; and (3) that the injury will likely be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-562 (1992). Petitioners bear the burden of demonstrating that all elements have been satisfied. *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

Prudential standing requirements are additional, court-imposed limits on the type of party or action that can invoke the authority of federal courts. *Warth*, 422 U.S. at 499. One such prudential limitation is that a petitioner "cannot rest [its] claim to relief on the legal rights or interests of third parties." *LaRoque v. Holder*, 650 F.3d 777, 781 (D.C. Cir. 2011) (quoting

[5] "The Article III restrictions under which this Court operates do not, of course, apply to the FCC. The Commission may choose to allow persons without Article III 'standing' to participate in FCC proceedings, as it did in this case." *Cal. Ass'n of Physically Handicapped v. FCC*, 778 F.2d 823, 826 (D.C. Cir. 1985).

Warth, 422 U.S. at 499). "This prudential limitation is meant to avoid 'the adjudication of rights which those not before the Court may not wish to assert' and to ensure 'that the most effective advocate of the rights at issue is present to champion them.'" *Id*. at 781-82 (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc*., 438 U.S. 59, 80 (1978)).

While "LPTV stations" may be the "most natural challengers" of the Commission's orders because they are "directly regulated parties," Pet. Br. at 40; *Shays v. FEC*, 414 F.3d 76, 94 (D.C. Cir. 2005), Free Access does not claim to be a licensee of any LPTV station. Instead, it alleges only that it "invests . . . in LPTV stations," and that the FCC orders have "materially impaired" the value of those investments. Pet. Br. at 42.

There is a "longstanding equitable restriction"—the shareholder standing rule—"that . . . prohibits shareholders from initiating actions to enforce the rights of the corporation" when the corporation, in its good faith business judgment, has not done so. *Franchise Tax Bd. v. Alcan Aluminum Ltd*., 493 U.S. 331, 336 (1990). Thus, "[n]o shareholder—not even a sole shareholder—has standing in the usual case to bring suit in his individual capacity on a claim that belongs to the corporation." *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984). Free Access does not for the most part describe the nature of its investments, but even if it is not an

equity shareholder, the principle is still the same. The claim for diminished value to the corporation's operations belongs to the corporation, and not the third party investor.[6]

To be sure, there is an exception to the rule for a shareholder that has "a direct, personal, interest in a cause of action"; in that case the shareholder may bring suit even if the corporation's rights are also implicated." *Franchise Tax Board*, 493 U.S. at 336. That exception does not apply here. Free Access' claimed investment injury is wholly derivative of the injury, if any, that might be sustained by LPTV stations that are not before this Court. The value of Free Access' investment in LPTV stations is only diminished by the FCC's orders if those orders have diminished the value of the LPTV stations themselves.

Petitioners' reliance on *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514 (D.C. Cir. 2009) is misplaced. In that case, an investor challenged an agency regulation allowing subsidiaries of mutual holding companies to limit their minority shareholders to 10% of the subsidiary's total minority stock. *Id*. at 517. The Court found that the investor had standing. There was

[6] Free Access refers to certain "options" it holds to buy the LPTV stations in which it has investments "at any time and in Free Access's sole discretion." Pet. Br. at 43; Maloof Decl. ¶ 5. But it nowhere asserts that it has exercised any of those options, or that it owns any LPTV station.

a "substantial probability" the investor would experience "economic harm" sufficient to give rise to standing, the Court explained, because he had previously acquired more than 10% of minority stock in some subsidiaries of mutual holding companies and sought to do so again. *Id*. at 518. In addition, the Court noted, the agency "proposed and ultimately adopted this new approach" precisely to limit the holdings of minority shareholders like the petitioner in that case. *Id*. The petitioner in *Stilwell* therefore could demonstrate, unlike Free Access here, that it had an independent interest as an investor, apart from the interests of the institutions in which he invested, that was implicated by the agency's rule.

In short, Free Access' rights are wholly derivative of those of LPTV stations, but their claims are not before the Court. Therefore, Free Access' claims should be dismissed for lack of standing.

II. THE COMMISSION REASONABLY DETERMINED NOT TO PROTECT LPTV STATIONS IN THE INCENTIVE AUCTION REPACKING

Even if petitioners had standing to challenge the Commission's orders—which they do not—the FCC's decision not to protect LPTV stations in the incentive auction repacking was a reasonable exercise of its broad discretion under the Spectrum Act to achieve the goals of the incentive auction.

Title III of the Communications Act of 1934, 47 U.S.C. §§ 301, *et seq*., "endow[s] the Commission with expansive powers," including "broad authority to manage spectrum . . . in the public interest." *Cellco P'ship v. FCC*, 700 F.3d 534, 541-42 (D.C. Cir. 2012). *See also* 47 U.S.C. § 303(a) - (c), (f) (authorizing FCC to classify stations, prescribe the nature of service to be rendered, assign frequencies, and prevent interference).

The Spectrum Act reinforced the Commission's established authority over spectrum allocation in service of the incentive auction by authorizing the agency to "implement and enforce" the Spectrum Act's provisions "as if this [title] is a part of the Communications Act of 1934." 47 U.S.C. § 1403(a). And the Spectrum Act specifically empowers the Commission, in making spectrum available for the incentive auction, to "make such reassignments of television channels as the Commission considers appropriate" and to "reallocate such portions of such spectrum as the Commission determines are available for reallocation." 47 U.S.C. § 1452(b)(1)(B); *see also id.* § 1452(i) ("[n]othing in [Section 1452(b)] shall be construed to expand or contract the authority of the Commission, except as otherwise expressly provided").

The Spectrum Act requires the Commission to preserve the coverage area and population served of only two classes of broadcasters: (1) full-power

television stations; and (2) Class A stations.[7] *See NAB*, 789 F.3d at 180. LPTV stations that have not obtained full-power or Class A status are thus, by the terms of the statute, not within the Spectrum Act's preservation mandate. *Id*. (affirming Commission's determination that low-power TV translator stations are not entitled to mandatory repacking protection). And the Commission determined that it would not extend discretionary protection to LPTV stations generally "[because of] the detrimental impact that protecting LPTV . . . stations would have on the repacking process and on the . . . incentive auction." *Order* ¶ 237 (JA ___); *Reconsideration Order* ¶ 64 (JA ___).

Petitioners ignore the exclusion of LPTV stations from the Spectrum Act's preservation mandate set forth in 47 U.S.C. § 1452(b)(2). Instead, they contend that the Commission's orders are inconsistent with the Spectrum Act's provision that "[n]othing in this subsection [1452(b)] shall be construed to alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5); Pet Br. at 44-52. That is incorrect.

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[7] *The Videohouse, Inc. v. FCC*, No. 16-1060, which is currently before the Court, concerns a dispute regarding the Commission's decision to extend discretionary protection to certain LPTV stations that obtained Class A licenses after Feb. 22, 2012. In contrast, this case involves LPTV stations that make no claim to Class A status.

A. The Commission's Interpretation of 47 U.S.C. § 1452(b)(5) Is Consistent With The Statutory Language And With LPTV Stations' Well-Established Secondary Status Under Commission Rules and Regulations

At the outset, as the Commission recognized, Section 1452(b)(5) sets forth a rule governing how the provision should be "construed." 47 U.S.C. § 1452(b)(5) ("Nothing . . . shall be construed to alter the spectrum usage rights of low power stations); *Reconsideration Order* ¶ 68 (JA __). Nothing in the text deprives the Commission of the substantive authority granted elsewhere in the subsection. Even more clearly, it is not a "limit on the Commission's authority" to manage spectrum rights that is granted elsewhere in the Communications Act. *Reconsideration Order* ¶ 68 (JA __). Petitioners' suggestion that the FCC must ensure the availability of a channel for every displaced LPTV station, *see, e.g.*, Pet. Br. 30, is contrary to this Court's conclusion that the FCC reasonably decided *not* to protect LPTV translator stations in this manner given the potential impact on the Commission's repacking flexibility. *See NAB*, 789 F.3d at 180.

In any event, Section 1452(b)(5) is not an affirmative "protection" against displacement, as petitioners argue. Pet. Br. 45. The language of the provision looks to LPTV stations' *existing* rights; it does not purport to add to those rights or provide additional protections. By contrast, Section 1452(b)(2) provides that "the Commission shall make all reasonable efforts to

preserve . . . the coverage area and population served of each broadcast television licensee." This language clearly provides affirmative, express protections for full-power and Class A television stations only. *See* 47 U.S.C. § 1401(6) (defining "broadcast television licensee"). Petitioners' contention is flatly at odds with Congress' determination to limit mandatory preservation to those two categories of television stations, and not to extend it to LPTV stations generally.

As the Commission reasonably determined, its decision not to protect LPTV stations in the incentive auction repacking does not "alter" their spectrum usage rights. *Reconsideration Order* ¶ 68 (JA __). When the Commission established LPTV service over three decades ago, it made clear its "firm intention that low power stations remain secondary, in terms of spectrum priority." *LPTV Service Order* ¶ 24. Secondary status means that LPTV stations that cause interference to a primary service may "be required to alter facilities or cease operation at any time." *Id*. ¶ 95. The Commission explained that their "inherently limited coverage potential" warranted a "distinction in regulatory treatment" between low power stations and primary services. *Id*. ¶ 109.

The Commission has reiterated the secondary status of LPTV stations in numerous subsequent orders. *See, e.g., Digital LPTV Order* ¶ 75 ("[W]e

note that a primary wireless licensee maintains the right to require that a secondary broadcast licensee immediately cease operations that cause actual interference to its operations"); *Reallocation and Service Rules for 698-746 MHz Spectrum Band*, 17 FCC Rcd 1022, 1034 ¶ 25 (2002), *pet. for recon. denied*, 17 FCC Rcd 11613 (2002) ("*698-746 MHz Spectrum Band Order*") (LPTV stations "would not be permitted to cause harmful interference to stations of primary services—including new licensees in the band—and would also be required to accept any interference caused by these primary services."): *Lower Power and Television Service*, 3 FCC Rcd 4470, 4472 ¶ 14 (1988) ("[W]e have emphasized repeatedly that low power television and television translator stations are a secondary service and, as such, subject to displacement without any attendant right to operate on other channels."). *See Reconsideration Order* n.262 (JA ___) (collecting Commission decisions).

In short, LPTV stations have always had "explicit, full and clear prior notice that operation in the LPTV service entails the risk of displacement." *Cmty. Broadcasters Ass'n*, Memorandum Opinion & Order, 59 Rad. Reg. 2d (P&F) 1216 ¶ 4 (1986) (*Cmty. Broadcasters Order*).

Petitioners contend that the Commission's interpretation of "alter" would render Section 1452(b)(5) "mere surplusage." Pet. Br. at 54. On the contrary, the Commission's interpretation is faithful to the meaning of the

term "alter." It is petitioners who in effect seek to alter the rights of LPTV stations by insulating them from the risk of displacement by primary spectrum users—a risk that LPTV stations faced long before the incentive auction.

Petitioners claim that had Congress intended to categorically exclude LPTV stations from the repacking, it could have limited the Commission's power to reassign television channels and reallocate the spectrum under Section 1452(b)(1) of the Act to "broadcast television licensee[s]," thereby excluding LPTV licenses. *See* 47 U.S.C. § 1401(6). But as the *NPRM* explained, broadcast television licensees are not the only users of the broadcast television spectrum. *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 27 FCC Rcd 12357, 12365-66 ¶ 18-21 (2012) (*NPRM*) (noting that channel 37 is used for radio astronomy and wireless medical telemetry, and that other users of the television bands include broadcast auxiliary services and wireless microphone operations). It would therefore have made no sense for Congress to have limited the Commission's Spectrum Act reassignment powers to certain users rather than the spectrum that was to be repurposed. Section 1452(b)(1), far from limiting the Commission's authority, gives the

Commission express plenary authority to reallocate spectrum in the television band, including the spectrum currently occupied by LPTV stations.

Petitioners also argue that Congress' decision to exclude LPTV stations from participation in the reverse auction does not imply that LPTV stations must also be excluded from the repacking phase of the auction because the reverse auction, repacking, and forward auction are "distinct" phases of the incentive auction, Pet. Br. at 50. But as the Commission has explained, the phases of the incentive auction are integrally related. *See Order* ¶ 357 (JA __)("Parity between repacking protection and reverse auction eligibility will further the goals of the incentive auction."); *NPRM* ¶ 5 (explaining that the three phases are "interdependent"). Moreover, petitioners ignore that Section 1452(b)(2), which governs the protections to be given to broadcasters in the repacking phase (not the reverse auction) also excludes LPTV stations. 47 U.S.C. § 1452(b)(2); *NAB*, 789 F.3d at 179. As we have explained, Congress' decision not to include LPTV stations in the protections afforded to full-power and Class A broadcast licensees in the repacking supports the Commission's reading that LPTV stations are not protected against displacement.

Moreover, petitioners mischaracterize the nature of the repacking authority by implying that the FCC is limited to repurposing spectrum that it

buys back from eligible broadcast television licensees in the reverse auction. *See, e.g.*, Pet. Br. 39, 69. Section 1452(b)(1) grants the FCC broad authority to reorganize the broadcast television bands in order to free up spectrum to carry out the forward auction. Petitioners' interpretation is absurd: if Congress had protected LPTV stations while excluding them from the reverse auction, as petitioners now suggest, then it would have deprived the FCC of the very tool the FCC would have needed to recover spectrum from protected LPTV stations— that is, the ability to share auction proceeds in order to encourage relinquishment of protected spectrum usage rights.

Finally, petitioners contend that the "absence" of legislative history regarding Section 1452(b)(5) supports their interpretation of the provision. Pet. Br. at 51. According to petitioners, Congress would not have enacted "such a sharp break", *id.*, from the protection of LPTV stations without at least some discussion in the legislative history. But the absence of legislative history is simply that—a silence that has no bearing on the statute's interpretation, and which certainly cannot override the meaning of the statute's text. That text looks to whether the rights of LPTV stations have been "altered" by the potential for displacement by licensed users as a result

of the incentive auction. Since those right have not been altered, there has been no "sharp break."[8]

B. Petitioners Have No Grounds Under The Spectrum Act to Protest The Commission's Decision to Permit Certain Unlicensed Uses.

Petitioners concede that "LPTV licenses are secondary to full-power stations and other specifically defined services for interference purposes," but contend that "LPTV is primary relative to all unlicensed services, such as WiFi broadband, 'white spaces' services,"[9] and devices (such as garage door openers) that are regulated under Part 15 of the Commission's rules, 47 C.F.R. §§ 15.1 *et seq*. Pet. Br. at 11-12. Petitioners contend that the Commission's actions wrongly "force[e] LPTV stations to shut down in order to make room for unlicensed uses that the FCC now desires to promote." Pet. Br. at 47. *See also* Pet. Br. at 30, 46.

Petitioners are mistaken. As explained in the *Order*, the incentive auction provides a means of repurposing spectrum for *licensed* use. *Order* ¶ 5 (JA __), *see* 47 U.S.C. § 1452(c)(1)(A) (authorizing the Commission to

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[8] For the same reasons, petitioners' reliance on the proposition that Congress does not "hide elephants in mouseholes," Pet Br. at 52, is misplaced. The potential displacement of LPTV stations is not an "elephant," it is simply a consequence of their long-settled secondary status.

[9] "White spaces" are portions of licensed spectrum that licensees do not use all the time or in all geographical locations.

"conduct a forward auction in which [it] assigns *licenses* for the use of the spectrum that [it] reallocates") (emphasis added), and the parties participating in the forward auction will all be licensed users. *See also, e.g.*, *Order* ¶¶ 61-80 (JA __-__) (discussing specifics of forward auction licenses).

To be sure, the *Order* makes the "guard bands" established in the repurposed spectrum available for unlicensed use. *Order* ¶¶ 8, 89. (JA __). A guard band is a portion of the spectrum that is set aside to separate two otherwise adjoining frequency ranges in order to prevent interference from "dissimilar adjacent operations." *Id*. ¶ 88 (JA __). But LPTV stations have no basis to complain about the Commission's decision to permit unlicensed operations in the guard bands that it established in order to protect *licensed* services from interference. That is because the Commission's construction of guard bands under the Spectrum Act is not subject to any rights LPTV stations might have under Section 1452(b) of the Act, including the provision in Section 1452(b)(5) regarding alteration of their spectrum usage rights. Congress expressly empowered the Commission to implement band plans with guard bands when repurposing spectrum through the incentive auction without regard to Section 1452. *See* 47 U.S.C. § 1454(a) ("[n]othing . . . in setion 1452 of this title shall be construed to prevent the Commission from using relinquished or other spectrum to implement band plans with guard

bands."). And the Spectrum Act expressly provides that "[t]he Commission may permit the use of such guard bands for unlicensed use." 47 U.S.C. § 1454(c). In short, LPTV stations have no grounds under the Spectrum Act to protest that the Commission has reserved guard bands for unlicensed use.[10]

In addition, petitioners complain that the Commission is "giving priority for use of 'vacant' television spectrum to unlicensed communication devices." Pet. Br. at 34-35, 37. Petitioners apparently refer here to a Notice of Proposed Rulemaking released on June 16, 2015, in which the Commission tentatively concluded that it would preserve a vacant channel in the remaining television bands in each area of the country for unlicensed white space devices and wireless microphones. *Amendment of Parts 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 (2015) (*Vacant Channel NPRM*). But any challenge that petitioners might make to the NPRM is not ripe for review because the NPRM is merely a proposal that has yet to be adopted. *See Ctr. For Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 710 F.2d

[10] The Order also permits unlicensed devices to operate in channel 37, but channel 37 is allocated, not for broadcast use, but for radio astronomy services and wireless medical telemetry service. *Order* ¶ 274 (JA __).

842, 846 (D.C. Cir. 1983) (noting that "the issuance of a notice of proposed rulemaking . . . often will not be ripe for review because the rule may or may not be adopted or enforced."); *Action on Smoking & Health v. Dep't of Labor*, 28 F.3d 162, 164-65 (D.C. Cir. 1994) (finding that OSHA's notice of proposed rulemaking was not ripe for judicial review).

C. The Commission's Decision Does Not "Revoke" LPTV Licenses.

Petitioners contend that the Commission's decision not to protect LPTV stations from displacement in the incentive auction repacking amounts to an unlawful "revocation" of their licenses outside of statutorily-required procedures. Pet. Br. at 46-47.

Section 312 of the Communications Act authorizes the Commission to "revoke" a station license only after serving on the licensee an "order to show cause" why an order of revocation should not be issued, and after a "hearing, or waiver thereof," on the grounds for revocation. 47 U.S.C. § 312(c); *see also* 5 U.S.C. § 558(c).

As the Commission explained (*Reconsideration Order* ¶ 69 (JA __)), the potential displacement of some LPTV stations does not constitute a "revocation" of their licenses within the meaning of the Communications Act because it does not require the stations to automatically terminate operations or relinquish their spectrum usage rights. Rather, the possibility that such

stations may have to vacate the channel on which they are operating (or even cease operations) is simply a consequence of one of the conditions imposed on an LPTV station's license—a condition that LPTV stations have known about and accepted since they first applied for their licenses.[11]

D. Petitioners' Contrary Interpretation Of The Spectrum Act Would Frustrate Its Purpose

Petitioners' interpretation of Section 1452(b)(5) also cannot be reconciled with the objectives of the Spectrum Act. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). Courts "must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

The Spectrum Act empowers the Commission to repurpose spectrum for new uses through the mechanism of an incentive auction. There is no

[11] Furthermore, the record does not demonstrate whether any particular LPTV station—including those of petitioners—will be displaced as a result of the incentive auction. To be sure, some LPTV stations will likely go "dark" permanently, a consequence that the Commission has acknowledged. *See Order* ¶ 656 (JA __). Yet, it remains to be seen whether any *particular* station will be required to cease operation due to interference with a primary user.

reason to think that Congress, which took pains to establish a mechanism for protecting the population and service areas only of full-power and Class A stations post-auction, *see* 47 U.S.C. § 1452(b)(2), nonetheless also intended to preserve every LPTV station in the reorganization of the television band. Had Congress intended to preserve LPTV stations in the repacking process, it could have simply included them in the Act's preservation mandate. It chose not to do so. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) ("When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.").

As this Court has recognized, it is "entirely permissible for the Commission to take into account the Spectrum Act's overarching objective of repurposing broadcast spectrum" in determining which preservation efforts are reasonable. *NAB*, 789 F.3d at 178. Here, the achievement of the Spectrum Act's objective to make broadcast television spectrum available for other uses would be substantially impaired if LPTV stations could not be displaced where their operations would cause interference to the new users of the spectrum purchased in the incentive auction. Petitioners' reading of Section 1452(b)(5) would frustrate the goals of the Spectrum Act by

effectively according LPTV stations a primary status they have never had. *See Shapiro v. United States*, 335 U.S. 1, 31 (1948) (where a statutory provision can be interpreted in two different ways, it should be construed "in the manner which effectuates rather than frustrates the major purpose of the legislative draftsman."). Because it is impossible to harmonize the goals of the Spectrum Act with petitioners' interpretation, the Commission reasonably rejected it.

E. The Commission's Decision Does Not Deprive Petitioners Of Property Without Just Compensation Or Due Process Under the Constitution

Finally, petitioners argue that the FCC's interpretation "raises serious constitutional questions" implicating their rights to just compensation and due process under the Fifth Amendment to the Constitution. Pet. Br. at 54-58.

In order to maintain a due process or takings claim under the Fifth Amendment, however, a party must first show that the challenged government action has an impact on a legally cognizable property interest. *See Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (requiring protected property interest for due process violation); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-61 (1980) (requiring protected property interest for taking). Petitioners cannot do so here.

The Supreme Court and this Court—as petitioners concede (Pet. Br. at 55 n. 9)—have consistently held that broadcast licenses are not protected property interests under the Fifth Amendment. *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("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."); *Mobile Relay Assoc. v. FCC*, 457 F.3d 1, 12 (D.C. Cir. 2006) ("The Commission grants a licensee the right to 'the use of' the spectrum for a set period of time 'but not the ownership'" of channels of communication)(citing 47 U.S.C. § 301)). And as the Commission explained in the *Order*, "[the] rights of LPTV . . . stations to use spectrum are defined by their licenses, which expressly subject them to . . . interference from primary services." *Order* ¶ 240 (JA __).

Although courts "will not submit to an agency's interpretation of a statute if it 'presents serious constitutional difficulties,'" they do not "abandon . . . deference" to the agency's interpretation "at the mere mention of a possible constitutional problem." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). Furthermore, "[t]he canon of avoidance of constitutional doubts must, like the plain meaning rule, give way where its application would produce . . . an unreasonable result plainly at variance with

the policy of the legislation as a whole." *Shapiro*, 335 U.S. at 31; *see also U.S. v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002). As explained, petitioners' proffered alternative reading of Section 1452(b)(5) "as substantively preserving LPTV stations' rights" against displacement, Pet. Br. at 57, is inconsistent with the Spectrum Act's objective of freeing up broadcast television spectrum for other uses and would significantly impede the Commission's ability to carry out the incentive auction.

III. THE COMMISSION COMPLIED WITH THE REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act calls on an agency to "prepare a final regulatory flexibility analysis" when the agency "promulgates a final rule under [5 U.S.C. §] 553." 5 U.S.C. § 604(a). This "'purely procedural'" requirement "directs agencies to state, summarize, and describe" a rule's economic impact on small businesses and the steps taken to minimize its costs. *Nat'l Tel. Co-op Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (quoting *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)). However, "the [RFA] in and of itself imposes no substantive constraint on agency decisionmaking." *Id*. All that is required of the agency is a "reasonable, good-faith effort to carry out [the] RFA's mandate." *U.S. Cellular*, 254 F.3d at 88 (quoting *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000)).

An agency may meet the requirements of the Regulatory Flexibility Act by certifying that the proposed rules "will not, if promulgated, have a significant economic impact on a substantial number of [small] entities." 5 U.S.C. § 605(b). If the agency cannot make such a certification—because it finds that there will be an economic impact on many such entities—it is required to publish a Final Regulatory Flexibility Analysis addressing certain legally delineated topics, including "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." *See* 5 U.S.C. § 604(a)(6); *Nat'l Tel. Coop. Ass'n*, 563 F.3d at 540.

After issuing an Initial Regulatory Flexibility Analysis with the NPRM, *see NPRM*, Appendix B (JA __), the Commission issued a 19-page Final Regulatory Flexibility Analysis as an addendum to the *Order*. *See Order*, Appendix B (JA __). Petitioners contend that the agency violated the Regulatory Flexibility Act by failing to either (1) "certify" that the proposed rules "will not, if promulgated, have a significant economic impact on a substantial number of entities, 5 U.S.C. § 605(b) or (2) describ[ing] the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." § 604(a)(6). Pet. Br. at 59. Petitioners are mistaken.

The Commission recognized in the Final Regulatory Flexibility Analysis that the incentive auction would likely have an economic impact on LPTV stations, which it presumed to be small entities under the Small Business Administration (SBA) standard. *FRFA* ¶¶ 9, 18 (JA __). The Commission explained that because LPTV stations are neither "permitted to participate in the reverse auction" nor "protected during repacking" due to their secondary status, "[m]any of these stations may be displaced from their current operating channel." *Id.* ¶ 9 (JA __). In light of the Commission's recognition that LPTV stations may be impacted by the incentive auction, the Commission did not certify that the rules adopted by the *Order* would not "have a significant economic impact on . . . small entities." 5 U.S.C. § 605(b). Instead, it prepared a Final Regulatory Flexibility Analysis discussing, among other things, the steps it had taken to minimize the impact of its rules on LPTV stations.

Petitioners insist that the Commission's Final Regulatory Flexibility Analysis was "required by law to evaluate the adverse economic impact of its auction . . . on LPTV licenses," because "[a]n agency by definition cannot determine how to minimize adverse impacts of proposed rules on small entities if, as here, it . . . refuses to conduct any 'systematic analysis' of the effects of its proposals on affected small businesses." Pet. Br. at 60-61. But

the impact of the Commission's rules on LPTV stations resulted from the agency's reasonable interpretation of the Spectrum Act and its lawful decision not to protect such stations in the incentive auction repacking. *See* FRFA ¶ 56 (JA __). Under the circumstances, the Commission explained, any additional "economic analysis" of the impact on LPTV stations would be "superfluous at best" *Reconsideration Order* ¶ 146 (JA __), because the Commission could not alter the statutory basis of the impact and because such an analysis would not meaningfully inform the Commission's adoption of steps to mitigate that impact. In any event, the Regulatory Flexibility Act does not require "cost-benefit analysis or economic modeling," *Alenco Commc'ns*, 201 F.3d at 625, where, as here, the agency has discussed the measures taken to minimize the impact on small businesses.

Indeed, Section 607 of the Regulatory Flexibility Act, 5 U.S.C. § 607, provides that in complying with Sections 603 and 604, an agency may furnish either: (1) "a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule", or (2) "more general descriptive statements if quantification is not practicable or reliable." Contrary to petitioners' contention (Pet. Br. at 62), the Commission fully satisfied the second requirement. As discussed, the Commission acknowledged, in general terms, that LPTV stations "may be impacted by

repacking" in the incentive auction, because they "are not permitted to participate in the reverse auction," and because they "have only secondary interference protection rights and will not be protected during repacking," "[m]any" such stations "may be displaced from their current operating channel." *FRFA* ¶ 9 (JA __). Furthermore, the Commission explained that there are 2,414 LPTV stations, *id*. ¶ 18 (JA __), and that according these "secondary" stations protection would in turn "severely limit recovery of spectrum and frustrate the purpose of the Spectrum Act." *Id*. ¶ 56 (JA __). The Commission's decision to provide general descriptive statements of the impact of its rules on LPTV stations was fully justified by its conclusion that a more detailed quantification would, under the circumstances, serve no purpose. *Reconsideration Order* ¶ 146 (JA __).

Lastly, petitioners contend that the Commission's Final Regulatory Flexibility Analysis failed to describe the steps the agency "has taken" to minimize the significant economic impact on small entities, 5 U.S.C. § 604(a)(6), because the Commission has only "promise[d] *future* steps the agency says it plans to take." Pet. Br. at 64.

Petitioners are incorrect. The Final Regulatory Flexibility Analysis sets forth a number of measures that the Commission adopted in the *Order* to mitigate the impact of its rules on LPTV stations. Thus, the Commission

established a procedure to allow LPTV stations that are displaced by reason of the auction the opportunity to submit a displacement application and propose a new operating channel. *FRFA* ¶ ¶ 9, 48 (JA __). In addition, "[t]o ease the burden on these stations," LPTV stations will be allowed "to explore engineering solutions or agree on a settlement to resolve mutually exclusive displacement applications." *FRFA* ¶ 9 (JA __). LPTV stations will also be permitted to remain on their existing channels during the post-incentive auction transition period until they are notified that a forward auction winner is within 120 days of commencing operations on the repurposed 600 MHz spectrum. *Order* ¶ 670 (JA __). As a result, many LPTV stations located in the UHF band affected by the auction may continue operations for many *years* until the winning bidders in the forward auction commence operations.[12]

The Commission's Final Regulatory Flexibility Analysis also explained that it intended to initiate a rulemaking proceeding to consider other measures to mitigate the potential impact of the incentive auction on LPTV stations. *FRFA* ¶ 9 (JA__). The Commission has since conducted this

[12] In addition, as petitioners concede, Pet. Br. at 64, the Commission's decision to delay the digital transition deadline for LPTV stations still transmitting analog signals was a step taken in mitigation of the burden the rules imposed on them.

rulemaking and adopted a number of additional measures to mitigate the impact of the incentive auction on LPTV stations. For example, the Commission adopted rules to allow channel sharing among LPTV and TV translator stations, affording LPTV stations a valuable and cost-effective solution to continue broadcasting. *Third Report & Order* ¶ 20. The Commission also adopted rules extending the deadline for LPTV stations to transition from analog to digital. *Id*. ¶ 6. Finally, Commission staff will use special repacking software to help displaced LPTV stations identify new channels. *Id*. ¶ 40. Taken together, the Commission clearly "has taken" numerous measures to minimize the significant economic impact on small entities. The fact that some of these measures will not go into *effect* until after the auction takes place is not a violation of the RFA. [13]

Notwithstanding such measures, petitioners may believe the Commission should have done more to mitigate the impact of its rules on LPTV stations. But the Regulatory Flexibility Act requires only that the Commission address the issue of mitigation; it imposes no substantive

[13] Petitioners argue that the Commission also violated Section 604(a)(6) of the RFA by failing to consider alternatives to the final rule it adopted. On the contrary, the Commission explained that it did not afford protection to LPTV stations in the repacking because such protection was not mandated by the Spectrum Act, and affording discretionary protection would be inconsistent with that statute's goals. *FRFA* ¶ 56.

limitation on the exercise of the agency's judgment. *Nat'l Tel. Coop. Ass'n*, 563 F.3d at 540.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction. In the alternative, the petition should be denied.

Respectfully submitted,

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February 22, 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 AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 15-1346

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 10,438 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

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STATUTORY ADDENDUM

Page

5 U.S.C.A. § 604

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS
PART I. GENERAL PROVISIONS

§ 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) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and

why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected;

(6) 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.

* * * * *

5 U.S.C.A. § 605

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS
PART I. GENERAL PROVISIONS

§ 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.

* * * * *

5 U.S.C.A. § 607

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
CHAPTER 6. THE ANALYSIS OF REGULATORY FUNCTIONS
PART I. GENERAL PROVISIONS

§ 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.

* * * * *

47 U.S.C.A. § 303(a), (b), (c), (f)

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 303. Powers and duties of Commission

* * * * *

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

* * * * *

47 U.S.C.A. § 312(c)

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 312. Administrative sanctions

(c) Order to show cause

Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee,

permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

* * * * *

47 U.S.C.A. § 1401(6)

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 13. PUBLIC SAFETY COMMUNICATIONS AND ELECTROMAGNETIC SPECTRUM AUCTIONS

§ 1401. Definitions

In this chapter:

* * * * *

(6) Broadcast television licensee

The term "broadcast television licensee" means the licensee of--

(A) a full-power television station; or

(B) a low-power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations.

* * * * *

47 U.S.C.A. § 1452

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 13. PUBLIC SAFETY COMMUNICATIONS AND ELECTROMAGNETIC SPECTRUM AUCTIONS
SUBCHAPTER IV. SPECTRUM AUCTION AUTHORITY

§ 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.

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

FREE ACCESS & BROADCAST TELEMEDIA , LLC and WORD OF GOD FELLOWSHIP, INC.	)	
Petitioners,	)	
v.	)	No. 15-1346
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I, Thaila K. Sundaresan, hereby certify that on February 22, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Courts of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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