

---

**BRIEF FOR RESPONDENTS**

---

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

---

Nos. 15-1264; 15-1280

---

MAKO COMMUNICATIONS, LLC AND BEACH TV  
PROPERTIES, INC.,

PETITIONERS,

FREE ACCESS & BROADCAST TELEMEDIA, LLC

INTERVENOR FOR PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

RESPONDENTS.

---

ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

---

WILLIAM J. BAER  
ASSISTANT ATTORNEY GENERAL

ROBERT J. WIGGERS  
KRISTEN C. LIMARZI  
ATTORNEYS

UNITED STATES  
DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20530

JONATHAN B. SALLET  
GENERAL COUNSEL

DAVID M. GOSSETT  
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS  
ASSOCIATE GENERAL COUNSEL

THAILA K. SUNDARESAN  
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

---

## 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) *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (JA \_\_) (*Order*); and (2) *In the Matter of 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.

*Free Access & Broadcast Telemedia v. FCC*, No. 15-1346 (*Free Access*), involves a separate challenge to the same set of FCC rulings as in this case. On November 30, 2015, the Court set a separate briefing schedule in *Free Access* and ordered that *Free Access*'s appeal and this case 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).

## TABLE OF CONTENTS

Table of Authorities.....	iv
Glossary.....	vii
Introduction.....	1
Jurisdiction.....	3
Questions Presented.....	4
Statutes and Regulations.....	5
Counterstatement.....	5
A. LPTV Stations.....	5
B. The Spectrum Act and the Upcoming Incentive Auction.....	6
C. The Orders on Review.....	11
1. Order.....	11
2. Second Order on Reconsideration.....	13
a. Mako.....	14
b. Beach TV.....	15
D. Third Report & Order.....	16
Summary of Argument.....	16
Standard of Review.....	19
Argument.....	20
I. MAKO’S PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE IT HAS ONLY PETITIONED FOR REVIEW OF THE RECONSIDERATION ORDER.....	20
II. THE COMMISSION DID NOT ALTER THE RIGHTS OF LPTV STATIONS.....	22

A. Petitioners Ignore The Exclusion Of LPTV Stations From  
The Spectrum Act’s Preservation Mandate.....23

B. 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.....25

C. Protecting LPTV Stations From Displacement In The  
Incentive Auction Would Undermine The Goals Of The  
Spectrum Act.....30

III. THE ORDERS DO NOT REVOKE LPTV LICENSES.....32

Conclusion.....36

## TABLE OF AUTHORITIES

### CASES

<i>Beehive Tel. Co. Inc. v. FCC</i> , 180 F.3d 314 (D.C. Cir. 1999).....	21
<i>Cellco P’ship v. FCC</i> , 357 F.3d 88 (D.C. Cir. 2004).....	20
<i>Cellnet Commc’n, Inc. v. FCC</i> , 965 F.2d 1106 (D.C. Cir. 1992).....	17
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984) .....	19
<i>Consumer Elec. Ass’n v. FCC</i> , 347 F.3d 291 (D.C. Cir. 2003).....	20
<i>ICC v. Bhd. of Locomotive Eng’rs</i> , 482 U.S. 270 (1987) .....	20
<i>Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC</i> , 525 F.2d 630 (D.C. Cir. 1976) .....	23
* <i>National Ass’n of Broadcasters v. FCC</i> , 789 F.3d 165 (D.C. Cir. 2015).....	6, 7, 11, 18, 24, 27, 31
<i>National Cable &amp; Tel. Ass’n v. FCC</i> , 567 F.3d 659 (D.C. Cir. 2009).....	19, 22
<i>NextWave Personal Commc’ns v. FCC</i> , 254 F.3d 130 (D.C. Cir. 2001), <i>affirmed</i> , 537 U.S. 293 (2003) .....	33
<i>Persinger v. Islamic Republic of Iran</i> , 729 F.2d 835 (D.C. Cir. 1984).....	31
<i>S. Pacific Transp. Co. v. ICC</i> , 69 F.3d 583 (D.C. Cir. 1995).....	17
* <i>Sinclair Broad. Grp., Inc. v. FCC</i> , 284 F.3d 148 (D.C. Cir. 2002).....	20, 21, 22
* <i>Sw. Bell Tel. Co. v. FCC</i> , 180 F.3d 307 (D.C. Cir. 1999).....	20
<b>STATUTES</b>	
5 U.S.C. § 558(c).....	32

5 U.S.C. § 706(2)(A).....	19
28 U.S.C. § 2342(1) .....	4
28 U.S.C. § 2344 .....	4
47 U.S.C. §§ 301, <i>et seq.</i> .....	23
47 U.S.C. §§ 303(a) - (c).....	23, 29
47 U.S.C. § 303(f) .....	23, 29
47 U.S.C. § 312(c).....	15, 32
47 U.S.C. § 316 .....	30
47 U.S.C. § 336(f) .....	10
47 U.S.C. § 336(f)(1)(ii).....	10
47 U.S.C. § 336(f)(2) .....	10
47 U.S.C. § 402(a).....	4
47 U.S.C. § 405 .....	17
Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 125 Stat. 156 (2012).....	2
47 U.S.C. §§ 1401, <i>et seq.</i> .....	2
* 47 U.S.C. § 1401(6) .....	10, 25
47 U.S.C. § 1403(a).....	23
47 U.S.C. § 1452(a)(1) .....	8
47 U.S.C. § 1452(b) .....	8, 9
47 U.S.C. § 1452(b)(1)(B) .....	9, 24
* 47 U.S.C. § 1452(b)(2) .....	10, 11, 17, 24
* 47 U.S.C. § 1452(b)(5).....	3, 11, 14, 18, 22, 24, 29, 30, 31
47 U.S.C. § 1452(c).....	9
47 U.S.C. § 1452(h) .....	30
47 U.S.C. § 1452(i) .....	24
<b>REGULATIONS</b>	
47 C.F.R. § 73.3572(a)(4) .....	35
47 C.F.R. § 73.6001(c).....	10

* 47 C.F.R. § 74.703 .....	29
47 C.F.R. § 74.787(a)(4) .....	35

## ADMINISTRATIVE DECISIONS

<i>Cnty. Broadcasters Ass’n, Memorandum Opinion &amp; Order</i> , 59 Rad. Reg. 2d (P&F) 1216 (1986) .....	6, 33
<i>In re Lower Power and Television Service</i> , 3 FCC Rcd 4470 (1988) .....	27
<i>In re Reallocation and Service Rules for 698-746 MHz Spectrum Band</i> , 17 FCC Rcd 1022 (2002), <i>pet. for recon. denied</i> , 17 FCC Rcd 11613 (2002) .....	26, 29
<i>In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service</i> , 13 FCC Rcd 7418 (1988) .....	28
* <i>In the Matter of 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</i> , 19 FCC Rcd 19331 (2004) .....	6, 26, 28
<i>In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions</i> , MB Docket No. 03-185, GN Docket No. 12-268, ET Docket No. 14-175, 2015 WL 9260876 (Dec. 17, 2015) .....	16, 35
<i>In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Mobile Spectrum Holdings Order</i> , 29 FCC Rcd 6133 (2014) .....	7
* <i>Low Power Television Service</i> , 51 Rad. Reg. 2d (P&F) 476 (1982) .....	5, 6, 26

\* Cases and other authorities principally relied upon are marked with asterisks.

**GLOSSARY**

LPTV	low-power television
MHz	megahertz – a measurement of radio waves equivalent to one million cycles per second
NPRM	<i>In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions</i> , 27 FCC Rcd 12357 (2012)
Order	<i>In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions</i> , 29 FCC Rcd 6567 (2014)
Reconsideration Order	<i>In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Second Order on Reconsideration</i> , 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)



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

---

Nos. 15-1264; 15-1280

---

MAKO COMMUNICATIONS, LLC AND BEACH TV PROPERTIES,  
INC.,

PETITIONERS,

FREE ACCESS & BROADCAST TELEMEDIA, LLC

INTERVENOR FOR PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

RESPONDENTS.

---

ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

---

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.*

In the incentive auction, 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 band allocated for broadcasting and thereby clearing contiguous spectrum in this band for a variety of non-broadcast uses, including wireless broadband. Wireless carriers and other bidders will participate in a “forward” auction to acquire rights to the spectrum made available through this reorganization.

The Spectrum Act mandates that the Commission preserve the coverage area and population served of two classes of 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.

Petitioners—licensees of LPTV stations—challenge the Commission’s decision. They argue (1) that the decision violates the Spectrum Act’s provision that “[n]othing [in it] shall be construed to alter the spectrum usage

rights of low-power television stations,” 47 U.S.C. § 1452(b)(5), and (2) that the decision effectively revokes the licenses of numerous LPTV stations.

As we show, the Commission’s interpretation of the Spectrum Act is consistent with the statute’s language, structure and purpose. The statute’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. In addition, the Commission’s decision not to protect LPTV stations in the repacking is entirely consistent with their secondary spectrum usage rights, and does not alter them. And although repacking could lead in specific cases to an LPTV station being forced to go off the air permanently, LPTV stations have always faced that risk: their status as a secondary service means that they can be forced off their channels by primary users of the same spectrum, and required to cease operations if they cannot find a different channel on which to operate. That potential consequence resulting from LPTV status reflects those limited license rights; it does not revoke them.

### **JURISDICTION**

The *Order* (JA \_\_) was released on June 2, 2014. The *Reconsideration Order* (JA \_\_) was released on June 19, 2015. Petitioner Beach TV

Properties, Inc. timely filed its petition for review of the *Order* and the *Reconsideration Order* on August 14, 2015, within the sixty-day filing period prescribed by 28 U.S.C. § 2344. This Court has jurisdiction over Beach TV’s petition pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

Petitioner Mako Communications, LLC, filed a petition for review—of the *Reconsideration Order* only—on August 6, 2015. For the reasons set forth below, the Court lacks jurisdiction over Mako’s petition because it sought review only of the *Reconsideration Order*, and not of the underlying *Order*.

### QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction over Mako’s petition for review of the *Reconsideration Order*.
2. Whether the Commission’s decision not to protect LPTV stations in the repacking phase of the incentive auction is consistent with the Spectrum Act’s provision that nothing in that Act shall “alter” the rights of LPTV stations.
3. Whether the Commission’s decision not to protect LPTV stations in the repacking phase of the incentive auction “revokes” petitioners’ LPTV licenses in violation of the Communications Act and the Administrative Procedure Act.

## STATUTES AND REGULATIONS

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

### COUNTERSTATEMENT

Petitioners challenge the Commission's decision not to protect LPTV stations in the incentive auction repacking process. Therefore, before describing the Spectrum Act and the upcoming incentive auction, we begin with a brief explanation of LPTV stations.

#### A. LPTV Stations

LPTV stations are broadcast stations that operate at a low electrical power in a smaller service area than “full-power” stations within the same region. 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 that “first and foremost, we intend to maintain the secondary spectrum priority of low[er] power stations.” *Id.* ¶ 217. Secondary status means that an LPTV station cannot cause interference to full service stations and other primary services, including new wireless services. *Id.* ¶ 17; *In the Matter of 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. As such, 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. Indeed, LPTV stations have always had “explicit, full and clear prior notice that operation in the LPTV service entails the risk of displacement.” *Cnty. Broadcasters Ass’n, Memorandum Opinion & Order*, 59 Rad. Reg. 2d (P&F) 1216 ¶ 4 (1986) (*Cnty. Broadcasters Order*).

### **B. The Spectrum Act and the Upcoming Incentive Auction**

The Spectrum Act authorizes the FCC to hold an incentive auction to encourage broadcasters to relinquish their spectrum rights in exchange for incentive payments. In doing so, Congress hopes to free up spectrum that is currently occupied by broadcast television for other uses, including wireless telecommunications services, for which demand has skyrocketed in recent years. See *National Ass’n of Broadcasters v. FCC (NAB)*, 789 F.3d 165, 169 (D.C. Cir. 2015).

The rapid adoption of smartphones and tablet computers, combined with the increasing deployment of high-speed 4G technologies, is driving significantly more intensive use of mobile networks. Ensuring the availability of adequate spectrum is especially crucial today where critical sectors like health care, public safety, education, and social services rely heavily upon wireless networks to carry out their services. *See id.* (describing the “nation’s growing need for spectrum”).

Yet, the current amount of available spectrum is woefully insufficient to handle the projected growth in demand in wireless use, even with technological improvements allowing for more efficient use of existing spectrum and significant investment in new facilities. *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Mobile Spectrum Holdings Order*, 29 FCC Rcd 6133 ¶ 23 (2014) (citation omitted). Spectrum currently held by broadcast television represents the best opportunity for reallocating large amounts of spectrum for mobile broadband use. Although broadcast television is an important source of information for many Americans, only 10% of television households rely solely on broadcast television for programming. *NAB*, 789 F.3d at 169 (citing *In the Matter of Expanding the Economic and Innovation Opportunities of*

*Spectrum Through Incentive Auctions*, 27 FCC Rcd 12357 ¶ 14 (2012) (JA \_\_) (NPRM).

The Spectrum Act is Congress' response to the country's pressing need to free up spectrum for wireless services and other uses. The auction is 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. *In the Matter of 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, 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 broadcast 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. § 1452(b) (granting incentive auction authority “to permit the assignment of new initial licenses subject to flexible-use service rules”).

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 broadcast 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).<sup>1</sup> Low-power television stations that do not have a Class A license are thus excluded from the definition of “broadcast television licensee.”

---

<sup>1</sup> 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 per 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).

## 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.<sup>2</sup> *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 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 statute’s obligation 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

---

<sup>2</sup> 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.

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 “simply 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 \_\_). Secondary status means that 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.<sup>3</sup> *Id.* ¶ 241 (JA\_\_\_\_). Protecting LPTV stations would thus increase the number of constraints on the repacking process and significantly curtail the Commission’s ability to recover spectrum—thereby frustrating the underlying purpose of the Spectrum Act. *Id.* (JA\_\_\_\_).

The Commission also adopted measures to mitigate the potential impact of the auction on LPTV stations, including creating special procedures for displaced stations to select a new channel. *Id.* ¶ 237 (JA\_\_\_\_).

## 2. Second Order on Reconsideration

Petitioner Mako, which had filed comments in the proceeding that led to the *Order*, filed a petition contending that the Commission’s decision not to protect LPTV stations in the repacking revoked their licenses in violation of the Communications Act and altered their rights in violation of the

---

<sup>3</sup> 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](https://apps.fcc.gov/edocs_public/attachmatch/DOC-335798A1.pdf).

Spectrum Act. *Reconsideration Order* ¶¶ 68-70 (JA \_\_). Petitioner Beach TV, which had not participated in the proceeding before the *Order* was adopted, also filed a petition for reconsideration out of an “abundance of caution.” *Id.* ¶ 78 (JA \_\_). Beach TV asked that the Commission protect its LPTV station in Atlanta, Georgia as a matter of discretion while it pursued its judicial appeal of the Commission’s denial of its application to become a Class A station. *Id.* ¶¶ 80-81 (JA \_\_).<sup>4</sup> The Commission denied both petitions in the *Reconsideration Order*.

**a. Mako**

In denying Mako’s petition for reconsideration, the agency reaffirmed that its decision not to protect LPTV stations in the repacking did not “alter” Mako’s LPTV spectrum usage rights in violation of 47 U.S.C. § 1452(b)(5). *Id.* ¶ 68 (JA \_\_). It explained that LPTV stations have “always operated on a secondary basis with respect to primary licensees,” and thus any prospective LPTV displacement does not alter their spectrum usage rights within the meaning of the Spectrum Act. *Id.* (JA \_\_).

---

<sup>4</sup> In an unpublished judgment, this Court subsequently affirmed the Commission’s denial of Beach TV’s application for a Class A license. *Beach TV Properties, Inc. v. FCC*, No. 14-1229 (Sept. 23, 2015).

The Commission also determined that displacement of an LPTV station did not “revoke” the station’s license within the meaning of section 312 of the Communications Act, which provides that a license may be revoked only after service of an order to show cause and the opportunity for a hearing. *Id.* ¶ 69 (JA \_\_). *See* 47 U.S.C. § 312(c). Displacement of an LPTV station, the Commission explained, is not a revocation of the station’s license “because it does not require termination of operations or relinquishment of spectrum usage rights.” *Id.* (JA \_\_). Instead, it requires only that an LPTV station “vacate the channel on which [it is] operating.” *Id.* (JA \_\_).

**b. Beach TV**

The Commission dismissed, and in the alternative, denied Beach TV’s petition for reconsideration. The Commission first determined that Beach TV’s petition for reconsideration was procedurally barred because there was no valid reason why it could not have raised its arguments in favor of protecting its Atlanta station *before* the adoption of the *Order*. *Id.* (JA\_\_).

In the alternative, the Commission denied Beach TV’s petition. *Id.* ¶ 81 (JA \_\_). The Commission explained that Beach TV is not a “broadcast television licensee,” *i.e.*, a full power or licensed Class A station, entitled to mandatory protection in the repacking process or eligible to participate in the reverse auction. *Id.* (JA\_\_). Instead, the Commission pointed out, Beach TV

is the licensee of an LPTV station that never successfully completed the process to become a Class A license. *Id.* (JA\_\_). The Commission also denied Beach TV's request to protect it "as a matter of discretion," on the ground that only full-power and Class A stations were afforded discretionary protection. *Id.* ¶ 82 (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. *In the Matter of 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.

#### **SUMMARY OF ARGUMENT**

1. Mako's petition seeks review of only the *Reconsideration Order* and should therefore be dismissed for lack of jurisdiction. This Court has held that a challenge to an agency order that does no more than deny



reconsideration is not reviewable unless it rests on new evidence or changed circumstances, or the petitioner's intent to seek review of the underlying order can be fairly inferred. Neither exception applies here. Mako's claims are therefore unreviewable and should be dismissed. This Court retains jurisdiction over Beach TV's petition, which seeks review of both the *Order* and the *Reconsideration Order*.<sup>5</sup>

2. On the merits, the Commission reasonably interpreted the Spectrum Act as not requiring the protection of LPTV stations in the repacking process. 47 U.S.C. § 1452(b)(2), the Act's explicit preservation mandate, extends only to full power and Class A stations—not LPTV stations. Petitioners' proffered interpretation of the statute as requiring the Commission to protect LPTV stations from displacement is squarely at odds with the statute's primary objective of repurposing spectrum for new uses. This objective would be

---

<sup>5</sup> In its appeal, Beach TV appears to have abandoned the arguments it raised before the Commission and instead joins in the arguments Mako has presented to this Court. Although Beach TV did not previously raise these arguments before the Commission, the Court permits "a party that is aggrieved to raise arguments it did not present to the agency but were presented by other parties." *S. Pacific Transp. Co. v. ICC*, 69 F.3d 583, 588 (D.C. Cir. 1995); *see also Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 1992) ("Consideration of the issue by the agency at the behest of another party is enough to preserve it."). *See* 47 U.S.C. § 405.

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.

The Commission's determination that LPTV stations should not be protected in the repacking is also consistent with the secondary status of these stations. As this Court recognized in *NAB*, 789 F.3d 179-80, the Spectrum Act does not require that LPTV stations that are not Class A stations be protected in the incentive auction repacking. Moreover, LPTV stations have always been subject to displacement by primary users, including wireless licensees. And when Congress provided in 47 U.S.C. § 1452(b)(5) that nothing should "alter the spectrum usage rights" of LPTV stations, it was simply affirming their status, which has long been recognized as secondary. 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.

3. The Commission's orders also do not revoke petitioners' licenses. As a result of the incentive auction, some LPTV stations may be displaced to different frequencies; others (if they cannot operate without interference to primary users) may be forced to go off the air entirely. But these consequences do not revoke any LPTV station's license. Instead, they simply

illustrate one of the longstanding conditions of such licenses—that they permit operation only if there is no interference with primary users.

If an LPTV station finds itself in a situation in which it can no longer operate without interfering with a primary user, it is free to file a displacement application to find a new frequency for its operations. The Commission has also adopted a number of rules—such as allowing LPTV stations to channel share and using special software to identify new channels—to increase the likelihood that displaced LPTV stations can resume operations as soon as possible.

### 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.” *National 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). 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. MAKO'S PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE IT HAS ONLY PETITIONED FOR REVIEW OF THE RECONSIDERATION ORDER

Mako filed a petition seeking review of the *Reconsideration Order*, which identified (and attached) only that order. Its petition did not reference the underlying *Order*, which adopted the rules regarding the incentive auction that Mako now challenges.

It is “settled law that an order which merely denies rehearing of another order is not itself reviewable,” *Sw. Bell Tel. Co. v. FCC*, 180 F.3d 307, 310 (D.C. Cir. 1999), whether or not the order denying reconsideration “discussed the merits of the . . . claims at length,” *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 280 (1987). “Absent new evidence or changed circumstances presented to the agency upon reconsideration, the court lacks jurisdiction to hear a challenge to an agency’s order denying reconsideration of its earlier administrative ruling.” *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 156 (D.C. Cir. 2002). To be new, evidence must be “discovered after the Commission issued its [original] Order.” *Id.*; accord *Beehive Tel.*

*Co. Inc. v. FCC* , 180 F.3d 314, 319-20 (D.C. Cir. 1999). Mako did not offer any new facts or evidence of changed circumstances when it sought agency reconsideration of the original *Order*.

To be sure, this Court may have jurisdiction to review an order unnamed in the petition for review when petitioner's intent to seek review of that order can be "fairly inferred" by examining "contemporaneously filed documents." *Sinclair Broad. Grp.*, 284 F.3d at 157. Here, however, it cannot be fairly inferred that Mako was seeking review of the underlying *Order* when examining the documents it filed contemporaneously with its petition for review.<sup>6</sup>

If the agency order for which review is sought is not listed in documents filed contemporaneously with the petition for review, "the defect

---

<sup>6</sup> For example, the dates identified for the order under review in Mako's *Docketing Statement* are the June 17, 2015 adoption and June 19, 2015 release date of the *Reconsideration Order*, as well as the August 6, 2015 Federal Register publication date of the *Reconsideration Order*. No mention is made of the *Order* under review, or any date associated with that order. Likewise, in its Certificate as to Parties, Rulings, and Related Cases, Mako cites only to the *Reconsideration Order*. In addition, in its *Statement of Issues to Be Raised*, Mako states, "Pursuant to the Court's Order of August 6, 2015....", in reference to the date in which the *Reconsideration Order* was published in the Federal Register. The two issues raised—(1) that the Commission's rules "revoke" Mako's broadcast licenses *en masse* without due process; and (2) that the Commission promulgated rules subordinating LPTV licenses to uses beyond full power television—were issues that the Commission addressed in the *Reconsideration Order*.

cannot be cured because the agency has not received adequate notice.”

*Sinclair Broadcast Grp.*, 284 F.3d at 157. Mako’s defect is therefore fatal and warrants dismissal of case No. 15-1264.<sup>7</sup>

## **II. THE COMMISSION DID NOT ALTER THE RIGHTS OF LPTV STATIONS**

On the merits, Petitioners contend that the “FCC’s confiscation and sale of Petitioners’ spectrum violate the unambiguous command of Congress” to protect LPTV stations in the incentive auction repacking. Pet. Brief. at 12. In doing so, they rely on 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 low-power television stations.”

Under *Chevron*, the Court must defer to the Commission’s interpretation of the Spectrum Act “so long as it is reasonable.” *Nat’l Cable & Tel. Ass’n*, 567 F.3d at 663. Petitioners fail to meet their burden of showing that the Commission’s decision not to protect LPTV stations in the repacking—which is entirely consistent with the Spectrum Act’s purpose and

---

<sup>7</sup> The defect in Mako’s petition for review does not require dismissal of the petition for review filed by Beach TV in No. 15-1280, since Beach TV made clear in its petition that it was seeking review of both the *Order* and the *Reconsideration Order*.

with the secondary status of LPTV stations—alters their spectrum usage rights in any way.

**A. Petitioners Ignore The Exclusion Of LPTV Stations From The Spectrum Act’s Preservation Mandate.**

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.” Determinations with respect to spectrum allocation policy have long been recognized to be precisely the sort that Congress intended to leave to the broad discretion of the Commission under § 303 of the Communications Act. *See, e.g., Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 635-36 (D.C. Cir. 1976) (allocation of spectrum for land mobile radio service). *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).

Congress—through the Spectrum Act—reinforced the Commission’s established authority over spectrum allocation 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) (“nothing 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. *See NAB*, 789 F.3d at 180. Because LPTV stations that have not obtained Class A status do not fall within either of these categories, by the terms of the statute, they are 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).

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). In petitioners’ view, section 1452(b)(5) of the Spectrum



Act embodies an “unambiguous command . . . to preserve LPTV licenses.”

Pet. Br. at 12. That is incorrect.

**B. 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) is not in form a “command”; it sets forth a rule governing how section 1452(b) should be construed. *Reconsideration Order* ¶ 68 (JA \_\_). As such, it is “not a limit on the Commission’s authority” to manage spectrum rights that is granted elsewhere in the Communications Act. *Id.* (JA \_\_).

Nor would it be reasonable to read section 1452(b)(5) as an affirmative protection against displacement, as petitioners appear to suggest. 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)—which does provide express protections for certain broadcasters—does so 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’s 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 preserve 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”); *In re Reallocation and Service Rules for 698-746 MHz Spectrum Band*, 17 FCC Rcd 1022 ¶ 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.”): *In re Lower Power and Television Service*, 3 FCC Rcd 4470 ¶ 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 *National Association of Broadcasters*, 789 F.3d 165, this Court upheld the Commission’s decision not to protect secondary services in the incentive auction. In that case, petitioners asserted that the Commission was required by the Spectrum Act to protect low-power television “fill-in translators” during the repacking process. *Id.* at 179. The Court rejected that argument, pointing out that the Spectrum Act’s preservation mandate extended only to full-power and Class A stations. *Id.* at 180. The Court went on to explain that the FCC’s determination was “all the more reasonable in light of the distinct and secondary status the Commission has generally afforded to translator stations, and the Commission’s assessment of the significant practical difficulties that would attend protection of fill-in translators.” *Id.*

What is true of TV translator stations (a species of LPTV station), is true of LPTV stations generally. Like fill-in translators, LPTV stations have

always been afforded secondary status and are expressly excluded from the Spectrum Act's preservation mandate. Displacement thus does not alter their rights within the meaning of the Spectrum Act.

Petitioners insist that although LPTV stations are secondary to other broadcasters, “[n]othing in the Communications Act or the FCC’s Rules subordinate or make an LPTV licensee’s rights ‘secondary’ to wireless communications service.” Pet. Br. at 21. They are mistaken.

As the Commission has long made clear, LPTV stations are secondary to “full service-television stations, certain land mobile radio operations and *other primary services.*” See *Digital LPTV Order* ¶ 2 (emphasis added); see also *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 13 FCC Rcd 7418 ¶ 105 (1988) (“As secondary operations, low power stations must give way to new operations by primary users of the spectrum.”). Over a decade ago, the Commission adopted rules reallocating spectrum from television broadcast channels for wireless usage. *Digital LPTV Order*. In so doing, the Commission treated the wireless licensees as “primary” users whose spectrum usage rights trumped those of LPTV stations. *Id.* ¶ 118 (“As explained in the Notice, LPTV ... stations are authorized on a secondary non-interfering basis to . . . other primary services, includ[ing] ‘other new

wireless services.”); *see also* 698-746 MHz Spectrum Band Order ¶ 27 (prohibiting LPTV stations from causing interference to new wireless licensees); 47 C.F.R. § 74.703 (“The offending digital LPTV ... station[must cease operations immediately upon notification by any primary wireless licensee, once it has been established that the digital low power TV or translator station is causing the interference.”). *See also* Order ¶ 741 (JA \_\_\_); 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).

In short, as the Commission has made clear, LPTV stations are secondary to all primary services, whether those users are other broadcast stations or those that employ spectrum for other uses, including for wireless telecommunications.

Petitioners argue that the Commission’s interpretation of “alter” would render section 1452(b)(5) “mere surplusage,” and that the “Spectrum Act bars the FCC from implementing the incentive auction in a way that would take away LPTV licensees’ spectrum usage rights.” Pet. Br. at 21-22. But as we have shown, the Commission’s decision not to protect LPTV stations against the consequences of the incentive auction repacking does not take away any

LPTV station rights, since those rights have always been secondary to primary users.

Finally, we note that the Spectrum Act provides that any “licensee” — even those broadcast television licensees that are *protected* in the repacking— are not entitled to protest a modification to their license as a consequence of the incentive auction. 47 U.S.C. § 1452(h) provides:

(h) PROTEST RIGHT INAPPLICABLE – The right of a licensee to protest a proposed order of modification of its license under section 316 of [the Communications Act of 1934 (47 U.S.C. § 316)] shall not apply in the case of a modification made under this section.

Putting aside the effect of this provision on the protest rights of LPTV stations, themselves, it would be odd indeed to construe the Spectrum Act to permit LPTV stations to protest a modification of their licenses when Congress expressly took away such rights from licensees that are protected in the repacking process. *See Reconsideration Order* ¶ 70 & n.269 (JA \_\_\_) (recognizing that Class A licensees do not “have the right to protest the resulting license modifications”).

**C. Protecting LPTV Stations From Displacement In The Incentive Auction Would Undermine The Goals Of The Spectrum Act.**

Unlike Petitioners’ interpretation, the Commission’s interpretation of section 1452(b)(5) comports with the statute’s structure and purpose of repurposing spectrum for new uses through the mechanism of the incentive

auction. There is no reason to think that Congress—which took pains to establish a mechanism for protecting the service areas only of full-power and Class A stations post-auction—nonetheless intended for LPTV stations to be entitled to interference protection against users of the freed-up spectrum. Had Congress intended to preserve LPTV stations in the repacking process, it could have simply included them in the Act’s preservation mandate. Congress 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.”).

In determining which preservation efforts are reasonable, it is “entirely permissible for the Commission to take into account the Spectrum Act’s overarching objective of repurposing broadcast spectrum.” *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 thus plainly frustrate the goals of the Spectrum Act by effectively according LPTV

stations a primary status they have never had. Because it is impossible to harmonize the goals of the Spectrum Act with petitioners' interpretation, the Commission reasonably rejected it.

### **III. THE ORDERS DO NOT REVOKE LPTV LICENSES**

Petitioners argue that the Commission's *Reconsideration Order* "would revoke existing LPTV licenses *en masse*," Pet. Br. at 27, without providing notice and a hearing, in violation of the Communications Act of 1934 and the Administrative Procedure Act (APA).

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). Similarly, under the APA, federal agencies must provide licensees with an opportunity to demonstrate compliance with necessary requirements before the "withdrawal, suspension, revocation, or annulment of a license." 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 (or a withdrawal, suspension, revocation or annulment of a license under the



APA) 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.<sup>8</sup>

Long before the incentive auction, LPTV stations operated with the knowledge that they could be displaced at any time by a primary service. *See Cmty. Broadcasters Order* ¶ 4 (LPTV stations have always had “explicit, full and clear prior notice that operation in the LPTV service entails the risk of displacement.”). The displacement of an LPTV station in order to avoid interference to primary users is simply the consequence of being a secondary service—something that LPTV stations have long known about.

Petitioners claim that “[s]taff simulations released by the FCC” show that there would be insufficient spectrum to cover all of Mako's five LPTV

---

<sup>8</sup> Citing *NextWave Personal Commc'ns v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *affirmed*, 537 U.S. 293 (2003), petitioners claim that this Court has held that “assigning a licensee's spectrum to successful bidders is an effective revocation.” Pet. Br. at 27. In the first place, LPTV licensees do not have the right to exclude primary users from any spectrum. In any event, in *NextWave*, because the licensees declared bankruptcy and did not make further payments on their licenses, the licenses were cancelled by reason of nonpayment well before the spectrum on which they had held licenses was reauctioned. *Id.* at 133, 136.

stations in the Dallas, Texas market, suggesting that one or more of those stations would have to cease operations after the auction. Pet. Br. at 27 n.15. (Beach TV makes no similar claim regarding its Atlanta station).

In the first place, the Commission did not consider the impact on LPTV stations when running auction simulations. *See Reconsideration Order* n.548 (JA \_\_) (“because LPTV stations are not entitled to protection in the repacking process, no assumptions regarding them are necessary to conduct auction simulations or repacking analyses; LPTV stations do not factor into such analyses.”). Therefore, the record does not demonstrate whether any particular LPTV station—including those of petitioners—might 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 been upfront about. *See Order* ¶ 656 (JA \_\_). Yet, it remains to be seen whether any particular station may be required to cease operation due to interference with a primary user.

Moreover, in order to mitigate the impact of the incentive auction on LPTV stations, the Commission has adopted a number of measures to assist displaced stations to resume operations as soon as possible. First, under the Commission’s rules, an LPTV station that cannot continue current operations because of interference with a primary user may file a “displacement

application” at any time to change channels. *See* 47 C.F.R. § 73.3572(a)(4) (analog LPTV stations); 47 C.F.R. § 74.787(a)(4) (digital LPTV stations).

In addition, the Commission plans to open a special filing window for licensed LPTV stations that are displaced by the incentive auction, allowing them to select a new channel. *Order* ¶ 659 (JA \_\_\_). LPTV stations will also be allowed 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. *Id.* ¶ 670 (JA \_\_\_). As a result, many LPTV stations located in the broadcast band affected by the auction may continue operations for many *years* until the winning bidders in the forward auction commence operations.

In the recently released *Third Report & Order*, 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, these measures—all of which go above and beyond what is required under the Spectrum Act—will increase the likelihood that LPTV stations remain on air and continue serving their local communities. In the end, however, even if some LPTV stations are displaced and must ultimately cease operations, that result would simply be a consequence—and not a revocation—of the LPTV station’s rights, which permit such stations to operate only in a manner that does not interfere with primary users.

### **CONCLUSION**

Mako’s petition for review in No. 15-1264 should be dismissed for lack of jurisdiction, and Beach TV’s petition in No. 15-1280 should be denied. In the alternative, both petitions should be denied.

WILLIAM J. BAER  
ASSISTANT ATTORNEY GENERAL

ROBERT J. WIGGERS  
KRISTEN C. LIMARZI  
ATTORNEYS

UNITED STATES  
DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20530

Respectfully submitted,

JONATHAN B. SALLET  
GENERAL COUNSEL

DAVID M. GOSSETT  
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS  
ASSOCIATE GENERAL COUNSEL

*/s/ Thaila K. Sundaresan*

Thaila K. Sundaresan  
COUNSEL

FEDERAL COMMUNICATIONS  
COMMISSION  
WASHINGTON, D.C. 20554

January 22, 2016

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

MAKO COMMUNICATIONS, LLC AND BEACH TV  
PROPERTIES, INC.,

PETITIONERS,

FREE ACCESS & BROADCAST TELEMEDIA, LLC

INTERVENOR FOR PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,

RESPONDENTS.

Nos. 15-1264; 15-1280

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 7,521 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.

*/s/ Thaila K. Sundaresan*  
Thaila K. Sundaresan  
Counsel  
Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1935 (Telephone)  
(202) 418-2819 (Fax)

January 22, 2016

## STATUTORY ADDENDUM

	<u>Page</u>
5 U.S.C. § 558(c).....	2
47 U.S.C. § 303(a),(b),(c) & (f).....	3
47 U.S.C. § 312(c).....	4
47 U.S.C. § 1401(6).....	5
47 U.S.C. § 1452.....	6
47 C.F.R. § 74.703(f),(g).....	15



**5 U.S.C.A. § 558(c)**

UNITED STATES CODE ANNOTATED  
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES  
PART I. THE AGENCIES GENERALLY  
CHAPTER 5. ADMINISTRATIVE PROCEDURE  
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

**§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**

\* \* \* \* \*

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

**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.

**47 C.F.R. § 74.703(f), (g)**

CODE OF FEDERAL REGULATIONS  
TITLE 47. TELECOMMUNICATION  
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION  
SUBCHAPTER C. BROADCAST RADIO SERVICES  
PART 74. EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST  
AND OTHER PROGRAM DISTRIBUTIONAL SERVICES  
SUBPART G. LOW POWER TV, TV TRANSLATOR, AND TV BOOSTER  
STATIONS

**§ 74.703 Interference.**

(f) It shall be the responsibility of a digital low power TV or TV translator station operating on a channel from channel 52–69 to eliminate at its expense any condition of interference caused to the operation of or services provided by existing and future commercial or public safety wireless licensees in the 700 MHz bands. The offending digital LPTV or translator station must cease operations immediately upon notification by any primary wireless licensee, once it has been established that the digital low power TV or translator station is causing the interference.

(g) An existing or future wireless licensee in the 700 MHz bands may notify (certified mail, return receipt requested), a digital low power TV or TV translator operating on the same channel or first adjacent channel of its intention to initiate or change wireless operations and the likelihood of interference from the low power TV or translator station within its licensed geographic service area. The notice should describe the facilities, associated service area and operations of the wireless licensee with sufficient detail to permit an evaluation of the likelihood of interference. Upon receipt of such notice, the digital LPTV or TV translator licensee must cease operation within 120 days unless:

- (1) It obtains the agreement of the wireless licensee to continue operations;
- (2) The commencement or modification of wireless service is delayed beyond that period (in which case the period will be extended); or

(3) The Commission stays the effect of the interference notification, upon request.

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

<b>MAKO COMMUNICATIONS, LLC, AND</b>	)	
<b>BEACH TV PROPERTIES, INC.,</b>	)	
<b>PETITIONER,</b>	)	
	)	
<b>FREE ACCESS &amp; BROADCAST</b>	)	
<b>TELEMEDIA, LLC</b>	)	
<b>INTERVENOR FOR PETITIONERS</b>	)	<b>Nos. 15-1264 &amp; 15-1280</b>
	)	
<b>v.</b>	)	
	)	
<b>FEDERAL COMMUNICATIONS</b>	)	
<b>AND UNITED STATES OF AMERICA</b>	)	
<b>RESPONDENTS.</b>	)	

**CERTIFICATE OF SERVICE**

I, Thaila K. Sundaresan, hereby certify that on January 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.

Aaron P. Shainis  
Lee J. Peltzman  
Shainis & Peltzman Chartered  
1850 M Street, NW  
Suite 240  
Washington, DC 20036  
*Counsel for: Mako Communications,  
LLC*

Robert J. Wiggers  
Kristen C. Limarzi  
Antitrust Division  
U.S. Department of Justice  
Room 3224  
950 Pennsylvania Ave., NW  
Washington, DC 20530  
*Counsel for: United States of America*



R. Scott Caulkins  
Caulkins & Bruce  
2300 Wilson Blvd.  
Suite 240  
Arlington, VA 22201  
*Counsel for: Mako Communications,  
LLC*

Glenn Manishin  
ParadigmShift Law LLP  
6735 Breezy Drive, Suite 101  
Warrenton, VA 20187  
*Counsel for: Free Access, et al.*

Adam J. White  
Boyden Gray & Associates, PLLC  
1627 I street, NW  
Suite 950  
Washington, DC 20006  
*Counsel for: Free Access, et al.*

W. James MacNaughton  
7 Fredon Marksboro Road  
Suite 100  
Newton, NJ 07860  
*Counsel for: Beach TV Properties,  
Inc.*

*/s/ Thaila K. Sundaresan*