

Advanced Television Broadcasting Alliance

May 2, 2014

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12TH Street, SW
Washington, DC 20554

RE: *In the Matter of Expanding the Economic and Innovation Opportunities of
Spectrum Through Incentive Auctions*, GN Docket No. 12-268
Written Ex Parte Communication

Dear Ms. Dortch:

The Advanced Television Broadcasting Alliance (“ATBA”), an organization comprised of hundreds of low-power television (“LPTV”) broadcasters, owners and operators of translators, and allied industry organizations and companies, hereby files this written *ex parte* communication in the above-referenced docket.

As the FCC moves towards establishing a framework for resolution of the countless complex issues posed by the incentive auction process, the ATBA submits this letter to reiterate the factors that should drive the FCC’s approach to the auction with respect to LPTV stations and translators. Most of these principles apply equally to all aspects of the auction.

First and foremost, we emphasize that the FCC does not have authority from Congress to simply dismantle the LPTV and translator industries or to achieve the same result by conducting the auction without consideration of the impact on these vital local services.

We acknowledge that the FCC has taken the position that LPTV and translator stations are “secondary” for all purposes within the auction. We respectfully disagree with that position. But even if the FCC’s position was correct, that classification would only establish the extent of the FCC’s obligations with respect to any individual LPTV or translator license. As the FCC has acknowledged on dozens of occasions over many decades, the agency has a broad mandate and obligation to promote the public interest.¹ With respect to the broadcasting service, the FCC has

¹ See, e.g., *FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 594 (1981); (“The Federal Communications Act grants the Commission “broad” and “expansive” powers to allocate broadcast licenses in the “public interest, convenience and necessity”); see also 47 U.S.C. §§ 307(a), 309(a), 310(d) (the Communications Act requires the Commission to ensure that the “public interest, convenience and necessity” is served).

consistently held that the public interest is best served by a broad diversity of ownership, maximizing the number of signals and independent “voices” available to citizens, permitting those with less access to capital nonetheless to access the airwaves, and extending service to unserved and underserved areas.²

Regardless of how Section 6403(b)(5) of the Spectrum Act³ is interpreted, the Commission’s auction planning **must** consider the impact on LPTV and translator service at every stage of the auction, from planning and execution of the auction to the repacking process itself. The FCC **must** undertake all reasonable efforts to preserve LPTV and translator facilities to the greatest extent possible. Congress has not authorized the FCC to disenfranchise LPTV and translator stations simply for the sake of repurposing spectrum that is not actually needed to accommodate broadband growth.

Consistent with the Commission’s obligation to protect and promote LPTV and translator service in the public interest, we urge the following specific measures.

A Prompt and Full Rulemaking Proceeding on LPTV Issues. To date, the Commission’s auction planning has proceeded as if the LPTV and translator services do not exist. Yet they do: they are ubiquitous, and they are used every day by millions of Americans. The FCC should and must consider the impact of various auction scenarios on LPTV and translator stations at every step of the planning process. If the FCC resolves all other auction issues before considering the treatment of LPTV and translators, some of the best options may have already been foreclosed. As noted above, even assuming for the sake of argument that LPTV and translator licensees have no enhanced rights with respect to the auction, the FCC has a longstanding obligation to preserve and, where possible, to advance LPTV and translator service generally.

Feasibility Checks and Optimization Planning. Should the FCC adopt an auction format that relies on repacking “feasibility checks” between bidding rounds⁴ the staff should be required to assess the net impact on LPTV and translator facilities. The Commission must leave a reasonable amount of “headroom”, both to account for inevitable errors in replication of predicted coverage areas for full power stations, but also to provide a reasonable opportunity for displaced LPTV and translator stations to find displacement channels. In addition, any post-

² See, e.g., *In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*; 26 FCC Rcd 2556 (2011); see also 47 U.S.C. § 307(b) (“the Commission shall make such distribution of licenses ... as to provide a fair, efficient, and equitable distribution” of service); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755 (significant public interest benefits include “increased service to unserved or underserved” areas”) (2005).

³ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, H.R. 3630, 126 Stat. 156 (enacted Feb. 22, 2012) (“Spectrum Act”), 47 U.S.C. 1452(b)(5).

⁴ See *Incentive Auction Task Force Releases Information Related to Incentive Auction Repacking*, GN Docket No. 12-268, ET Docket No. 13-26, Public Notice, 28 FCC Rcd 10370, 10371 (WTB 2013).

auction “optimization” phase should permit adequate time for selection of optimization scenarios that preserve the greatest degree of LPTV and translator service.

The need to consider LPTV and translator impact during the feasibility checking and optimization phases is a prime example of why it is imperative that the FCC undertake a rulemaking proceeding to address LPTV issues *now*, before final resolution of other auction issues. With the statutory deadline for the auction still eight years away, the FCC has more than ample time to consider LPTV and translator issues and still conclude the auction at an early date.

Honest Brokerage. The FCC must assume the role of an honest broker in the reverse and forward auctions. It should attempt to reclaim only the amount of spectrum for which there is actual, robust demand. The whole point of the auction is to allow the market to determine the “highest and best” use of the 600 MHz band by matching supply and demand. As a matter of policy, the FCC as an institution should not care how much spectrum is relinquished and re-sold, or even whether the auction closes at all. The FCC’s clarion calls for broadcast licensees to “bid into” the auction and its clearly stated preference for repurposing as much spectrum as possible are deeply troubling because they substitute the preference of an appointed bureaucracy for the express will of Congress that the “invisible hand” of the market should determine the outcome. And they are more troubling still, because the FCC itself is writing the rules and will be conducting the auction. The public interest requires that the FCC act as an honest broker and let the market declare the best allocation of spectrum.

Taking Only What is Needed. Closely related to the need for an “honest broker” is the obligation of the FCC to repurpose only the broadcast spectrum that is demanded by the market and actually needed to meet that demand. ATBA supports the calls of many other commenters who have observed that the guard bands should be the absolute minimum necessary size to ensure the integrity of licensed services. Congress has set this as a specific condition of the auction.⁵

The ATBA opposes the form of market variability the FCC appears to favor because it sets up a structural mechanism and incentive for the FCC to repurpose more broadcast spectrum than a truly free market would express. It is universally acknowledged that whatever the demand for more “flexible use” spectrum, the demand is far greater in the areas of highest population density. A variable plan that was “tuned” to best match supply and demand would establish a uniform national plan and anticipate that a *larger* amount of spectrum would be repurposed in the largest markets where it is purportedly needed most. Yet the FCC seems poised to do just the opposite: to adopt a “uniform” national band plan but accept *smaller* amounts of spectrum to be repurposed where it is needed most. The proposed approach all but guarantees that *more* spectrum will be cleared where it is needed *less*, diluting MHz/pop receipts and potentially

⁵ See *Spectrum Act* § 6407. 47 USC 1454.

displacing hundreds or thousands of broadcast facilities, full power and low power, without a sufficient corresponding public interest benefit.

Market variability itself introduces some inherent inefficiencies that the FCC should seek to avoid. The costs in interference mitigation in any variable scenario are substantial, particularly when users and devices are mobile, not fixed. Moreover, the Commission should put a premium on intensive use of the spectrum though greater investment in hardware and operations. The fact that some bidders may be willing to purchase the “excess” blocks in lower-demand areas does not mean the FCC has efficiently re-allocated that spectrum if it leads to less efficient spectrum use, less equipment purchased, fewer jobs, and more LPTV and translators displaced.

If the FCC does adopt a variable band plan it should be limited to the smallest possible delta – not exceeding one block for supplemental downlink or at most one paired 5 MHz block in addition to what is reclaimed in major markets. The “variable” blocks will be the last to be deployed and may well be stranded.

Flexible Use. The FCC should permit all LPTV and translator stations, post-auction, to operate pursuant to “flexible use” rules. At a minimum, the Commission should permit all LPTV and translator facilities that are wholly or partially displaced to operate pursuant to flexible use rules as long as they continue to provide a channel of free-to-air service. Flexible use for LPTV and translator stations would represent a sound and rational policy, and pragmatically fulfil the FCC’s mandate to serve the public interest.

Allowing flexible use would give displaced LPTV and translator licensees more options to maintain service and preserve coverage. Existing and emerging technical standards and architectures can permit low power stations to operate with greater interference tolerance and perhaps to maintain coverage at lower power levels. LPTV and translator licensees that may otherwise face loss of their license altogether should be given the option to continue service with newer, more efficient technical facilities. Flexible use also advances the goals of the Commission: broadcasters should be not just permitted, but encouraged, to deploy facilities that can better harness modern technology to provide better public service. Congress, too, has embraced this goal, by encouraging the FCC to grant flexible use waivers to full power and Class A broadcasters that relinquish claims to relocation funds. As the FCC has determined that LPTV and translator stations will not be reimbursed for displacement costs, the same flexible use policy should apply to them.

Blanket Waiver. The FCC should immediately call a “time out” on all LPTV construction obligations until a reasonable period of time after the auction and repacking have concluded. No one could rationally dispute the futility of undertaking any LPTV construction when the FCC has taken the position that any or all facilities could be displaced at some time in the future. The Commission should promptly issue a public notice tolling all low power television construction deadlines until further notice. At an absolute minimum, pending a complete suspension of construction requirements, ATBA has previously urged the FCC to grant

a blanket waiver for all new LPTV construction permits to harmonize their construction deadline with the September 1, 2015 date applicable to other low power television facilities.⁶ That petition was unopposed, is ripe for grant, and should be granted immediately.

Full Transparency. Finally, ATBA joins other commenters who have noted that the FCC must design and conduct the auction, repacking and displacement processes with the utmost transparency. Critically important decisions that are, in actual effect, agency rules, should not be delegated to the staff. They should be voted on by the full Commission. Similarly, the FCC must release all software, manuals, procedures, selection criteria and all other data, information and factors that it will employ in the conduct of the auction for public comment well in advance of the auction. It must release final versions of the same materials, must strictly adhere to those published rules in the conduct of the auction, and must give the public the opportunity to review all intermediate decisions made during the auction. Unlike prior auctions, in which the parameters of what is being auctioned were fixed and known well in advance of the auction, the FCC staff here will be making a series of subjective value judgments. Interested parties have a right to know the foundation or rules on which those judgments will be made, and the agency must be accountable for adherence to those rules.

Preservation of Diversity and Localism. The nation's robust and diverse LPTV and translator industry epitomizes the achievement of the FCC's ambitious goals for the broadcasting service. ATBA members provide diverse voices, offer niche programming, and extend full power network and independent stations' free over-the-air television service to areas that otherwise would be unserved. Unlike almost all other electronic media, LPTV broadcasters continue to be "mom and pops" – hometown businesses that serve their communities with local church services, local sports and cultural coverage, weather alerts, and programming for varied ethnic and linguistically isolated audiences. The LPTV industry is just now getting back on its feet from the digital repack and transition. These "mom and pop" operators had to make large investments for new transmitters, antennas and broadcast infrastructure to conform to the digital standard. Many others had to move out of the way for a full power station and had to spend even more money filing for a new frequency. Yet they continue to provide a unique level of localism, and the FCC must act in the public interest by minimizing the impact on, and loss of, that unique localism.

⁶ See Petition for a Blanket Extension or Waiver, MB Docket No. 03-185, filed February 20, 2014 by the Advanced Television Broadcasting Alliance.

The ATBA acknowledges the complexity of the task Congress has given to the Commission, and urges the Commissioners and staff to work with us constructively to find solutions that adhere to the statute and respect the interests of all stakeholders.

Respectfully submitted,

/s/

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