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VIA ECFS

December 15, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.E.
Washington, D.C. 20554

Re: **Notice of *Ex Parte* Presentation**—GN Docket No. 12-268, MB Docket No. 15-146, MB Docket No. 16-306, MB Docket No. 03-185, AU Docket No. 14-252

Dear Ms. Dortch:

In accordance with Section 1.1206(b)(2) of the Commission's rules, this letter is submitted on behalf of Free Access & Broadcast Telemedia, LLC ("FAB") to provide notification for the record that on Tuesday, December 13, 2016, David J. Mallof, principal of FAB, Erwin Krasnow of Garvey Schubert Barer and the undersigned counsel met separately with: (i) J. David Grossman, Office of Cm. Mignon L. Clyburn; (ii) Matthew Berry, Office of Cm. Ajit V. Pai; and (iii) Erin McGrath, Office of Cm. Mike O'Rielly.

FAB recommended that the Commission should act now to:

- Reject the proposal to pocket 1-2 (or more?) TV channels for unlicensed services in the pending *Vacant Channel NPRM* (MB Dkt. 15-146);
- Revise the *Commencing Operations Order* procedures to provide explicitly for agency review/approval of termination notices from 600 MHz Band licensees or, at a minimum, an expedited complaint resolution process;
- Include low-power television ("LPTV") earlier in the repack by (a) loading license/channel/power data into auction software, and (b) allowing use of that software by LPTV licensees to locate new channels before the post-auction "displacement window" opens; and
- Grant technical flexibility (and flexible use) for LPTV immediately.

In particular, FAB emphasized concerns that the Incentive Auction Task Force ("IATF") and the Wireless Bureau may effectively be "keeping two sets of books" on the spectrum auction

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and repack plan in order to reveal, after the auction closes, that between one and four TV channels, below the officially cleared band plan, have been held in reserve as if “vacant.” The attached Reply Comments and *ex parte* submission of November 15th, distributed at the meetings, lay out FAB’s concerns on the legal aspects of such actions to diminish the license integrity and spectrum usage rights of LPTV stations.

FAB also reiterated its belief that the possibility of a substantial, preferential carve-out for unlicensed services may be depressing forward auction bidding and the ability of LPTV stations to secure capital investment, and that awarding billions of dollars in free spectrum to WiFi interest groups without maintaining LPTV’s secondary usage rights would be manifestly outside the intention of Congress and the Spectrum Act.

The documents distributed by FAB are attached for filing in the record of the captioned proceedings.

If you have any questions about this submission, please do not hesitate to contact the undersigned

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn B. Manishin". The signature is stylized with a large, sweeping initial "G" and "M".

Glenn B. Manishin
*Counsel to Free Access & Broadcast Telemedia,
LLC*

cc: Matthew Berry, Chief of Staff, Office of Commissioner Pai
J. David Grossman, Chief of Staff and Media Policy Advisor, Office of
Commissioner Clyburn
Erin McGrath, Legal Advisor, Office of Commissioner O’Rielly

Attachments: FAB and EICB-TV East Reply Comments and *ex parte* submission, November
15, 2016
Talking points from meetings held December 13, 2016

ATTACHMENT A

FAB Telemedia

LPTV Treatment in the Commission's Incentive Spectrum Auction GN Dkt. No. 12-268

1. *As Background: The FCC's Orders Violate the Spectrum Act*

- § 1452(b)(5) mandates that FCC not "alter" LPTV's "spectrum usage rights"
- *First R&O* wrongly claimed this was not a "limit on the Commission's authority"
- "Not a limit" position rejected by D.C. Circuit in *Mako v. FCC*, 835 F.3d 146 (2016)
- *Mako* upheld *First R&O* relying on the theory that LPTV would not be displaced in the post-auction "repack" **except** for interference with primary services

2. *Mako Decision Did Not Address Key Fallacies of the FCC's Auction Design*

- 600 MHz Band plan and clearing assumptions based on false narrative of a wireless spectrum crunch (see 3rd Round bids and 4th Round clearing target)
- Even assuming that there is a "crunch," the behavior of forward auction bidders demonstrates that they are not looking at 600 MHz to solve the crunch; they are newly focused on higher bands for 5G, which has more potential for profitable service and much higher data capacity to meet customer demand.
- Objectives of Spectrum Act articulated by FCC arise not from the statute or its legislative history, instead from other recommendations of the staff *National Broadband Plan* not adopted or endorsed by Congress, nor ever by the sitting Commission itself. Repurposing substantial TV spectrum for unlicensed wireless contradicts § 1452(b)(5) and reverses decades-old FCC rules providing all licensed services, including LPTV, priority over unlicensed services
- Leaving "displaced" LPTV stations without a reasonable number of alternative channels to which to relocate, and especially failure to even make a determination about how many channels will be available, is impermissible use of repacking obligation under § 1452(b)(5)

3. *Most Recent Orders Further Expose FCC's Misdirection*

- *Commencing Operations Order* does not make exclusive spectrum assignments, but OGC still says new wireless carriers have exclusive rights (*i.e.*, no secondary licensees) in 600 MHz Band; FCC mandates 39-month shutdown deadline without regard to interference.
- Delegation of 600 MHz termination notices to private parties, without filing at or review by FCC, raises serious constitutional problems.
- *Channel Sharing Order* fails to offer any meaningful or realistic assistance to LPTV stations and falsely claims in Regulatory Flexibility Act section that sharing will "greatly minimize" harm to LPTV. GAO findings confirm this point.
- GAO found that current FCC plan will result in perhaps the largest destruction of local, minority, and niche audience programming in the history of TV broadcasting, to the significant detriment of viewers, who are the FCC's primary statutory constituency (the "public" interest).
- While the FCC's plate may be full, resulting in pressure to defer action on some issues while going forward with others, deferral cannot be justified when the result will do serious harm to both small businesses and the FCC's important public constituency.

FAB Telemedia

4. *Going-Forward Changes Needed Immediately*

- **Reject the proposal to pocket 1-2 (or more?) TV channels for unlicensed services in the pending so-called *Vacant Channel NPRM* (MB15-146)**
- **Revise *Commencing Operations* procedure to provide explicitly for agency review/approval, or at a minimum an expedited complaint resolution process.**
- **Include LPTV earlier in the repack by (i) loading license/channel/power data into auction software, and (ii) allowing use of software by LPTV licensees to locate new channels before post-auction “displacement window” opens.**
- **Technical flexibility (and flexible use) for LPTV immediately.**

ATTACHMENT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Parts 15, 73 and 74 of the) MB Docket No. 15-146
Commission's Rules to Provide for the)
Preservation of One Vacant Channel in the)
UHF Television Band For Use By White)
Space Devices and Wireless Microphones)

WRITTEN EX PARTE

The attached Reply Comments are respectfully submitted as a written *Ex Parte* comment in the above-referenced proceeding.

Respectfully submitted

**FREE ACCESS & BROADCAST
TELEMEDIA, LLC**

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By: _____
/s/
Glenn B. Manishin
Its Attorney

November 15, 2016

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	
)	
Incentive Auction Task Force and Media)	MB Docket No. 16-306
Bureau Seek Comment on Post-Incentive)	
Auction Transition Scheduling Plan)	

**REPLY COMMENTS OF FREE ACCESS & BROADCAST TELEMEDIA, LLC AND
EICB-TV EAST, LLC**

Free Access & Broadcast Telemedia, LLC,¹ and EICB-TV East, LLC² (collectively, “Joint Commenters”), by counsel, hereby respectfully submit these Reply Comments on the Commission’s post-auction transition scheduling plan.³ The Joint Commenters strongly support the Public Notice’s tentative conclusion not to use temporary channels in the repacking process for full power and Class A television stations. We urge the Commission to do more to reduce the multiple reshuffling and “displacement” impact of the repack on low power television (“LPTV”) stations by (1) providing transparency about when temporary channels may be used, for how long, and whether displaced LPTV stations can apply for a channel used temporarily by a full

¹ Free Access & Broadcast Telemedia, LLC, is an investor in LPTV stations and its investments will be directly injured by FCC actions that displace LPTV stations in the upcoming repacking of the television band. FAB has filed multiple comments and *ex parte* notices in GN Docket 12-268.

² EICB-TV East, LLC, is licensee of numerous religious-oriented LPTV stations.

³ *Incentive Auction Task Force and Media Bureau Seek Comment on Post-Incentive Auction Transition Scheduling Plan*, Public Notice, MB Docket No. 16-306, GN Docket No. 12-268, DA 16-1095 (Sept. 30, 2016)(“Public Notice”).

power or Class A station, (2) ensuring that no vacant channel is held in reserve for future unlicensed use until all displaced existing LPTV stations and permit holders have been accommodated, and (3) waiving or forbearing from Section 312(g) of the Communication Act (47 U.S.C. § 312(g)) in order to allow displaced LPTV stations forced to “go silent” to retain their licenses despite being off the air for 12 months during the post-auction transition.

In the Public Notice, the Commission tentatively concluded that the demand on resources, the increased overall transition costs, and the confusion for viewers do not warrant using temporary channels to ease the size or number of linked station sets among full power and Class A TV stations during the transition.⁴ Despite that conclusion, the Commission backed away, also stating that if it does use temporary channels, it would constrain such assignments to relatively lower powered stations to limit the costs and burdens on stations eligible for repack-ing.⁵ Unfortunately, the Commission did not account for the even greater cost and burden on LPTV stations that would be caused by such use of temporary channels. Rather, the Commission simply acknowledged that “full power or Class A stations operating on a temporary channel could displace” an LPTV station.⁶

“The reduction in available spectrum associated with the [post-auction] reallocation of airwaves to wireless services is anticipated to have a substantial impact on the LPTV industry.” *Mako Communications, LLC v. FCC*, No. 15-1264, ___ F.3d ___, slip op. at 6 (D.C. Cir. Aug. 30, 2016). To mitigate that impact, the Commission merely repeated that it will provide a filing

⁴ *Id.* para. 20.

⁵ *Id.* para. 21.

⁶ *Id.* para. 24.

window for LPTV stations after full power and Class A TV stations have had the chance to request alternate channels or expanded facilities.⁷ The Commission reasoned that an LPTV licensee could either “go silent” or “seek temporary authorization to operate its facility at variance from its authorized parameters in order to prevent interference.”⁸

That LPTV “displacement filing window” will not open until after full power and Class A stations have had the opportunity to file for their allotted and, thereafter, expanded facilities and alternate channels.⁹ Thus, use of temporary channels by full power and Class A stations will undermine the effectiveness of having a displacement window for LPTV. A channel selected in the LPTV window could well end up being available only for a limited period of time if temporary channels are assigned to full power and Class A TV stations. Consequently, the Commission needs to provide transparency about when temporary channels will be used and for how long, and whether a displaced LPTV station can apply for or reserve a channel used temporarily by a full power or Class A station after that temporary use has ended.

The Commission must also ensure that no vacant channels are held in reserve for future unlicensed use unless and until all displaced existing LPTV stations and permit holders have been accommodated.¹⁰ LPTV stations’ right to file for a displacement channel trumps all

⁷ *Id.* para. 24.

⁸ *Id.* note 71.

⁹ *Id.* para. 27.

¹⁰ This is especially true because the Commission’s *Vacant Channel NPRM* remains pending. *Amendment of Parts 15, 73, and 74 of the Commission’s Rules to Provide for the Preservation of One Vacant Channel In the UHF Television Band for Use by White Space Devices and Wireless Microphones*, Notice of Proposed Rulemaking, 30 FCC Rcd. 6711, 6712 (2015)(proposing that displaced LPTV stations applying for a new license “demonstrate that their proposed new, displacement, or modified facilities would not eliminate the last vacant UHF television channel for use by white space devices and wireless microphones in an area”). Prioritizing unlicensed

unlicensed uses as a matter of law. It is settled Commission precedent that the television services for which spectrum has been “allocated on primary and secondary bases” — including LPTV — “are important media for the provision of news, information, and entertainment that warrant priority over unlicensed broadband.” *In re Digital Television Distributed Transmission System Technologies*, 23 FCC Rcd. 16731, 16743 (2008).¹¹ Thus, as the D.C. Circuit has held, the Spectrum Act’s prohibition against “alter[ing]” LPTV spectrum usage rights (47 U.S.C. § 1452(b)(5)) “has the effect of making clear that . . . the Commission’s repacking authority does not enable it to displace LPTV stations even if they cause no interference to primary services.” *Mako Communications*, *supra*, slip op. at 11. Giving priority to unlicensed uses during the transition to deny LPTV stations displacement use of existing TV channels “turns the Commission’s unlicensed rules on their head.”¹²

Moreover, if temporary channels are used for full power and Class A TV stations in the transition, the inevitable result will be that more LPTV stations will be displaced sooner than if the Commission did not resort to temporary channel assignments. Some LPTV stations may need to wait until after the 39-month transition period to operate at a more stable location and channel

uses by denying LPTV licensees transitional, post-auction use of any such purportedly “vacant” channels would contravene the Commission’s rules on secondary spectrum usage, the Administrative Procedure Act, and the court of appeals’ recent holding in *Mako Communications*.

¹¹ As a licensed service, LPTV is primary relative to all unlicensed services, such as WiFi broadband, “white spaces” services and other “Part 15” devices (47 C.F.R. § 15.1 *et seq.*). Unlicensed services are prohibited from causing harmful interference to licensed services. 47 C.F.R. § 15.5(b).

¹² Reply Comments of the National Assn. of Broadcasters (“NAB”), filed Feb. 2, 2015, p.2. It “prioritizes unlicensed services over licensed LPTV and translator stations currently providing service to their communities” by “artificially and unnecessarily increasing the scope of repacking following the incentive auction to create contiguous bands of white space channels for unlicensed use.” *Id.*

in the TV band, assuming they should be so fortunate not to be permanently displaced. Those LPTV stations face automatic cancellation of their licenses under Section 312(g) of the Act unless the Commission waives or forbears from that provision or adopts other special relief out of “equity and fairness.”¹³ The Commission did not analyze or simulate how many LPTV stations could face that situation. No mention was made in either the Public Notice, or the Initial Regulatory Flexibility Analysis (“IRFA”) included as Appendix B, whether the Commission would extend the one-year silent period before automatic cancellation occurs under the Act to give displaced LPTV stations a chance to re-build just once after the transition rather than building multiple times.

Nor did the Public Notice or IRFA analyze or mention the disruption to the going concern value of LPTV stations that are silenced even sooner in order to accommodate a temporary channel reassignment for a full power or Class A station and what steps the Commission would take to ameliorate the loss of LPTV service. The Commission failed to include any discussion or consideration of allowing an LPTV station to move temporarily to the 600 MHz band, or in a guard band that has more than 6 MHz bandwidth until wireless licensees build out, as an option to reduce the potential number of nomadic moves an LPTV station may need to make until the transition is concluded and to preserve LPTV’s going-concern value. By declining to take any cognizable steps to ameliorate the potentially devastating impact of the repack and post-auction transition on LPTV licensees, the Public Notice and IRFA have thus

¹³ “If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or *for any other reason to promote equity and fairness. . . .*” 47 U.S.C. § 312(g)(emphasis added).

unnecessarily raised serious questions about the legal validity of the Commission's proposed transition schedule under the Fifth Amendment's taking's clause and pursuant to the Regulatory Flexibility Act's requirements that it (a) quantify the significant adverse economic impact of the new rules on LPTV owners as small business entities (or explain why quantification is impracticable), and (b) take steps to "minimize" that impact. 47 U.S.C. §§ 604(a)(6), 607.

Indeed, in its unfortunate, customary fashion in these incentive auction proceedings, the Commission failed entirely to cost out the impacts on LPTV stations if temporary channels are used for full power and Class A stations in the transition. As the National Translator Association commented, the auction and repacking process has been designed as though low powered stations did not exist – those stations “are faced with harsh choices of [going][sic] out of service, or of incurring one or more retrofits as an unfunded Federal mandate.”¹⁴ The Commission deliberately ignores the impact on LPTV stations in the transition plan. It failed to examine the increased potential for prematurely and permanently silencing LPTV stations. It failed to size the additional cost imposed on LPTV businesses of having to move two or more times without reimbursement that other licensees are given, assuming that LPTV stations are not permanently silenced.

Notwithstanding its statutory obligations and pending appellate challenges under the RFA to the Commission's auction decisions impacting small businesses, Appendix B of the Public Notice (the IRFA) declined to address the added costs or discuss less disruptive means to imposing multiple displacements on LPTV stations or silencing LPTV stations earlier than

¹⁴ National Translator Association Comments in the Notice of Proposed Rulemaking, filed October 31, 2016, pp. 1-2.

would otherwise be needed if temporary channels for full power and Class A stations are indeed employed. The Commission's IRFA analysis of alternatives was limited to reimbursement options available solely to full power or Class A stations.¹⁵ It is difficult to imagine how the Commission can expect to satisfy its RFA requirement to consider impacts on small business, here LPTV, without so much as addressing them explicitly.

For these reasons, Joint Commenters fully agree with the Comments filed by LPTV & Translator Parties¹⁶ urging the Commission to adopt clear rules that permit LPTV stations to remain silent for more than 12 months until some reasonable period after the transition by full service and Class A stations. The Joint Commenters also support the proposal to provide flexibility in the relocation of LPTV stations, not only relocations beyond the current 30-mile distance from an LPTV station's community of license,¹⁷ but relocation to temporary channels in the 600 MHz band and guard bands so long as no interference is caused to licensed services.¹⁸

As the National Association of Broadcasters pointed out, the Commission failed to assess how LPTV stations unable to operate during the transition will "result in significant service losses for viewers."¹⁹ Joint Commenters agree, as NAB urged, that the Commission needs to "consider how the transition can be coordinated to minimize service losses from displaced LPTV

¹⁵ Public Notice, App. B, para. 26.

¹⁶ See Comments of Northeast Gospel Broadcasting, Inc., Grace Worship Center, Inc., EICB-TV West, LLC, the National Translator Association, and the Advanced Television Broadcasting Alliance (collectively, LPTV & Translator Parties), filed October 31, 2016, p. 6.

¹⁷ 47 C.F.R. Section 74.787(a)(4).

¹⁸ LPTV & Translator Parties Comments, pp. 5 & 7.

¹⁹ Comments of NAB, filed October 28, 2016, p. 18.

and translator stations.”²⁰ If the Commission conducted any analysis on how it might minimize the impact of its transition schedule on LPTV stations, it is not reflected in the Public Notice or elsewhere in the record of this proceeding.

CONCLUSION

The Commission should adhere to its tentative conclusion not to use temporary channel assignments for full power and Class A stations in the transition plan. If it does employ temporary channel assignments, the Commission should provide transparency on when and for how long they will be permitted, and must allow LPTV stations in the displacement window to reserve channels assigned temporarily to full power and Class A stations. In any event, the Commission should waive the minor modification rule applicable to LPTV displacement applications to provide flexibility in finding a displacement channel so that stations are not restricted to 30-mile moves.²¹ It must ensure that no vacant channels are held back for future unlicensed use unless and until all displaced existing LPTV stations and permit holders have been accommodated. The Commission should also allow temporary use of channels in the 600 MHz band and in guard bands with sufficient bandwidth until wireless licensees build out their facilities as a means of easing the transition. Finally, the Commission should invoke the “equity and fairness” exception in Section 312(g) of the Communications Act – or alternatively waive or forbear from that provision for LPTV stations during the post-auction transition – to

²⁰ *Id.*, p. 19.

²¹ 47 C.F.R. § 74.787(a)(4).

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